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INQUEST TO *LEGACY*

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Inquest.—Inquest is a body of persons to whom the trial of any question, civil or criminal, has been committed, and who give their verdict according to the evidence led. In this sense it is simply another term for a jury, and is so called because it is its function to *inquire* into the truth of the facts. The word is also used to denote such an inquiry.

In early times inquest was the general mode of inquiry in judicial matters. Thus under the old feudal law superiors held their Courts, consisting of their vassals, who were obliged to attend and give their judgment. Before the institution of the Court of Session by James v. in 1532, which led to the adoption of the "summons," brieves were the foundation of almost all civil actions in Scotland. A brieve is a writ issuing from Chancery, in the name of the sovereign, addressed to a judge, ordering trial to be made by an inquest or jury of the points stated in the brieve. Though all brieves thus were executed by the intervention of an inquest or jury, the special name of "brieve of inquest" was always used to denote the procedure for the service of heirs. Formerly this inquest had to be summoned fifteen days before the service, but afterwards they could be summoned on the shortest warning, and it was not uncommon for persons, if present in the Court-house, to be summoned to act on the inquest, provided no disqualifications were stated to them.

The inquest consists of fifteen persons, but in earlier times this number varied; though it was always an odd number so as to prevent any doubt as to their verdict. Objection could be taken to them by either party on cause shown.

By a Statute of Rob. III. c. 1, it was ordained that the judge should only summon for the inquest the most worthy and sufficient persons within his jurisdiction (Balfour, *Practiks*, p. 421).

In course of time everyone possessed of £40 yearly rental was qualified to be admitted a member of the inquest, and in later times even this ceased to be a necessary qualification.

After the institution of the Court of Session, the "summons," with a few exceptions, took the place of the brieve. Even those brieves which survived have in most cases been superseded by other procedure. For a list of these, see BRIEVE.

In cases in which procedure by brieve is still competent, appeal may be

taken to the Court of Session at any time before the inquest or jury has pronounced a verdict, or possibly before extract. Thereafter reduction is the only method of review.

In England "inquest" is the term applied to the inquiry made by a jury before a coroner in cases of sudden or suspicious death, or death in prison.

[Stair, ii. 3. 3, iv. 1. 2, and iv. 3. 4; Bankt. ii. 554; Ersk. iv. 1. 3.]

See BRIEVE; JURY; JURY TRIAL; SERVICE.

***In re mercatoria*, Writings.**—The international character of trade relations and the necessity for rapid despatch in business transactions furnish the ground for dispensing, in the case of mercantile writings, with the ordinary rules as to authentication and date (1 Bell, *Com.* 325). Accordingly, such documents are valid if subscribed; and subscription may be by initials, or by cross or mark. In that case, the subscription must be proved to be genuine, and to be the form ordinarily employed by the subscriber (*Id., ib.*). It is proper, but not essential (Dickson, s. 793), that it be adhibited before witnesses (as to initials, see *Thomson*, 1676, M. 16968; as to authentication by mark, see *Brown*, 1662, M. 16802; *Ker*, 1803, Hume, D. 50; *Stewart*, 11 July 1815, F. C.; *Kennedy*, 25 May 1816, F. C.; *Craigie*, 1832, 10 S. 510: *Rose*, 1878, 5 R. 600).

"The writings which are held to be comprehended under this privilege are bills, notes, and checks on bankers; orders for goods; mandates and procurations; guarantees; offers and acceptances to sell or to buy wares and merchandise, or to transport them from place to place; and, in general, all the variety of engagements, or mandates, or acknowledgments which the infinite occasions of trade may require" (Bell, *ut supra*). Thus the privilege has been held to cover a letter instructing a sale of shop fittings (*Kinninmont*, 1892, 20 R. 128), an award by a referee in a question between the seller and purchaser of goods (*Dykes*, 1869, 7 M. 357), a writing passing between a landlord and tenant as to transactions regarding sales of cattle (*Fell*, 1869, 41 Sc. Jur. 236: cf. *Stephen*, 1832, 10 M. 279), and a document truly part of the bill transaction (*Thoms*, 1867, 6 M. 174); and seems to extend to composition contracts (2 Bell, *Com.* 504; Goudy, *Bankruptcy*, 518; see *Glass*, 1825, 4 S. 1; *Kilpatrick*, 1825, 4 S. 80). It is an open question whether it extends to a guarantee granted by a bank for future advances (*National Bank of Scotland*, 1892, 19 R. 885, per Ld. (Ordinary) Kyllachy and Ld. M'Laren). An acknowledgment for borrowed money, unconnected with any mercantile transaction (*Hamilton's Exors.*, 1858, 21 D. 51; *Purvis*, 1869, 7 M. 764; see *Bryan*, 1892, 19 R. 490), letters instructing a contract of service as salesman (*Stewart & Macdonald*, 1869, 7 M. 544), and a document obliging the granter to deliver goods to the order of a person named, and granted not in the ordinary course of business, but for the purpose of raising money (*Commercial Bank*, 1859, 21 D. 864; cf. *M'Adie*, 1883, 10 R. 741), have been held not to fall within the privilege.

It appears that a writ *in re mercatoria* proves its own date only where the question relates to the ordinary mercantile purposes for which such a document is granted (Dickson, ss. 794, 814; *Anderson*, 1852, 14 D. 866; cf. *Walker's Tr.*, 1883, 10 R. 699; *Maxwell Witham*, 1884, 11 R. 776).

[See Dickson, *Evidence*, ss. 793–796; Ersk. iii. 2. 24.] See BILLS OF EXCHANGE.

In retentis. — See COMMISSION (PROOF BY); DEPOSITION BY DECEASED PERSONS IN CRIMINAL CASES.

Insanity.—Insane persons have for long been divided by legal writers into two classes: (1) *Idiots*, imbeciles or fatuous persons—those in whom the mental faculties have, practically, not developed at all, or have developed only in a defective degree, and who are treated by the law as perpetual pupils; and (2) *Lunatics*, frenzied or furious persons—those suffering from perturbation or derangement of intellect (it may be, with lucid intervals). Within each of these classes very varying degrees of insanity are met with, ranging, in the case of idiocy, from complete fatuity at the one extreme, to slight weakness at the other; and, in the case of furiosity, from frenzy to mere "eccentricity of conduct." According to its degree, insanity entails different consequences as regards legal capacity and responsibility.

I. *THE CARE AND TREATMENT OF INSANE PERSONS.*—These are regulated by the Lunacy Acts. See LUNACY ACTS.

II. *THE CARE OF THE ESTATES OF INSANE PERSONS.*—For treatment of this subject, see JUDICIAL FACTOR and TUTOR-AT-LAW.

III. *CIVIL INCAPACITY.*—It may be stated as a general rule, that a person while insane is incapable of entering into a contract (Stair, i. 10. 13: Ersk. i. 7. 51; Bell, *Prin.* ss. 10, 2103 *et seq.*). He is legally incapable of giving the requisite consent. Consequently, a person while insane cannot marry (Fraser, *H. & W.* 55 *et seq.*; Walton, *H. & W.* 7), although a person who has been mad, may, if he recover even temporarily, marry during the lucid interval (see MARRIAGE). Nor can a person test while he is insane.

The *presumption is in favour of sanity* (Dickson on *Evidence*, s. 27, and cases at (*b*); s. 39), and the onus of proving insanity rests on the party alleging it. Where insanity has been established, and the insane person temporarily recovers, and, *e.g.*, marries during a lucid interval, the onus is of course shifted, and rests on the party alleging sanity (Dickson on *Evidence*, s. 114 (1); Fraser, *H. & W.* 78; *Turner*, 1808, 1 Hagg. Con. 414).

The presumption of sanity may be overcome and the existence of insanity proved in: (1) *An Action of Reduction*, where a deed is sought to be set aside on the ground of the mental incapacity of the granter,—the form in which the question is now most frequently raised in the civil Courts,—and in which the incapacity is established only in so far as the matter in question is concerned; or (2) *A Process of Cognition.* This latter process is treated in the article on BRIEVE (vol. ii. 221 (*q.v.*)). (3) It is also to be noted that where a person has not been cognosced, a *curator bonis* may be appointed on the petition of a relative or of anyone interested (see JUDICIAL FACTOR).

What Constitutes Legal Insanity.—It is impossible to formulate any general criterion in this matter. The late Ld. Pres. Inglis (then Ld. Justice-Clerk), in addressing the jury in *Morrison* (1862, 24 D. 625, at p. 631), said: "I am not going to give you any definition of insanity, and I am not even going to define to you what legal capacity is in a question of this kind, because I may tell you at once that the question whether a man is in such a state of mind as to be capable of executing a deed of this kind is a question of fact and not of law. It may in some cases embrace questions of law, and also in some cases embrace questions, and very difficult questions, of medical science." It was laid down in that case that no test of capacity to execute a deed could be stated without reference to the nature of the deed; and that a person executing a settlement must be held to have sufficient capacity to

do so if he is capable of distinctly understanding what he is doing,—of expressing that purpose in intelligible language,—and of understanding the consequences and effects of what he does. But a deed disclosing no trace of incapacity or insanity may nevertheless spring from an insane belief or delusion, in establishing which there must be proved not merely the groundlessness of the belief, but also the impossibility of its being entertained by any sane mind (*ib.*). The existence of a disordered belief upon some extraneous point, having no connection with the subject of the settlement, is not necessarily fatal to the deed (*ib.*; also *Nisbet's Trs.*, 1871, 9 M. 937: *Ballantyne*, 1886, 13 R. 652). In *Nisbet's* case a will executed by Major Nisbet in a lunatic asylum, where he had been confined on the ground of insanity for several years, and in which he died two months after the date of the deed, was, after proof, held valid, he having recovered his reason at the time of executing the will. It was observed in that case that, in judging of the validity of a deed executed by a person who has been afflicted with general insanity, the rationality of the deed itself is an important element, especially if it is framed by or on the instructions of the granter (see also *Hope*, 1896, 23 R. 513).

Insanity, where permanent, may form a ground on which a *partnership* may be dissolved (*Eadie*, 1885, 12 R. 660; Partnership Act, 1890, s. 35 (*a*); Bell, *Com.*, ii. M'L.'s ed., 524; *Prin.* s. 376). A *mandate* seems to subsist, notwithstanding supervening insanity, until parties dealing with the agent are put in bad faith by having knowledge of the principal's insanity (Bell, *Com.* i. 489 (M'L.'s ed. 525); *Prin.* s. 228). An insane person, whether cognosced or not, cannot sue (*Reed*, 1839, 1 D. 400; but as to charge in his name, see *Yule*, 1891, 29 S. L. R. 151). Where he has been cognosced, the usual instance is that of his tutor-at-law. Where not cognosced, the proper course is to petition for a tutor dative or a *curator bonis*,—not a *curator ad litem*,—at whose instance the action then proceeds (Mackay, *Manual of Practice*, 149). An action against a cognosced lunatic may be competently brought against his tutor alone. Where he has not been cognosced, the action must be against the insane person, and also against his curator—not against his curator alone (*Govan*, 20 December 1814, F. C.).

[See also CIRCUMVENTION (FACILITY AND).]

IV. *CRIMINAL RESPONSIBILITY.*—In criminal law insanity may be pleaded in three forms. (1) It may be stated as a *plea in bar of trial.* (2) It may be stated as a *special defence.* (3) It may be urged either as a palliation, as reducing the crime from a higher to a lower category (*e.g.* from murder to culpable homicide), or in mitigation of punishment—while not exempting from some degree of criminal responsibility.

1. *Insanity as a Plea in Bar of Trial.*—The plea is that the accused person is insane at the time fixed for the trial, and incapable of giving instructions for his defence (Macdonald, 431; Hume, ii. 143, 144; Alison, i. 644). This plea must be stated at the first diet (Crim. Proc. (Scotland) Act, 1887, 50 & 51 Vict. c. 35, ss. 28, 29). Although the plea of insanity is not stated on behalf of accused, the prosecutor may raise the question of accused's sanity (*Robertson*, 1891, 3 White, 6). The Court also may, *ex proprio motu*, investigate as to whether the panel is a fit subject for trial (*Warrand*, 1825, Shaw, 130; *Douglas*, 1827, Shaw, 192; *Barclay*, 1833, Bell, *Notes*, 4; Alison, i. 659, 660). Where this plea is tendered, proof is led at the second diet, without impanelling a jury. The proof is usually, in practice, limited to the evidence of medical men who have examined the accused; and these witnesses ought to make a fresh examination as to accused's mental condition on the morning of the trial, or as shortly before

that as is possible, the inquiry being as to his *present* state. If present insanity be proved to the satisfaction of the Court, the judge finds that the accused cannot be tried, and orders him to be confined until the royal pleasure regarding him be known (20 & 21 Vict. c. 71, s. 87). See LUNACY ACTS.

2. *Insanity may be pleaded as a Defence.*—The meaning of this plea is that the panel, having been insane at the time of the alleged crime, was not criminally responsible for his act, and is exempted from penal consequences therefor. This is a special defence, and must, accordingly, be tendered at the first diet (Crim. Proc. (Scotland) Act, s. 36), unless cause be shown, to the satisfaction of the Court, for its not having been lodged until a later day, "which must, in any case, not be less than two clear days before the second diet" (*ib.*). The trial proceeds at the second diet in the usual way. If, as the result of the evidence, the jury find that the prisoner was insane at the time of the offence, they acquit him on the ground of insanity. The jury are required to find whether the prisoner was acquitted on the ground of insanity. If they so find, the Court orders him to be confined until Her Majesty's pleasure be known (20 & 21 Vict. c. 71, s. 88; *Milne*, 1863, 4 Irv. 301). See LUNACY ACTS.

To exempt from prosecution or responsibility, insanity must amount to a complete alienation of reason, whereby the judgment is so clouded or misled as to prevent the accused from knowing "the nature or the quality of the act" he is perpetrating; or, "if he does know it, that he does not know he is doing what is wrong" (Hume, i. 37, 38; Alison, i. 645; *Gibson*, 1844, 2 Br. 332; *Milne*, 1863, 4 Irv. 301; *Brown*, 1866, 5 Irv. 215; *Robertson*, 1891, 3 Wh. 6; *Miller*, 1874, 3 Coup. 16; *Macklin*, 1876, 3 Coup. 257; *Barr*, 1876, 3 Coup. 261; Macdonald, *Crim. Law*, 3rd ed., 10, 11, 12).

3. *Mental unsoundness*, while not of a degree to bar trial, or to exempt from punishment, may still be present in a degree which is regarded as taking the offence from a higher to a lower category, reducing it, *e.g.*, from murder to culpable homicide (*Dingwall*, 1867, 5 Irv. 466; *Granger*, 1878, 4 Coup. 86; see Ld. M'Laren's charge in *Robertson* or *Brown*, 1886, 1 White, 93; *Abercrombie*, 1896, 2 Ad. 163, 23 R. J. C. 80). Finally, the fact that a prisoner is weak-minded, or of an ill-balanced mind, is frequently urged with success in mitigation of punishment.

[See also RAPE.]

V. *THE INSANE AS WITNESSES.*—The admissibility of insane persons as witnesses is one of degree. (See WITNESS.)

Insolvency.—Insolvency is the condition of inability to meet one's debts or obligations. Two tests of its existence may be taken: one being whether the debtor can meet his obligations, according to their terms, as they fall due; the other, whether the value of his total assets at a particular time is equal to the sum of his liabilities, due presently or *in futuro*, or contingent (Bell, *Com.* ii. 152; *M'Nab*, 1889, 16 R. 610; *Teenan*, 1886, 13 R. 833; *Aitken*, 1890, 28 S. L. R. 115). In the former case the insolvency has been said to be *practical* insolvency; in the latter, *absolute* insolvency. For most purposes the former test is that which falls to be applied. What creditors are primarily concerned with, particularly in commercial dealings, is to get fulfilment of their claims as they become prestable; and if the debtor cannot so perform his obligations, but needs time to liquidate his affairs, he is giving his creditors less than their due, even although he may ultimately realise his estate so as to pay all his debts in full, with interest. An apparent sufficiency of assets, if and when realised, to meet all liabilities,

is subject to the uncertainties of realisation; and, in any case, the debtor has no right to demand a delay which may in many cases be ruinous or detrimental to creditors who have calculated on an exact fulfilment of their debts according to their terms. Accordingly, it is quite settled that, in ascertaining the existence of insolvency in connection with its most important effect, viz. as an ingredient of notour bankruptcy, it is practical insolvency that has to be looked to (*M'Nab*, 1889, 16 R. 610, per Ld. Adam: *Tennan*, 1886, 13 R. 833: *Aitken*, 1890, 28 S. L. R. 115. See BANKRUPTCY). The expiry of a charge without payment affords *primâ facie* proof of insolvency in constituting notour bankruptcy (*M'Nab, supra*: *Fleming*, 1884, 21 S. L. R. 164, 9 App. Ca. 966; *Knowles*, 1865, 3 M. 457). On the other hand, it sometimes becomes necessary to ascertain retrospectively a man's financial state at a period when there had been no declared insolvency or failure to meet his current obligations. This often happens in the case of creditors challenging alienations or preferences granted by a debtor to their prejudice: and in such cases it becomes necessary to resort to a general view of the debtor's financial affairs, so as to ascertain whether by the act challenged he was depleting a fund insufficient, or no more than sufficient, for meeting all his existing liabilities, or was giving away from a surplus of assets (Bell, *Com.* ii. 153; Goudy on *Bankruptcy*, 19, *infra*).

Insolvency has at common law and under statute certain effects on a debtor's power of dealing with his estate: (1) in restraining him from preferring particular creditors on what is *ex hypothesi* an insufficient fund for payment of all, and (2) in restraining him from depleting his estate, to the prejudice of his creditors, by alienating it for gratuitous or inadequate considerations. Apart from these effects, which will be found treated more particularly below, insolvency operates in various ways to qualify a man's relations with those towards whom he is under contractual obligations. Thus if a debtor in a debt not yet due be insolvent, or even if only in that suspect condition described as *vergens ad inopiam*, his creditor is entitled to the exceptional remedy of diligence in security, by way of arrestment, inhibition, or adjudication, or sequestration for rent (Bell, *Com.* i. 7, 752–3; Bell, *Prin.* 46, 69, 832; Ersk. ii. 12. 42; iii. 6. 10; *Juríd. Styles*, iii. 126, 275, 304). And in the same circumstances it is probably competent for a creditor in a debt not yet due to raise action and obtain decree conditioned upon the arrival of the term of payment (see *Crear*, 1882, 9 R. 890). Similarly, in the case of mutual contract, if the obligations are not strictly reciprocal in point of time, the anterior obligation may be suspended if the party whose obligation is postponed is insolvent (Bell, *Prin.* s. 71). Again, in the law of sale, the doctrine of stoppage *in transitu* recognises the right of a seller to stop the delivery of goods to an insolvent buyer while the goods are still in course of transit (56 & 57 Vict. c. 71, s. 44; Bell, *Com.* i. 223 *et seq.*); and, on the other hand, it is the right and the duty of a buyer who has become insolvent to refuse to take delivery of goods sent him by the seller, to the effect of rescinding the contract, unless the seller should decline to rescind (56 & 57 Vict. c. 71, s. 45 (4): Bell, *Com.* i. 253; Goudy on *Bankruptcy*, 293). Under the Sale of Goods Act, 1893, which has codified the law of sale, a person is deemed insolvent within the meaning of the Act "who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not" (56 & 57 Vict. c. 71, s. 62 (3)).

Insolvency does not, however, tie a debtor's hands so as to prevent him from entering into contracts and doing all acts which a man may enter into

"with a view to carry on affairs, and in the hopes of a better fortune" (Bell, *Com.* i. 264–6; *Grant*, Mor. 951, per. Ld. Kames; *Ehrenbacher*, 1874, 1 R. 1131; Goudy on *Bankruptcy*, 21). But if the insolvency is notorious, and indicates a resolution on the part of the debtor *cedere foro*, it is a fraud for him to continue contracting; and contracts entered into under such circumstances may be rescinded by those who are the victims of the fraud (*Schuurmans*, 1828, 6 S. 1110; *Watt*, 1846, 8 D. 529; see *Richmond*, 1854, 16 D. 403; *Morton*, 1858, 20 D. 362; *Ehrenbacher*, *supra*).

Nor does insolvency *per se* bar the debtor from carrying on litigation, or, in the general case, subject him to the necessity of finding caution for expenses (*Ritchie*, 1881, 8 R. 747; *Weir*, 1876, 4 R. 8; see *Bell*, 1862, 24 D. 603; *Laurie*, 1888, 16 R. 62; *Johnstone*, 1890, 18 R. 191). But caution is a matter entirely in the discretion of the Court, and in special circumstances of pronounced insolvency, combined with frivolous or vexatious litigation, the Court may require it to be found (Mackay, *Pract.* 154; *Ritchie*, *supra*, per Ld. Young; *Stevenson*, 1886, 13 R. 913).

The special effects of insolvency in restraining the debtor from granting alienations or preferences, to the prejudice of his creditors, will be treated under the following headings: I. Gratuitous Alienations at Common Law; II. Fraudulent Preferences at Common Law; III. Gratuitous Alienations under the Act 1621, c. 18; IV. Alienations in Defraud of Diligence under the Act 1621, c. 18.

I. Gratuitous Alienations at Common Law.

The general principle of this branch of the law is that from the moment a debtor becomes insolvent he is bound to regard himself as administering his estate for his creditors; and, accordingly, while he may continue trading for the benefit both of his creditors and himself, he is not permitted to give away gratuitously the estate which it is his duty to make available to his creditors for payment of their debts. Every form of gratuitous alienation, whether direct or indirect, is thus forbidden. Where, *e.g.*, an insolvent debtor, in knowledge of his insolvency, expended funds in improving a house held by his marriage-contract trustees for his wife and children, an action by the trustee in his sequestration was found relevant in which declarator was sought that, so far as the trust property was found to be benefited by the expenditure, the marriage trustees held it for behoof of the pursuer (*Main*, 1881, 8 R. 880). The gratuitous alienation of a *spes successionis*—as by discharge of legitim—has been held to be reducible when granted by a bankrupt after sequestration (*Obers*, 1897, 34 S. L. R. 538); and the principle of the decision seems to strike at such an alienation when granted during the debtor's insolvency, before actual bankruptcy; for, while a *spes successionis* is not attachable either by ordinary diligence or by sequestration, the debtor is not entitled by voluntary act to deprive his creditors of the chance of the succession becoming available for payment of their debts.

Constructive fraud in the alienation.—*Animus fraudandi* on the part of the debtor is not required in order to vitiate the transaction challenged (Bell, *Com.* ii. 184; *Street*, 1672, Mor. 4911; *Main*, *supra*; see *M'Cowan*, 1853, 15 D. 494). Nor does it seem to be necessary that he be in contemplation of bankruptcy, or conscious of his insolvency (*ib.*; *Wilson*, 1863, 16 D. 275; Goudy on *Bankruptcy*, 26; cf. *Edmond*, 1853, 15 D. 703). The injury to the creditors is equally great whether the debtor knows of his insolvent state or not. The point, however, is not very clearly settled. Fraud on the part of the recipient of the gift is not required (*M'Cowan*, *supra*; Goudy on *Bankruptcy*, 26).

Non-onerosity.—The onus of proving a particular transaction to have been gratuitous lies on the person challenging it, there being no presumption at common law, as under the Act 1621, c. 18. The terms of the deed constituting the grant are, of course, not conclusive, and may be contradicted by parole evidence (Bell, *Com.* ii. 184; *Trotter*, Mor. 12561; see *Morrison*, 1854, 16 D. 1125; *Forsyth*, 1863, 1 M. 1054).

Value in money, or money's worth, must amount to a fair equivalent in order to support the transaction, otherwise it will be reducible *quoad excessum* (*Glencairn*, 1677, Mor. 1011; see *Miller's Tr.*, 1862, 24 D. 821; *Watson*, 1874, 1 R. 882).

Prior legal obligation forms, in point of quality, good consideration to elide the charge of non-onerosity (see *Broadfoot*, 9 Dec. 1808, F. C.; *Horne*, 1847, 9 D. 651; *M'Cowan*, *supra*; *Taylor*, 1888, 15 R. 328). The granting of security or satisfaction (other than specific performance) to a prior creditor may be challengeable as a preference (see *infra*, *Fraudulent Preferences at Common Law*).

Consideration or value arising out of the provisions of mutual contracts may or may not be adequate to elide a challenge, according to the circumstances of the particular case (Bell, *Com.* ii. 176). The cases under this head have mainly related to settlements by marriage contract. In the case of an *antenuptial* marriage contract entered into while the husband is insolvent, the general result of the authorities seems to be that a provision made by him for his wife will be sustained to the extent of a reasonable provision. Thus Professor Bell says: "Even in antenuptial contracts, if the husband is at the time insolvent, the provision to the wife will not be sustained beyond the limits of a reasonable and moderate allowance" (Bell, *Com.* i. 683; see Goudy on *Bankruptcy*, 29; *Duncan*, 1785, Mor. 987; *M'Lachlan*, 1824, 3 S. 132; *Carphin*, 1867, 5 M. 797; cf. Fraser on *H. & W.* ii. 1350). In estimating the reasonableness of the settlement, it has been said that the Court will not "measure the rationality of the provisions in nice scales: a case of gross excess must be made out to justify reduction" (per Ld. Neaves in *Carphin*, *supra*). In the case of *M'Lachlan* (*supra*), the Court held that "the station of the wife and the fortune she brought should be chiefly kept in view, rather than the private circumstances of the husband" (see also *Buchanan*, 1822, 1 S. 299; *Watson*, 1874, 1 R. 882). Collusion between the spouses may introduce a different element, as showing that the provisions were not truly the consideration for the marriage (see *Watson*, *supra*, per Ld. Ormidale). The validity of provisions to the children of the marriage depends on the same principle as those to the wife; and, accordingly, they will be sustained so far as moderate and rational in character, and reducible *quoad excessum* (Goudy on *Bankruptcy*, 30; Burton on *Bankruptcy*, i. 148; *Ballantyne*, 17 Feb. 1814, F. C.; *Blackburn*, 29 May 1816, F. C.; *Watson*, *supra*). Antenuptial provisions made by the insolvent parent of either of the spouses would seem to be also supported by the onerosity of the marriage, so far as reasonable, where the marriage takes place on the faith of them (see *Thoirs*, 1729, M. 984; *Cruickshank*, 4 Bell's App. 179; Goudy on *Bankruptcy*, 31). But knowledge by the spouses of the granter's insolvency may lay the provision open to challenge (*Wood*, 1680, Mor. 977). The onerosity of the marriage extends to provisions in favour of the more remote issue as well as the immediate children, but not to provisions in favour of third parties (*Hall*, 20 R. (H. L.) 88).

A *Postnuptial* settlement differs from an antenuptial one in lacking the onerosity which arises where the marriage takes place on the faith of the settlement; accordingly, a non-remuneratory postnuptial provision by a

husband in favour of his wife, to take effect *stante matrimonio*, is in law a donation *inter virum et uxorem*, and reducible by his creditors, whether he was solvent or insolvent when he granted it (*Dunlop*, 1865, 3 M. 758, 5 M. (H. L.) 22; *Learmonth*, 1871, 10 M. 107, 2 R. (H. L.) 62). A postnuptial settlement to take effect after the husband's death is in a different position, because there is a natural obligation on a husband to make reasonable provision for his wife's support after his death. It is not a clearly settled question whether such a settlement can compete with the husband's creditors. The weight of more recent opinion is to the effect that it cannot (see *Guthrie*, 1846, 9 D. 124; Fraser on *H. & W.* ii. 1500; Goudy on *Bankruptcy*, 32; M'Laren on *Wills*, 667–8; *Walker*, Mor. 953; *M'Kenzie*, Mor. 958; *Campbell*, Mor. 988; *Fergusson*, Mor. 1001). Postnuptial provisions to children, granted during insolvency, give no right in competition with onerous creditors (Ersk. iv. 1. 34; Bell, *Com.* i. 687–8; Fraser on *H. & W.* 1502; *Queensberry*, Mor. 961).

There is, however, a statutory exception to the general rule applicable to postnuptial settlements in the case of policies of assurance. By the Married Women's Policies of Assurance (Scotland) Act, 1880, it is enacted that "a policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency . . . provided always that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person on whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof" (43 & 44 Vict. c. 26, s. 2).

Insolvency of the Debtor.—It is not necessary that the debtor shall have been insolvent before granting the alienation challenged; it is sufficient if the effect of the alienation is to make him so (Bell, *Com.* ii. 228; *M'Kenzie*, Mor. 924). The debtor must have continued insolvent down to the time when the transaction is challenged; the vice in it will be cured if he has regained a solvent condition (Goudy on *Bankruptcy*, 34; *Street*, Mor. 4911; *M'Cowan*, 1852, 14 D. 901).

In the general case, the onus of proving insolvency lies on the creditor challenging the transaction, there being no presumption at common law, as under the Act 1621, c. 18. As the insolvency has to be shown retrospectively, the proof proceeds by a comparison of the debtor's total assets with his total liabilities at the date of the transaction (Bell, *Com.* ii. 153, 180; *Street*, Mor. 4911; *Lourie*, Mor. 911; *M'Kenzie*, Mor. 924; *A. & B.*, 17 November 1837, F. C.; *M'Kellar*, Mor. 1114; see *M'Cowan*, 1852, 14 D. 901; *Hodge*, 1883, 21 S. L. R. 40). "It has been held sufficient if the debtor have, at the time of the deed, a *visible* estate, although *ex eventu* he should prove insolvent. The subsequent depression of his funds, or the fall of markets for land or goods, will therefore afford a good answer on the question of

insolvency, where, on a fair reckoning of the estate as at the date of the deed, the debtor was solvent" (Bell, *Com.* ii. 180; *M'Kell*, Mor. 920). The estimate of the debtor's affairs will be taken favourably to solvency when the challenge is at a distant time (Bell, *Com. ut supra*).

The onus of proof may be shifted if the transaction be attended by circumstances laying it under suspicion, as where the connection between the parties has been very close and intimate (Bell, *Com.* ii. 184: *Marshall*, Mor. 48, note: *Inglis*, Mor. 11567; *M'Christian*, Mor. 4931), or where the transaction is of a latent character (*Pollock*, Mor. 4909; *Simpson*, Mor. 11570; Burton on *Bankruptcy*, i. 115). And even where the alienation has been made during the granter's solvency, it has been held liable to challenge, if kept latent so as to deceive posterior creditors, especially where the receiver has had any participation in the design (*Pollock, supra*: *Street*, Mor. 4914: *Inglis*, Mor. 11567: *Reid*, Mor. 4923: *Blair*, Mor. 4927: *Robertson*, Mor. 4929; *Roseberry*, 1823, 2 S. 394; *Hodge*, 1883, 21 S. L. R. 40).

Title to Challenge.—Any onerous creditor, whether prior or posterior, may make the challenge (Ersk. iv. 1. 44; *M'Cowan*, 1852, 14 D. 968: *Edmond*, 1853, 15 D. 703: see *Wink*, 1867, 6 M. 77). In other respects the title to challenge is the same as under the Act 1621, c. 18 (see *infra*).

Form of Challenge.—"Challenges at common law seem always to have been competent by way of exception as well as action; and where the question was one affecting moveable rights, they might be made in the inferior Courts as well as in the Court of Session" (Goudy on *Bankruptcy*, 36; *M'Ewen*, 1828, 6 S. 889). Under the Bankruptcy Act, 1856, s. 10, "all alienations of property by a party insolvent or notour bankrupt, which are voidable by statute or at common law, may be set aside either by way of action or exception" (this section applies to the Sheriff Court under 20 & 21 Vict. c. 19, s. 9). "Exception" includes the case of a pursuer challenging by way of reply (see *Dickson*, 1866, 4 M. 797, per Ld. Pres. Inglis). An action of reduction in the Sheriff Court is not competent (*Dickson, supra*: see *Moroney*, 1867, 6 M. 7), and the ordinary jurisdiction of the Sheriff is not enlarged by the above provisions (*Dickson, supra*).

Where the challenge is made by a direct action, it must be in the form of a reduction in the Court of Session if it involves the setting aside of any writing on which the alienation depends (*Cook*, 1896, 23 R. 925; see *Dobie*, 1854, 17 D. 97, for case of reducing title created by recipient of the property). But where the alienation has been made without writing, the challenge may be by a petitory action in the Sheriff Court (if the pursuer be one having a title to insist in a petitory claim, as, *e.g.*, a trustee in sequestration; see *Cook, supra*), or a petitory or declaratory action in the Court of Session (see Mackay, *Practice*, 391; *Main*, 1881, 8 R. 880: *Juridl. Styles*, vol. iii. 79; Lees, *Sheriff Court Styles*). It is competent to combine with an action of reduction a conclusion directed against the bankrupt for payment of the pursuer's claim, and thus obtain, where necessary, a ground for doing diligence against the property when the alienation has been set aside (per Ld. M'Laren in *Cook, supra*). The necessary averments of the action are: (1) that the alienation was made gratuitously; (2) that the granter is insolvent, and was so at the date of the alienation; (3) that the alienation was made to the prejudice of lawful creditors (*Main, supra*; *Edmond*, 1853, 15 D. 703; see *M'Cowan*, 1852, 14 D. 901).

As regards the effects of a successful challenge, reference may be made to what is said below on this head, in dealing with the Act 1621, c. 18.

II. Fraudulent Preferences at Common Law.

The prohibition of transactions of this nature depends, not on their being gratuitous (the recipient being *ex hypothesi* a creditor), but on the fact that they disturb the equality among the creditors, whose rights are regarded as fixed, so far as the debtor is concerned, on the occurrence of his insolvency (Bell, *Com.* i. 9; ii. 226).

(1) *Preferences Challengeable.*—"Speaking generally [as to exceptions, see *infra*], every kind of transaction by which a benefit is given to one creditor in preference to others, whether it be by direct transfer or by some indirect operation, is open to challenge. Thus the rule applies where a security is given for what was formerly an unsecured debt, or an obligation to grant a security is undertaken (*M'Cowan*, 1853, 15 D. 494; *Thomas*, 1866, 5 M. 198; see English Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 48; and Robson on *Bankruptcy*, 135 *et seq.*); or, again, where the debtor facilitates a creditor's attempt to execute diligence or obtain a decree (*M'Ewen*, 1828, 6 S. 889; *Lauric's Tr.*, 1867, 6 M. 85; *Wilson*, 1856, 16 D. 275; *ex parte Pearson*, L. R. 8 Chan. App. 667). As it is said in the *Digest*: 'si forte datâ operâ ad judicium non ad fuit' (*Dig.* 42. 8. 3. 1). But a mere voucher or acknowledgment of debt, such as an I. O. U., is not impeachable (*Williamson*, 1882, 9 R. 859)" (Goudy on *Bankruptcy*, 38–9). A trust deed for creditors providing for equality of treatment in distribution is not reducible at common law (Bell, *Com.* ii. 387–8). Where certain creditors of an insolvent assembled and, without either calling a general meeting, or obtaining a disposition, or any legal warrant, took possession of part of the stock and divided it among themselves in proportion to their debts, and agreed to contribute small sums towards enlarging the dividend arising out of the residue for the benefit of the other creditors, it was held, in a question with a creditor who was no party to this arrangement, that they must either restore to the estate the abstracted goods or their just value, or pay the creditor his debt in full (*Crawford*, 1829, 8 S. 158).

(2) *Nature of Fraud.*—*Animus fraudandi* on the part of the debtor is not required: fraud is presumed if the preference is granted voluntarily, while he is insolvent and conscious of his insolvency (*M'Cowan*, 1852, 14 D. 968, and 1853, 15 D. 494; *Wilson*, 1856, 16 D. 275). The decisions, however, are not uniform on the question whether collusion on the part of the creditor who receives the preference is necessary. The earlier decisions seem to affirm the necessity of this element in the transaction (Bell, *Com.* ii. 226–32; see *Kinloch*, Mor. 889; *Cramond*, Mor. 893; *Scrymzeor*, Mor. 903; *Grant*, Mor. 949; *Blaikie*, Mor. 887; *Marshall*, Mor. 1144). In the leading case of *M'Cowan & Wright*, however, the question was fully considered, and the doctrine was clearly laid down that knowledge of the debtor's insolvency on the part of the creditor is unnecessary, the *ratio* being that the presence or absence of such knowledge makes no difference in the injury done to the other creditors by the preference being granted (*M'Cowan*, 1853, 15 D. 494; see also the subsequent cases of *Wilson*, 1853, 16 D. 275; *Guild*, 1857, 20 D. 3 and 392; *Adamson*, 1867, 6 M. 347; and cf. *Edmond*, 1853, 15 D. 703, per Ld. Pres. M'Neil; *Thomas*, 1866, 5 M. 198; *Lauric's Tr.*, 1867, 6 M. 85; and Goudy on *Bankruptcy*, 40, for opinion that question not settled).

(3) *Transactions exempted from Challenge.*—(*a*) *Cash Payments.*—Payment in cash of a money debt presently due is not challengeable (*Broadfoot*, 9 Dec. 1808, F. C.; *Thomas*, 1865, 3 M. 358; *Coutt's Tr.*, 1886, 13 R. 1113; see *Lamond*, 1857, 15 R. 32), even though

both the debtor and the creditor are aware of the debtor's insolvency (*Thomas*, 1865, *supra*; *Coutt's Tr.*, *supra*; *Taylor*, 1888, 15 R. 328, per Ld. Rutherfurd Clark); but payment may be bad if anticipatory (*Speir*, 1827, 5 S. 680; *Blincow*, 1827, 7 S. 124: affd. 7 W. & S. 26; *Guild*, 1857, 20 D. 3 and 392; cf. *Stiven*, 1897, 34 S. L. R. 692), or as the result of a fraudulent contrivance between the debtor and creditor for conversion of the debtor's assets into cash, to enable payment to be made in that form (see *Taylor*, 1888, 15 R. 328; *Lamond*, *supra*).

(*b*) *Transactions in Course of Trade.*—The fulfilment of obligations otherwise than by payment of money is protected if done in the fair and ordinary course of trade (Bell, *Com.* ii. 228; *Thomas*, 1866, 5 M. 198. See the corresponding exception under the Act 1696, c. 5, in article on BANKRUPTCY).

(*c*) *Nova debita.*—Alienations in specific implement of obligations under onerous contracts, where the obligations *hinc inde* are undertaken *unico contextu*, are not subject to challenge, as, *e.g.*, delivery of goods under a contract of sale (see *Taylor*, 1855, 17 D. 639), or a security for a loan specifically agreed to be given when the loan was granted (*Miller's Tr.*, 1862, 24 D. 821; *Horne*, 1847, 9 D. 651; *Stiven*, 1867, 9 M. 923; see *Rose*, 1868, 6 M. 960; *Clark*, 1883, 9 R. 1017). But a transaction which is *ex facie* a *novum debitum* may be impeached if it be really a collusive contrivance to confer a preference, as where a sale to an existing creditor is made for the purpose of enabling him to plead his existing debt as a set off against the price (Bell, *Com.* ii. 124, 199: *Marshall's Tr.*, Mor. 1144).

(*d*) *Insolvency of the Debtor.*—The debtor must have been insolvent before granting, or have been reduced to insolvency by, the alienation challenged; and he must have continued insolvent down to the date of the challenge (*M'Cowan*, 1852, 14 D. 968, and 15 D. 494. See further, as to proof of insolvency, under head of *Gratuitous Alienations at Common Law*, *supra*).

(*e*) *Title to Challenge, etc.*—It cannot be said to be definitely settled whether creditors in debts contracted after the alienation are entitled to challenge, or only those whose debts were contracted prior thereto. In the leading case of *M'Cowan* (14 D. 968) the issue was limited to prior creditors, but the question does not appear from the report to have been considered. In the analogous case of challenges under the Act 1696, c. 5, the Court, prior to the Bankruptcy Act, 1856 (s. 11), decided that the right of challenge was confined to prior creditors. Erskine, however, lays it down that "creditors whose debts are contracted after the alienation made by the debtor, though they have no aid from the Statutes, are not excluded from the remedies competent to them by the common rules of law. They are, therefore, entitled to an action for setting aside every right granted by the debtor to their prejudice, though previously to their own grounds of debt, if it carry in it evident marks of fraud" (Ersk. iv. 1. 44). Bell (*Com.* ii. 227) also supports the right of posterior creditors to challenge (see also Goudy on *Bankruptcy*, 44: Mackay, *Practice*, 407). As in other respects the title to challenge, and form and effects thereof, are the same as under the Act 1696, c. 5, reference is, *brevitatis causa*, made to the article on BANKRUPTCY.

III. GRATUITOUS ALIENATIONS UNDER ACT 1621, c. 18.

This Act, which was based mainly on the *Actio Pauliana* of the Roman Law (*Dig.* 42. 8), was in form a confirmation of an "Act of the Lords of Council and Session made against dyvours and bankrupts at Edinburgh

the 12th day of July 1620." After a lengthened preamble reciting the evils arising from the frauds of bankrupts, practised by means of simulate alienations "to their wives, children, kinsmen, allies, and other confident and interposed persons," the Act provides as follows:—

"For remeed whereof, the said Lordes, according to the powers given unto them by His Majestie and his most noble progenitors, to set downe orders for administration of justice: meaning to follow and practise the good and commendable lawes, civil and canon made against fraudful alienations, in prejudice of creditors, and against the authors and partakers of such fraude; statutes, ordaines, and declares, That in all actions, and causes depending, or to be intended by any true creditor, for recoverie of his just debt, or satisfaction of his lawful action and right: They will decreete and decerne, all alienations, dispositions, assignations, and translations whatsoever, made by the debtor, of any of his lands, teindes, reversions, actions, debtes, or goods whatsoever, to any conjunct or confident person, without true, just, and necessarie causes, and without a just price really payed, the same beeing done after the contracting of lawful debts from true creditors: To have beene from the beginning, and to be in all times comming, null, and of none availe, force, nor effect: at the instance of the true and just creditor, by way of action, exception, or reply: without further declarator. And in case any of His Majesties good subjects (no ways partakers of the saids fraudes) have lawfully purchased any of the saids bankrupts landes or goods, by true bargaines, for just and competent pryces, or in satisfaction of their lawful debts, from the interposed persons, trusted by the said dyvours. In that case, the right lawfully acquired by him who is no-wayes partaker of the fraude, shall not be annulled in manner foresaid. But the receiver of the pryce of the saids lands, goods and others, from the buyer, shall be holden and oblished to make the same forth-comming to the behoove of the bankruptes trew creditors, in payment of their lawful debts. And it shall be sufficient probation of the fraud intended against the creditors, if they, or any of them, shall be able to verifie by writte, or by oath, of the partie receiver of any securitie from the dyvour or bankrupt, that the same was made without any true, just, or necessarie cause, or without any true and competent price: Or that the landes and goods of the dyvour and bankrupt beeing sold by him who bought them from the said dyvour, the whole, or the most part of the price thereof was converted, or to be converted to the bankruptes profit and use. Providing alwayes, that so much of the saids landes and goods, or prices thereof so trusted by bankrupts to interposed persons, as hath beene really payed, or assigned by them to any of the bankrupts lawful creditors, shall be allowed unto them, they making the rest forth-comming to the remanent creditors, who want their due payments."

(1) The Act differs in its operation from the common-law rule against gratuitous alienations during insolvency, in respect that it is applicable only to alienations made to "any conjunct or confident person." Further, in applying the Act the challenging creditor has been accorded by the Court the benefit of two presumptions. These are, that if it be admitted or proved that the grantee is a conjunct or confident person, and that the debtor is insolvent, it is presumed: (1) that the debtor was insolvent at the date of the alienation; and (2) that the alienation was granted without any consideration such as is required to elide the Act. The onus of rebutting these presumptions by proof to the contrary is thus thrown on the defender (Bell, *Com.* ii. 172, 179; *infra*).

It is a question whether the Act differs further from the common law in striking only at rights depending on writing. This question is not clearly determined by decision. The kinds of alienation expressly mentioned in the Act include "alienations" of "goods" (see, however, Erskine's definition of "alienation," iv. 1. 29). The construction of the Act, moreover, has proceeded on the footing that the particular cases specified in it are examples merely, and not restrictive (Mackenzie, *Obs.* fol. 2–8: *Thomas*, 1865, 3 M. 1160, per L. J. C. Inglis). There is no ground of principle for holding the rule of the Act applicable only to written rights; and in the case of the Act 1696, c. 5, the construction adopted by the Court has rejected the literal meaning of the words "dispositions, assignations, or other deeds," and admitted the Act to apply to all alienations of the character struck at by the Act, whether dependent on writing or not (see *Forbes*, Mor. 1124; Bell, *Com.* ii. 196). On the other hand, the language used by the institutional writers and in the decided cases regarding the Act seems to assume that it applies only to written rights (see Stair, i. 9. 15; Ersk. iv. 1. 29; Bell, *Com.* ii. 174); and it has been generally considered that transferences of assets without writing, as, *e.g.*, delivery of goods, do not fall under the Act (Goudy on *Bankruptcy*; see *Dobie*, 1854, 17 D. 97: *Main*, 1881, 8 R. 880; *Thomas*, 1865, 3 M. 1160; cf. *Forbes*, Mor. 1124: *Ross*, 1830, 8 S. 916; *North British Railway*, 1882, 20 S. L. R. 129).

The kinds of alienation struck at by the Act include not merely direct conveyances of property, but every transaction by which the debtor's estate is diminished, either directly or indirectly (Stair, i. 9. 15; Ersk. iv. 1. 29; Bell, *Com.* ii. 174), as, *e.g.*, the discharge of a debt (*Laing*, 1832, 10 S. 200), the abandonment of defences to an action (*Wilson*, 1853, 16 D. 275), the purchase of property which is conveyed direct by the seller to the conjunct or confident person (*Bolden*, 1863, 1 M. 522), a preconcerted decree allowed to pass in absence (Mackenzie's *Works*, ii. p. 8). Obligatory documents, such as bonds and promissory notes, on which diligence may be used, are held to fall under the Act (*Wightman*, 4 Bro. Supp. 477: *Belch*, Bell, *Com.* ii. 177, note; *Thomas*, 1865, 3 M. 1160; cf. *Mathew's Tr.*, 1867, 5 M. 957); as also leases (*Kyd*, 1890, 17 R. 1051). But a mere acknowledgment of debt or voucher does not seem to fall under the Act (*Thomas, supra*; see *Mathew's Tr., supra*). The transfer of a right which is not attachable by creditor's diligence is, in the opinion of Prof. Bell, not impeachable under the Act. In a recent case, however, it has been held that the gratuitous alienation of a *spes successionis* by a sequestrated bankrupt was reducible (*Obers*, 1897, 34 S. L. R. 538), and the principle of the decision seems applicable to such an alienation granted during insolvency, before actual bankruptcy.

(2) *Conjunct and Confident Persons.*—The terms "conjunct or confident" are amplified in the preamble of the Act into "wives, kinsmen, children, allies, and other confident and interposed persons." In the early decisions the test of relationship in the application of the word "conjunct" was generally taken to be the same as for the declinature of a judge under the Acts 1594, c. 16, and 1681, c. 13. According to this test, parents and children, brothers and sisters, uncles and aunts, nephews and nieces, are "conjunct" (*Turpersie*, 1673, Mor. 900; *Brown*, 1754, Mor. 886); so are parents and children, and brothers and sisters by affinity (*Hume*, 1673, Mor. 899; *Mercer*, 1695, Mor. 12563—a stepson), but not uncle and nephew by affinity (*Elibank*, 1712, Mor. 12569). The husband of a wife's sister, however, was held in one case not to be conjunct (*M'Gowan*, 1826, 4 S. 498). It has not been decided whether a cousin is conjunct (*Sinclair*, 1680, Mor. 12562; *M'Dowal*, 1714, Mor. 12569). The term "confident" does not imply relation-

ship. "The principle of the rule applies to every situation of intimate and confidential intercourse. It seems to comprehend partners in trade, servants, factors, confidential men of business" (Bell, *Com.* ii. 175. As to law agents, see *ib.*). "By confident persons are meant those in whom the granter is presumed to place an uncommon trust from his employing them in certain offices about his person or estate, as a doer, steward, or domestic servant" (Ersk. iv. 1. 31; see *Edmond*, 15 D. 703). Trustees under an ordinary trust settlement are not confident with the beneficiaries (*Young*, 1835, 13 S. 305; see *Watson*, 1874, 1 R. 882). A constituent has been held not confident with his factor (*Buccleuch*, Mor. 12573). It was said, however, that the factor might be confident with his constituent. In one case the debtor's paramour and bastard children were apparently regarded as falling within the category of the Act (*Ballantine*, 17 Feb. 1814, F. C.).

The onus of proving the grantee to be conjunct or confident with the debtor lies on the creditor challenging the transaction.

(3) *Non-onerosity of Transaction challenged.*—To render an alienation liable to challenge under the Act, it is necessary that it has been granted "without true, just, and necessary causes, and without a just price really paid." The terms of the Act would seem intended to throw the onus of proving non-onerosity on the creditor making the challenge. But the rule has for long been established by the Courts, that if it is admitted or proved that the debtor is insolvent and the grantee a conjunct or confident person, the creditor is entitled to the benefit of a presumption that the deed was gratuitous, as well as a presumption that the debtor was insolvent when he granted it (Bell, *Com.* ii. 172, 179; *Riddoch*, Mor. 12554; *Hamilton*, Mor. 12555; *Whitehead*, Mor. 12557; *Stansfield*, Mor. 954; *Napier*, Mor. 3755), and that the onus of negativing these presumptions lies on the grantee.

The proof as to onerosity may be by parole (*Laing*, 1832, 10 S. 200; *Mathew's Tr.*, 1867, 5 M. 957, per Ld. Pres. Inglis; *Hodge*, 1883, 21 S. L. R. 40). The terms of the deed are not in themselves sufficient to displace the presumption of non-onerosity (Bell, *Com.* ii. 179; *Whitehead*, Mor. 12557; *Rule*, Mor. 12566; *Skene*, Mor. 12572; *M'Kies*, Mor. 12574). Nor is the oath of the grantee in supplement of the terms of the deed conclusive (*Hamilton*, Mor. 12555; *Auld*, Mor. 12552; *North British Railway Co.*, 1882, 20 S. L. R. 129). It is said by Bell, however, that "it may be taken as the reconciling principle of the varying decisions, that wherever the presumption arising from the mere connection of the parties was alone to be overcome, the narrative, fortified by the holder's oath, is sufficient; but wherever any additional circumstance appeared indicative of unfair dealing, other evidence is necessary" (*Com.* ii. 179, note). The same author states that "where the narrative bears gratuitous causes, it is considered as confirming so strongly the presumption of gratuitousness that the law holds it as ultimate evidence of no valuable consideration having been given" (*Com.* ii. 179). In the case of *Hodge* (1883, 21 S. L. R. 40) parole evidence to negative the terms of deeds which purported to be gratuitous was admitted and considered; but as the Court held the granter to have been solvent at the date of the deeds, the proof of onerosity was unnecessary to the decision of the case. Ld. Rutherfurd Clark, who dissented from the decision, said: "The deeds bear to be gratuitous. I have considerable doubt whether, in such a question as this, it is open to the granters to allege and prove, contrary to their tenor, that they were granted for onerous considerations. But it is very clear to my mind that, if they are allowed to do so, the allegation of onerosity must be very precise, and supported by abundant evidence."

If the challenge does not take place until forty years after the date of the alienation, the grantee is not bound to prove onerosity (*Blackwood*, Mor. 904; *Elliot*, Mor. 905; *Guthrie*, Mor. 1020; Bell, *Com.* ii. 181); and where there is *mora* and taciturnity for a long period, short of the prescriptive one, slight evidence will be sufficient to rebut the legal presumption; "in all questions of computation, the creditors are not entitled, after a long delay, to go very narrowly to work in their reckonings, but the question is to be taken on a broad and fair and rather favourable view for the debtor" (Bell, *Com.* ii. 181; *Selkrig*, 28 Nov. 1815, F. C.).

Kinds of Onerosity.—(*a*) Value in money, or money's worth, must be fairly adequate in amount (Bankt. i. 10. 78; Bell, *Com.* ii. 179–80; see *Glencairn*, Mor. 1011; *Hodge*, 1883, 21 S. L. R. 40). "In proving the consideration of the deed, every case must depend on its own circumstances. It may be observed, however, in general: 1. That it is not in all cases necessary to prove that the highest price possible has been got for the subject, but quite sufficient if what is commonly called a fair price has been received, *i.e.* a price which, in the whole circumstances of the case, indicates a fair and *bonâ fide* transaction. A sale of the subject soon after the conveyance, without any material change of market or of circumstances, will afford sufficient evidence of the value. But all circumstances which have affected the price of that sort of property are proper to be considered in estimating *ex eventu* the value as at any particular time which is past. 2. In estimating the value of a contingent interest, as an annuity which has been alienated, it seems inadmissible to take the value *ex eventu*. It must be taken as *in prospectu* at the time of the alienation, and the value which such an annuity would then have given in the market is the true and just consideration for which alone it can be alienated to the prejudice of creditors. 3. Where the deed objected to is a bond, bill, or other voucher of debt, such evidence as would be relevant in an action of constitution of the debt will be sufficient to establish value in a question upon this Statute" (Bell, *Com.* ii. 179–80). The apparent price must not only be a "just price" in point of amount, but be also really paid. Thus it was held relevant that the apparent price, though counted and paid over, was not substantially and really paid, and did not, from any proofs of its existence with or application by the debtor, appear to have come to his use (*M'Arthur & Gibson*, Bell, *Com.* ii. 177, note; see also *North British Railway, Co.*, 1882, 20 S. L. R. 129). "The law presumes a collusion, which the mere show of a payment will not sufficiently refute" (Bell, *Com.* ii. 177).

(*b*) It is sufficient to elide the Statute if the alienation is granted in order to fulfil or satisfy a previously existing legal obligation of the debtor, and that whether the alienation amounts to specific implement or is intended as satisfaction in another form, or is given in security. Thus the Act was held not to apply to a disposition granted by an insolvent in satisfaction of the price of certain victual sold and delivered to him a month previously (*Laird of Birkinbog*, Mor. 881), nor to an assignation granted by a client to her agent in satisfaction of an account incurred by him to an Edinburgh agent on her behalf (*A. & B.*, 17 Nov. 1837, F. C.; see also *M'Ewen*, 1828, 6 S. 889; *Mansfield*, 1833, 11 S 389; *Horne*, 1847, 9 D. 651; *Williamson*, 1882, 9 R. 859). Similarly, a security given to a cautioner in relief of his liability does not fall under the Act (*Thomas*, 1866, 5 M. 198). And where daughters living in family with their father contributed from their earnings to the support of the house, this was held a sufficient cause to sustain an assignation of long leases by him in their

favour (*Hodge*, 1883, 21 S. L. R. 40; see *Dawson*, 1888, 15 R. 891; *Kyd*, 1890, 17 R. 1051; *Taylor*, 1888, 15 R. 328; *Thomson*, 1889, 16 R. 333).

(*c*) *Marriage Settlement Provisions.*—Marriage constitutes a just cause in the sense of the Act, and provisions made by an antenuptial marriage contract in favour of the wife or the issue of the marriage are protected, so far as reasonable in amount (*Lockhart*, Mor. 956; *Blackburn*, 29 May 1816, F. C.; *Garden*, 1822, 2 S. 34; *M'Lachlan*, 1824, 3 S. 132; *Carphin*, 1867, 5 M. 797; *Watson*, 1874, 1 R. 882; Bell, *Com.* ii. 176–7). The question of reasonable amount depends on the circumstances of the parties (see *supra*, under *Gratuitous Alienations at Common Law*). If the provisions are excessive, they may be reduced *quoad excessum* (*M'Lachlan*, *Carphin*, *Watson*, *supra*. As to the form of challenge, see per Ld. Ormidale in *Watson*). Provisions made by the parents of the spouses as part of the marriage compact are treated on the same footing (Ersk. iv. 1. 33; *Blackburn*, 29 May 1816, F. C.; *Scott*, 1822, 1 S. 481; *Garden*, 1822, 2 S. 34; *Watt*, Mor. 975). An antenuptial provision by an uncle in favour of his nephew's wife was held onerous *quoad* the wife, and not reducible under the Act (*Thoirs*, Mor. 984; see Burton on *Bankruptcy*, i. 145). If the insolvency of the granter of the provision was within the knowledge of the grantee or notorious in character, the element of fraud or *mala fides* may vitiate the transaction (Ersk. iv. 1. 33; *Wood*, Mor. 977).

Postnuptial settlements lack the element of onerosity which is imparted to antenuptial settlements by reason of the marriage taking place on the faith of them; and it is not clearly settled how far the natural obligation of a husband to provide for his wife after his death constitutes a just cause of granting under the Act, to support a postnuptial settlement made during his insolvency (*Campbell*, Mor. 988; *Urquhart*, Elch. *voce* "Fraud," No. 8; *M'Kenzie*, Mor. 958; cf. *Sharp*, 1839, 1 D. 396; *Guthrie*, 1846, 9 D. 124; Fraser, *H. & W.* ii. 1501; M'Laren on *Wills and Successions*, i. 667; and see *supra*, under *Gratuitous Alienations at Common Law*). Postnuptial provisions to children are not protected (Stair, i. 9. 15; Ersk. iv. 1. 34; see *Globe Insur. Co.*, 1854, 17 D. 216). The claim of a natural child for maintenance is that of a creditor of the father (*Downs*, 1886, 13 R. 1101; *Valentine*, 1892, 19 R. 519; *Ballantyne*, 17 February 1814, F. C.); and a provision by the father, of an extent not exceeding his obligation of maintenance, will not be reducible under the Act.

As to policies of assurance in favour of a wife or children under the Married Women's Policies of Assurance (Scotland) Act, 1880, reference may be made to what has been said under the head of *Gratuitous Alienations at Common Law*, *supra*.

Insolvency of Debtor.—Alienations struck at by the Act are prohibited if made "after the contracting of lawful debt," and the Act does not expressly postulate insolvency at the date of granting, but this has been construed by decision to be the condition of its application (*Garthland*, Mor. 915; *Clerk*, Mor. 917). It is enough, however, if the alienation challenged has the effect of making the granter insolvent (see *Meldrum*, Mor. 928; *Queensberry*, Mor. 961; *Carphin*, 1867, 5 M. 797).

The onus of proving insolvency at the date of the challenge, if disputed, lies on the challenging creditor (*M'Cowan*, 1852, 14 D. 901; *Bolden*, 1863, 1 M. 522); but if it is established, and if the alienation be admitted or proved to be in favour of a conjunct or confident person, there is a presumption that the granter was insolvent at the date of the grant, and the onus of proof is thrown upon the grantee (Bell, *Com.* ii. 172, 180; *Crs. of Cult*, Mor. 974; *Holwell*, Mor. 11583; *M'Cowan*, 1852, 14 D. 968; *Bolden*, *supra*.

The insolvency at the date of the alienation must be insolvency in the sense of an absolute deficiency of assets (Ersk. iv. 1. 28; Bell, *Com.* ii. 180; *M'Kell*, Mor. 920; *M'Kenzie*, Mor. 924; *Hodge*, 1883, 21 S. L. R. 40; see further, on this head, under *Gratuitous Alienations at Common Law, supra*).

Title to Challenge.—While the Act gives the right of challenge to "any true creditor," this has been held to mean prior creditors, *i.e.* creditors whose grounds of debt are prior in date to the alienation challenged (Stair, i. 9. 15; Ersk. iv. 1. 44; *Mansfield*, 1833, 11 S. 389; *M'Cowan*, 1852, 14 D. 968; *Edmond*, 1853, 15 D. 703; cf. Bell, *Com.* ii. 172–3, and per Ld. Curriehill (Ordinary) in *Edmond, supra*). In the case of debts not resting on writing, but proveable by witnesses, it is enough if the date of contracting be prior to the alienation, although the debts have not been constituted by decree till subsequently (*Pollock*, Mor. 1002; *Street*, Mor. 1003); and a gratuitous disposition was reduced at the instance of a prior onerous creditor under an implied warrandice, although the decree establishing the debt upon the incurring of the warrandice was not obtained until after the disposition (*Catheart*, Mor. 1005). But a challenge by a creditor whose debt is conditional is, in its effect against the defender, suspended till the purification of the condition (Bell, *Com.* ii. 173: Mackenzie, *Obs. on Statute*, 1621, c. 18, p. 31). Gratuitous creditors are entitled to challenge under the Act alienations granted during supervening insolvency of the debtor (Bell, *Com.* ii. 174).

A trustee in sequestration is entitled to set aside any deed or alienation for behoof of the whole body of creditors, and in doing so is entitled to the benefit of any presumption which would have been competent to any creditor (B. A., 1856, s. 11). The trustee's title does not, however, evacuate the title of an individual creditor (*Brown*, 1890, 18 R. 311). A trustee under a private trust deed granted by the debtor may challenge alienations, provided (1) the trust deed expressly empowers him to do so, and (2) creditors, having themselves a title to challenge, accede to the trust deed, thereby impliedly constituting the trustee their representative (*Fleming's Trs.*, 1892, 19 R. 542). The title of a trustee in *cessio* has never been expressly affirmed. In the case of *Thomas*, 5 M. 198, the judgment of the Court (p. 202) negatived generally the title of the pursuer *qua* trustee in *cessio*, although the action related partly to a personal obligation granted by the bankrupt (viz. a promissory note), and partly to a conveyance of heritage. It is thought, however, that a trustee in *cessio* who represents prior creditors would be held to have a title (see further, as to this point, "Title to Challenge" under Act 1696, c. 5, in article on Bankruptcy). The debtor cannot himself make the challenge, unless he has been reinvested in his estate by discharge on composition contract in sequestration, and obtained an express assignation of the right of challenge from the creditors (Goudy on *Bankruptcy*, 413). And, similarly, a purchaser of the bankrupt estate does not acquire a title without express assignation (*Smith & Co.*, 1889, 16 R. 392).

Form and Effects of Challenge.—The Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 10, provides that "all alienations of property by a party insolvent or notour bankrupt, which are voidable by statute or at common law, may be set aside either by way of action or exception; and a decree setting aside the deed by exception shall have the like effect as to the party objecting to the deed, as if such decree were given in an action at his instance"; and this section applies to "actions and exceptions as well in the ordinary Court of the Sheriff as in the Court of Session" (20 & 21 Vict. c. 19,

s. 9). "Exception" includes answer in replication. "Thus if the title of the alienee is pleaded in defence to an action otherwise competent, the Act of Parliament or the rule of the common law may be pleaded in reply" (per Ld. M'Laren in *Cook*, 1896, 23 R. 925; see *Dickson*, 1866, 4 M. 797; *Mackenzie*, 1868, 6 M. 833; *Moroney*, 1867, 6 M. 6). The effect of a successful challenge under the Act "is simply to restore the alienated subject to the position in which it was before the alienation. It becomes assets of the bankrupt's estate, and may be attached by the diligence of the creditor who has established the nullity, and also by other creditors whose claims are prior in time to the alienation. The reduction of a fraudulent alienation does not give the creditor any right against the assignee to require payment or delivery of the subject to himself" (per Ld. M'Laren in *Cook, supra*; Bell, *Com.* ii. 183). It may sometimes happen that the effect of the reduction is to establish a preference in another creditor. Thus where a creditor arrested a ship which, prior to the arrestment, had been registered as belonging to the debtor's son in virtue of a conveyance voidable under the Act, a subsequent reduction of the conveyance by the trustee in the debtor's sequestrated estate was held to let in the creditor's arrestment and effectuate his preference thereon (*Bell*, 1862, 1 M. 183). A direct action by an individual creditor must, accordingly, be an action of reduction in the Court of Session, or, if there is no written title to set aside, an action of declarator (see *Stiven*, 1897, 34 S. L. R., as to competency of action in Sheriff Court). In the latter case, however, a creditor holding a ground of diligence would seem entitled to proceed to attach the subject alienated, as being assets of his debtor; and if the alienation be put forward as establishing the right to the subject in the alienee, the Act can be pleaded by way of answer. (See, however, doubt as to the application of the Act to transferences not dependent on writing, *supra*.) It is competent for a creditor to combine with reductive conclusions a conclusion against the bankrupt for payment of his claim, so as to enable him to do diligence on his decree against the fund when the transaction under challenge has been reduced (*Cook, supra*, per Ld. M'Laren). A trustee for creditors, having a title to receive the bankrupt's assets, may, along with other necessary conclusions, insist in conclusions for delivery or count and reckoning (Bell, *Com.* ii. 183).

The requisite averments in a challenge under the Act are: (1) that the alienee is conjunct or confident with the debtor; (2) that the alienation was granted without true, just, and necessary cause, and without a just price really paid; (3) that the debtor was insolvent at the date of the alienation; (4) that the debtor is insolvent at the date of the action; and (5) that the pursuer is either (*a*) a prior creditor, (*b*) a trustee in sequestration, or (*c*) a trustee having a title to represent prior creditors (see *Jurid. Styles*, vol. iii. p. 79). The action may, in the Court of Session, be tried either with or without a jury, but in practice the latter course is now usually adopted (see Mackay, *Prac.* 409; as to form of issue, see *Bolden*, 1863, 1 M. 522; *Caird*, 1857, 20 D. 187; *Ramsay*, 1854, 16 D. 720).

The provision in the Act (see *supra*) protecting third parties who have onerously and in *bonâ fide* acquired the subject alienated from the grantee, expresses what is the common-law rule (*Williamson*, 1851, 14 D. 127). It is necessary that the third party shall have been ignorant of the nature of his author's right (*Hay*, Mor. 1009; see *Caird*, 1857, 20 D. 187; as to proof of knowledge, and the presumptions which are applied, see *Hay, supra*; Bell, *Com.* ii. 183; *Gordon*, Mor. 1012; *Allan*, Mor. 1022; *Caird, supra*). It is

not decided whether an adjudger from the grantee is entitled to the same protection as a purchaser (Bell, *Com.* ii. 182–183).

IV. Alienations during Insolvency in Defraud of Diligence under Act 1621, c. 18.

The provisions of the Act on this head are as follows:—

"And if in time comming any of the saids dyvours, or their interposed partakers of their fraude, shall make any voluntarie payment or right to any person in defraud of the lawful and more timely diligence of another creditor, having served inhibition, or used horning, arreastment, comprising, or other lawful meane, duely to affect the dyvour's lands, or goods, or price thereof to his behoove. In that case the said dyvour or interposed person shall be holden to make the same forthcoming to the creditor having used his first lawful diligence: who shall likewise be preferred to the concreditor who being posterior unto him in diligence hath obtained payment by the partial favour of the debtor or of his interposed confident, and shall have good action to recover from the said creditor that which was voluntarily paid in defraud of the pursuer's diligence."

The "voluntary payment or right" may be one made in any form, direct or indirect, and, unlike the alienations struck at in the first branch of the Act, may be in favour of a stranger. A trust disposition for behoof of all the creditors of the granter may be set aside under this branch of the Act (*Grant*, 1835, 13 S. 424; *Mackenzie*, 1868, 6 M. 833).

The alienation challenged must have been granted voluntarily. As under the first branch of the Act, payments in cash of debts due are not liable to challenge (see *Forbes*, Mor. 1042, and Elch. *voce* "Bankrupt," No. 26; cf. *Veitch*, Mor. 1029), nor *nova debita* (Bell, *Com.* ii. 188. As to deeds granted in implement of prior legal obligation other than proper *nova debita*, see *Mansfield*, 1833, 11 S. 825; cf. Bell, *Com.* ii. 189). Alienations under pressure of personal diligence are not voluntary within the meaning of the Act (*Gordon*, Mor. 1041). And a conveyance to a creditor who, though his diligence may have begun later than that of the challenging creditor, has a right to perfect it sooner, will be protected (see *Gellatly*, Mor. 1053; *Mansfield*, *supra*, per Ld. Glenlee).

The insolvency of the debtor at the time of the alienation challenged must have been notorious. If the insolvency is secret, and in particular, unknown to the grantee, the challenge will not be successful (Bell, *Com.* ii. 186; *Royal Bank*, Mor. 1058; *Tweedie*, Mor. 1037; *Miln*, Mor. 1046). Actual collusion on the part of the grantee is not required (see *Grant*, 1835, 13 S. 424; *Mackenzie*, 1868, 6 M. 833).

The title to challenge is in creditors who, prior to the alienation, have begun to use such diligence against the debtor's estate as would, if not interrupted, legally affect the subject alienated. The diligence must be regular and formal, and be prosecuted in due course and without any unfair or improper delay (Bell, *Com.* ii. 186).

A successful challenge under this branch of the Act, while it protects the diligence of the challenging creditor, has the same effect *quoad* third parties as in the case of challenge of alienations under the first branch of the Act (Bell, *Com.* ii. 190).

[Bell, *Com.* ii. 184 *et seq.*; Ersk. iv. 1. 37 *et seq.*; Goudy on *Bankruptcy*, 59; Mackay, *Prac.* 410; Burton on *Bankruptcy*, i. 158.]

Inspection of Goods.—See Sale.

Instalment.—When a sum of money is payable by instalments, effect will be given to a stipulation that if there be failure to pay any instalment when it falls due, payment of the whole may be instantly demanded. If there be no such stipulation, diligence may be done for the recovery of such instalments only as are actually due, but diligence in security for the rest may proceed. In a bill or promissory note the sum may be made payable by stated instalments, or by stated instalments with a provision that upon default in payment of any instalment the whole shall become due (Bills of Exchange Act, 1882, s. 9; *Macfarlane*, 1864, 2 M. 1210; *Gordon*, 1898, 5 S. L. T. No. 407).

Where goods are to be delivered by instalments, it has been laid down that payment for each instalment is due on delivery of such instalment in the absence of anything in the contract to the contrary (*Hall & Sons*, 1860, 22 D. per Ld. J.-C. Inglis, at p. 420; *Linn*, 1863, 2 M. per Ld. J.-C. Inglis, at p. 93). It is provided by the Sale of Goods Act, 1893, s. 31: "(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. (2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated." Upon the effect of this section on previous decisions in Scottish cases, see Brown on *Sale of Goods Act*, p. 148.

"I am not sure that the law is clearly settled as to the remedy or remedies open to a purchaser under a continuing contract for the supply of goods at such times as he may require them. If on one occasion the seller should tender goods inferior to contract quality, the purchaser would not in ordinary circumstances be justified in rescinding the whole contract, though he would be entitled to return the particular lot of goods which were objectionable. But if a seller systematically sends goods which are not conformable to contract, and the contract is for successive deliveries, I do not doubt that when such conduct is persisted in, so as to make it evident that the seller does not intend to fulfil his contract, the purchaser may rescind the contract and refuse to take further deliveries" (*Govan Rope and Sail Co.*, 1897, 24 R. per Ld. M'Laren, at p. 373). See Sale.

Instigation.—See Accessary.

Institor, in Roman law, was the manager of a trade or business, as a shopkeeper, a banker, or an innkeeper: *qui negotiationibus præponuntur institores vocantur* (*Inst.* iv. 7). In the early law a principal could not be sued on a contract which his *institor* had entered into on his account. This inconvenience was remedied by the prætors, who granted an *actio institoria*, under which the principal (*dominus negotii*) was made directly liable on all contracts entered into by the *institor* in the ordinary course of business. This action belonged to the class known as *actiones adjectitiæ qualitatis*, because they were subsidiary or additional to the direct remedy against the true contracting party. In other words, the prætorian action was superadded to the *jus civile* action, so that, though the principal had been made

directly liable, the *institor* was not thereby exonerated. Consequently, the person who contracted with an *institor* had two debtors—the *institor* himself and his master or employer. The principal was, of course, responsible for a contract of the *institor* only when the contract was within the scope of the business intrusted to him (*Dig.* 14. 3. 5. 12). A notice in plain characters, forbidding contracts to be made with the manager of a shop, exonerated the owner of the shop (*Dig.* 14. 3. 11. 2); and if the notice were clearly legible and placed in a conspicuous place, creditors could not plead that they were unaware of it (*Dig.* 14. 3. 11. 3). The principle of the *actio institoria* was gradually extended to contracts by agents who were not strictly *institores*, so that, in the later law, a contract entered into with an agent could always be enforced against the principal by the *actio ad exemplum institoriæ actionis*, or, as it is called by the commentators, the *actio quasi institoria*. At the same time, the principle of the *actio institoria*, even in its latest development, fell short of the full recognition of agency in the modern sense in two respects: (1) it did not exonerate the agent from liability; and (2), although it allowed the principal to be sued directly, it did not enable him to take direct action against the persons contracting with his agent.—[Gaius, iv. 71; Just. *Inst.* iv. 7; *Dig.* 14. 3.]

Institute.—A destination, properly so called, cuts off the series of heirs called by law to the succession to property, and substitutes an order prescribed by the will of the proprietor. The first member of this prescribed order is called the institute: those called to succeed the institute are heirs of provision or substitutes. Thus if A. dispones his lands "to B., whom failing to C., whom failing to D.," B. is the institute, C. and D. are substitutes.

A conditional institute is one who is called to succeed contingently on the failure of others prior to the period when the deed is to take effect. In a *mortis causa* conveyance in the terms above mentioned, C. is a conditional institute, because he becomes the institute should B. predecease A., the granter of the deed. D., in like manner, would be the institute should both B. and C. predecease A. Similarly, if A. dispones "to the heirs of my body, whom failing to B.," etc., the heir of A.'s body, if he survived A., would take as institute, but if A. died leaving no heirs of his body, B. would take as institute. In such a destination the condition upon which one called as substitute becomes institute is the predecease of those called before him. Should these, or any of them, survive the granter, one subsequently called can never take as institute, but his right to take as substitute remains. The condition, however, may be such that, if it is not purified, the whole destination is evacuated, *e.g.* where A. frames the destination as follows: "In the event of my dying without heirs of my body I dispone to B., whom failing to C., whom failing to D." Here B. is not substituted to the heirs of A.'s body, but is instituted conditionally upon A. dying without heirs of his body; and to entitle him to take at all, this condition must be purified. If A. dies, leaving heirs of his body, the institution of B. flies off, carrying with it the substitution of C. and D. The condition is a condition precedent to the whole destination taking effect, and if it is not purified the succession is regulated by the *provisio legis*, and the estate devolves upon the heir of the granter, who takes not under the deed, but independently of it.

The granter of the deed may make himself the institute, as where A. dispones "to myself, whom failing to B.," etc. In this case, after the death of A., B. would take not as institute, but as substitute. Formerly

when the granter disponed "to the heirs of my body, whom failing to B.," he was held to have constructively instituted himself; but this doctrine was negatived by the case of *Hutcheson*, 1872, 11 M. 229.

The institute takes by direct force of the grant. He is a disponee and not an heir, and must make up his title accordingly. When conditions and prohibitions in a deed are directed only against "heirs," they do not affect the institute (*Edmonstone*, 1769, Mor. 4409, H. of L. 1771, 2 P. 255; *Maxwell*, 1836, 15 S. 291).

[Ersk. iii. 8. 44 and 73; Menzies, *Convey.* 459.] See SUBSTITUTE; VESTING; DISPOSITION.

Instrumentary Witnesses.—See DEEDS (EXECUTION OF); FORGERY.

Instruments.—See INFEFTMENT; NOTARIAL INSTRUMENT; RESIGNATION; etc.

Insucken Multures, sometimes called intown multures, were the payments for grinding corn due by those who were astricted to a mill under an obligation of thirlage. The area astricted to the mill was called the sucken—obviously the same word as the feudal "soken," which was used to designate alike the area within which a franchise granted by the king to a subject was exercised, and the franchise itself. Those within the sucken were called the suckeners, and the duties which they were required to pay for grinding were called insucken (or intown) multures. The compulsitor on the suckeners to resort to the mill enabled the person in right of the multures to charge something above the competition value of the services rendered, and so the insucken multures ("the monopoly price of grinding," Bell, *Prin.* s. 1018) were as a rule considerably higher than the rates charged to those whose resort to the mill was purely voluntary (known as outsucken, or outtown, multures). A common rate was one peck in the boll (*i.e.* one-sixteenth) for insucken multures, and one peck in six firlots (*i.e.* one-twenty-fourth) for outsucken multures (*e.g. Bruce*, 1741, Elch. "Multures," No. 7). But the insucken multures might be at a lower rate than the outsucken (*Murray*, 1745, Elch. "Thirlage," No. 2).

Payment of insucken multures was a most important element of proof in all cases in which it was sought to prove the constitution of thirlage, provided that it was possible to ascribe such payment to compulsion (*e.g.* King's mill, *Dog*, 1635, Mor. 10853; Church mill, *Maxwell*, 1740, Mor. 16017, 5 B. S. 687; Barony mill, *Robertson*, 1744, 5 B. S. 740). Accordingly, if payment of insucken multures for the prescriptive period was established, this was held sufficient proof of the constitution of thirlage in all cases in which the mill and the lands thirled belonged to the same owner, as being good presumptive evidence of the constitution of a right which is not necessarily constituted by writ; but where the land and the mill belonged to different owners, payment of insucken multures for any period is held to have been *meræ facultatis*, and something more is required in order to prove astriction (*Earl of Hopetoun*, 1753, Mor. 16029, Elch. "Multures," No. 12).

See THIRLAGE.

Insurance.—See Accident Insurance; Fire Insurance; Life Insurance; Marine Insurance.

Intentio, in Roman law, was that clause of the *formula* in which the pursuer embodied his claim. There could be no *formula* without an *intentio* setting forth the question at issue. If the *judex* decided that the claim in the *intentio* was well founded, a verdict in favour of the pursuer necessarily followed. Again, the right alleged by the pursuer, or, in other words, the contents of the *intentio,* determined the nature of the action. Consequently we find that the numerous divisions of Roman actions are based mainly on differences in the structure of the *intentio.* Thus if the question at issue in the *intentio* was one of fact, *i.e.* if the pursuer's claim depended on whether certain alleged facts were true or untrue, the *actio* was *in factum concepta*; if, on the other hand, the question in the *intentio* was one of law, the *actio* was *in jus concepta.* Similarly, actions were *utiles, fictitiæ, bonæ fidei,* and so on, according to modifications inserted in the *intentio.*

Intercessio, in Roman law, denotes a liability incurred on behalf of a third party. An *intercessor* either (1) takes upon himself the debt of another, and becomes debtor in his place, thereby releasing the previous debtor from liability (see Expromissio); or (2) incurs liability for the debt of another, while the person for whom he intercedes remains liable. The former kind of *intercessio* is known as "privative," the latter kind, as "cumulative." The most important case of *intercessio* of the latter kind is *fidejussio,* or cautionry. The contracts, *mandatum qualificatum,* in which a lender gives credit to a borrower in reliance on the representations of the *mandator,* and *constitutum debiti alieni,* in which one promises to pay the subsisting debt of another, are also species of cumulative *intercessio.*

In constitutional law the term *intercessio* is used to denote the right of veto possessed by Roman magistrates.

Interdict.—Interdict may be applied for (1) in the Court of Session, or the Bill Chamber, as a branch of that Court, (2) in the Sheriff-Courts, (3) in Burgh Courts. Interdicts are either perpetual or interim. In the former case they are granted as the decree which the complainer or pursuer obtains. In the latter case they are interim decrees which may be granted during the dependence of an action in which interdict is sought. As we shall see, whether interim interdict be granted or not is a question of circumstances in each case, depending on a balance of convenience and inconvenience which the exercise of this jurisdiction is likely to occasion.

1. *In the Court of Session.*—An interdict is a decree to restrain or prevent a person from doing an act which will interfere with another person's rights. It is thus necessarily a negative remedy used to prevent injury to any right, or stay or prevent the execution of diligence. But in the latter case it is only used when the process of suspension of a decree of an inferior Court, or of a charge under a decree, is no longer competent.

The rights first sought to be protected by interdict were those connected with land. It was early seen that if the possessor of land, even although he had a title to it, was liable to be disturbed at any moment by anyone founding on a title alleged to be prior to his, "his right would be very lame

and ineffectual." To prevent this result, the rule of law was established, that anyone who had been in the peaceable and open possession of land for seven years by virtue of an infeftment should be able to interdict anyone from interfering with his possession until the rights of the parties had been determined in a competent process. This interdict was taken from the Roman law, and was known as *uti possidetis*. Its object simply was to give the possessor a possessory action to enable him to retain possession (Stair, iv. 26. 3; Ersk. iv. 1. 47; *Colquhoun*, 1859, 21 D. per Ld. Cowan, 1001).

In course of time the remedy was extended to the protection of other rights. It would be almost impossible to mention any rights that might not be protected by interdict, and almost every one has been or might be. Thus an interdict can be granted to prevent a person from doing any act which interferes with the rights of another person. It is also granted against a person who interferes, or threatens to interfere, with another person when in the performance of a lawful act (*Gibb*, 1837, 16 S. 169). The following are illustrations of the interdicts usually granted: A liar can prevent a liferenter from injuring his rights; trespassing (*Merry & Cuninghame*, 1895, 22 R. 247), nuisance (*Monerieffe*, 1886, 13 R. 921), the infringement of patent rights, the violation of copyright, and piracy of a trade mark can be prevented by interdict; as can also the disclosure of confidential communications, such as private letters, the publication of private manuscripts, and of libels. Again, the wrong performance of any act by any individual or individuals can, when threatened or attempted, be stopped by interdict. Thus trustees and executors can be prevented by interdict from doing any act which would injure beneficiaries whose interests it is their duty to safeguard, or paying away trust funds to beneficiaries who are in contempt of Court (*Edgar*, 1893, 21 R. 59). One partner can interdict another. Arbiters can be interdicted from proceeding to adjudicate on the matter referred to them. Parties can be prevented from enforcing a decree-arbitral. The debtor in a bond and disposition in security can interdict the seller from selling under the powers contained in it, if he establish that these are being wrongly exercised. Clubs, companies, corporations, can also all be interdicted from acting wrongously. And many other cases might be figured.

Interdict may also be used to prevent the enforcement of a decree of an inferior Court which is not appealable (*Caledonian Railway*, 1897, 24 R. 855) or to stop the execution of diligence. This is usually done by a suspension; but if the diligence has passed a certain stage, it can only be stopped by interdict. Thus where a decree is obtained against a person, it may be suspended if it has been pronounced in an inferior Court; or if a charge upon any decree has been given or threatened, it may be suspended. But if after a charge has expired and a warrant to sell has been granted, the objector if he want to stop the sale, must do so by interdict (*Macdonald*, 1852, 15 D. 191).

On the other hand, an interdict will only be granted if the complainer has a right to demand that remedy. Thus it has been decided that although it is a criminal offence for a person to call himself a "patent agent" unless he is registered under the Patent Acts, still no right is conferred on other persons to interdict him from so designing himself (*Institute of Patent Agents*, 1894, 21 R. H. L. 61; see also *Hood*, 1884, 12 R. 362).

It is, in addition to this, of course a question in each case whether the remedy will be granted, for the defender or respondent may disprove the averments of the pursuer or complainer. It is also always in the discretion

of the Court whether it should be granted or not. Thus the "rule of law, that a complainer is entitled to interdict if he prove his case," is not an absolute rule—that is to say, although the complainer may be entitled to have the respondent restrained from doing the things of which he complains, yet the whole circumstances of the case may be such, in the opinion of the Court, that the end in view may be obtained with more propriety otherwise than by granting an interdict (per Ld. Young in *Macleod*, 1886, 14 R. 92; cf. Ld. M'Laren in *Fleming*, 1897, 24 R. 281). It also follows from the nature of interdict that it is intended to be directed against an act yet to be done. If, therefore, the act complained of is completed and has been acquiesced in, the party complaining may have to vindicate his right in another action, such as a declarator (*Hoyle*, 1854, 17 D. 83; *Dickson*, 1863, 1 M. 1157). The application must also be presented timeously, and it scarcely needs authority to prove that what is timeous is a question of circumstances (*Lowson*, 1864, 3 M. 53; *Begg*, 1874, 1 R. 366). Again, an interdict, strictly speaking, seeks to prevent injury to a right. It does not, as a rule, establish it. Thus a person who may have a right to the possessory interdict above referred to, may also have to establish his right to his estate in another action. Or a patentee, who has obtained an interdict against an infringer, may afterwards have to defend an action to reduce the patent. In such cases the interdict does not render the right *res judicata*, as would be the result if the decree were obtained in a declarator or other action. But it may have that result, and a party in an action for interdict may be able to establish his right. Thus a proprietor with a right of salmon-fishing, who brought an action for interdict against a burgh to have it stopped from fishing in the sea *ex adverso* of certain lands, was allowed to prove by proof of prescriptive possession what the true extent of his right of fishing was. The interdict, when obtained, would thus have the same effect as an action of declarator (*Earl of Fife*, 1829, 8 S. 137). Moreover, it cannot fail to have that effect if the only person claiming an adverse right is interdicted. When, however, a party desiring interdict requires at the same time to establish his right, the appropriate course for him to take is to raise an action of declarator and interdict. If he succeed in that action, he will not only establish his right and render the matter *res judicata*, at least in a question with his opponent, but will also stop him from interfering with it. A right so established may also be rendered *res judicata* in a question with other persons as well. Thus an action of declarator and interdict regarding a right of way, if properly tried, between a proprietor and members of the public asserting the public interest, decides whether the road is public or not in a question with everyone (*Jenkins*, 1867, 4 M. H. L. 27). Of course only the persons named in the decree are interdicted, but, as the right of way has been negatived, other trespassers can be interdicted under a simple application for interdict. An interdict will not easily be obtained if there is no assertion of right on the part of the respondent (*Hay's Trs.*, 1877, 4 R. 398), nor if the injury is inappreciable (*Winans*, 1885, 13 R. 1051); but if a right is asserted adverse to that of the complainer, the interdict will be granted (*Macleod*, 1886, 14 R. 92).

Interdict is a remedy intended to prevent not only an injury to any right, but also any threatened injury. This is a point firmly established, both in the case of suspension and interdict. Thus a threatened charge may be suspended, and an interdict can be obtained against a person against whom there are reasonable grounds merely for apprehending that he will injure the complainer's right (*The Singer Co.*, 1873, 11 M. 267).

Again, an interdict must be precise. If the prayer is vague it will not

be granted, for of course the respondent must know what is the act he is prevented from doing (*Cathcart*, 1864, 3 M. 76; *Cairns*, 1892, 20 R. 16). As an interdict only affects those against whom it is directed by name, a general interdict against A. B. and all others is incompetent (*Pattison*, 1823, 2 S. 536). Although a petition for interdict be in correct terms, and the complainer make out his case, it is quite settled that the Court can modify the terms of the interdict asked for, or even dispose of the case in the complainer's favour without granting interdict at all, if it be of the opinion that that course will meet the justice of the case (*Perth General Station Committee*, [1897] App. Ca. 479, 24 R. (H. L.) 48).

Again, although the Court will not abstain from enforcing a right by interdict on account of the inconvenience or pecuniary loss which the enforcement of it will cause (*Bank of Scotland*, 1891, 18 R. 957), still in exceptional cases it can abstain from enforcing specific implement of a decree (*Grahame*, 1882, 9 R. H. L. 91).

Finally, an interdict is always granted *periculo petentis*. If, therefore, it has been obtained wrongly, the complainer in whose favour it has been granted will be liable in damages to the respondent for having interfered with his just rights (*Miller*, 1865, 3 M. 740).

Procedure in the Court of Session.—According to invariable practice, a party never simply asks for interdict, but the application is always conjoined with a prayer for suspension in the process of suspension and interdict, or, as we have just seen, with declaratory or rescissory conclusions in an ordinary action (*Jurid. Styles*, iii. 457). In the latter case there is nothing peculiar in the procedure, except that it should be noted that interim interdict is not granted in such cases. In the former case the action begins by a note of suspension and interdict being presented in the Bill Chamber. When so presented, the Lord Ordinary *ex parte* pronounces the first interlocutor, ordering intimation of the application. He may then grant interim interdict, though, if a *caveat* has been lodged, he will not do so until the respondent has had an opportunity of being heard. At the next hearing of the case, if the respondent appear, the Lord Ordinary has to decide if he will pass or refuse the note, grant or refuse interim interdict, and whether the granting of it is to be conditional on the complainer finding caution. This interlocutor, passing or refusing the note, can be reclaimed against to the Inner House (1 & 2 Vict. c. 86, ss. 4, 6; A. S., 24 Dec. 1838, s. 5; *Caledonian Railway*, 1897, 24 R. 855); and as it is a final one, an appeal lies to the House of Lords from the decision of the Inner House (*Fleming*, 1839, Macl. & R. 547; *Scott*, 2 March 1803, F. C.). Like every other proceeding commencing in the Bill Chamber, a petition for suspension and interdict becomes, for all purposes, a Court of Session action as soon as the interlocutor passing the note has become final (Court of Session Act, 1868, s. 90).

Interim Interdict, as we have just seen, can only be granted in the Bill Chamber. In itself it is simply an interim decree, which has for its object to prevent the respondent from doing any act to the prejudice of the complainer's rights during the course of the litigation. At the stage when it is applied for, the Court, as a rule, has no evidence to base its decision upon. It must almost necessarily, therefore, dispose of each case on the averments and statements of parties. The balance of convenience and inconvenience is thus the ruling consideration (*Incandescent Gas Light Co. Ltd.*, 1897, 5 S. L. T. 180). If it be granted, the complainer may be asked to find caution to indemnify the respondent, in the event of his failing to prove that his rights have been infringed. On the other hand, it

may be refused if the respondent offer to find caution to keep the complainer from suffering loss. This is not an unusual course in interdicts to prevent infringement of patent rights. But if interim interdict be granted, it must be obeyed (*Robertson*, 1829, 7 S. 272). It is never granted to prohibit an act that has been performed, though the perpetual interdict, if it be granted, will operate *retro* (*Glen*, 1868, 6 M. 797). Now, however, the difficulty here indicated can scarcely arise, because sec. 89 of the Court of Session Act, 1868, enacts: "Where a respondent in any application or proceeding in the Bill Chamber, whether before or after the institution of such proceeding or application, shall have done any act which the Court, in the exercise of its preventive jurisdiction, might have prohibited by interdict, it shall be lawful for the said Court, or for the Lord Ordinary on the Bills, upon a prayer to that effect in the note of suspension and interdict, or in a supplementary note, to ordain such respondent to perform any act which may be necessary for reinstating the complainer in his possessory right, or for granting specific relief against the illegal act complained of."

If the note be passed, the case proceeds, and perpetual interdict may be either granted or refused. If granted, not only must it be obeyed, but everything must be done to restore the complainer against the consequences of the respondent's wrongful act, even if the act interdicted have been long since completed; but the Court may, in exceptional circumstances, and in the exercise of its equitable jurisdiction, restrain the complainer from enforcing his rights to their full extent (*Grahame*, 1881, 9 R. H. L. 91).

2. *In the Sheriff Court.*—The application takes the form of a petition for interdict alone. Interim interdict can be granted, and there is hardly an act against which an application for interdict may not be made, provided the control of the act falls within the jurisdiction of the Sheriff Court. Thus interdict cannot be granted against a respondent not subject to its jurisdiction, nor can it, under the guise of an action for interdict, dispose of a case which it has no jurisdiction to entertain. For instance, as it has no jurisdiction in actions of suspension, it has been held that it cannot interdict the negotiation of a bill of exchange, nor the use of diligence (*Thom*, 1848, 10 D. 1254; *Beattie*, 1870, 7 R. 1171; *Crawford*, 1885, 12 R. 1033; Wilson, *Sheriff Court Practice*, 438).

As an interdict is intended to prevent injury to a right, and not, directly at least, to enforce any pecuniary claim, the £25 limit introduced by the Sheriff Courts Act, 1853, s. 20, does not apply to such cases; and, therefore, every interlocutor granting or refusing interdict can be appealed to the Court of Session (*ibid.* 570). In other respects there is nothing calling for remark regarding the application for interdict in the Sheriff Courts.

3. *In Burgh Courts.*—There can be no doubt that the civil jurisdiction possessed by magistrates in royal burghs and burghs of barony and regality includes the power to grant interdict regarding rights threatened with injury within the burgh. The Act of Sederunt of 13 Feb. 1845, passed to regulate the forms of process to be used in civil actions in Burgh Courts, refers specifically to their right to grant interdict, including interim interdict.

The civil jurisdiction of magistrates is now, however, seldom exercised. It was, besides, never exclusive, but only cumulative with that of the Sheriff, and, like the Sheriff's, it is subject to review by the Court of Session (*Pattison*, 1823, 2 S. 536; Heritable Jurisdiction Act, 1747, ss. 26, 27; Ersk. i. 4. 21. 22. 30).

See Breach of Interdict.

Interdicts in Roman Law were commands by the magistrate, issued in virtue of his official power (*imperium*) as conservator of order and custodian of the peace. Accordingly, they are described by Gaius as proceedings wherein the *prætor principaliter auctoritatem suam interponit* (Gaius, iv. 139). In an ordinary *actio*, the prætor pronounced no order on the matter in dispute, but simply issued a *formula* appointing a *judex* to investigate the question. In an *interdictum*, on the other hand, the procedure was, in the earlier law, not *per formulam*, but *per cognitionem*. No *judex* was appointed, but the whole proceedings were conducted before the magistrate *in jure*, who himself pronounced an order that something should be done or should not be done. The interdict procedure, in other words, was originally a purely administrative procedure; and the magistrate, in granting an interdict, did not exercise *jurisdictio*, but acted solely in virtue of the *imperium*.

The administrative pronouncement of the magistrate obviously failed in many cases to constitute a real decision of the matter in dispute. Accordingly, in the later law, it became usual for the prætor, finding it impossible to investigate the actual facts for himself, to content himself with a merely conditional direction addressed to the parties, and to transmit the real determination of the question at issue to a *judex*. In this way the interdict lost its summary character. Not only were directions of this kind made in particular cases by the prætor without inquiry, but the circumstances in which such directions would be issued were carefully defined and published beforehand in the edict. An interdict, then, did not now involve a decision on the matter in dispute: it was a merely conditional direction addressed by the prætor to the parties, based on an administrative rule enunciated beforehand in the prætorian *album*.

The procedure in interdict cases was as follows. On the application of the party aggrieved, the prætor, if, after hearing the parties, he saw sufficient *primâ facie* reason, issued the interdict. The prætor, before granting the interdict, made no inquiry into the merits of the case; his duty was simply to determine whether, in the alleged circumstances, the interdict applied for was applicable. If the person to whom the interdict was addressed declined to be bound by it, the subsequent proceedings, by which the matter in dispute was definitely decided, resembled those in an ordinary action. Thus, in the later law, the interdict procedure generally only served the purpose of introducing an ordinary *actio*.

The matters to which interdicts were particularly applicable were those in which the interests of public order were predominant, *e.g.*, in the department of public law, questions relating to public roads and rivers, or concerning *res sacræ* (*interdictum de viâ publicâ, de locis sacris, Dig.* 43. 8. 2. 34); claims under the law of *status* and family relations (*interdictum de homine libero, Dig.* 43. 29; *interdictum de liberis exhibendis, Dig.* 43. 30); and matters arising in the department of procedure, such as the *interdictum fraudatorium*, protecting creditors against fraudulent alienation by insolvent debtors (*Dig.* 42. 8). Most important of all, however, were the interdicts, employed in the law of property for the protection of possession, which are known as the possessory interdicts. *Interdicta*, according to Gaius (iv. 142–144), are *prohibitoria*, *exhibitoria*, and *restitutoria*. This division, which was based upon the tenor of the prætor's order, was in the later law something of an anachronism. *Interdicta prohibitoria* were orders forbidding some act; *interdicta exhibitoria* were orders for the production of some person or thing; *interdicta restitutoria* were orders sometimes for the restoration of possession, as in the interdict *Unde vi*,

and sometimes for the delivery of possession, where no possession has preceded, as in the interdict *Quorum bonorum*.

The possessory interdicts were: (1) *interdicta adipiscendæ possessionis*; (2) *interdicta retinendæ possessionis*; and (3) *interdicta recuperandæ possessionis*. The more notable interdicts belonging to the *first* class were the *interdictum quorum bonorum*, granted to a person who received a grant of *bonorum possessio*, and the *interdictum Salvianum*, granted to a landlord to enable him to take possession of the stock of his tenant (*colonus*) in security of his rent. These *interdicta adipiscendæ possessionis* are not, however, strictly possessory interdicts, inasmuch as they are not founded on previous or actual possession, but on some title to the property. The interdicts of the *second* class—*retinendæ possessionis*—were two in number, named respectively *Uti possidetis* and *Utrubi*, from the initial words of the edict. The former protected persons in possession of immoveables; the latter, persons in possession of moveables. Of interdicts belonging to the *third* class—*recuperandæ possessionis*—the more important were the interdict *Unde vi*, granted to a person who had been forcibly ousted from the possession of immoveable property; and the interdict *De precario*, a remedy by which a thing, moveable or immoveable, could be recovered from a person who held possession of it by permission of the owner, but not under a contract.

[Gaius, iv. 138–170; *Inst.* iv. 15; *Dig.* 43; *Cod.* 8. 1. 9.]

Interdiction.—Erskine defines interdiction as "a legal restraint laid upon those who, either through their profuseness or the extreme facility of their tempers, are too easily induced to make hurtful conveyances, by which they are disabled from signing any deed to their prejudice without the consent of their curators, who are called interdictors" (i. 7. 53). The object of interdiction is to protect the property of any person of a weak and facile disposition (*prodigus*), which is otherwise liable to be squandered, to the detriment of himself and his heirs. Its imposition may be voluntary or judicial.

1. *Voluntary.*—A person may put himself under this restraint by granting a bond of interdiction in which, on the narrative that it is desirable that his property should be under the control of persons of firmer will and greater experience than himself, he binds himself to certain persons, his interdictors, that he will not grant any deed without their consent. The real cause of granting is not usually inserted in the bond.

2. *Judicial.*—This can only be imposed by the Court of Session; a Sheriff cannot do it. It may proceed *ex proprio motu*, if it appears to the Court, in the dependence of a suit, that one of the parties is facile and liable to be imposed upon; or it may be by decree in an action at the instance of the person's heir or next of kin, or perhaps of any relative. Proof must be shown by the pursuer of the action that the defender is weak and liable to be concussed into granting deeds to his prejudice.

The interdiction is ineffectual (except against the interdictors) until registration, the requisites of which are similar to those in the case of inhibition. Letters of publication are granted upon a bill presented to the Lord Ordinary on the Bills, their warrant being the registered bond of interdiction or the decree of the Court. The letters should, in the case of judicial interdiction, be executed against the *prodigus* in the same method as a summons, and in both cases they must be registered in the Register of Inhibitions (31 & 32 Vict. c. 62, s. 16). The restraint affects only deeds

relating to the heritable property of the interdicted person, and transactions in regard to moveables in so far as, by diligence or otherwise, they are made the ground of proceeding against his heritage. It has no retroactive effect. Deeds granted without consent of the interdictors are not null, but reducible on proof of lesion. The person interdicted may grant rational and onerous deeds without consent, and these will be in every way as valid as if consent was given. If the consent of the interdictors is adhibited to a deed—signing the deed as witnesses or cautioners will not do—it has the validity which it would have had if the granter had never been interdicted. If lesion is suffered, the interdicted person has only recourse against his interdictors in a claim of damages, on the ground that their consent was wrongously or fraudulently given. A deed granted by a *prodigus* after interdiction in favour of one of his interdictors has been upheld. Such a deed is to be treated as if no consent was adhibited, and therefore the test of its efficacy is—Is it rational and onerous? (*Kyle*, 1826, 5 S. 117; *Fraser*, 1827, 5 S. 279; *Rankin*, 1868, 7 M. 126). In regard to *mortis causa* deeds, Erskine says (i. 7. 58) that an interdicted person "can make no settlement of his heritable estate, nor alter any former settlement of it, though upon the most rational grounds, either with or without his interdictors' consent"; but the opinions of the other text writers are opposed to this, and the decision in a reported case was expressly laid upon the ground that interdiction effects no limitation upon the power to test (*Mansfield*, 1841, 3 D. 1103). Reduction *ex capite interdictionis* may be sued in an action at the instance of the *prodigus*, or his heir or other near relative, or by the interdictors or a creditor. The general rule is that a plea of invalidity of a deed on this ground can only be put forward in an action brought for that purpose; but it would seem that this rule is not without exception, and that in some cases, at anyrate, it may be pleaded *ope exceptionis* (*Rankin, supra*).

Recall of interdiction, when it has been imposed voluntarily, cannot be made at the will of the interdicted person, because "the law, presuming that he would not have laid himself under that restraint if he had not been conscious of his incapacity for business, considers his interest against his inclination" (Ersk. i. 7. 55). It falls with the death of the interdictors or of a *sine quo non*, or with the reduction of their number below a quorum, if that is required by the bond. It may be removed by the Court of Session, in an action at the instance of the *prodigus*, on proof that there was no sufficient reason for the restraint at the beginning, or that the interdicted person has become *rei suæ providus*; and it may be recalled by the common consent of interdictors and interdicted. But a bond of interdiction by an unmarried woman, which was subsequently ratified and approved in her marriage contract, was held to be irrevocable (*Williamson*, 1890, 17 R. 927). The Court of Session alone can bring judicial interdiction to an end, since it must be removed by the authority by which it was imposed. If the interdictors have died, application to the Court of Session is necessary to have others appointed.

The office of an interdictor differs materially from those of tutor or curator. He has no guardianship or care of the person or property of the *prodigus*; he is appointed solely *ad auctoritatem præstandam*. He may consent to the granting of a deed by the person interdicted, or he may refuse to do so. If his consent is given, he is answerable for fraud or fault in giving it. But he is not liable for omissions; if he refuse to give consent, the interdicted person, it has been said, may apply to the Court to have their authority interponed to the deed. The more suitable procedure

would probably be to petition the Court to remove the interdictors and to appoint others.

[Stair, i. 6. 37 : iii. 8. 37 ; iv. 20. 30 ; Bankt. i. 7. 118 ; Ersk. i. 7. 53 ; Bell, *Com.* i. 139 ; *Prin.* s. 2123 ; Fraser, *P. & C.* 554 ; *Jurid. Styles,* ii. 448 ; iii. 293.]

Interest in the subject-matters of a litigation, or of a transaction, has legal significance as bearing upon the question of title to sue or defend, or as giving rise to a disqualification in the party interested for the performance of certain functions.

Interest as Matter of Process.—1. *Interest in the Pursuer.*—A party pursuing an action must not merely have a formal title to pursue; he must further have some substantial interest in the result of the suit. "Right without interest will not be sustained in a process either by way of action or objection, and as little will interest without right" (Kames, *Elucidations,* art. 32, p. 213). However clear one's title to pursue an action may be, he will not be allowed to prosecute it in a Court of law if he can derive no benefit therefrom (Shand, *Practice,* 139 ; and see *Macdonald,* 1825, 4 S. 371 (374); Mackay, *Manual,* pp. 125–127). Where the only result of success would be to expose a pursuer to claims at the instance of the defender, to an amount equal to or greater than those which he makes in the action, the maxim *Frustra petis quod mox es restituturus* applies to exclude the action—at least where it is apparent that it is merely vexatious (Shand, *loc. cit.* ; *Robertson,* 1821, 1 S. 406 ; *Burke,* 1865, 3 M. 799 ; *Ker's Tr.,* 1866, 5 M. 4). A party whose property has been destroyed by fire is not, however, precluded from suing merely because his loss is fully covered by insurance, so that the benefit really accrues to the insurers (*Port-Glasgow & Newark Sailcloth Co.,* 1892, 19 R. 608 ; 1893, 20 R. H. L. 35). The phrase Jus tertii (*q.v.*) is frequently used to express the absence of interest in the pursuer, even when there may not actually be interest in any other (Kames, *loc. cit.* 140). Interest, in general, implies a title to sue someone ; but it does not necessarily imply that the party having it is entitled to sue a particular defender or a particular action. He may have to make his interest effectual otherwise (see *Pyper,* 1878, 6 R. 143 ; *Peock,* 1824, 2 S. 769 ; *Hinton,* 1883, 10 R. 1110 ; *Henderson,* 1889, 16 R. 341 ; *Rae,* 1888, 15 R. 1033). General legatees and beneficiaries cannot sue trust debtors (*Gray,* 1711, Mor. 8062 (executor suing for special legacy). See also the cases of *Martin,* 1885, 13 R. 274 ; *Macdonald,* 1890, 17 R. 951 (unsuccessful candidates for bursaries suing for damages); and other cases collected in Mackay, *Manual,* pp. 126, 127). It may even be that in an extreme case this may result in one who has a distinct interest being practically wholly deprived of remedy, as, *e.g.,* where an intended beneficiary under a will is excluded through the unskilful drawing of the will by the testator's agent, against whom he has nevertheless no ground of action (cf. per Campbell, L. C., 4 Macq. 177). Interest may, however, be bargained for in favour of a party in such a way as to give him a title to sue where there is no direct contractual relation between him and the defender (see Jus quæsitum tertio).

It has been said that interest must be libelled : but it would seem to be sufficient if, from the summons and condescendence, a *primâ facie* interest may be deduced (see *Gifford,* 1829, 7 S. 854, and *Earl of Zetland,* 1882, 9 R., H. L. 40).

The interest must be in a right recognised by law (Broom, *Legal Maxims,* 6th ed., p. 192, 199). It need not, however, be pecuniary (see

Magistrates of Edinburgh, 1857, 20 D. 156; *Browne*, 1872, 10 M. 397; *Earl of Zetland, supra*; *Beattie*, 1876, 3 R. 634; *Stewart*, 1878, 5 R. 1108). Where there is some interest disclosed, it is matter for the discretion of the Court whether the interest is sufficient (*Skinner*, 1855, 18 D. 158; *Beattie*, 1876, 3 R. 634; *Naismith*, 1874, 3 R. 863). In *Carsons*, 1863, 1 M. 604, it was held that a mere reference in a plan to a street does not give sufficient interest to enforce its construction, if merely introduced for identification of the subjects. It may happen that though there is plainly some interest, it is too unsubstantial or trifling to support action (see DE MINIMIS NON CURAT PRÆTOR; also cases cited Mackay, *Manual*, p. 127). Actions against suspect tutors, and for reduction of deeds granted by minors to their lesion, and confirmed by oath, may, it seems, be pursued by any near kinsman of the ward or minor (Ersk. iv. 1. 17; Act 1681, c. 19).

Where the pursuer has an interest of his own, but so qualified by or dependent upon some *jus tertii* or condition that he has no title to sue separately, the defect may be cured by the "consent and concurrence" of the person by whose right his is qualified or on whose right it is dependent. But when the principal party has no interest of his own, his defect of title cannot be cured by the "consent and concurrence" of the person to whom alone the right of action truly belongs (*Hislop*, 1881, 8 R., H. L. 95). Nor can the party having interest, in such a case, cure the defect by sisting himself as a pursuer, *pendente processu*, unless with the consent of the defender (*ib.* per Ld. Watson, p. 106).

2. *Interest in the Defender.*—Generally speaking, a defender who is called as such in a process has, in the mere obtaining of absolvitor, sufficient interest to resist the conclusions of the action. "As every defender finds his account in an absolvitor, it is obviously his interest to defend himself against a claim that is not well founded in law" (Kames, *Elucidations*, 217). It sometimes occurs, however, that defenders are called, not because the pursuer admits their interest, but merely *ob majorem cautelam*, and in such a case, if the conclusion for expenses against them is limited to the case of their appearing and opposing, there seems no reason why, on it appearing, when defences are lodged, that there is no substantial interest, they should not be held precluded from insisting. Contrary to the rule obtaining in the case of pursuers, any party having interest may appear and sist himself as defender, although not specially called. Thus in petitory actions upon infeftment, any person producing an infeftment, or its equivalent, may appear to be heard for his interest, though not cited (Stair, iv. 22. 1 and 6). So, too, a landlord may sist himself for his interest (where he has such), even after the tenant has disclaimed, and decree has passed against him (Shand, *Practice*, 489). Creditors may defend a divorce suit (Fraser, *H. & W.* 1144, etc.; *Ford*, 1822, 1 Sh. 296, 2 S. App. 435); but not after the oath of calumny has been taken (*Greenhill*, 1822, 1 S. 296 N. E. 327); so also in other actions where there is collusion, creditors may defend; and a member of the public was held to have interest to plead the negative prescription in answer to a declarator of a private jurisdiction (*Lord Dun*, 1731, cited Kames, *Elucidations*, 221). But appearance, even as a defender, will not be allowed if there be clearly no interest (*Buchan*, 1829, 7 S. 296 (debtor held precluded from pleading defence open to tenant in mails and duties); *Hutcheson*, 1830, 8 S. 982 (heritable creditor defending against adjudger in implement); *Stewart*, 1829, 7 S. 440 (party alleging preferable right to debt)).

One called as a defender may plead objections to the pursuer's title

appearing *ex facie* thereof, although he could not otherwise benefit from these. Where, however, the title is *ex facie* good, the defender cannot raise objections to it unless he would take benefit from the reduction of it (Kames, *Elucidations*, 221, etc.). Exceptions proper are not open to the plea of *jus tertii* (*ib.*).

Questions of some nicety as to interest have arisen in relation to two classes of cases, viz.: (1) cases involving the rights of (*a*) superiors and (*b*) co-feuars to enforce conditions of a feu; and (2) cases where the right to possession is temporarily separated from the property, as in lease. The principles applicable to these may be noticed shortly.

Interest to Enforce Conditions of a Feu-Right.—Whenever a feu-right contains a restriction on property, the superior, or the party in whose favour it is conceived, cannot enforce it unless he has some legitimate interest. This was decided in the case of *The Tailors of Aberdeen*, 1 Rob. App. 296. "But that case does not lay down the doctrine that an action at the superior's instance, which merely sets forth the condition of the feu-right and its violation by the vassal, must be dismissed as irrelevant because the pursuer has failed to allege interest. *Primâ facie* a vassal, in consenting to be bound by the restriction, concedes the interest of the superior. The onus is therefore upon the vassal who is pleading a release from his contract, to allege and prove that, owing to some change of circumstances, any legitimate interest which the superior may originally have had in maintaining the restriction has ceased" (per Ld. Watson in *Earl of Zetland*, 1882, 9 R., H. L. 40, at p. 47). Where, however, the action is at the instance of a co-feuar, under a mutual condition, but with no privity of contract, the rule is different (see *Campbell*, 1868, 6 M. 943; *Naismith, supra*; *Magistrates of Edinburgh*, 1857, 20 D. 156). Before a co-feuar can sue at all he must set out a case showing *primâ facie* mutuality of interest (see *Hislop, supra*, and Conditions in Feudal Grants).

Interest where Property and Possession of Subjects separated.—(*a*) *Actions against Third Parties.*—Right of action by the tenant in respect of an actual or threatened injury caused by a third party, or through nuisance, or infringement of an alleged servitude, or to prevent trespass, depends entirely on the amount of his interest in the subjects let to him (Rankine, *Leases*, 569, etc.). In the case of transitory injuries, the tenant alone has the right to sue. So in case of a trespass with permission of the tenant, the landlord may not sue unless the trespass is directed towards assertion of a permanent right (see *Stewart*, 1877, 4 R. 873). In case of permanent injuries, the tenant may sue in so far as they affect his interest. In case of an injury to a servitude he can, however, only sue if the servitude is included in his lease (Bell, *Prin.* 1224).

The landlord may take action when the injury is done to the subjects themselves, or where it is in assertion of a right adverse to his own, or where it operates in denial of his right; or if it may injure his reversion. But if no denial of right be involved, and the injury is merely to the possession (as, *e.g.*, by noise, smoke, or vibration), the landlord's title to object is suspended during the tenancy, owing to absence of interest (Rankine, *Leases*, 571, etc.). All parties having interest may join in the same action, even when the matters complained of are divisible into certain affecting owners and certain affecting the tenants. It has been suggested that this course is desirable in interests of all concerned, as it gives the judgment greater value as *res judicata* (Rankine, *loc. cit.*; *Young*, 1830, 8 S. 959).

(*b*) *Actions by Third Parties.*—These must be directed against the

party interested, or the conclusions so limited as not to affect the unrepresented interest.

The same principles will be applicable wherever property and possession are temporarily severed, as, *e.g.*, in Liferent and Fee.

Interest as a Disqualification.—Interest in a Judge.—Any direct interest in the subject-matter of an action is a disqualification in a judge. *Nemo debet esse judex in propria sua causa* (see *sub voce* Declinature; Ersk. *Inst.* 47; Broom, *Legal Maxims*, 6th ed., pp. 110, etc.).

Interest in an Arbiter.—On the same principle, "the arbiters, as judges, ought to be clear of all interest or suspicion of obliquity" (Bell, *Lect.* i. 369, and cases cited *ibi.*). Interest, however, if known to the parties when they enter into the submission, is not an objection (*ib.*). Interest emerging after nomination is sufficient to disqualify (*Tennant*, 1836, 14 S. 976). But where the interest arises *ex officio*, mere change of office during the currency of the submission will not disqualify (*Phipps*, 1843, 5 D. 1025).

Interest in a witness in a suit was formerly in most cases a disqualification to his giving evidence (see Stair, iv. 43. 7, and More, *Notes*, ccccxiii and ccccxiv). But by 16 & 17 Vict. c. 20, s. 1, and 37 & 38 Vict. c. 64, ss. 1 and 2, interest is no longer an objection to the examination of any witness (cf. Bell, *Prin.* ss. 2244, *et seq.*). The objection *Forent consimilem causam* was never a ground of rejection.

Interest in an instrumentary witness does not seem to be an absolute disqualification, or to render his attestation *ipso facto* void (*Graham*, 1685, Mor. 16887 (witness considerable legatee); *Ingram*, 1801, Mor. App. *voce* "Writ," 2 (both witnesses small legatees, one also executor); *Mitchell*, 1742, Mor. 16900 (one trustee, but not otherwise interested). But see Ersk. *Inst.* 1121, and cases there cited). It is obvious, however, that, wherever possible, neutral witness should be procured (Bell, *Lect.* i. 51; Ersk. *Inst.* 1121, note (*c*)).

Interest in Notary Public or Law Agent.—A notary who acts officially in the execution of a deed ought to have no concern with the deed in any other way. In the case of *Ferrie*, 1863, 1 M. 291, it was held that a trust disposition and settlement was invalid in respect that one of the notaries by whom it bore to be signed, as in place of and authorised by the testator, was one of the trust disponees and executors, although he had no patrimonial interest under it, but had merely the ordinary rights and powers of a testamentary trustee. So a notary cannot protest bills of which he is drawer and endorser. He cannot certify the fact which is the foundation of his own recourse (*Leith Banking Co.*, 1836, 14 S. 332). It has, however, been questioned, on the ground that his office is a *munus publicum*, whether mere interest is enough to invalidate sasine given by a notary—at least where his interest is as granter of the precept (cf. Bell, *Lect.* 652; *Sim*, 1831, 10 S. 85; Titles Act, 1860, s. 26). Interest taken by a law agent under a will in general throws upon him the onus of proving the deed to have been granted by the testator freely and rationally (*Grieve*, 1869, 8 M. 317).

Interest in Sequestration Proceedings.—One whose interest in so doing is adverse to that of the general body of creditors may be held debarred from applying for sequestration (Bell, *Com.* ii. 288). The Bankruptcy Act, 1856, 19 & 20 Vict. c. 79, provides (s. 68) that "it shall not be lawful to elect as trustee . . . any person . . . who holds an interest opposed to the general interest of the creditors." Commenting on a similar provision in the earlier Act of 1839, Professor Bell says (*Commentaries*, ii. 302): "In the ordinary case a creditor may be a trustee, but where he has a distinct and material interest adverse to that of the other creditors—not

an interest trifling and inconsiderable, but such as may be reasonably suspected to sway his conduct—he is ineligible." The brother-in-law of a creditor, whose interests in a question of some intricacy stood opposed to those of the other creditors, was held ineligible as a trustee. So a person who was the mere cover or creature of another, who was objectionable, was held ineligible (Bell, *Comment., loc. cit.*, and cases cited).

For interest as bearing on insurance, see *sub voce* MARINE INSURANCE: ACCIDENT INSURANCE: FIRE INSURANCE; LIFE INSURANCE: and 19 Geo. II. c. 37: 14 Geo. III. c. 48: and Bell, *Com.* i. 651, 671, 675.

Interest (of Money).—*Simple Interest.*—"Nothing can be considered less amenable to a settled general principle than our law upon a creditor's right to interest. Interest upon bills and notes is settled by Statute (45 & 46 Vict. c. 61, ss. 9, 57); that on bonds, by express contract [but the agreement must be express, *Forbes*, 1894, 21 R. 630]: that on loans, by legal implication [*Garthland's Trs.*, 1820, 20 F. C. 140]. But when this has been said, almost all that has been fixed is presented. We must bear in mind that every liquid debt past due does not bear interest. Feu-duties [*Maxwell's Trs.*, 1893, 20 R. 958], ground-annuals and rents [*Advocate-General*, 1855, 17 D. 290], are cases in point, where payment of interest has not been made matter of express obligation. But what of other debts, mercantile accounts, law agent's business accounts, accounts for services of any description? The most that can be said is that where there is anything in the course of dealing or in the custom of trade which suggests that, if the debt should not be paid at a particular period, interest will run, that will be allowed, otherwise not. A demand for payment more or less urgent seems to me, apart from contract, to be a condition precedent to liability for interest. Common sense itself suggests that a man who pays whenever payment is asked, pays in good time" (Ld. Craighill in *Blair's Trs.*, 1884, 12 R. p. 108). So too Ld. Fraser in the same case: "Claims for interest cannot be brought under any general rule. They are said to arise *ex lege*, or *ex pacto*, or *ex mora*. With regard to interest due *ex pacto* the case is quite clear. It is lawful to stipulate for interest; and now that the usury laws are abolished, any amount of interest may be agreed upon and exacted. It is when the claim is founded, not on paction, but on some rule of law, that the difficulty arises. Interest is due *ex lege* in various cases by Statute; and it is in virtue of statutory enactment that it is claimable in Scotland upon bills of exchange and promissory notes [from the date of presentment or maturity] (1681, c. 20: 1696, c. 36: 12 Geo. III. c. 72: 45 & 46 Vict. c. 61, ss. 9 and 57), and there are other instances in which the claim has statutory sanction. Interest is also due by law upon money lent: and it was so found although there was no stipulation for interest [*Garthland's Trs.*, 1820, 20 F. C. 140], and the demand for it was only made thirty-four years after the loan, and when the lender and borrower were both dead (*Cunninghame*, 1868, 6 M. 890). But it is not correct to say that interest is claimable upon all debts, either from the date when the account was closed or from the date that it was rendered. It is sometimes said that interest is due as damages for the undue detention of money when a debt clearly ascertained remains unpaid. By those lawyers who hold this opinion interest is considered incident legally to every debt certain in amount and payable at a certain time. This is plainly not good law. There are many illustrations to the contrary. No debt can be more certain in amount or certain as to

the time of payment than feu-duties or ground-annuals, and yet it has been determined frequently that interest is not due upon arrears of these (*Napier*, 1831, 9 S. 655; *Wallace*, 1835, 13 S. 564; *Wallace*, 1838, 1 D. 162; [*Maxwell's Trs.*, 1893, 20 R. 958]). According to the principle of these decisions, interest would not be claimable upon rents unless expressly stipulated for; and for this latter proposition (which has not been expressly decided) there are judicial dicta of high authority [*Advocate-General*, 1855, 17 D. 290]. The ground of these decisions simply was, that parties having stipulated for the payment of a specific sum, without stipulating for interest on non-payment, it was not intended that interest in such circumstances should be claimed. The cases of bills and loans of money, in regard to which interest is due though not stipulated for, rest on special grounds. Interest is due on bills by virtue of Statute [from the date of presentment when the bill is payable on demand, otherwise from maturity (45 & 46 Vict. c. 61, ss. 9, 57)]. And the law implies an obligation to pay interest on loans arising from the very nature of the contract.

"The mere fact, therefore, of delay in payment, after payment could have been, or has been, demanded, will not necessarily ground a claim for interest, and consequently there must be distinctions made, consequent upon the nature of the debt due, and upon the reasons of the non-payment of it. Ld. Westbury, in the case of *Carmichael* (1870, 8 M. H. L. 131), expresses himself as follows: 'Interest can be demanded only in virtue of a contract express or implied, or by virtue of the principal sum of money having been wrongfully withheld and not paid on the day when it ought to have been paid.' According to this opinion the mere non-payment of money was not sufficient. It must be 'wrongfully' withheld."

This dictum of Ld. Westbury was cited also with approval by Ld. Young in *Durie's Trs.* (1894, 22 R. at p. 38): and to the same effect Ld. Brougham in the *Edinburgh and Glasgow Union Canal Co.* (1842, 1 Bell's App. 316) said: "Unless there was a contract to pay the money on a given day, which had passed by without payment, no claim for interest could have been competent"; and Ld. Campbell: "The contract contains no express stipulation for interest. The burden is on the person claiming to show that interest is due."

Blair's case (*supra*) is the only authority in which the decisions in earlier cases have been reviewed and examined from the bench, and the law on the subject considered from the point of view of principle. Of the other cases, putting aside those which turned on the construction of Statutes or contracts (*e.g. Wauchope*, 1863, 2 M. 326; *Christie*, 1879, 10 M. 9; *Ewing*, 1882, 10 R. H. L. 1), the bulk of the decisions appear to have been based upon the doctrine that "whoever has intromitted with money belonging to another, or has unjustly detained it, is, in general, liable for interest, at least from the time that a legal demand has been made for it. This is not so much from any real or supposed *mora*, but rather as a recompense to the creditor for being deprived of the use of his money" (see Ersk. iii. tit. 3, s. 80) (*Anderson*, 1805, 13 F. C. 437, argument; *Darling*, 1834, 12 S. 598). Advances of money accordingly carry interest, including arrears of sums advanced towards aliment (*Hill*, 1821, 1 S. 33), and cash advances by a law agent (*Findlay, Bannantyne, & Co.*, 1864, 2 M. H. L. 86; *Graham's Exor.*, 9 M. 298; *Blair's Trs.*, 1885, 12 R. 104); but "cash advances" do not include ordinary judicial outlays (*Macpherson*, 1853, 15 D. 706; *Barclay*, 1850, 22 Jur. 354). On legacies, interest runs from the date of the testator's death or six months thereafter (*Kirkpatrick*, 1878, 6 R. H. L. 4; *M'Lean's Trs.*, 1891, 18 R. 892), as also on claims of legitim (*M'Murray*, 1852, 14 D. 1048; *Bishop's Trs.*, 1894, 21 R. 728; *Gilchrist*, 1889, 16 R.

1118). On the other hand, the executry are entitled to compute interest on advances towards legitim made during the parent's life (*Johnston*, 1829, 7 S. 226). In awarding interest on such claims, a distinction appears to have been drawn between cases where the trustee was *in mora* in making payment and cases where there was a real difficulty in realising trust funds.

Where one enters into possession of land on a contract of sale, but does not pay the price, he is liable for interest on the price from the date of entry as an equivalent for the fruits of the soil (*Spiers*, 1827, 5 S. 714; *Wallace*, 1825, 3 S. 525; *Dickson*, 1855, 17 D. 524; *West Highland Railway Co.*, 1894, 26 R. 576; *Grandison's Trs.*, 1895, 22 R. 925). But where a railway company occupied a line in terms of statutory authority with the corresponding duty of paying a rent to be fixed by an arbiter, and the occupation continued for some years before the rent was fixed, they were held not liable for interest on sums due for their occupation between the date of their entry and the assessment of the rent (*Stirlingshire and Dunfermline Railway Co.*, 1857, 19 D. 598).

As pointed out by Ld. Fraser in *Blair's* case (*supra*), it is doubtful whether a tradesman can demand interest upon an account rendered, apart from special bargain. In the case of *Cardno* (1869, 7 M. 1026) the defender conceded that a tradesman should receive interest from the date of his last rendering his account; but the Court hesitated to consider the point. A similar doubt was expressed in *Blair's* case, but it is thought that the law stands thus. Interest on such debts is undoubtedly due from the date of judicial or notarial demand, from a point of time agreed on by the debtor and creditor for the payment of the debt, or from the expiry of the credit allowed by the custom of the particular trade; and on illiquid claims, from the date of a decree establishing the debt (*Wallace*, 1821, 1 Sh. App. 42). Interest has been allowed on a law agent's account for professional services from one year after the date of the last entry in his account (*Young*, 1830, 8 S. 624; *Walls*, 1865, 3 M. 536), unless there has been undue delay in rendering the bill (*Bremner*, 1837, 16 S. 213; *Napier*, 1835, 13 S. 853; see Bell, *Com.* i. 691 *et seq.*).

Compound Interest.—Compound interest is only allowed as a penalty for breach of trust duties, or where the holder of a fund is under an obligation to accumulate interest. To this rule there is, of course, the exception of special agreement, and noticeably the terms upon which banks lend money. This rule is recognised as firmly established in the decision in the case of *Douglas* (1867, 5 M. 827), where Inglis, L. J. C., stated it thus: "A claim for compound interest with annual rests is a demand which can only be maintained either in the case of a fixed usage in commercial dealings, or where there has been an abuse in the party trusted with funds and violating his trust. In dealing with money in a bank, interest is accumulated because the course of practice in reference to banks dealing in money is fixed [cf. *Findlay, Bannantyne, & Co.*, 1864, 1 M. H. L. 87]. Where there is a fiduciary relation constituted between two parties, so that the party who is trustee is bound either to recover or account for sums of money and fails in his duty and, it may be, uses the property held by him in trust for his own purposes, he shall be held to account upon the very strictest system of accounting. I think that the decision in the case of *Jolly* (1830, 4 W. & S. 455), which has been adopted and adhered to since, effectually put a stop to the principle of accumulation as being acted upon in our law in the case of ordinary debtor and creditor. There could not be a case more fitted for the equitable interposition of the Court in dealing with a debtor on stringent principles, if it was considered consistent with law to do so, than the case of

Jolly. There was delay for a very long period, and that delay was occasioned by the passing off of an alleged discharge which was found to be wholly bad, even positively fraudulent, in the end; and yet the Court here, having given accumulated interest with biennial rests, the House of Lords reversed that judgment under the direction of Ld. Lyndhurst. In the subsequent case of *Napier* (1831, 5 W. & S. 745) there is no impeachment of the doctrine laid down in *Jolly's* case; and in the case of *Maclean* (1856, 18 D. 609) the doctrine is affirmed that accumulation is a penal demand only to be given effect to in circumstances which justify it, except in the case of persons having a fiduciary character, or in commercial dealings." So a *curator bonis* who had retained his ward's funds in his own hands was held liable in compound interest at 5 per cent. on annual balances (*Blair*, 1843, 5 D. 1315; *Buchanan*, 1847, 9 D. 700; see too *Campbell*, 1802, 13 F. C. 64; *Hamilton*, 1813, 17 F. C. 213; *Hall*, 1813, 17 F. C. 462).

Rate of Interest.—The rate of interest awarded by the Courts in recent years has varied from 2 per cent. to 5 per cent., according to the circumstances of the case viewed in the light of the Court's discretion. "There is at present no statutory rate of legal interest; 5 per cent. was only a maximum rate, and there is no statutory rule obliging the Court to award 5 per cent. in perpetuity. It may not be beyond the powers of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country" (Ld. M'Laren in *Ross*, 1896, 23 R. 802). Accordingly, in that case, which was an accounting between an executrix and a son for legitim, the Court awarded 4 per cent., the interest actually earned. In *Bishop's Trs.* (1894, 21 R. 728), which was of the same nature, 5 per cent. was allowed; while in *Melville* (1896, 24 R. 243) 3 per cent. was considered a fair rate of interest on trust funds.

Interim Decree.—An interim decree is one containing a final decision, but not dealing with the whole subject-matter of the cause. See DECREE.

Interim Execution.—The respondent in an appeal to the House of Lords may, if he so desires, present a petition to the Inner House craving for interim execution, possession, or payment of expenses. This petition must be laid before the Division to which the cause belongs; and the said Division "shall have power to regulate all matters relative to interim possession, or execution, or payment of costs and expenses already incurred, according to their sound discretion, having a just regard to the interests of parties as they may be affected by the affirmance or reversal of the judgment or decree appealed from" (48 Geo. III. c. 151, s. 17). The prayer of the petition will be granted unless cause be shown to the contrary, and so long as the party petitioning be acting in *bonâ fide* (*M'Beath*, 1887, 15 R. 8), but may be subject to such conditions as the Court thinks fit. If the prayer is for execution of a decree for money, it is the custom to find the party obtaining the execution liable in caution to repeat (Mackay, *Manual*, p. 582). Execution will be granted even though the unsuccessful party has sufficient funds in the hands of third parties to afford a perfect guarantee (*Steel Co. of Scotland*, 1889, 26 S. L. R. 465).

It is competent for the Court to grant an order for interim execution for expenses, even where the account of expenses is neither taxed nor decerned for, so long as it is generally found due. Interim execution is frequently

granted as to expenses, when it is otherwise refused (*Brock*, 1823, 2 S. 291). The expense of obtaining an order for execution is a good item against the opposite party: to grant the application is a matter for the discretion of the Court, and if the Court thinks the application proper, the party obtaining it is entitled to expenses (*Symington*, 1877, 4 R. 993). The expense of the petition will not, however, be included in the interlocutor granting the petition (*King, Brown, & Co.*, 1891, 78 R. 540).

In granting the application the Court may impose such conditions as it thinks fit. It is usual for the Court to ordain the applicant to find caution to repeat in the event of reversal (*King, Brown, & Co.*, 1891, 18 R. 540), or consignation may be ordered (*Ross*, 1847, 10 D. 222). The Court to which the petition is made must be the Court in which the cause has been heard, and must consist of four members (48 Geo. III. c. 151, s. 17). The ordinary form of interlocutor in a petition for interim execution for expenses is as follows: "Having resumed consideration of the petition for execution pending appeal, along with the Auditor's report of the petitioner's account of expenses, approve of said report, and decern against for the sum of , the taxed amount of said expenses: Allow said decree to go out and be extracted and execution to proceed thereon, all as prayed for in said petition, upon the petitioner's finding caution in common form to repeat whatever sum or sums they may recover under this decree in the event of the interlocutors appealed against being reversed in the House of Lords."

[Mackay, *Manual*, pp. 580–582; Monteith Smith on *Expenses*, pp. 276–279; Coldstream on *Procedure*, pp. 244, 262, 350.]

See EXPENSES.

Interim Possession.—Power to deal with all matters relative to interim possession pending appeal to the House of Lords is conferred by Statute on the Division before which the cause belongs. See INTERIM EXECUTION.

Interlineations.—See DEEDS (EXECUTION OF).

Interlocutor.—An interlocutor is the instrument which contains a judgment. It is the embodiment in writing of the determination of the Court. The term "interlocutor" is sometimes employed for decree (Mackay, *Manual*, p. 308), but only a final interlocutor can properly be called a decree. Inner House interlocutors can only be corrected in so far as clerical errors are concerned, and errors into which the Court has been led by the parties (*Smith*, 1891, 29 S. L. R. 137; *Fletcher's Trs.*, 1888, 15 R. 862). A Lord Ordinary may correct any error in an interlocutor by consent of parties (A. S., 11 July 1828, s. 63). The tenor of an interlocutor may be proved, if the writing itself be lost. If the tenor of an unextracted interlocutor is to be proved, the tenor of the summons must likewise be proved (Mackay, *Manual*, p. 511).

[Mackay, *Practice*, vol. i. pp. 582–600; *Manual*, pp. 308, 313, 512: Coldstream on *Procedure*, pp. 20, 125, 130.] See DECREE.

Interlocutory Judgment.—An interlocutory judgment or decree is one pronounced in the course of an action, before its final decision

by the judge or Division of the Court before which it depends. It usually relates to procedure, but may also relate to the merits of the case. What is an interlocutory judgment will be seen by contrasting it with a final decree, which, in the Court of Session, is defined as one "which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause"; but a cause may have been finally decided although "expenses, if found due, have not been taxed, modified, or decerned for" (Court of Session Act, 1868, 31 & 32 Vict. c. 100, s. 53). The "whole subject-matter" in this provision includes expenses, in so far that a judgment which leaves the question of liability for expenses still to be determined, reserving it either expressly or by implication, is not final, but interlocutory (*Baird*, 1882, 9 R. 970; *Burns*, 1897, 24 R. 325). It has even been held that, where this has been already decided, a subsequent interlocutor modifying expenses, the question of modification not having been previously considered, was the final judgment in the case (*Stirling Maxwell's Trs.*, 1883, 11 R. 1; *Crellin's Tr.*, 1893, 21 R. 21; *Taylor's Trs.*, 1896, 23 R. 738).

The distinction between interlocutory and final decrees is of importance from the fact that the former are generally subject to a special rule as regards the right to reclaim. In Court of Session procedure, until the whole cause has been decided in the Outer House in the sense above explained, an interlocutor by a Lord Ordinary can, unless falling under a special class to be noticed immediately, be reclaimed against only with the leave of the Lord Ordinary, and the reclaiming note must be lodged within ten days from the date of the interlocutor giving leave (31 & 32 Vict. c. 100, s. 54). *E.g.* an interlocutor repelling an objection to the competency of a multiplepoinding on the ground of "no double distress" falls under this rule (*Stewart*, 1889, 26 S. L. R. 656). A final interlocutor may be reclaimed against within twenty-one days, and without leave. An interlocutory judgment on the merits of the cause may be reclaimed against within twenty-one days, provided that the Lord Ordinary's leave be obtained and the reclaiming note be lodged within ten days of the interlocutor granting leave (*Fraser*, 1872, 10 M. 420). Where a reclaiming note requiring leave is presented without it, the Court will not entertain it, even where the respondent waives the objection (*Burns, supra*).

Certain special interlocutory judgments, namely, those allowing or refusing proof, or determining the mode of proof, may be reclaimed against, without leave, within six days. Motions in the Inner House to vary issues fall under the same rule (31 & 32 Vict. c. 100, s. 28; A. S., 14 Oct. 1868, s. 6; A. S., 10 March 1870, s. 2). A remit to a man of skill is an interlocutor falling within this class (*Quin*, 1888, 15 R. 776; but see *Edin. Northern Tram. Co.*, 1894, 21 R. 930).

[See DECREE; RECLAIMING NOTE; Mackay, *Manual*, pp. 294, 308.]

Appeals to the House of Lords against interlocutory judgments pronounced by a Division of the Court of Session require the leave of the Division, except where there is a difference of opinion amongst the judges pronouncing the judgment, in which case no leave is required (48 Geo. III. c. 151, s. 15).

[See APPEAL TO HOUSE OF LORDS.]

Interlocutory Judgments in the Sheriff Court.—Interlocutory judgments are distinguished from final by the same criterion as in the Court of Session, as regards both appeals to the Court of Session from the Sheriff

Court, and appeals to the Sheriff from the Sheriff-Substitute. Under the Sheriff Court Act, 1853, an interlocutor might be final although the question of expenses had still to be disposed of (16 & 17 Vict. c. 80, s. 24). But this provision, though never expressly repealed, is understood to have been repealed by implication by the terms of the Court of Session Act, 1868, and the Sheriff Court Act, 1876, (31 & 32 Vict. c. 100, s. 33 : 39 & 40 Vict. c. 70, s. 3 : *Greenock Parochial Board*, 1877, 4 R. 737 ; *Russell* and *Malcolm*, 1877, 5 R. 22 ; but see *D. of Roxburghe*, 1875, 2 R. 715).

An interlocutory judgment of a Sheriff-Substitute may be appealed to the Sheriff, where an appeal is competent, within seven days, whereas a final judgment may be appealed within one month unless it has been earlier extracted or implemented (39 & 40 Vict. c. 70, ss. 28, 33).

[See Appeal from Sheriff-Substitute to Sheriff : Dove Wilson, *Sheriff Court Practice*, 4th ed., pp. 312–316.]

The period allowed for appealing to the Court of Session against interlocutory judgments of the Sheriff Court is, where an appeal is competent, the same as in the case of final judgments, namely, six months ; but as the judgment may now be extracted after fourteen days, the time available for appeal has been practically reduced to that number of days. The Sheriff has power still further to curtail the time (31 & 32 Vict. c. 100, ss. 67, 68 ; 39 & 40 Vict. c. 70, s. 32).

[See Appeal to Court of Session from Sheriff Court ; Dove Wilson, 4th ed., pp. 572, 575.]

International Law was a phrase invented by Bentham (*Morals, etc.*, 326) to supersede the phrase "Law of Nations," as applied to the aggregate of rules which States habitually observe in their intercourse with each other. The phrase Law of Nations was a translation of the Latin *Jus Gentium* (see Jus), and was used to denote the law, or part of the law, which was common to all civilised States, and which included, it was thought, the rules dealing with the conflict of laws in private rights. (See Comity ; International Private Law.) Bentham's phrase has become popular, but has merely taken the meaning of the older one, and so the subject has been divided into Public International Law and Private International Law, or International Public Law and International Private Law. The arrangement of these words is a subject of discussion, but for purposes of naming the order is immaterial (cp. Dicey, *Conflict of Laws*, 14).

Public International Law, or the Public Law of Europe as it is sometimes called, is said to regulate the relations of States as such *inter se*. There is a vague body of principles and rules, founded mainly on the Roman law, supplemented by treaties, conventions, and customs recognised by States, elaborated and commented on by jurists, which may be described as International Law. This body of law, as such, has no force of its own in the Courts of this country.

When a point of public international law affects private rights or procedure in the Courts, it is dealt with as an ordinary question of the law of Scotland. The principal points which occur in practice will be found under the appropriate heads. (See Alien ; Allegiance ; Ambassador ; Embargo ; Extradition ; Foreign Enlistment, etc.)

The authorities on this branch of law are : (1) Statutes and Orders in Council ; (2) decisions of the law Courts in prize and other cases ; (3) writers of authority on this subject, and also on the prerogative of the Crown ; (4) foreign writers and foreign laws are more often referred to in

this than in other branches of law where the law of Scotland is obscure or doubtful, but they have no absolute authority (cp. *Reg.* v. *Keyn*, 1876, L. R. 2 Ex. D. at p. 203; *Direct U.S. Cable Co. Ltd.*, 1877, 2 App. Ca. at p. 420).

In older authorities (*e.g.* Blackstone) it is said that the law of nations is part of the law of England, and we might add of the law of Scotland. This proposition was one of a class which affirmed that the law of the land included the law of God, Christianity, morality, public policy, and so forth; but the sounder view no doubt is that the law of nations is only recognised in this country in so far as it is adopted by the Legislature and the Courts of law (cp. *Brook*, 1861, 9 H. L. C. at p. 215; Bell, *Com.*, 7th ed., i. 320, note 5; Dicey on *The Constitution*).

The power of making treaties is part of the royal prerogative, but for their due execution the practice is to embody their provisions in a Statute, so making them expressly municipal law (*e.g.* The Treaty of Union between England and Scotland, 1707; 6 & 7 Vict. c. 79; 46 and 47 Vict. c. 22 (Fisheries Conventions); 53 & 54 Vict. c. 32 (Heligoland); 57 Vict. c. 2 (Behring Sea Award) (criticised by U.S. Government, State Papers, U.S. No. 4 (1897), p. 109); Stephen, *Com.* ii. 482). (See COPYRIGHT; EXTRADITION.)

Transactions contrary to the public policy of this country in war or neutrality are void (Bell, *Com.* i. 323), but it is not unlawful for a British subject to run a blockade while this country is neutral, though the belligerent is entitled to capture and confiscate the vessel (*Ex parte Chavasse, etc.*, Tudor Ca. M. L. 1040; *Clements*, 1866, 4 M. 583).

It has been held that foreigners cannot found on the common law of nations, or even on treaties, as conferring privileges denied to natives (*Poll*, 1897, 5 S. L. T. 219). So it was held to be illegal to relax a blockade to belligerents and exclude neutrals (*The Franciska*, 1855, 10 Moo. P. C. C. 37, Tudor, 1023).

Proclamations and acts of war, Proclamations of neutrality, and other acts of State may fall under the denomination *Acts of Princes*. (See INSURANCE.)

On the subject of international law in its public aspects, reference may be made to the bibliography contained in Woolsey's *International Law*, App. I., and also to Hall's *International Law*, Wharton's *International Law Digest* (American), Field's *International Code* (American), T. J. Lawrence's *Essays* and *International Law*, Maine's *International Law*, Hertslet's *Commercial Treaties* (for Orders in Council, etc.), *Map of Europe*, *Map of Africa*, *Chinese Treaties*. The historical works of M. Ernest Nys, Brussels, deal largely with English international law. In its bearing on questions of private right, the subject is discussed or referred to in Bell's *Commentaries* and *Principles*; and in treatises on shipping and other subjects; Owen Douglas, *Declaration of War*; Nelson, *Private International Law*.

International Private Law is the name now officially recognised by the Scottish Universities Commissioners as applying to the subject otherwise known as Private International Law, or the Conflict of Laws (cp. Holland's *Jurisprudence*, 8th ed., p. 367).

"Private International Law . . . . is a convenient expression for such rules as in the jurisprudence of most civilised nations are applied *ex comitate* to the solution of questions depending upon foreign status, foreign laws, or foreign contracts. But no law, binding *proprio vigore* upon any independent State, can be established by generalisation from the jurisprudence of other nations. All such rules must yield to the *lex loci* whenever it differs from them" (per Ld. Selborne in *Ewing*, L. R. 10 App. Ca. p. 513). "Various civilised

countries take different views of it . . . This part of the international law, as recognised by the Scotch law, becomes part of the Scotch law" (per Lindley, L. J., in *Queensland Co.*, [1892] 1 Ch. D. p. 226). It might thus be correctly said, there is not one body of private international law, but many private international laws, and this statement might be applied not only to the laws of different countries, but even to the treatment of *different branches* of law.

The two postulates which constitute the foundation of the subject are: (1) that States are independent, and the laws of one State have no force within the territory of another; and (2) modern States have the duty of administering justice to all foreigners, irrespective of nationality (cp. Huber, quoted by Story, s. 29; Lorimer, *Law of Nations*, i. 348; Dicey, *Conflict of Laws*, 22. See COMITY).

When the attention of practising lawyers was first called to such questions, an attempt was made to solve them by grammatical analysis in the *Statute* theory (cp. *statuta personalia; realia; mixta*), but these divisions could not stand examination. In Scotland the Courts, down to the present century, appear to have been working out a new Scottish *Jus Gentium* for foreigners, running parallel to the Scots law for natives (Miller, *Law of Nature and Nations in Scotland*, 101). In earlier decisions and treatises, traces of political jealousy are clearly observable. Savigny revolutionised the subject by attempting to put it on a *logical* basis: but the objection to his method, put generally, is that mere logical deduction from legal categories does not necessarily operate justice in concrete cases. Bar, in Germany, has developed the subject on wider principles. Savigny's work was adopted as the foundation of Phillimore's and Prof. Westlake's treatises; and translated by Mr. William Guthrie, with valuable notes. The late Ld. Fraser has dealt exhaustively with the questions raised in the laws of marriage and divorce. Wharton, in America, has dealt with the great wealth of American decisions; and Prof. Dicey, in England, has treated the subject as a branch of English law deduced from the decisions of English Courts. This method is more satisfactory than the older ones, because it takes advantage of their theoretical discussions, and tests them by the facts of daily life as seen in actual cases. It is thus a late development of legal theory and practice which has differentiated this branch from the other branches of public international law and the municipal law.

In the earlier cases jurisdiction is assumed; but in the more recent authorities the question of jurisdiction has been abstracted and treated separately, because if the Court pronouncing a judgment had jurisdiction, its judgment, however erroneous, may yet be recognised, *ut sit finis litium*. All States assume jurisdiction over their territories and over their own subjects, and the natural tendency is to extend this jurisdiction as widely as is consistent with doing justice to individuals and the power of enforcing the decrees. The jurisdictions assumed by civilised Powers thus necessarily overlap, and here there is a conflict of rights (of jurisdiction) between Courts and States themselves. This collision is seen, in England, between the Courts of Chancery, Common Law, Admiralty, Star Chamber, and so forth, and between the Courts of England and Scotland. The practical result is that Courts modify and restrict the tendency, said to be that of a good judge—*ampliare jurisdictionem*. This was done by amendment of the Rules of Court in England; and has also been done by judicial decision in Scotland, mainly by the application of the principle of *Forum non conveniens* (*q.v.*). Jurisdiction *ratione delicti* in cases of divorce was practically law in Scotland, until it was found that the English Courts refused to recognise the decrees.

After much litigation and many appeals to the House of Lords it is now finally decided that there is no jurisdiction except *ratione domicilii* (see DOMICILE; *D'Ernesti*, 1882, 9 R. 655; *Redding*, 1888, 15 R. 1102). This was not law in Scotland fifty years ago. The same process of compromise, of which this is merely a type, applies in other cases: (first) between Courts in the British dominions; (secondly) between British and foreign Courts; (thirdly) with Turkish and Eastern Powers, in consular Courts; and (finally) in the FOREIGN JURISDICTION ACT (*q.v.*). There is thus in practice a gradual widening of jurisdiction, according to the state of society which calls for its application.

The laws which generally come into conflict are the following:—

1. *Lex Ligeantiæ.*—There are traces of this in the older Scots law (see ALLEGIANCE). As to guardianship, see *in re Bourgoise*, 41 Ch. D. 310.

2. *Lex Domicilii*, which generally applies to questions of capacity and status, legitimation depending on the domicile of the father at the date of the child's birth and of the subsequent marriage. This applies also to rights of married persons, and succession in moveables. (See DOMICILE; JURISDICTION; LEGITIMATION; SUCCESSION.)

3. *Lex rei sitæ—Lex situs*—which applies to laws affecting heritable property and heritable succession — a survival of the Statute theory. (See M'Laren on *Wills*, 17.)

4. *Lex loci delicti commissi*—deduced from practice as to crimes (*Rosses*, 1891, 19 R. 31).

5. *Lex loci actus* (*Locus regit actum*) applies to forms of executing deeds, and procedure (Ersk. *Inst.* iii. 2. 39).

6. *Lex loci contractus*, a species of the last, has varied in meaning between the place of execution, the place of fulfilment, and the domicile of one of the parties. It may be said now to depend on the intention of the parties (*Hamlyn*, [1894] App. Ca. 202; *in re Missouri Co.*, 1888, 42 Ch. D. 321. See LAW OF THE FLAG).

An important application of this principle is contained in the Bills of Exchange Act, 1882, s. 72, which must be read along with secs. 51, 53, 57, and the general references to local custom throughout the Act. (See BILL.)

Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, indorsement, or acceptance *supra* protest, by the law of the place where such contract was made (*i.e. locus regit actum*); provided that—

(*a*) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue (see below).

(*b*) Where a bill issued out of the United Kingdom conforms as regards requisites in form to the law of the United Kingdom, it may, for the purpose of enforcing payment, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of the Act (s. 54, etc.), the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill is determined by the law of the place where such contract is made; provided that where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for, or sufficiency of, a protest or notice of dishonour or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (*i.e. locus solutionis*, No. 7, *infra*).

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable (No. 7, *infra*).

7. *Lex loci solutionis* generally rules as to acts to be done—forms of delivery, protest of bills, etc. This is also a species of No. 5. It should be noted that while the rule *locus regit actum* applies to arbitrary matter of form, the extension of the rule to the matter of acts or contracts is in many cases absolutely unwarrantable. (See Bills of Exchange Act, *supra*. As to custom of port, see M'Lachlan on *Shipping*, 4th ed., 550–553.)

8. *Lex Fori*—the law of the Court—properly is a species of No. 5, and applies to procedure (*in re Queensland Mercantile and Agency Co.*, [1892] 1 Ch. 219 (Scots case), 15 R. 935 ; *Phosphate Sewage Co.*, 1879, 4 App. Ca. 801), and also to prescription (*Don*, 1837, 5 Cl. & Fin. 1); but in England this principle receives a very wide interpretation (*e.g. Bullock*, L. R. 10 Q. B. 276, followed *in re Doetsch. Matheson*, [1896] 2 Ch. 836 ; Gillespie's Bar, 2nd ed., p. 240).

Under the Bankruptcy Act, 1856, and the Companies Acts, the Courts of the three kingdoms are made ancillary to each other.

The Scottish Courts do not recognise foreign laws if (1) they are inconsistent with the fundamental policy of this country ; (2) if they are inconsistent with the conception of decency and morality prevailing in Scotland ; and (3) if they are imperative laws locally prevailing, *e.g.* penal laws (Guthrie's Savigny, 2nd ed., p. 81 ; *Fenton*, 18 D. 865, 3 Macq. 497 : *Brook*, 9 H. L. C. 193 (marriage with a deceased wife's sister) ; *Hyde*, L. R. 1 P. & D. 130 (Mormon marriage) ; *Bethell*, 38 Ch. D. 220 (Baralong marriage) ; as to slavery, see *Santos*, 6 C. B., N. S. 841, 8 C. B., N. S. 861 ; Guthrie's Savigny, 85 ; *Huntington*, [1893] App. Ca. 150 (penal laws)). This rule in general applies to the foreign revenue laws (see Bills Act, s. 72 ; *Vadery*, 3 R. 965 ; Dicey, *Conflict of Laws*, p. 561). Rules for collision laid down by foreign Legislatures are not binding, while those contained in British Acts (*e.g.* Bills Act, Bankruptcy, Companies Acts, etc.) are absolutely so.

Foreign laws must be averred and proved as a matter of fact in Scottish Courts, but the mode of proof may vary as in the following cases :—

(1) Evidence of lawyers practising in foreign Courts (*Parnell*, 17 R. 552 ; *Brinkley*, 15 P. D. 76). (2) Opinion of a foreign lawyer (*Brown's Trs.*, 17 R. 1177). (3) Foreign professors (knowledge not merely acquired from reading books) (*Goetze*, 2 R. 150 ; *Obers*, 24 R. 719). (4) Ambassador's secretary (*in the Goods of Dost Ali Khan*, 6 P. D. 6). (5) Ambassador (*in the Goods of Prince of Oldenburg*, 9 P. D. 234). (6) Court which tries the case, from books, by consent of parties (*Bradlaugh*, L. R. 5 C. P. 473). In *Urie* v. *Urie's Trs.*, 1897, not reported, an opinion was obtained by mutual consent from an American lawyer (Professor J. B. Moore). (7) In appeals from Courts of the United Kingdom the House of Lords requires no proof of law (*Cooper*, 15 R. H. L. 21). (8) Case stated to English or Irish Court

(22 & 23 Vict. c. 63; *Welsh*, [1891] App. Ca. 639; *Hewitt's Trs.*, 18 R. 793). (9) Under the Act 24 Vict. c. 11 it was made competent to lay a case before a foreign Court to ascertain the foreign law, but no treaties have been executed to carry out the Act.

A mistake by a foreign Court as to Scots law will not prevent the judgment receiving effect in this country if the Court had jurisdiction and the trial and conduct of the parties were regular (*Godard*, L. R. 6 Q. B. 139; *in re Trufort, Trafford*, 36 Ch. D. 600).

The authorities on the various questions which occur in practice may be sought: (1) in the decisions and treatises on the several branches of law in which they arise; (2) of general treatises, Dicey's *Conflict of Laws* comes first; J. A. Foote's *Private International Jurisprudence* deals with the subject on the basis of English decisions; and Nelson's *Private International Law* supplies a useful digest of these. Campbell's *Ruling Cases* may also be referred to; Westlake and Phillimore are useful for discussing the application of foreign authorities; Wharton's *Conflict of Laws* is valuable for American cases; Bar's *Private International Law*, for German law; while Mr. G. R. Gillespie's *Notes* are a valuable supplement for Scots law; Bar and Savigny may be utilised for supplying arguments to criticise native authorities; and foreign decisions will be found collected in the *Journal du droit international privé* of M. Clunet, now in its twenty-fourth year of publication.

Interpretation; Interpretation Acts.—See STATUTE LAW.

Interrogatories.—After adjustment of issues or fixture of trial, or, in very special circumstances, during the course of the trial (*Stone*, 1849, 11 D. 1041), "when it shall be made out upon oath to the satisfaction of the Court that a witness resides beyond the jurisdiction of the Court, and is not likely to come within its authority before the day of trial, or cannot attend on account of age or permanent infirmity, or is labouring under severe illness which renders it doubtful whether his evidence may not be lost, or is a seafaring man, or is obliged to go into foreign parts, or shall be abroad and not likely to return before the day of trial, it shall be competent to examine such witness by commission, on interrogatories to be settled by the parties and approved of by one of the principal Clerks of Session or Record Clerk" (A. S., 16 February 1841, s. 17). When the motion for interrogatories is made, the names of the witnesses must be given (*Gray*, 1849, 11 D. 1023), and it must be declared on oath that the witnesses are unable to attend the trial (*Mackintosh*, 1850, 21 D. 783). In the cases specified in the Act of Sederunt, interrogatories are imperative, but it has become customary to dispense with them, and to ask the Court to grant a simple commission. Interrogatories are still commonly employed in examining witnesses resident abroad. Depositions following upon interrogatories can only be used "on its being established at the trial to the satisfaction of the Court, by affidavit or by oath in open Court, that such witness is dead, or cannot attend owing to absence, age, or permanent infirmity" (A. S., 16 February 1841, s. 17): and these depositions shall not be used if the witnesses so examined be afterwards brought forward at the trial (*ib.*). Where a commission is granted to one party to examine witnesses on interrogatories, it is competent to the other party to have a joint-commission, or to propose cross interrogatories to such

witnesses; and further, the commissioner may put such additional questions to the witnesses as may appear to him to be necessary (*ib.*).

[Mackay, *Practice*, vol. ii. pp. 82–84; *Manual*, pp. 368–9; Coldstream on *Procedure*, pp. 70, 81, 400.]

See Evidence; Witness; Commission.

Interruption.—See Prescription.

Intimation (*in Petition Procedure*).—In the procedure incident to summary petitions, the first order pronounced by the Court is one appointing the petition to be "intimated to" and "served upon" the parties interested, in order that they may have an opportunity of lodging answers. Intimation is made "on the walls and in the minute-book,"—"on the walls," by the petitioner's agent putting up a print of the petition, having annexed to it a copy of the interlocutor ordering intimation, in the outer lobby of the Parliament House; and "in the minute-book," by the Clerk having a notice of it inserted there. A certificate that intimation has been duly made is lodged in process by the agent. Intimation may be dispensed with by the Court in cases of urgency (*Fraser*, 1828, 7 S. 205; *Livingstone*, 1835, 13 S. 1033). Where necessary, intimation of new is ordered, as, *e.g.*, where a considerable time has elapsed since the petition was last moved in (*Greig*, 1830, 8 S. 1012, note; *Scoullar*, 1834, 13 S. 101; *Thorburn*, 1846, 8 D. 1000).

Petitions under the Entail Amendment Acts are specially provided for by Statute (38 & 39 Vict. c. 61, c. 12 (4)), which requires intimation. In the case of a petition to record a deed of entail, no intimation or service seems to be necessary where the petitioner is the maker of the entail, or the institute or a substitute in possession (Shand, *Practice*, ii. 1020, note).

[Mackay, *Manual*, 532, 553–4; Shand, ii. pp. 978 *sqq.*, 1020.]

See Service; Advertisement.

Intoxication.—Intoxication may have important effects both on the civil capacity and on the criminal responsibility of the intoxicated person.

As regards civil capacity, its effect is closely analogous to that of insanity. Stair states the rule with reference to capacity to enter into contractual obligations as follows: "Idiots or furious persons, except in their lucid intervals, cannot contract. . . . Those also who, through fear, or drunkenness, or disease, have not for a time the use of reason, do not legally contract" (i. 10. 13). Similarly, Erskine says that: "Persons while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige themselves; but a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling the contract" (Ersk. iii. 1. 16; cf. Bell, *Com.* i. 317).

A distinction is recognised between degrees of intoxication. To have the effect of invalidating a deed or contract, the intoxication must be so complete as to exclude the power of giving the necessary consent. If it falls short of this, it must be combined with fraud, in the sense of being fraudulently induced or taken advantage of for the purpose of obtaining the deed or agreement in question. In point of fact, it is only in very rare instances that an obligation can be invalidated by the intoxication of the

granter without the additional element of fraud. Such cases may be conceived, but perhaps only where both parties are intoxicated, and one of them completely so.

The general rules as applied in England are well stated in the leading case of *Cooke* (1811, 18 Ves. 12), and the doctrine there laid down has been judicially approved in Scotland: "A Court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, ought not to assist a person to get rid of an agreement or deed merely upon the ground of his having been intoxicated at the time"; but, "if there was any unfair advantage made of his situation, or any contrivance or management to draw him in to drink, he might be a proper object of relief in a Court of equity. As to that extreme state of intoxication that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained from him while in that condition" (per Sir W. Grant, M. R., at pp. 15, 16; cf. *Pitt*, 1811, 3 Camp. 33, per Ld. Ellenborough, at p. 34; *Butler*, 1879, 1 Bligh, H. L. 137).

Similar rules are applied in Scotland (*Duncan*, 1823, Macfarlane, 278, where the statement in *Cooke's* case was expressly approved). It has been laid down that, where no fraud is averred, the question to be considered is whether the person was "so drunk as to have been deprived of understanding, and to have been incapable of giving his consent" (*Taylor*, 1864, 2 M. 1226, per Ld. Cowan, at p. 1233, and per Ld. J.-C. Inglis, at p. 1232; see also *Lord Haltoun*, 1672, Mor. 13384; *Mackie*, 1752, Mor. 4963; *Johnston*, 1854, 17 D. 228; *Couston*, 1862, 24 D. 607, and contrast the issues approved in the last two cases). General irregularity of habits and addiction to drink is clearly insufficient (*Mackay*, 1831, 5 W. & S. 210). The question is always one of fact, turning on the special circumstances of each case.

Intoxication, where it does not of itself, or in combination with fraud, invalidate a contract, may be an element in showing that the parties had no intention of entering into any serious bargain (*Jardine*, 1803, Hume, *Dec.* 864; *Hunter*, 1804, Hume, *Dec.* 686, commented on in *Taylor*, 1864, 2 M. 1226, at p. 1232).

The older cases, particularly in England, support the view that the intoxication of the granter might render a deed *ab initio* null (*Fenton*, 1815, 1 Stark. 126; *Gore*, 1845, 13 M. & W. 623). It is now, however, established in the English Courts that its effect is only to render the deed voidable, and probably the same rule would be followed in Scotland (*Matthews*, 1873, L. R. 8 Ex. 132; and see opinions in *Pollok*, 1875, 2 R. 497), parole evidence being of course admissible.

Intoxication sufficient to exclude consent to marriage affords ground for a declarator of nullity (*Blair*, 1748, Mor. 6293; *Johnston*, 1823, 2 S. 495; see Fraser, *H. & W.*, 2nd ed., pp. 71, 72).

The intoxicated person may, on recovering his sober senses, ratify the bargain into which he entered during intoxication (*Matthews, cit. sup.*). If he is to obtain relief, he must apparently make his challenge at once on recovering the use of his faculties, and learning what he is alleged to have done (*Pollok, cit. sup.*, per Ld. J.-C. Moncreiff, at p. 503). Otherwise he will be barred from doing so.

Capacity to make a will is also affected by intoxication. Here similar rules are applied. In this case, also, the element of fraud is usually present (Stair, iii. 8. 37).

An intoxicated person is not admissible as a witness (Stair, iv. 43. 7),

and a prisoner's declaration cannot be taken unless he is in his sound and sober senses (Hume, ii. 328; Alison, ii. 557; *Elder*, 1827, Syme, 92). In England a confession of guilt uttered by a person while drunk has been allowed as evidence (*R.* v. *Spilsbury*, 1835, 7 Car. & P. 187, per Coleridge, J.).

See CONTRACT; FRAUD; CIRCUMVENTION.

Criminal Law.—Drunkenness was made a punishable offence by a series of old Scots Acts (1436, c. 144; 1617, c. 20; 1661, c. 19; 1672, c. 22; 1693, c. 40; 1696, c. 31). These are in desuetude, and drunkenness is not now an offence except under special conditions as provided by several modern Statutes. By the Public Houses Acts Amendment Act, 1862 (25 & 26 Vict. c. 35), s. 23, a person found in a public place intoxicated and unable to take care of himself is guilty of an offence, and is liable on conviction to a fine of five shillings or to imprisonment for twenty-four hours. The Burgh Police Act, 1892 (55 & 56 Vict. c. 55), s. 381 (24), imposes a penalty not exceeding forty shillings or one month's imprisonment on a person who in any street is drunk and incapable, and not under the care of any suitable person. The Police Acts of particular towns contain special provisions of a similar nature (*e.g.* the Edinburgh Police Act, 1879, 247 (6), 248 (4)).

Intoxication is in itself no defence to a criminal charge. Erskine, after excluding from the category of crimes involuntary actions, the cause of which is without the agent, says: "But care must be taken not to reckon in this class the sudden sallies which flow from passion, drunkenness, or the like. For though after one's anger is worked up to a certain height, or after he is intoxicated to a certain degree, he may in one sense be said not to be master of himself, yet the first principle of action is truly in the agent: for every man may by due pains check his irregular passions in their first motions; and therefore what one does under the influence of these is to be accounted his action" (*Inst.* iv. 4. 5: cf. Hume, i. 45, 46, and cases there cited). There is an exception where the intoxication is itself involuntary, as, *e.g.*, where it is due to a temporary diseased condition (*Milne*, 1863, 4 Irv. 301, Ld. J.-C. Inglis's charge).

Intoxication may, however, have the effect of mitigating the seriousness of the offence. It has been held in a number of cases in Scotland that a weak or disordered state of mind—including intoxication—in the accused person at the time when the act was committed, is a consideration relevant to the question whether the act was or was not premeditated; and intoxication may even be taken into account as an element in making the difference between murder and culpable homicide (*Dingwall*, 1867, 5 Irv. 466; *M'Lean*, 1876, 3 Coup. 334; *Granger*, 1878, 4 Coup. 86; *Smith*, 1893, 1 Adam, 34; *Brown*, 1886, 1 White, 93; *Macdonald*, 1890, 2 White, 517, Ld. J.-C. Macdonald's charge). This view does not seem to receive much countenance in England (*R.* v. *Carroll*, 1835, 7 Car. & P. 145; *R.* v. *Meakin*, 1836, *ib.* 297). Even in England, however, in cases where the crime alleged is such that the intention is a constituent element of it, the fact that the accused was drunk may be taken into account as bearing on the question whether he was capable of forming that intention (*R.* v. *Cruse*, 1838, 8 Car. & P. 541; *R.* v. *Doherty*, 1887, 16 Cox, C. C. 306, per Stephen, J.).

In the special case of offences committed by the uttering of words, *e.g.* using seditious language, the fact that the words were used by a person in a state of intoxication, ought, according to Hume, to be regarded as a mitigation (Hume, i. 46, 47, and 570; cf. *Alves*, 1830, 5 Deas & And. 147).

Mental disease due to habitual drunkenness is treated in the same way as other forms of insanity. If the insanity thus produced would be sufficient to absolve from criminal responsibility if due to an innocent

cause, its origin is not a material consideration (*Milne*, 1863, 4 Irv. 301; *Macdonald, cit. sup.*). English judges have sometimes held that mental derangement caused by the prisoner's excesses is no excuse unless fixed and continuous (*Rennie's* case, 1825, 1 Lew. C. C. 76). This view does not seem to have been admitted in Scotland, and even in England it has been departed from in recent cases (*Reg.* v. *Davis*, 1881, 14 Cox, C. C. 563, per Stephen, J., at p. 564; *R.* v. *Baines*, *Times*, 25 Jan. 1886). A rule stated by Alison, that a temporary alienation of reason due to excesses on the part of the accused is to be held an excuse for criminal acts committed during the alienation, if the accused was ignorant that "such an indulgence in his case leads to such a consequence," but not "if this infirmity was known to him," is not recognised by authority, and seems to have no justification in principle (Alison i. 654).

[See Wood Renton, *Lunacy*, pp. 911 *sqq.*); Macdonald, *Criminal Law*, pp. 12 and 16.] See Insanity; Drunkards (Habitual).

Intrinsic.—See Oath on Reference; Evidence.

Intromission.—Intromission takes place when a person assumes the possession and management of the property of another. This may be done either upon legal grounds or without authority. The subject of intromission without authority will be dealt with later. See Passive Title; Vitious Intromission.

Legal intromission exists in several forms, and involves certain liabilities. Such cases as the intromission of a trustee or of a factor with the funds in his possession call for no discussion here.

1. *Intromission as an Adjudger.*—Under the old law, when a creditor adjudged, or, as was then the case, apprised, the lands or other heritable property of his debtor in satisfaction of or in security for his debt, the property became his own, under a right of reversion in favour of the debtor, and he was entitled to enter into possession and draw the rents without being bound to account for the latter to the debtor, or to impute them towards the payment of the debt. By various Statutes this state of affairs was altered, and the adjudger's right is not now one of absolute property, but is a mere judicial security for his debt. He is entitled to intromit with the rents of the property, but he is bound to account for his intromissions to the debtor, and the amount of the debt is affected thereby. The extinction of the debt by the intromissions of the creditor during the legal *ipso facto* brings the adjudication to an end, without the necessity of a decree of declarator (Ersk. ii. 12. 37). When the adjudger brings an action of declarator of expiry of the legal, the debtor is entitled to call upon him to account for his intromissions, in order that the amount of the debt still standing against him may be ascertained, and that he may still have an opportunity of redeeming the lands. In intromitting with the rents, the adjudger is bound to use exact diligence, and he is not entitled to take credit for arrears unless he can show that he has done so. See Adjudication for Debt.

2. *Intromission as a Heritable Creditor.*—A heritable creditor is bound to impute his intromissions with the rents of the subjects towards the extinction of his debt, and his security diminishes as the debt is paid by means of his intromissions. He has under his bond, in the assignation to rents, a written warrant to intromit with the rents, and although, as a rule, a written

obligation requires a written discharge, proof of his intromissions will be received to show how far the debt has been reduced.

3. *Intromission on more than one Title.*—"Where a possessor has several rights in his person affecting the subject possessed, the general rule is that he may ascribe his possession to which of them he pleases" (Ersk. ii. 1. 30). Thus a person who is in possession of an estate upon two titles, one preferable to and one inferior to the title of another person who claims a right to the estate, he is, as a rule, entitled to ascribe his possession to the inferior title. Thus, where the preferable title is an adjudication or a heritable bond, he is entitled to ascribe his intromissions prior to the appearance of the competitor, to his inferior title, otherwise they would have to be imputed towards the extinction of his debt under the preferable title, and he would derive no benefit from his inferior title. His future intromissions, after the appearance of the competitor, fall to be ascribed to his preferable title.

Intrusion.—See Ejection and Intrusion.

Invecta et illata.—See Hypothec; Thirlage.

Inventory.—An inventory is a detailed list of articles composing an estate, in which these articles are described *seriatim*, and with reasonable peculiarity. The word is also applied to a list of documents made up for any purpose, as, for example, the *Inventory of process* lodged along with the summons in calling an action, the *Inventory of documents* lodged to satisfy production in an action of reduction, or the *Inventory of title deeds* produced in a judicial sale of lands. In our law there are several kinds of inventory which call for notice here.

1. *Inventory in a Service cum beneficio inventarii.*—The Act 1695, c. 24, provided a means by which an apparent heir might enter to his ancestor "upon inventory as use is in executories and moveables." This limited his liability for his ancestor's debts to the amount of the value of the estate given up by him in the inventory. The subject has already been discussed under the title Beneficium inventarii (*q.v.*).

2. *Tutorial or Curatorial Inventory.*—The Act 1672, c. 2, provided for the making up of an inventory of the whole property, heritable and moveable, of a pupil, or minor, or insane person, by the tutor or curator. In the case of tutors-at-law, tutors-dative, factors *loco tutoris*, and curators *bonis*, the procedure under this Act has been superseded by the Pupils Protection Act of 1849 (12 & 13 Vict. c. 51); and the Guardianship of Infants Act (49 & 50 Vict. c. 27, s. 12) applies that Act to all tutors "being administrators-in-law, tutors-nominate, or guardians appointed or acting in terms of this Act." Sec. 3 of the Pupils Protection Act ordains every judicial factor, as soon as may be after extracting his appointment, and within six months at latest, to lodge with the Accountant of Court a distinct rental of the lands committed to his management, a list of all the funds belonging to, and debts due to the estate, and an inventory of all the moveables belonging to the estate. By sec. 25 the provisions of the Act are made applicable to tutors-at-law, tutors-dative, and curators to insane persons. And by sec. 30 the rental, list, and inventory lodged in terms of the Act are declared to be equivalent to the tutorial or curatorial inventories required by the Act of 1672. Curators nominated by the father of the minor under the Act 1696, c. 8,

or chosen by the minor, have still to give up an inventory in accordance with the provisions of the 1672 Act. It is doubtful whether curators appointed by a stranger to manage a specific estate given by him to the minor fall under this rule. Their position is rather that of trustees than curators (see *Kilpatrick*, 1793, Mor. 16381; Fraser, *Parent and Child*, 175 and 203). For details as to the rather cumbrous procedure which has to be adopted under the 1672 Act, see CURATOR; CHOOSING OF CURATORS.

3. *Inventory of Personal Estate.*—The Act 48 Geo. III. c. 149, s. 38, provides that an inventory must be given up by every person who, as executor or otherwise, intromits with or enters upon the possession or management of any personal or moveable estate in Scotland belonging to any person dying after the date of the Act. The executor-nominate, therefore, of a deceased person, or a person desirous of being decerned executor-dative, must, upon applying for confirmation or decerniture, give up an inventory of the whole moveable estate situated in Scotland of which the deceased died possessed. The inventory must also set forth the value of the estate, and the applicant must make oath or affirmation before the Commissary or Commissary Clerk that the inventory contains the whole moveable estate of the deceased so far as is known to him. By 23 & 24 Vict. c. 80, s. 5, the value of the estate was to be calculated as at the date of the taking of the oath, but under the Finance Act of 1894 it would seem that the value should now be taken as at the date of the death of the deceased (57 & 58 Vict. c. 30, s. 7, subs. 5). The valuation of the estate for the purposes of the inventory is not liable to the stamp duty upon appraisements (34 & 35 Vict. c. 103, s. 26). The inventory must be given up within six months of the death of the deceased, and must be recorded in the Sheriff Court of the county in which the deceased died domiciled. When the deceased died domiciled outwith Scotland, or where he had no known domicile, the inventory must be recorded in the Sheriff Court of Edinburgh. The inventory must be written upon an *ad valorem* stamp. (Forms of inventories are supplied by the Inland Revenue Department, and may be afterwards stamped.) The only case in which partial confirmation is permitted is that of an executor-creditor, who need not take out confirmation to more of the estate than covers the debt due to him (4 Geo. IV. c. 97, s. 1), but he must give up an inventory of the whole estate for the purposes of the duty, though he is only confirmed to part of it. Where an executor discovers, after confirmation, that he has omitted to give up in his inventory some part of the deceased's estate, he must, within two months of the discovery, lodge an additional inventory with the Commissary Clerk. This additional inventory must specify the amount or value of the estate comprised in any former inventory or inventories, and duty is payable upon the whole amount set forth, subject to the repayment of what has been paid upon the former inventory (48 Geo. III. c. 149, s. 40). The lodging of an additional inventory is known as making an EIK TO A CONFIRMATION (*q.v.*). Where the value of any part of the estate cannot be ascertained at the time, a statement must be annexed explaining the matter fully, and undertaking to pay the duty and furnish the particulars as soon as these are ascertained (57 & 58 Vict. c. 30, s. 7, subs. 3).

The whole personal estate situated in Scotland must be included in the inventory. By the Confirmation and Probate Act of 1858 (21 & 22 Vict. c. 56), as amended by the Sheriff Courts Act of 1876 (39 & 40 Vict. c. 70, ss. 41–44), personal estate situated in England or Ireland may be included in the inventory. When this is done, the executor has only to produce his Scottish confirmation in the principal Court of Probate in England or in the Court of Probate in Dublin, get it sealed there, and lodge a copy with the

registrar, in order that it may have the same effect as if probate or letters of administration had been granted in these countries. The value of such English or Irish estate must be separately stated in the inventory, but the stamp must cover the value of the whole estate wheresoever situated in the United Kingdom (21 & 22 Vict. c. 56, s. 9). If any English or Irish estate is included in the inventory, all such estate must be included (21 & 22 Vict. c. 56, s. 15). But the inventory may be limited to the personal estate situated in Scotland, and, in that case, if there is personal estate in England or Ireland, probate or letters of administration must be applied for in England or Ireland, as the case may be. For the purposes of the revenue, if the Scottish estate alone is set forth in the inventory, all other personal estate belonging to the deceased must be specified in a note annexed to the inventory, and if the inventory includes English or Irish estate, all personal estate situated outwith the United Kingdom must be specified in a note. But confirmation is only granted in respect of the estate set forth in the body of the inventory, and the estate specified in the note is not included in the amount upon which duty falls to be paid. Where the deceased died domiciled in England or Ireland, and possessed of personal estate situated in Scotland, such estate may be confirmed to separately in Scotland, or may be included in the probate or letters of administration granted in England or Ireland. Where the domicile of the deceased was outwith the United Kingdom, the only competent course for his executor to follow is to be confirmed to the Scots estate, and to obtain probate or letters of administration to the English or Irish estate.

All personal property actually belonging to the deceased at the date of his death, or over which he had, or, had he been *sui juris*, would have had, a power of disposal, must be included in the inventory (57 & 58 Vict. c. 30, ss. 2, 22 (2-*a*)). Heritable securities, except where conceived in favour of heirs, excluding executors, or where the security is constituted by an absolute disposition qualified by a back-bond, or by way of ground-annual, are, since 1869, moveable with regard to the succession of the creditor (31 & 32 Vict. c. 101, s. 117). By the Acts 23 & 24 Vict. c. 15, s. 6, and 23 & 24 Vict. c. 80, ss. 1 and 8, heritable securities and personal bonds excluding executors are declared to be moveable property for the purposes of the Acts relating to inventory duty, and as such fall to be included in the inventory of moveable estate. By the Finance Act of 1894, estate duty has taken the place of inventory duty, and is payable upon heritable as well as upon personal estate. The forms issued by the Inland Revenue authorities provide for a statement of the heritable estate as well as for an inventory of the personal estate, but it would appear that, under the Acts above quoted, such securities should still be set forth in the inventory of personal estate. Heritable securities, in the sense of the Consolidation Act of 1868, include all heritable bonds, bonds and dispositions in security, bonds of annualrent, bonds of annuity, and securities for cash accounts or credits under 19 & 20 Vict. c. 91, s. 7 (31 & 32 Vict. c. 101, s. 3). For a full discussion of what falls to be included in the inventory as personal estate, reference is made to the article on HERITABLE AND MOVEABLE, and also to the succeeding article on INVENTORY DUTY.

Property held by the deceased as trustee or executor-nominate, and in which he had no beneficial interest, need not be set forth in the inventory. Such property is not liable in duty, nor can his executor take out confirmation in regard to it. If, however, he had a beneficial interest in it, it must be included to the extent of that interest. Where trust funds have been invested in the deceased's own name, or have been immixed with his own

funds, they must be included in the inventory, and the right of the beneficiary is considered a debt due by the deceased, and allowed for accordingly in calculating the amount of duty payable. So also, where the deceased held funds as an executor-dative, whose right transmits to his representatives, the inventory need not include more than the amount of the deceased's beneficial interest; but if it includes the whole, the shares payable to other beneficiaries are considered to be debts due by the deceased. Where the deceased died domiciled in the United Kingdom, it is competent for the person applying for confirmation to state in his affidavit the fact of such domicile, and to deliver therewith or to annex thereto a schedule of the debts due by the deceased to persons resident within the United Kingdom, and of the funeral expenses; and in such a case, for the purpose of ascertaining the duty to be charged, the aggregate amount of the debts and funeral expenses so set forth shall be deducted from the value of the estate given up in the inventory (44 Vict. c. 12, s. 28). The debts so scheduled must be debts which are payable by law out of the estate given up in the inventory, and must not be voluntary debts due on the death of the deceased, or payable under any instrument which was not *bonâ fide* delivered to the donee twelve (44 & 45 Vict. c. 12, s. 38) months before death, or in respect of which any real estate may be primarily liable. The debts must have been incurred *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and must take effect out of his interest, and must not be debts in respect of which there is a right of reimbursement from any other estate or person, unless such reimbursement cannot be obtained (57 & 58 Vict. c. 30, s. 7, subs. 1). When the deceased owed heritable debts, and his heritable estate is not sufficient to meet them, the balance is a debt payable by law out of the personal estate, and as such may be set forth as a debt to be deducted from the value of the estate. No deduction is allowed in the first instance for debts due to persons outside the United Kingdom, unless they were contracted to be paid in the United Kingdom or charged upon property situated therein, except out of the value of personal property of the deceased situated outwith the United Kingdom in respect of which duty is paid. But if the commissioners are satisfied that such foreign property is insufficient to meet the duty, the excess of duty charged may be repaid (57 & 58 Vict. c. 30, s. 7, subs. 2). Where the deceased was domiciled abroad, an application for the return of duty in respect of debts must be made under 5 & 6 Vict. c. 79, s. 23, within three years of the recording of the inventory, and the commissioners have power to extend this time in cases in which the executor has been prevented from claiming such return by reason of any proceeding at law or in equity.

Special forms are supplied by the Inland Revenue Office for making up inventories to small estates under the Finance Acts of 1894 and 1896. Such estates, for which special provision is made with regard to the duty exigible, are estates which, without deducting debts and funeral expenses, do not exceed £500 or £300 (57 & 58 Vict. c. 30, s. 16), and estates which, after deducting debts and funeral expenses, exceed £100 and do not exceed £200 (59 & 60 Vict. c. 28, s. 17).

A calendar of all confirmations granted and inventories given in during the year in Scotland is published by the Commissary Clerk of Edinburgh at the end of each year, and a copy of this calendar is sent by him to every Sheriff Clerk in Scotland and to the registrars of the Probate Courts of London and Dublin. This calendar is open to the

inspection of the public upon payment of a small fee (39 & 40 Vict. c. 70, s. 45).

[M'Laren, *Wills and Succession*, 870; Currie, *Confirmation of Executors*, chap. 6; Cameron, *Intestate Succession*, pp. 166–216.]

See Confirmation of Executors; Heritable and Moveable; Estate Duty under the Finance Act, 1894; Inventory Duty.

Inventory Duty.

(1) *The Duty in General; Inventory; Additional Inventory; Duty in Case of Small Estates.*
(2) *The Scale of Duty.*
(3) *Exemptions.*
(4) *Property Liable to Duty.*
(5) *When and by whom the Duty is Payable; Interest.*
(6) *The Dutiable Amount; Rectification of Duty; Deduction of Debts.*
(7) *The Incidence of the Duty.*
(8) *The Method of Recovery.*
(9) *Forms.*

(1) *The Duty in General; Inventory; Additional Inventory; Duty in Case of Small Estates.*—Inventory duty (placed under the management of the Commissioners of Inland Revenue by the Act 12 & 13 Vict. c. 1: see 53 & 54 Vict. c. 21) is a stamp duty in respect of the moveable estate of persons who died prior to the 2nd August 1894,—the date from which the Finance Act, 1894 (57 & 58 Vict. c. 30, s. 24), operates. See Estate Duty under Finance Act, 1894. It was imposed for the first time by the Act 44 Geo. III. c. 98, which operated as from 10 October 1804. This Act provided for the payment of the duty upon the "testament testamentar or testament dative, or eik thereto, to be expeded in any Commissary Court in Scotland" (see Sched. A to the Act). The Act 48 Geo. III. c. 149 repealed these duties, imposed new duties at the same rates, and made them payable no longer upon the confirmation, but upon the inventory, save where the deceased died after 10 October 1804, and before or upon 10 October 1808.

Sec. 38 of the Act last cited provides that every person who, as executor, next of kin, creditor or otherwise, shall intromit with or enter upon the possession or management [see 47 & 48 Vict. c. 62, s. 11; *Att.-Gen.* v. *New York Breweries Co.*, 13 T. R. 347] of the moveable estate in Scotland of any person dying after 10 October 1804, shall, within six calendar months after having assumed such possession or management in whole or part, and before being confirmed executor, testamentary or dative, exhibit upon oath or affirmation in the proper Commissary Court in Scotland a full and true inventory, duly stamped as required by the Act, of all the moveable estate of the deceased already recovered or known to be existing, distinguishing what may be situated in Scotland and what elsewhere, together with any testament or other writing relating to the disposal of such estate which he may have in his custody or power. The section goes on to provide that the inventory, together with the testament or writing, shall be recorded in the said Court.

Further, if at any subsequent time discovery shall be made of other effects belonging to the deceased, an additional inventory thereof shall, within six calendar months after the discovery, be exhibited and recorded as aforesaid. See also Estate Duty under 52 Vict. c. 7.

The penalty on refusal or failure to exhibit such inventories, or knowingly omitting therefrom any of the deceased's estate, is £20 and double duty. By the Act 44 Vict. c. 12, s. 40, the penalty imposed upon neglect to exhibit an inventory is double duty.

Sec. 40 of 48 Geo. III. c. 149 provides that an additional inventory shall specify the amount or value of the estate of the same deceased person comprised in any former inventory or inventories; that it shall be charged with duty in respect of that amount plus the amount of the estate which it itself includes; and that the duty paid on the previous inventory or inventories shall be repaid. The Act 53 Geo. III. c. 108, s. 19, exempted from duty any additional inventory not liable under the Act 48 Geo. III. c. 149 to a duty of greater amount than the duty already paid upon any former inventory of the estate of the same deceased person; and 16 & 17 Vict. c. 59, s. 8, provided that any additional inventory shall be chargeable with such an amount of duty as, together with the duty charged upon any former inventory of the same deceased person, shall make up the full amount of duty chargeable in respect of the whole estate of the said deceased specified in the said additional and any former inventory. See also (6) *infra*.

Sec. 41 of the Act 48 Geo. III. c. 149 provides that the duty on the inventory shall be chargeable only in respect of the moveable estate situate in Scotland. An alteration in this respect was introduced by the Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56, s. 9), as amended by the Sheriff Court (Scotland) Act, 1876 (39 & 40 Vict. c. 70, s. 41), by which it is made competent to include in the inventory of a domiciled Scotsman deceased, his personal estate situated in England or Ireland, provided that the fact that he died domiciled in Scotland be set forth in the affidavit to the inventory. If this be set forth, the Sheriff Clerk or Commissary Clerk may insert in the confirmation, or note thereon, and sign, a statement that the deceased died domiciled in Scotland, and such statement is, by the provision of sec. 17 of the former Act, to be taken as conclusive on the question of domicile, but only for the purposes of that Act (see *Hamilton*, 1888, 16 R. 192). In order to render a confirmation containing such a statement an active title, it must be produced in the principal Court of Probate in England, or in the Court of Probate in Ireland, as the case may be, and a copy thereof must be deposited with the registrar. When sealed with the seal of the said Court, and returned to the person producing it, it shall have the same effect in England or Ireland, as the case may be, as if probate or letters of administration had been granted (21 & 22 Vict. c. 56, ss. 12, 13; 39 & 40 Vict. c. 70, s. 41). Similar provision is made for the extension of English or Irish probates or letters of administration (21 & 22 Vict. c. 56, ss. 14, 15; A. S., 19 March 1859; see also *in the Goods of Ryde*, L. R. 2 P. & D. 86: *in re Allison*, 3 Sw. & Tr. 574, 34 L. J. P. 20. It was provided by the Act 44 Vict. c. 12, ss. 26, 27, 30, that the stamp should be no longer on the probate, etc., but on the affidavit); and the same principle is made operative by the Act 55 Vict. c. 6, in regard to probates or letters of administration (see s. 6 of the Act) granted by a Court of Probate in a British possession, or by a British Court in a foreign country, to which the Act applies. If any estate in England or Ireland be included in the inventory, the whole estate within the United Kingdom must be included therein (21 & 22 Vict. c. 56, s. 15). The inventory, while it must bear that the deceased had personal estate elsewhere than in Scotland, may still be limited to the Scots estate: and this course must be followed in the case of the Scots moveable estate of a person domiciled abroad at the date

of his death. If so limited, probate or letters of administration must be obtained in respect of any estate in England or Ireland belonging to the deceased.

Sec. 42 of 39 & 40 Vict. c. 70 provides that when an additional inventory has been given in and recorded, and confirmation granted of the English or Irish estate of a person who died domiciled in Scotland, the provisions of 21 & 22 Vict. c. 56, ss. 12, 13, shall apply thereto, whether the original confirmation shall have been sealed or not, and although the additional inventory shall not contain Scots estate belonging to the deceased. And a confirmation or additional confirmation of Scots estate, which shall contain or have appended thereto and signed by the Sheriff Clerk a note or statement of funds in England or Ireland, or both, held by the deceased in trust, shall, on being produced and sealed in conformity with the provisions of 21 & 22 Vict. c. 56, as amended by the Act last cited, have the like force and effect in respect to such funds as if probate or letters of administration had been granted; and such note or statement may be inserted or appended as aforesaid, provided the same shall have been set forth in any inventory which has been recorded in the books of the Court of which he is clerk (*ib.* s. 43).

Where probate has been granted in England or Ireland in respect of Scots estate, and duty paid thereon, and the domicile of the deceased at his death was not in the country where probate was granted, the Board of Inland Revenue has authorised an inventory impressed with a denoting stamp to be recorded.

The inventory must be exhibited upon oath or affirmation (exempt from stamp duty), which may be taken either before the Sheriff or his Substitute, or the Commissary Clerk or his Depute, or, where there is no Commissary Clerk, before the Sheriff Clerk or his Depute, or before any Commissioner appointed by the Sheriff, or before any Magistrate or Justice of the Peace within the United Kingdom or the Colonies, or before any British Consul (48 Geo. III. c. 149, s. 38; 21 & 22 Vict. c. 56, s. 11; 39 & 40 Vict. c. 70, ss. 35, 36). It is a requirement of the Inland Revenue that the deponent state whether the deceased left a widow and lawful issue surviving him, and whether he left any heritable estate.

In the case of a person dying domiciled in Scotland, the Sheriff or Commissary Court of the county within which he died is the proper Court in which to give up and record his inventory, and expede confirmation. In the case of a deceased person, possessed of personal property in Scotland, whose domicile is foreign or unknown, the proper Court is the Commissary Court of Edinburgh (21 & 22 Vict. c. 56, ss. 3, 8; 39 & 40 Vict. c. 70, Pt. VII.).

Where the whole personal estate of a person dying on or after 1 June 1881, without any deduction for debts or funeral expenses, shall exceed the value of £100, but shall not exceed the value of £300, wheresoever may have been the deceased's domicile at the time of death, the stamp duty payable upon the inventory shall be 30s. and no more (44 Vict. c. 12, s. 34). If it be afterwards discovered that the whole personal estate exceeded the value of £300, then inventory duty is payable at the ordinary rates, and no allowance is made for the 30s. already paid (*ib.* s. 35). The ordinary procedure is competent in the case of these small estates.

In certain cases where confirmation is not required, the Inland Revenue Department will, upon application, accept and file a document made up solely for revenue purposes in the form of an inventory.

As to duty where the Crown takes as *ultimus hæres*, see (3) *infra*.

The Sheriff Courts (Scotland) Act, 1876, s. 45, provides for the annual publication of a calendar of confirmations and inventories.

(2) *The Scale of Duty* introduced in 1804 by the Act 44 Geo. III. c. 98, and repealed and re-enacted in 1808 by the Act 48 Geo. III. c. 149, was altered in 1815 by 55 Geo. III. c. 184. In 1859 the scale was extended beyond estates of the value of a million sterling (22 & 23 Vict. c. 36, s. 1). By the Act 27 & 28 Vict. c. 56, s. 5, inventories of persons dying after 25 July 1864, where the whole estate did not exceed £100 in value, were exempted from duty. In 1880 this scale was superseded by a new scale (43 Vict. c. 14), which remained in force from 1 April 1880 until 1 June 1881. The Act 44 Vict. c. 12, s. 27, provides that on and after 1 June 1881 inventory duty shall be chargeable at the rate of £1 for every full sum of £50 and for any fractional part of £50 over any multiple of £50, where the estate is above £100 and not above £500 in value; at the rate of £1, 5s. for every full sum of £50 and for any fractional part of £50 over any multiple of £50, where the estate is above £500 and not above £1000 in value; and at the rate of £3 for every full sum of £100 and for any fractional part of £100 over any multiple of £100, where the estate is above £1000 in value.

It is to be observed that the scale of duty applicable to an additional inventory is that which was in force when the original inventory was exhibited and recorded (see 56 Geo. III. c. 107, s. 1; 43 Vict. c. 14, s. 9; 44 Vict. c. 12, s. 27).

Where, in the case of any person exhibiting an inventory on or after 1 June 1889, the value of the dutiable estate exceeds £10,000, an additional duty called estate duty is payable. See ESTATE DUTY UNDER 52 VICT. C. 7.

(3) *Exemptions.*—Duty is not chargeable in the case of persons dying on or after 25 July 1864 where the whole estate does not exceed £100 (27 & 28 Vict. c. 56, s. 5); or upon additional inventories, where the duty on the whole estate does not exceed that actually paid on a former inventory of the estate of the same deceased (16 & 17 Vict. c. 59, s. 8); or in respect of the effects of any common soldier, seaman, or marine who shall die in the service of the Queen (55 Geo. III. c. 184, Sched., Pt. III.); or upon the share or other interest of a deceased member registered in a colonial register under the Act 46 & 47 Vict. c. 30, s. 7, who shall have died domiciled elsewhere than in the United Kingdom (52 & 53 Vict. c. 42, s. 18). A policy of life assurance effected with any insurance company by a person who shall die domiciled elsewhere than in the United Kingdom (*ib.* s. 19) is regarded as not dutiable, on the ground that confirmation is not a condition precedent to payment.

It is to be observed in this connection that The Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 29, 30: The Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 15 (repealed 59 & 60 Vict. c. 25; 59 & 60 Vict. c. 26), The Trades Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 10: The Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 11 (repealed 56 & 57 Vict. c. 39, s. 8); The Savings Bank Act Amendment Act, 1863 (26 & 27 Vict. c. 87), ss. 41–43 (see 50 & 51 Vict. c. 40, s. 11), and The Government Annuities Act, 1882, provide that, in the cases specified, sums under £50 may be paid without confirmation being obtained. These provisions are, in the case of the five Statutes last cited, extended to sums under £100 by the Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47, s. 3), repealed by sec. 11 of the Savings Bank Act, 1887 (50 & 51 Vict. c. 40), as to savings banks, and by

the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), as to industrial and provident societies. The two Acts last cited make provisions similar to those of sec. 3, which they repeal (see *Escritt*, L. R. [1896] 1 Q. B. 461). So far as friendly societies are concerned, the regulative enactments are the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 56–59, and Sched. 3, and the Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), Schedule. Similar privileges are conferred by the Navy and Marines Property of Deceased Act, 1865 (28 & 29 Vict. c. 111), ss. 6, 15; by the Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 8; by the Regimental Debts Act, 1893 (56 Vict. c. 5), s. 16; and by a group of Acts dealing with distribution of pay, prize-money, etc. (11 Geo. IV. and 1 Will. IV. c. 41, s. 5; 27 & 28 Vict. c. 36; 29 & 30 Vict. c. 47, ss. 6, 7; 47 & 48 Vict. c. 55, s. 4).

Where the Crown takes as *ultimus hæres*, the Queen's and Lord Treasurer's Remembrancer takes possession of the estate without exhibiting an inventory or paying duty. The donee of the Crown takes it subject to a deduction which is held to cover all duties (see Clerk and Scrope, *Forms and Powers of the Court of Exchequer in Scotland*, pp. 221 *et seq.*; Currie, *Confirmation of Executors*, p. 93; LAST HEIR).

(4) *Property Liable to Duty.*—In order to render property liable to inventory duty, it must, in the first place, be, at the time of the owner's death, either property in respect of which he has exercised a power of testamentary disposal (23 Vict. c. 15, s. 4; see *Platt*, 6 M. & W. 756; 10 L. J. Ex. 105; 3 Beav. 257; 10 L. J. Ch. 131; and *sub nom. Drake*, 10 Cl. & Fin. 257), or his actual property (*Lord Advocate* v. *Lansdowne*, 1872, 11 M. 6). Accordingly, where A. bequeathed one-third of the residue of her estate to B., whom failing, to his executors and representatives, and B. predeceased A., leaving a will appointing executors, it was held that B.'s executors were not liable for duty on one-third of A.'s residue (*Lord Advocate* v. *Methven's Exors.*, 1893, 20 R. 429, and *sub nom. Lord Advocate* v. *Boyle*, 1894, 21 R. (H. L.) 6: see also *Attorney-General* v. *Loyd*, L. R. [1895] 1 Q. B. 496). It will be sufficient to attract duty, that the property in question ultimately turns out to be the property of the deceased. Thus where, on the failure of all the purposes of A.'s will by the death of B. without issue, the residue of A.'s personal estate devolved upon the representatives of his next of kin, all of whom had predeceased B., it was held that property so devolving formed part of the next of kin's estate, and was dutiable accordingly (*Lord*, L. R. 3 Eq. 737). That case followed the rule laid down by Ld. Campbell (*Attorney-General* v. *Brunning*, 8 H. L. C. 243, 30 L. J. Ex. 379), "that all moneys which the executor recovers by virtue of the probate must be considered part of the estate and effects of the testator, and subject to probate duty." In a question whether a policy of insurance is or is not dutiable, "it is immaterial who pays the premium, or on whose life the policy is taken. The material point is, in favour of whom is the beneficial obligation undertaken by the company" (*Thomson's Trs.*, 1879, 6 R. 1227, per Ld. J.-C. Moncreiff; cf. *Muirhead*, 1867, 6 M. 95; *Smith*, 1869, 7 M. 863; *Pringle's Trs.*, 1872, 10 M. 621; *Chalmers' Trs.*, 1882, 9 R. 743). But where a husband insures his life for the benefit of his wife and children, the policy, if undelivered at his death, will form part of his dutiable estate (*Schumann*, 1886, 13 R. 678; *Jarvie's Tr.*, 1887, 14 R. 411: see also ACCOUNT DUTY). The goodwill of a trading business (see *Trego*, L. R. [1896] 1 A. C. 7) is a dutiable asset of the deceased's estate (*Donald*, 1893, 21 R. 246; *Philp's Exor.*, 1894, 21 R. 482; cf. *Bell's Trs.*, 1884, 12 R. 85). In the case of solicitors, surgeons, physicians, and the like, there is not in

general any analogous asset (*Bain*, 1878, 5 R. 416; *Drummond*, 1886, 13 R. 541, per Ld. Fraser; *Arundell*, 52 L. J. Ch. 537). Observe that rents of a married woman's heritable estate, vested in her prior to the passing of 44 & 45 Vict. c. 21, fall under the *jus mariti* (*Scott's Trs.*, 1889, 16 R. 507). As to the effect of investments, deposit receipts, etc., taken by the deceased with a special destination, see ACCOUNT DUTY; DELIVERY OF DEEDS; DEPOSIT RECEIPTS; DONATION, PRESUMPTION AGAINST. As to the dutiable proportion of rents of heritable subjects, feu-duties, ground-annuals, interests on bonds, etc., dividends, and all periodical payments of the nature of income, accrued or become payable, see APPORTIONMENT ACTS; *Bulkeley*, L. R. [1896] 2 Ch. 241. Observe that the Apportionment Act, 1870 (33 & 34 Vict. c. 35), does not affect stipend and ANN, which are still regulated by the Act 1672, c. 13 (see *Latta*, 1877, 5 R. 266; *Dow*, 1887, 14 R. 928).

In the second place, the property must be personal *suâ naturâ*, or impressed with the character of personalty. As to what property falls under this description, see HERITABLE AND MOVEABLE. It may be observed that, by Statute, copyright (5 & 6 Vict. c. 45, s. 25) and patent rights (15 & 16 Vict. c. 93, s. 21; see *Advocate-General* v. *Oswald*, 1848, 10 D. 969) are declared to be personal property; and ships and shares of ships registered at ports in the United Kingdom are made liable to inventory duty (27 & 28 Vict. c. 56, s. 4). Bonds, whether heritable or personal, expressly excluding executors, and securities constituted by disposition *ex facie* absolute, qualified by back-bond, are dutiable (23 Vict. c. 15, s. 6; 23 & 24 Vict. c. 80, s. 1); and may be given up for duty in a special inventory, to be lodged with the Solicitor of Inland Revenue at Edinburgh, or may be added to the inventory of personal estate (23 & 24 Vict. c. 80, s. 1). By 31 & 32 Vict. c. 101, s. 117, it is enacted that on and after 1 January 1869 heritable securities, save where executors are expressly excluded, or where the security is by way of ground-annual or absolute disposition qualified by back-bond, shall be moveable *quoad* the creditor's succession (see *Hare*, 1889, 17 R. 105; *Cunningham*, 1889, 17 R. 218; *Hughes' Trs.*, 1890, 18 R. 299); and this section is made applicable to real burdens upon land, save ground-annuals (37 & 38 Vict. c. 94, s. 30). It has been observed that inventory duty is or is not payable according to the character of the property at the time of the owner's death (*Forbes*, L. R. 10 Eq. 178). Accordingly, where, prior to his death, his property has had impressed upon it a changed character, by reason of the doctrine of equitable conversion, it is to be treated as personalty, and duty is payable (*re Gunn*, L. R. 9 P. D. 242, approved in *Attorney-General* v. *Ailesbury*, L. R. 12 A. C. 672, per Ld. Macnaghten; see also *re Goodall*, 65 L. J. Ch. 63; *Attorney-General* v. *Brunning*, 8 H. L. C. 243, 30 L. J. Ex. 379; *Advocate-General* v. *Anstruther*, 1842, 13 D. 450); and the same rule applies to a deceased's interest in the price of heritable subjects directed to be sold by the will of some other person, whether actually sold or not (*Attorney-General* v. *Lomas*, L. R. 9 Ex. 29). Thus, the heritable assets of a Scots copartnery are personal *quoad* the succession of the partners, whether the property be situated in this country or abroad (*Minto*, 1833, 11 S. 632; *Laidlay's Trs.*, 1890, 17 R. (H. L.) 67; *Ld. Adv.* v. *Macfarlane's Trs.*, 1893, 31 S. L. R. 357; see also *Forbes*, L. R. 10 Eq. 178; *Waterer*, L. R. 15 Eq. 402; *Attorney-General* v. *Hubbuck*, L. R. 13 Q. B. D. 275; and 53 & 54 Vict. c. 39, s. 22). As to the profits from lighthouse tolls, see *Attorney-General* v. *Jones*, 1 Mac. & G. 574, 19 L. J. Ch. 266).

In the third place, the property must (subject to what has been

said above (1)) be situate in Scotland (48 Geo. III. c. 149, s. 41). Property which consists of shares in a company must be taken to be situate in the country in which the business of the company is carried on (*Attorney-General* v. *Higgins*, 2 H. & N. 339, 26 L. J. Ex. 403; *in the Goods of Ewing*, L. R. 6 P. D. 19: *Laidlay's Trs., ut supra*; cf. *Bearer*, L. R. [1895] A. C. 251). Thus, the shares in a company, incorporated by Royal Charter, having its head office in England, and whose business was carried on chiefly in India, were held to be dutiable (*Fernandes' Exors.*, L. R. 5 Ch. App. 314). Where A.'s executors were entitled to one-fourth part of the residuary estate of her husband, a domiciled Englishman, the estate consisting in part of mortgages in New Zealand, it was held that the executors' right was an English asset, and that A.'s estate was liable to probate duty in respect of one-fourth of the value of the New Zealand mortgages (*Attorney-General* v. *Sudeley*, L. R. [1896] 1 Q. B. 354, L. R. [1897] A. C. 11: see also (5) *infra*). Foreign stocks, *e.g.*, French Rentes, which are transferable in the foreign country only, and simple contract debts due by foreigners, although secured by bills or notes within this country, are not dutiable assets (*Attorney-General* v. *Dimond*, 1 C. & J. 356, 9 L. J. Ex. 90; *Attorney-General* v. *Hope*, 2 Cl. & Fin. 84); and the debtor's agreement to convert a foreign debt into a debt exigible in this country does not make it liable to duty (*Pearse*, 9 Sim. 430). But duty is payable on foreign instruments, negotiable in this country, and situate there at the time of the owner's death (*Attorney-General* v. *Bouwens*, 4 M. & W. 171, 7 L. J. Ex. 297; *Stern*, L. R. [1896] 1 Q. B. 211). It appears that, in England, personal property *in transitu* to this country at the time of the owner's death, and property belonging to a British subject which is on the seas, is liable to probate duty (*Attorney-General* v. *Pratt*, L. R. 9 Ex. 140, Hanson, 242). In Scotland, inventory duty is "payable only in respect of the amount or value of such parts of the estate and effects as shall be situated in Scotland" (48 Geo. III. c. 149, s. 41; see (1) *supra*). But where confirmation is necessary in order to obtain possession of estate arriving in this country after the owner's death, it can proceed only on a duly stamped inventory (Currie, *Confirmation of Executors*, 145). The Act 23 Vict. c. 5, s. 1, makes certain Indian Government securities dutiable, if, at the time of the owner's death, they were registered in the books of the Secretary of State in Council in London, or in the books of the Bank of England, or shall have been enfaced in India before the owner's death for the purpose of being so registered. The Regimental Debts Act, 1893 (56 Vict. c. 5, s. 15), provides that any property of an officer or soldier dying in service shall not by reason of coming, under the Act, into the hands of any paymaster, etc., be deemed to be assets where that paymaster resides; and that it shall not be necessary to take out representation in respect of that property for that place. The Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30, s. 7), provides that the share or other interest of a deceased member registered in a colonial register, under the Act, shall, so far as relates to British duties, be deemed to be part of his estate and effects in the United Kingdom, for or in respect whereof an inventory is to be exhibited and recorded in like manner as if he were registered in the register of members kept at the registered office of the company. The Act 52 & 53 Vict. c. 42, s. 18, limits the operation of the Act last cited to the case of a member who shall have died domiciled within the United Kingdom.

(5) *When and by whom the Duty is Payable; Interest.*—As to the statutory provisions regulating the time at which an inventory or an

additional inventory must be given up, see (1) *supra*. Observe that the Act 4 Geo. IV. c. 98, s. 1, provides that, in all cases of intestate succession occurring after 19 July 1823, where any person who, at the period of the death of the intestate, being next of kin, shall die before confirmation is expede, the right of such next of kin shall transmit to his representatives, so that confirmation of the said intestate's estate may be granted direct to them. But this right to obtain a direct title *per saltum* does not deprive the revenue of duty on the intermediate successions (*Ld. Adv.* v. *Findlay* (*Kennedy's Factor*), 1890, 28 S. L. R. 596). Where, however, the intestate dies domiciled abroad, the right of the next of kin is not a claim to specific Scots assets: it is a claim rather against the deceased's estate of which they form part. Accordingly, if the next of kin were domiciled abroad, and their representatives obtain a title *per saltum*, the intermediate successions will not be dutiable. It is otherwise in England (see *Partington*, L. R. 4 H. L. 100; Hanson, 291; Westlake, *Private International Law*, 3rd ed., 123; see also (4) *supra*).

Sec. 18 of the Finance Act, 1896, provides that simple interest at the rate of £3 per cent., without deduction of income tax, shall be payable from the date of the deceased's death, or, where the duty is payable by instalments, or becomes due at any date later than six months after the death, from the date at which the first instalment or the duty becomes due, and shall be recoverable as if it were part of the duty. The commissioners are empowered to remit the interest when not worth the trouble of calculation and account.

(6) *The Dutiable Amount; Rectification of Duty; Deduction of Debts.*— Sec. 5 of the Act 23 & 24 Vict. c. 80 provides that the inventory of the personal estate of a deceased shall be stamped with duty according to the value of the property contained therein at the time it is sworn to, including the proceeds accrued thereon down to that time (*H.M. Advocate* v. *Kennedy's Factor*, *ut supra*). The charge of duty is not limited to rights capable of exact valuation (*Attorney-General* v. *Brunning*, 8 H. L. C. 243, 30 L. J. Ex. 379, per Ld. Wensleydale; *Lord Advocate* v. *Meiklam*, 1860, 23 D. 57); and where an asset is entered at a merely nominal value, duty will be payable upon the true value as at the date of the oath (*Lord Advocate* v. *Pringle*, 1878, 5 R. 912; see *Talbot*, 1 John. & H. 484, 31 L. J. Ch. 197), provided that it be ascertained during the administration of the estate (see *Attorney-General* v. *Smith*, L. R. [1893] 1 Q. B. 239). But a claim for return of duty is not well founded in respect of an asset which, entered at its true market value at the date of the oath, turns out eventually to be of less value (*Galletly's Trs.*, 1880, 8 R. 74).

Sec. 37 of 44 Vict. c. 12 authorises the commissioners, at any time within three years after the recording of the inventory, to require the administrator of a deceased's estate to furnish such explanation and produce such evidence regarding the contents of the inventory as they think fit (*Attorney-General* v. *Smith*, *ut supra*). But the enactment does not debar them, on obtaining information elsewhere, from making a claim for further duty even after that time. When too little duty has been paid, an additional inventory impressed with the appropriate duty must be exhibited and recorded, as explained above (see (1)). Where too much duty has been paid, a corrective inventory, showing the true value of the estate, and impressed with the appropriate duty, must likewise be exhibited and recorded. In the latter case it is the practice of the Inland Revenue Department to transfer the duty, so far as exigible, from the original to the corrective inventory, and to return the balance. It is to be observed

that sec. 31 of 44 Vict. c. 12, providing for the return of duty overpaid, does not apply to Scotland (*Alston's Trs.*, 1895, 33 S. L. R. 278); and the ruling enactment, so far as Scotland is concerned, is sec. 23 of 5 & 6 Vict. c. 79. Under its provisions, the application is for a return of duty in respect of debts payable by law out of the estate; and it must be made within three years of the recording of the inventory, save where the executor has been prevented from claiming such return by reason of any proceeding at law or in equity. In such cases the commissioners may allow further time. Sec. 3 of the Act 24 & 25 Vict. c. 92 provides that no return of inventory duty shall be made in respect of any voluntary debt due by any person dying after 28 June 1861 which shall be expressed to be payable on the death of such person, or payable under any instrument which shall not have been *bonâ fide* delivered to the donee thereof three months before the death of such person. These two Acts make it a condition precedent to any return of duty, that the debts be instructed not only by the oath of the executor, but by "proper vouchers." Observe that "debts payable by law" are debts which, as of themselves and in their own nature and character, are payable out of the personal estate, independently of any testamentary provision as to their payment (*Percival's Exors.*, 3 H. & C. 217, 33 L. J. Ex. 289).

In ascertaining the value of the estate, it is competent, where the deceased died domiciled within the United Kingdom, to deduct from the gross amount the debts due by him to persons resident there (44 Vict. c. 12, s. 28). Prior to that enactment, it was not competent to deduct the debts in the inventory; and the proper course was to make an application under 5 & 6 Vict. c. 79, s. 23, as explained above. This course must still be followed where the deceased died domiciled abroad. Debts, to be deductible, must be "debts due and owing from the deceased and payable by law out of any part of the estate and effects comprised in the affidavit or inventory, and are not to include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bonâ fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable, or a reimbursement may be capable of being claimed from any real estate of the deceased, or from any other estate or person" (44 Vict. c. 12, s. 28). Where executors paid calls in respect of bank stock, registered in their name, duty was returned, on the ground that these were payments of debts due by the deceased (*Galletly's Trs.*, 1880, 8 R. 74); and where, in an antenuptial contract of marriage, there is a positive obligation by the husband to pay the children a fixed sum after his death, the sum may be deducted (*Advocate-General* v. *Trotter*, 1847, 10 D. 56; *Hagart's Exors.*, 1870, 9 M. 358; 1872, 10 M. (H. L.) 72). It is otherwise, however, where the obligation constitutes merely a protected succession (*Arthur & Seymour*, 1870, 8 M. 928; *Moir's Trs.*, 1874, 1 R. 345; *Marshall's Exors.*, 1874, 1 R. 847). Observe that where heritable bonds excluding executors have been included in an inventory, and deduction has been allowed under the Act 5 & 6 Vict. c. 79, s. 23, the amount still dutiable is the balance of the whole estate given up in the inventory (*Hagart's Exors., ut supra*). Further, where the personal estate of the deceased is situate partly in this country and partly abroad, the foreign estate cannot be taken into account in estimating the amount of duty to be returned under the above provision (*Ostell's* case, 18 L. J. Q. B. 201). Of course, the debts to be deducted must be legally payable out of the deceased's personal estate (*re Taylor's Estate*, 8 Ex. 384, 22 L. J. Ex. 211; *Barham*, 3 Myl. & K. 607, 3 L. J. Ch. 223; cf. *Percival's*

Exors., 3 H. & C. 217, 33 L. J. Ex. 289). Sec. 28 of the Act 44 Vict. c. 12 also provides that reasonable funeral expenses according to law may be deducted. In Scotland, these include the expense of moderate and suitable mournings for the widow and family (*Hall*, 1753, M. 11852; *Shedden*, 1802, M. 11855; *M'Intyre*, 1865, 3 M. 1074; Ersk. i. 6. 41; iii. 9. 22; 1 Bell, *Com.* 634: More, *Notes*, 341; 2 Fraser, *H. & W.* 990).

(7) *The Incidence of the Duty.*—The principles which governed the incidence of the inventory duty prior to 1 June 1881 apply to the inventory and estate duties payable under 44 Vict. c. 12, s. 27, and 52 Vict. c. 7, s. 5 (*re Bourne*, L. R. [1893] 1 Ch. 188). Accordingly, it was held in that case that where a will amounts to a specific gift of property, partly realty and partly personalty, followed by a gift of the residuary moveable estate, the duties under these Acts must be paid wholly by the residuary legatee.

(8) *The method of recovery* is regulated by the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56). See also the Act 54 & 55 Vict. c. 38, which provides for the recovery of money received for duty, and not appropriated thereto.

(9) *Forms* to aid in the preparation of inventories have been prepared under the authority of the Board of Inland Revenue, and are obtainable at the Legacy and Succession Duty Office, Edinburgh, or from distributors of stamps. These forms, and also forms for additional and corrective inventories, supplementary inventories, and inventories *ad omissa* and *ad non executa*, will be found in the appendices to Currie, *Confirmation of Executors.* Printed regulations to be observed in applications for a return of duty, on the ground of debts paid out of the deceased's effects, are obtainable at the Legacy and Succession Duty Office, Edinburgh; and forms of the statement to be delivered with the inventory for estate duty purposes, under 52 Vict. c. 7, s. 5, are supplied by the same office.

[See Hanson, *Death Duties*, 4th ed., 1897; Trevor, *Taxes on Succession*, 4th ed., 1881; Norman, *Digest of Death Duties*, 1892; Currie, *Confirmation of Executors in Scotland*, 2nd ed., 1890; Williams, *Law of Executors and Administrators*, 9th ed., 1893. See also CONFIRMATION OF EXECUTORS, ESTATE DUTY UNDER 52 VICT. C. 7, S. 5, and UNDER THE FINANCE ACT, 1894.]

Inventory of Process.—See PROCESS.

Investiture.—See INFEFTMENT.

Invoice (Fr. *envoyer*, to send) means strictly a list sent to the purchaser of goods by the seller (or by the carrier or agent), containing particulars of the goods, the price, and usually the date of despatch and the means of transport, or, if the goods are not forwarded at the same time, an intimation that the goods are held or stored to the purchaser's order.

An invoice is a document of less authority than a bill of lading or delivery-order; but its precise effect on the transference of property appears never to have been authoritatively settled in Scotland. In England, where, under the Statute of Frauds, writing is necessary, in the absence of *rei interventus*, to establish the sale of goods, the value of which exceeds £10, a signed invoice is accepted as sufficient to satisfy the Statute. As the Scots law differs materially from the English law on this point, English decisions

must be accepted with hesitation in Scotland. But one English rule which would seem to apply equally in Scotland is that an invoice, though useful evidence of a sale, is not itself the contract, and may therefore be contradicted in any particular by extrinsic evidence (*Holding*, 5 H. & N. 117, 29 L. J. Ex. 134; cf. *Jones*, 6 A. & E. 486).

Where a *bonâ fide* sale has taken place, and the goods have been invoiced to the purchaser as in store to his order (or similar phrase), and the invoice contains sufficient particulars to identify specific goods sold, without requiring any further selection, measurement, or separation, if the goods perish by a *damnum fatale* before delivery the loss will fall on the purchaser (*Anderson & Crompton*, 1870, 9 M. 122), as in the ordinary case where there is no invoice (see Sale of Goods Act, 1893, s. 18). The Ld. J.-C. Moncreiff went in that case further than his brethren could follow him, holding that invoicing the goods as held "to your order," after the contract time for delivery had expired, constituted a new contract of gratuitous storage under which the risk passed to the purchaser, though the goods were not separated.

Again, an invoice with such particulars will give a *bonâ fide* purchaser an absolute right to claim delivery (per Ld. Gifford (Ordinary) in *Stiven*, 1871, 9 M. 923); but if there be no *bonâ fide* sale, no security for a loan can be constituted over the borrower's goods by invoicing them to the lender (*Stiven, supra*; Bell, *Com.* ii. 14). Where goods are *in transitu*, the endorsement of the invoice will not be good against stoppage *in transitu*, differing in this respect from a bill of lading; while an endorsement of an invoice will be defeated by a subsequent endorsement of a bill of lading for the same goods in favour of a different endorsee (Bell, *Com.* ii. 14).

In *Pini & Co.* (1895, 22 R. 699) it was held that a docquet put on the invoice by the sellers, to the effect that the goods sent were "the same in every respect as those ordered," did not relieve the consignees from the duty of timeously examining the goods.

A contract, verbal or in writing, cannot be modified by an invoice, unless the contract expressly refers to the invoice. Thus where a brewer verbally contracted to supply a retailer with beer, and to allow him a discount of 35 per cent., it was *held* that a printed heading on an invoice was insufficient to restrict the discount to accounts paid within three months (*Buchanan & Co.*, 1895, 23 R. 264).

I. O. U.—An I. O. U. is the simplest of all money securities, being the mere acknowledgment in writing of a debt due by one person to another. It implies an obligation to pay (*Allan*, 1837, 15 S. 1130). Unless it is objected to, an I. O. U. is a perfectly good writ to instruct a loan (per Lord President (Inglis) in *Williamson*, 1882, 9 R. at 864); but the mere giving of an I. O. U., like the acceptance of a bill of exchange, does not preclude the named debtor from showing that there was no consideration (per Bovill, C. J., in *Hurton*, L. R. 3 C. P. at 164; see also *M'Creadie's Trs.*, 30 Oct. 1897, 5 S. L. T. 153). An action is not competent on the document, the proper course being to sue the debtor for the amount, using the I. O. U. as evidence of the sum due (*Neilson's Trs.*, 1883, 11 R. 119). The writing is usually expressed in the following terms:—

Edinburgh, 1 *June* 1894.

John Smith,

I. O. U. Ten pounds.

Peter Jones.

Essentials.—The essentials of an I. O. U. are: (1) It must be holograph of the granter (*Haldane*, 1872, 10 M. 541). (2) It must contain the words or letters "I owe you," or "I. O. U." (3) The amount due must be stated, and (4) it must be signed by the granter.

Non-Essentials.—An I. O. U. need not be dated. If a date is inserted, the fact that the deed is antedated will not of itself vitiate the document (*Williamson, supra*). An I. O. U. need not be addressed to any person, and the omission from the document of the name of the creditor does not invalidate it. The person in possession of the document is presumed to be the person to whom it was intended to be addressed (*Brunton*, 1 S. L. J. 58; *Ferneze Spinning Company*, 1 S. L. J. 93; *Curtis*, 1 Man. & G. 46).

Non-Negotiable.—An I. O. U. is not a negotiable document in the sense that it may be indorsed to a succession of persons. The debt, however, of which it is the acknowledgment may be assigned by the creditor, and the assignee of the debt may sue therefor, using the I. O. U. as evidence.

Stamp Duty.—An I. O. U. in the form given above, being a simple acknowledgment of a debt, is not liable to stamp duty. If, in addition to an acknowledgment of a debt, the document contain an agreement that it is to be paid on a certain day or after the lapse of a fixed period, it is a promissory note, and as such requires to be stamped. Again, if the contract is not such as to place it under the category of promissory notes, it may still be liable to stamp duty as an agreement unless the sum acknowledged to be due is under £5 (Stamp Act, 1891, 55 & 56 Vict. c. 39. See Agreement, *Exemption* No. 1; see also *Mortgage Insurance Corporation Limited*, 1888, L. R. Q. B. D. 352; *Thomson*, 1894, 22 R. 16; *Bell*, 1896, 4 S. L. T. 214).

A writing in the following terms: "Berwick, 16 March 1841. Received of Mrs. (*B. T.*) the sum of £170, for which I promise to pay her at the rate of five per cent. from the above date," was found not liable to stamp duty (*Taylor*, 11 Jur. 806). Similarly, in *Melanotte*, 13 L. J. R. (N. S.) Exch. 358, a writing expressed thus: "I. O. U. £45, 13s., which I borrowed of Mrs. Melanotte, and to pay her five per cent. till paid," was held not to require a stamp. But a writing expressed thus: "11 Oct. 1841. I. O. U. £20, to be paid on the 22nd inst.," was held liable in stamp duty (*Brooks*, 2 M. & W. 74).

Irrelevancy.—See DEFENCES.

Irritancies, Legal and Conventional.—An irritancy is the forfeiture or determination of a right consequent upon an omission to comply with, or an act done in contravention of, the express or implied conditions upon which the particular right is held. It is among contract rights and remedies that irritancies properly take place in a legal system. They arise either by force of laws, as an implied term, or in consequence of express paction between the parties to a contract. The primary purpose of all irritant clauses is to secure performance of the conditions of the contract, the penalty for non-performance by one party being the emergence of a right to irritate the contract in the person of the other party; and, as a consequence of the exercise of the right to irritate, the forfeiture of the contract rights of the offender, which may be more or less valuable.

The right to enforce an irritancy is, however, a privilege introduced in favour of one party to the contract, which may be exercised, renounced, or

waived by him at his pleasure (*Kinloch*, 1836, 14 S. 905: *Burns*, 1887, 14 R. H. L. 20; *Bidoulac*, 1889, 17 R. 144: *Hall*, 1831, 9 S. 612). And the right to irritate is alternative to, not cumulative with the usual remedies which arise upon breach of contract. Thus, a superior or landlord cannot insist in the right to irritate the contract of feu or lease and at the same time claim arrears of feu-duty or rent, or sue out damages in respect of the breach of that condition from which the right to irritate springs. He must elect between his remedies (see below, s. 1, s. 4).

On the other hand, the right to purge an irritancy incurred is a purely equitable right (Ld. Rutherfurd Clark, *Maxwell's Trs.*, 1893, 20 R. 958, p. 964), which is granted or refused by the Court in the exercise of its equitable jurisdiction, the terms upon which purgation may be allowed being within its discretion. Logically, the emergence of the right to irritate, and the election to stand upon the right which is implied in the raising of an action to enforce it, imply also the negation of any subsisting right in the offender to perform the contract. The time for performance has gone past, and, strictly, the function of the Court is confined to the declaration and enforcement of the irritancy, if found to have been incurred. The ground upon which the Court can still interpose and allow purgation is that the primary intention of parties being the performance, not the avoidance, of the contract, the allowance of purgation is truly carrying the contract into effect (Ld. Kinnear, *Cassels*, 1885, 12 R. 722, p. 777). It follows, that, where the intention of parties to the contract is clear that the occurrence of the given event shall carry with it the determination of the contract, the Court has no alternative but to give effect to this intention, the right to purge is excluded, and the intervention of the Court can only be appealed to on the general ground of its equitable jurisdiction to prevent gross abuse and oppression (*Stewart*, 1864, 2 M. 1414; see *Hannan*, 1879, 7 R. 380). The former classification of irritancies into penal and non-penal is inconclusive as a test of the admissibility of purgation, for all irritancies are in their nature penalties upon non-fulfilment of the conditions of the contract. The distinction, however, points to the grounds upon which the Court may in equity interpose between the parties to a contract (see Stair, iv. 18. 3; Ersk. ii. 5. 25; Rankine, *Leases*, 493).

I. Legal Irritancies.

1. *Irritancy* ob non solutum canonem.—Of irritancies implied by law the most important is the irritancy *ob non solutum canonem*, or tinsel of the feu. This irritancy arises upon failure to pay the feu-duty for two years. Although incident to every feu-right, it does not arise from the nature of the contract of feu, but from statute, 1597, c. 250 (see Ld. Balgray, *Mags. of Edinburgh*, 1834, 12 S. 593, p. 597). The statute, however, is declaratory in its nature (Ld. Watson, *Sandeman*, 1885, 12 R. H. L. 67, p. 71); for a condition of irritancy upon failure to pay the feu-duty is good at common law (Ld. Rutherfurd Clark, *Sandeman*, 1883, 10 R. 614, p. 629). See Irritant and Resolutive Clauses.

Whether the irritancy be legal or conventional, a declarator of irritancy is necessary before forfeiture can follow, and even an express stipulation that the irritancy shall take effect *ipso facto*, and without the necessity of declarator, will not receive effect (Stair, iv. 18. 3; see Ld. Fraser, *Cassels*, 1885, 12 R. 722, p. 759). The parties may contract out of the statute so as to deprive the superior of his right to irritate (*M'Vicar*, 1740, Mor. 4180); for, as already stated, this right is a personal privilege conferred upon the superior, which may be waived by him at his pleasure.

The irritancy thus incurred may be purged by payment of the arrears of feu-duty. Formerly a distinction was made where the irritancy was conventional (see *Wedderburn*, 1666, 2 Bro. Supp. 138; *E. of Mar*, 1680, 2 Bro. Supp. 256; Ersk. ii. 5. 27), but this is not now law. Whether legal or conventional, the irritancy is purgeable at any time before decree of declarator is extracted (*Lockhart*, 1770, Mor. 7244; *Coutts*, 1840, 1 Rob. App. p. 316; Ersk. *v.s.*; Bell, *Prin.* s. 701). And now no decree of declarator of irritancy *ob non solutum canonem* is deemed final until recorded in the appropriate Register of Sasines (50 & 51 Vict. c. 69, s. 4). Prior to this enactment, purchasers of the lands had no security from the records that a vassal whose title appeared *ex facie* complete was not in reality divested by a decree irritating his right. Anyone having an interest, whether the vassal himself, sub-feuars or purchasers from him, or holders of heritable securities, may come forward and may purge the irritancy; but third parties so paying cannot at common law demand an assignation to the superior's rights (*Guthrie*, 1880, 8 R. 107; *Hinshelwood*, 1877, 8 R. 108, note). After decree has been extracted, the irritancy cannot be purged, and an offer of payment of the arrears tendered in a reduction of the decree comes too late (*Ballenden*, 1792, Mor. 7252). The same effect would seem to follow though the decree upon which extract is given be taken in absence, provided that the vassal was properly cited, and had an opportunity of purging before the decree was taken (see Ersk. ii. 6. 44, Ld. Ivory's Note, and cases there cited; *Kennedy*, 1807, Hume, 578; see also *Campbell*, 1777, Mor. App. *voce* "Irrit." No. 1).

The effect of the irritancy, when declared and not purged, is that the feu reverts to the superior unaffected by subordinate rights granted by the vassal; for the "subordinate right is, from its nature, subject to the condition upon which the principal right, out of which it was derived, was created" (Selborne, L. C., *Sandeman*, *v.s.*, 12 R. H. L. p. 76). Accordingly, the lands fall back into the superior's hands unaffected by sub-feus (*Sandeman*, *v.s.*; *Cassels*, *v.s.*), or heritable securities granted by the vassal (*Drummond*, 1686, Mor. 7235; see *Sandeman*, 10 R. pp. 630, 632). This result, of course, does not follow if the superior's consent to the sub-feus has been obtained, or where the superior had, under the former law, confirmed the base infeftments (see Ld. Watson, *Sandeman*, *v.s.*, 12 R. H. L. p. 74). The implied entry introduced by the Conveyancing Act of 1874 does not affect the superior's rights in this respect (37 & 38 Vict. c. 94, s. 4). The decree *ob non solutum canonem*, however, does not carry to the superior personal claims competent to the vassal against third parties, though such claims be connected with the lands resumed (*Cal. Ry.*, 1875, 2 R. 917).

A proper declarator of irritancy (*Jurid. Styles*, iii. 62, 63) is competent only in the Court of Session (Ersk. ii. 5. 25; Mackay, *Pr.* i. 203). An equivalent decree, however, is now, under certain limitations, obtainable in the Sheriff Court (16 & 17 Vict. c. 80, s. 32; 55 & 56 Vict. c. 17, Sched., s. 11; *Hope*, 1872, 10 M. 347). This procedure is also applicable to the case of tenants under long leases (see below, s. 2).

The title to sue lies in the superior alone; his assignee or executor cannot sue a declarator of tinsel of the feu (Ld. Rutherfurd Clark, *Maxwell's Trs.*, 1893, 20 R. 958, p. 964). The holder of a security granted by the superior cannot sue, unless, of course, the form of his security is such as to have effected a divestiture of the superior, leaving to him only a personal *jus crediti* to insist upon reconveyance (*Campbell*, 1865, 4 M. 23). And the superior can maintain a declarator for failure to pay such feu-duties only as have accrued due during his tenure of the superiority (*Wedderburn*, 1612, Mor.

6322, 7181, 7831; *Maxwell's Trs., r.s.*): but, it is thought, he may sue on the score of arrears of feu-duties accrued before the vassal entered to the subjects (Ld. Rutherfurd Clark, *Maxwell's Trs., r.s.*). If, however, a superior betakes him to the remedy of irritating the right, he cannot also insist in an action for payment of arrears of feu-duty (*Mags. of Edinburgh*, 1834, 12 S. 593; *M'Vicar*, 1748, Mor. 15095; see below, s. 4).

See generally, Ersk. ii. 5. 26, 27: Bell, *Prin.* s. 701: Menzies, *Convey.* 524: M. Bell, *Convey.* i. 625; More's *Notes*, ccvj.

2. The remaining legal irritancies arise out of the contract of lease.

At common law such an irritancy is incurred by non-payment of rent for two successive years. This irritancy, which is obviously founded upon the analogy of feu-rights, now stands upon an Act of Sederunt, 14 Dec. 1756: but it is clear that this A. S., like the Statute of 1597 (*supra*, s. 1), is largely declaratory of common law and recognised practice (*Alexander*, 1744, Mor. 15306: Stair, ii. 9. 32, 33, and cases there cited: Hunter, *L. & T.* ii. 121 *seq.*; Rankine, *Leases*, 480). Cases in which the common law can alone be appealed to are rare; when the action is so laid, however, the Court of Session has exclusive jurisdiction, this being *remedium extraordinarium* (see Lds. Balgray and Gillies, *Horn*, 1830, 8 S. 329, p. 331: *Nisbet*, 1866, 4 M. 284, where the passages in Erskine and relative cases are fully explained by Lds. Cowan and Benholme, pp. 289, 290; Bell, *Prin.* s. 1249).

By A. S., 1756, *s.* 4, it is provided that "where a tenant has irritated his tack by suffering two years' rent to be in arrear, it shall be lawful to the setter or heritor to declare the irritancy before the Judge Ordinary, and to insist in a summary removing before him; and it shall be lawful to the Sheriff to find the irritancy incurred and to decern in the removing, any practice to the contrary notwithstanding."

By sec. 5 of the same A. S. a further remedy is provided to the landlord in cases where the tenant (*a*) is in arrear of a full year's rent, or (*b*) deserts his possession and leaves the farm unlaboured. The Sheriff may ordain the tenant to find caution for the arrears due and for five future crops, or for the remainder of the lease, if this be less than five years; and, failing caution, summarily remove him in the same manner as if the tack were determined and the tenant had been legally warned. The law thus enacted was to some extent altered by the Hypothec Abolition Act, 1880 (43 Vict. c. 12, ss. 2, 3), which provisions were in turn repealed by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 62).

This last Statute (*s.* 27) authorises the raising of an action of removing as at the term following action brought where six months' arrears of rent are due and unpaid; failing payment of arrears plus caution for one further year's rent, the Sheriff ordains the tenant to remove at the following term, in the same manner as if the lease were determined and he had been legally warned. The same section saves the rights of waygoing tenants, and expressly excludes recourse to sec. 5 of the A. S. of 1756 in cases to which the later enactment is applicable. The Statute of 1883, however, does not apply (*a*) to leases current on 11 November 1881, (*b*) to leases of lands of or under two acres in extent, or (*c*) to leases of lands over two acres, if not let for agricultural purposes.

The net result, accordingly, is—

(1) In cases (*a*), (*b*), and (*c*), the A. S. 1756 affords the only rule for the enforcement of legal irritancies.

(2) In all cases, procedure under sec. 4 of the A. S. is an alternative, though obviously a less stringent remedy than that provided by the Agricultural Holdings Act.

(3) In all cases to which the later Act applies, procedure under sec. 5 of the A. S. is excluded.

By the Sheriff Court Act, 1853, a legal irritancy, upon the analogy and having the effects of a decree *ob non solutum canonem*, has been introduced (see above, s. 1). This provision applies only to leases of more than twenty-one years in endurance, and where the subjects let do not exceed £25 in annual value.

There is a considerable body of case law applicable to these enactments, which will be found fully discussed in Hunter, *L. & T.* ii. 125 *seq.*; Rankine, *Leases*, 483 *seq.* The more important points only can here be referred to. To sustain title to sue, the arrears of rent must be due to the pursuer of the action of removing (see *Lennox*, 1893, 21 R. 77). So, the heir cannot insist in an action where the arrears belong to the landlord's executor or assignee (*Lord Elibank*, 1780, Mor. 13869; cf. *Wedderburn*, 1612, *v.s.*, s. 1; 2 Bell, *Leases*, 41). There must be the full amount of the arrears due and resting-owing at the date of the decree (*Campbell*, 1763, Mor. 13867; *Low*, 1796, Mor. 13873; Bell, *Prin.* s. 1251); but the amount may be the rent of one year, or made up by piecing together the rents of several years (*Urquhart*, 1824, 3 S. 84). The term "rent and arrears" in the A. S. does not include illiquid prestations *ad facta præstanda* (*Earl of Morton*, 1793, Mor. 13872). If the necessary amount be due, the landlord's right of action cannot be defeated by the tenant's making a payment to account (*Carruthers*, 1780, Mor. 13869; *Low*, *v.s.*). Nor can the tenant plead as *pro tanto* diminutions of the arrears due by him, and so as to exclude the action, debts due by the landlord, or public burdens paid without the landlord's authority (*Carruthers*, *v.s.*), or counter claims of damages (*Hamilton*, 1831, 9 S. 926), or sums recovered by the landlord *pendente processu* in the course of legal diligence (*Marshall*, 1803, Hume, 569; *Low*, *v.s.*; but the soundness of this principle may, it is thought, be questioned, at least so far as cases under sec. 4 of the A. S. are concerned; see 2 Bell, *Leases*, 42, note). The landlord must credit the tenant with improvement expenditure incurred by him in terms of the lease (*Urquhart*, *v.s.*); and it is a good defence to the tenant that he has been interpelled from paying rent by legal diligence (*Gordon*, 1825, 4 S. 229).

As regards the desertion requisite to constitute an irritancy under the A. S., s. 5, it will be noticed that the elements of desertion and of want of labouring must concur. A merely temporary absence is not enough; there must be a real abandonment by the tenant, inferring substantial prejudice to the landlord (*Earl of Dalhousie*, 1802, Mor. 15311; *Arnot*, 1805, Hume, 576; cf. *Honeyman*, 1806, Hume, 824). So, insufficiency of stocking will not entitle a landlord to the remedy afforded by irritancy (*Horn*, *v.s.*; see *Macdonald*, 1888, 16 R. 168).

The A. S. applies to leases of agricultural subjects only (Ld. Ormidale, *Wright*, 1875, 3 R. p. 70; Hunter, *L. & T.* ii. 127; Rankine, *Leases*, 481); but the lease need not be written, but may be verbal, from year to year, or running on tacit relocation (*Munro*, 1827, 5 S. 807).

3. *Legal Irritancies: Purgation.*—In all legal irritancies the general rule is that it is open to the offender to purge the irritancy incurred. Purgation is just implement of the obligation which has not been fulfilled, with the addition in some cases of a just security against the recurrence of a similar breach. The purgation of an irritancy *ob non solutum canonem* has been already considered (see above, s. 1). The same *modus* is adopted in cases of irritancies of tacks, the Court finding the irritancy incurred (see *Maxwell's Trs.*, *supra*, s. 1), but superseding extract to admit of an oppor-

tunity to purge by payment or consignation of the arrears due, or finding caution, as the case may be (*Campbell*, 1777, Mor. 7252, App. "Irrit." No. 1; *Macdonald*, 1825, 4 S. 227). This rule applies indifferently to cases at common law (*Phin*, 1682, Mor. 7234, 15305; *Dick*, 1683, Mor. 7184, 7234, 15306; *Alexander*, *v.s.*, s. 2), or under the enactments above referred to (see *Campbell*, *Macdonald*, *supra*). The right to purge, however, is excluded when decree has been extracted (*Hunter*, 1800, Mor. App. "Removing," No. 1; *Kinloch*, 16 June 1812, F. C.), and an offer of payment or caution in a suspension will not be regarded (*Clerk*, 1759, Mor. 7237). The same result would seem to follow upon extract decrees taken in absence (*supra*, s. 1).

4. *Legal Irritancies: How enforced.* — An irritancy *ob non solutum canonem* is, as we have seen, enforced by declarator in the Court of Session. In proceedings under the A. S., 1756, the Agricultural Holdings Act, and the Sheriff Court Act, 1853, the action is really one of removing based upon a finding in fact that the irritancy has been incurred, and not a proper declarator. In such cases declarator is unnecessary, and the action is only competently laid before the Sheriff, whose jurisdiction of first instance is here privative (*Cameron*, 1804, Mor. 13875; see below, s. 7; Mackay, *Pr.* i. 203, 230; Dove Wilson, *Sh. Ct. Pr.* 478 *seq.*). In actions of removing under A. S., 1756, the Act need not be specially libelled (Ld. Ormidale, *Lyon*, 1874, 1 R. 512, p. 515).

The landlord cannot both insist upon the irritancy and at the same time claim damages. He must elect between the remedies (see *M. of Abercorn*, 26 June 1817, F. C.; *Walker's Trs.*, 1886, 13 R. 1198; Ld. Pres. Inglis, *Bidoulac*, 1889, 17 R. 144, p. 148; Rankine, *Leases*, 479).

II. Conventional Irritancies.

5. Any lawful stipulation or condition in a contract may be fortified by an irritancy. Such clauses, like other conditions of mutual contracts, are to be construed fairly and conformably to the intention of the parties (Ld. Medwyn, *Moncreiff*, 1842, 5 D. 249, p. 257; see *Mags. of Glasgow*, 1883, 10 R. 635), and will be enforced according to their terms (*Hannan*, 1879, 7 R. 380). Considerations of hardship are not relevant (see *Moncreiff*, *v.s.*, pp. 259, 261); but the Court, in the exercise of its equitable jurisdiction, will interfere to prevent gross abuse or oppression (*Stewart*, 1864, 2 M. 1414; see *Hannan*, *v.s.*, p. 383).

Conventional irritancies that are merely reproductions of irritancies implied by law are treated as equivalent to and subject to the rules which govern the corresponding legal irritancy. Thus, although the general rule is that conventional irritancies are not purgeable, a conventional irritancy *ob non solutum canonem*, if its terms add nothing to the force of the corresponding legal irritancy, is equally purgeable (see above, s. 1).

With the exception of irritancies owing to non-implement of building conditions (see *Mags. of Glasgow*, *v.s.*; *Napier*, 1831, 9 S. 655), most of the questions regarding irritancies have, in modern practice, arisen out of the contract of lease. Some of the more generally occurring conventional irritancies may be here noted.

A lease frequently contains a conventional irritancy upon non-payment of rent, the object being to give the landlord an earlier access to the lands than the law provides under a legal irritancy. The remedy provided by the Agricultural Holdings Act has, however, practically superseded the necessity for special stipulation, but in cases to which that Act does not apply it may still be useful. The arrears of rent for the period expressed in

the lease must be resting-owing at the date of an action raised to enforce the irritancy (see *Hog*, 1825, 3 S. 617).

Other conventional irritancies in common use are those which are stipulated for in the event of a tenant's insolvency (*Moncreiff*, *v.s.*; cf. *Hannan*, *v.s.*, insolvency of a partner irritating a contract of copartnery), or bankruptcy (*Scott*, 1829, 7 S. 481; *Anstruther*, 1855, 18 D. 59; *Bidoulac*, *v.s.*, s. 4), sequestration or notour bankruptcy (*Gordon*, 1805, Mor. App. *voce* "Tack," No. 11; *Forbes*, 2 June 1812, F. C.), cessio (*Williamson*, 1848, 11 D. 332), granting a trust deed for creditors (*Hall*, 1831, 9 S. 12), or allowing an award of sequestration at the landlord's instance to go out (*Stewart*, 1864, 2 M. 1414). In these and similar cases the tenant cannot defend himself in a removing by tabling a discharge from his creditors (*Gordon*, *v.s.*; *Hall*, *v.s.*; see Ld. Moncreiff, *Tennent*, 1836, 14 S. 976, p. 979). Another condition which is frequently fenced with an irritancy is the usual prohibition against assigning and sub-setting. The additional force of the irritancy enables the landlord not only to avoid the assignation in virtue of the prohibition, but also to cut down the assignee's right (Hunter, *L. & T.* ii. 122; see *Lyon*, 1874, 1 R. 512). For examples of conventional irritancies in tacks, see *Jurid. Styles*, i. 578, 588, 590, 603.

6. *Conventional Irritancies: Cannot be purged.*—The general rule is that conventional irritancies cannot be purged (Ld. Pres. Inglis, *Lyon*, *v.s.*; *Hannan*, *v.s.*), but, as already stated, this rule may yield in cases where the conventional is a mere copy of a legal irritancy. As in the case of legal irritancies the right to enforce the irritancy is a privilege which may be waived, but the raising of a declarator or action of removing is a clear election to stand upon the irritancy. Thereafter an offer of payment of arrears of rent comes too late (*Clerk*, *v.s.*, s. 3; cf. also cases of *Gordon*, *Hall*, and *Tennent*, *supra*, s. 5). It is obvious that in many cases the admission of a right to purge would destroy any virtue in the irritancy clauses and render them absolutely nugatory (see Ld. J.-C. Inglis, *Stewart*, *v.s.*, s. 5, p. 1420; *Hannan*, *v.s.*, p. 383).

7. *Conventional Irritancies: How enforced.*—It has long been settled that it is competent to pursue removings on irritancies contained in tacks before the Sheriff and without any declarator (see *Gordon*, *Forbes*, *Hall*, and *Lyon*, *supra*; and s. 4, above; see also, as to the Sheriff's jurisdiction in removings upon irritancies, *Wylie*, 1871, 10 M. 253; *Scot. Prop. Invest. Co.*, 1881, 8 R. 737). The usually adopted styles contain clauses dispensing with the necessity of declarator, and providing for *ipso facto* nullity in the landlord's option. But neither of these clauses, it is submitted, are of real assistance. For, assuming the landlord to have a clear option to terminate upon the emergence of the hypothesis stated in the contract, the additional stipulation as to *ipso facto* nullity carries him no further in a question with an antagonistic tenant. The facts founded on by the landlord as constituting such a breach as admits his right to terminate must still be proved in the action of removing, and, if an irritancy be found to have been incurred, the question as to the time of removal, whether instant or at a term following, is a matter which falls within the discretion of the judge (see *M'Niven*, 1847, 9 D. 1138; *Williamson*, 1848, 11 D. 332; *Stewart*, *v.s.*; Rankine, *Leases*, 485, 493). But where, on the other hand, the lease treats the irritancy as a mere acceleration of the natural ish, a decree for instant removal upon incurring the irritancy is unwarranted (*Lyon*, 1874, 1 R. 512). It may be noted that an action of interdict is an inappropriate remedy for enforcing an irritancy (*Rankin*, 1864, 3 M. 128).

For the law relating to irritancies under entails, see ENTAIL.

Irritant and Resolutive Clauses. — These terms are frequently used as synonymous (see Stair, iv. 18. 3), but, properly speaking, their functions are distinct. An irritant clause is directed to irritating and avoiding a right granted in contravention of a prohibition; a resolutive clause is that by which the right of the contravener himself is forfeited and resolved (Ersk. iii. 8. 25; Bell, *Prin.* 1731; Menzies, *Conveyg.* 731, 735; see *Hepburn*, 1758, Mor. 15507; affd. 2 Pat. 17). In practice, questions as to such clauses are almost entirely confined to cases of entails, and in this connection the law is treated elsewhere. See ENTAIL.

At common law a party may contract on what conditions he pleases, or a man may dispone his property on what conditions he thinks fit, and such conditions, so far as not contrary to law, are good in a question with the other party to the contract, or the grantee and his representatives. But the case stands differently in questions with third parties or creditors. So long as the property in the subject of the contract or the disposition is not taken out of the former proprietor, in other words, if the conditions be conditions suspensive of the passing of the property, no difficulty arises. Where, however, the right of property is once transferred, no condition resolutive of the right can, at common law, affect third parties or creditors (Bell, *Prin.* ss. 109, 110; Stair, i. 14. 3; Bell, *Com.* i. 258, correcting Ersk. iii. 3. 11). Such a condition founds only a personal action; it has no effect as a real qualification of the subject (see *Corbett*, 1872, 10 M. 329). This was the object aimed at by the introduction of irritant and resolutive clauses. Thus, in the case of a sale or disposition of property under a condition or prohibition, say, against alienation, the prohibition not being, like a condition in a feu-contract, a real condition of the grant, only creates a personal obligation in the disponee, and the prohibition, being personal, lays third parties under no disqualification to acquire. The addition of an irritant clause adds nothing; for, every fiar having at common law full power of disposal, the right of a third party is unimpeachable while his author's right stands. Nor does the addition of a resolutive clause improve matters. For such a clause assumes that the contravener had a good title, and, if so, the deed granted by him was valid, and the forfeiture can only affect any right still remaining in him. The result, accordingly, is that an attempt to confer a real quality upon conditions by the adjection of irritant and resolutive clauses must be unsuccessful; except in the case of entails, under the authority of a statute (see Brodie's Stair, p. 264, where the whole matter is fully treated).

In the case of feudal contracts constituting the relation of superior and vassal, the adjection of irritant and resolutive clauses was formerly thought to give force to conditions as in a question with singular successors. This notion, however, has long been decided to be erroneous (*Tailors of Aberdeen*, 1837, 2 S. & M'L. 609; 1840, 1 Rob. App. 296). Conditions in feudal grants take nothing in aid from such clauses, so far as their effect against singular successors is concerned. If the condition be properly made a real burden, such clauses are not required to make it good against singular successors; if, on the other hand, the condition remains personal, the adjection of irritant and resolutive clauses will confer no real quality (see *Tailors of Aberdeen*, 1 Rob. App. p. 326). They may, however, afford an additional and powerful remedy to a superior seeking to enforce a condition which has been made real (*Ld. Brougham*, 2 S. & M'L. p. 668; see 1 Rob. App. pp. 315, 326; *Colquhoun*, 1867, 5 M. 773). See IRRITANCIES.

Ish and Entry.—The right of free ish and entry is usually expressly conferred by a feu-charter (*cum libero exitu et introitu*). It imports a right to all ways and passages, in so far as they may be necessary, to kirk or market through the adjacent grounds of the granter, who is by the clause laid under that burden. But the right, if not expressed, is always implied; and though the ground through which the vassal must necessarily pass should belong to another, and though it should not be subjected to any conventional servitude, the vassal is entitled to free ish and entry, because without it property would be useless. The right to claim from, and the duty to afford to, his neighbour all necessary ways and passages arises from the rights and obligations essential to property. The right must be exercised in the manner least burdensome to the conterminous proprietor, and does not imply a right to a road by the nearest line, nor will it be extended to all convenient passages.

If the deed is silent on the subject, the grant implies the use of an actual passage as it stood at the time of the conveyance. "When a man sells a portion of his ground which has an access through the other portion which he reserves, there is an implied grant of that access. That is the principle of *Cochrane* v. *Ewart* (4 Macq. 117) and a number of other decisions, and it is consistent with equity and legal principle. Nothing is better settled than that the conveyance of a piece of ground implies a right of access to it. No one can possess a piece of ground without a right of ish and entry; and the way that is to be obtained, if the conveyance is silent, is just the existing way" (*Walton Brothers*, 1876, 3 R. per Ld. Pres. Inglis at p. 1133; see also *Ferrier*, 1832, 10 S. 317; *Crawford*, 1874, 2 R. 20; *M'Laren*, 1878, 5 R. 1042; *Union Heritable Security Co.*, 1886, 13 R. 670; *Cullens*, 1895, 23 R. 209). It was held in a recent case that a proprietor was not entitled to diminish the width of a close in a burgh, where the owner of an adjacent house with a grant of access through the close objected (*Grigor*, 1896, 24 R. 86).—[See Stair, ii. 7–10; Ersk. ii. 6–9; Rankine, *Land Ownership*, 377, 396.]

"Issue."—The term issue has no technical meaning in the Scots law of succession (*Young's Trs.*, 1883, 10 R. 1165). It has been laid down that a destination to a person's issue in the ordinary case includes not children only, but direct descendants of every degree *per stirpes* (*Turner's Trs.*, 1897, 24 R. 619).

Issues.—Issue, as a technical term in civil process, means a question of fact submitted to a jury. At one time proof might be taken on issues of consent before a judge (13 & 14 Vict. c. 36, s. 46), but this procedure is obsolete, and the cases in which issues fall to be adjusted are now confined to those which are appropriated to jury trial. These are principally actions of damages, actions for nuisance, and actions of reduction (6 Geo. IV. c. 120, s. 28; and see JURY TRIAL). Even in these cases, however, which go before a jury, issues may be dispensed with of consent, and the matter tried on the record. When that course is taken, the record is not shown to the jury, but the points are stated by the respective counsel, under the direction of the judge (*Brannan*, 1884, 12 R. 61).

Interlocutor ordering Issues.—When a case is to be tried upon issues, an interlocutor is pronounced by the Lord Ordinary at the closing of the record, where the case is in the Outer House, assigning a day not later than

eight days thereafter for the adjustment. The parties must lodge the issues respectively proposed by them two days before the day so fixed (A. of S., 10 March 1870, s. 1 (5)). Where the case comes into Court by way of an appeal to the Inner House, a similar order is made on the appeal appearing in the single bills, or, it may be, after a summar roll discussion, if issues have not previously been ordered. The Act of Sederunt is directory rather than peremptory. Where a Tuesday was assigned for the adjustment, issues were held to be lodged timeously on the Monday, as the office was shut on the Saturday, and the party should not be required to lodge them as early as the Friday (*M'Alpine*, 1895, 3 S. L. T. 232).

Approval of Issues.—The issues lodged are subject to objection by the opposite party, and to alteration by the party lodging them. If the Court sustains a motion for the disapproval of issues altogether, then the action may be dismissed, or the defences repelled wholly or in part, as the case may be. If the Court is prepared to allow an issue, it holds the issue, proposed or amended, as adjusted and settled, and appoints the same to be the issue for the trial of the cause. The Court may alter a proposed issue as it sees fit, as it is responsible for the form of the issue. An interlocutor ordering issues is not one allowing proof, and cannot therefore be reclaimed against without leave (*Kennedy*, 1890, 17 R. 1036).

An interlocutor approving of issues, if not reclaimed against, is final; and on a case coming into the Inner House by notice being given for the sittings, it is incompetent to move an amendment inconsistent with that interlocutor. Accordingly, motions by defenders to add a plea of incompetency, on account of accumulation of defenders and separate matters in one action, and for separation of trials, were refused (*Arthur*, 1895, 22 R. 417). Amendment of the issue may, however, be made at any time, even in the course of the trial, under 31 & 32 Vict. c. 100, s. 29, for the purpose of determining the real question in controversy between the parties (*M'Garrey*, 1893, 1 S. L. T. 303; *M'Kean*, 1896, 3 S. L. T. 502). This amendment is subject to the same rules as amendment of the record.

Varying Issue—Reclaiming.—Where issues have been adjusted in the Outer House, and either party, if he has not moved for the fixing of a day for the trial (*Craig*, 1871, 9 M. 715; *Croucher*, 1889, 16 R. 774), is dissatisfied with their terms, he may, within six days of the date of the Lord Ordinary's interlocutor, make a motion in the Inner House to vary their terms (31 & 32 Vict. c. 100, s. 28; A. of S., 14 October 1868, s. 6). But if a party objects to an issue being allowed at all, or complains of an issue having been disallowed, he must raise the matter by way of a reclaiming note, subject to the same conditions (*Mason*, 1877, 4 R. 513), and not by a motion to vary (*Burns*, 1896, 23 R. 507). On the other hand, when the object is merely to vary an issue, a reclaiming note is incompetent (*MacArthur*, 1871, 8 S. L. R. 499). But proposing an issue on a different ground of action is not varying, and a reclaiming note is required (*Burns, supra*).

Lodging Copies.—Before the trial, eighteen copies of the issue, now always printed, although the case may be in the Outer House, are lodged for the use of the jury. Six copies of the record must also be lodged, it is said, for the same purpose, but the jury are not allowed to see the record.

Pursuer in an Issue.—The party who takes an issue is the pursuer in that issue and leads in the proof, whether he be the pursuer in the action or not (*Macdougall*, 1831, 9 S. 392; Dickson on *Evidence*, 24 *et seq.*; A. of S., 29 Nov. 1825, s. 11). Thus where the issue was whether the pursuers had homologated and acquiesced in a decree, of which they sought reduction,

the defender in the action was pursuer in the issue and led in the proof. In the issue the pursuer of the action was called "defender," and *vice versâ* (*Curries*, 1834, 12 S. 568); and in a more recent case the heading was altered from "*Issues in the cause in which A. B. is pursuer*," to "Issues in which A. B. is pursuer" (*Gordon*, 1886, 14 R. 75; see also issue in *Paterson*, 1893, 20 R. 370, 374). In the case of a defender in an action taking a counter issue, the defender is the pursuer in the counter issue, but the designations of the parties remain the same as in the action (*Powell*, 1896, 23 R. 534). When both parties are allowed issues, the Court decides which party shall stand as pursuer at the trial (A. of S., 29 Nov. 1825, s. 12).

Proof under Issue.—Proof under the issue, even although it is in general terms, is regulated by the record, as a party is never allowed to make a case differing from that of which he has given notice (*Fairley*, 1855, 18 D. 78; *Kerr*, 1858, 21 D. 169: *Hunter*, 1894, 21 R. 850). But the approval of a general issue does not necessarily imply that proof will be allowed of all the averments on record. Where an issue of "*illegally and wrongfully detained*" in an asylum was allowed, the pursuer was not permitted to prove violations of the Statute in the treatment received there (*Mackintosh*, 1865, 2 M. 389, 1261, 2 Pater. App. 1292).

Issue, General.—The form of an issue in modern practice is, in most cases, very simple, since it puts a general question (*Ireland*, 1882, 10 R. 53; *Fairleys*, 1855, 28 Sc. Jur. 22). In the older practice an issue was much longer, and often involved a great many statements of admissions and particular questions which are now omitted. Styles taken from the older cases, therefore, are not to be relied on in present practice, and are indeed, as a rule, to be avoided. Admissions are now usually dispensed with, or, if necessary, are made with reference to a schedule.

The question in dispute between the parties is the proper subject of an issue, and that should be stated particularly as to time and place, and generally as to the other facts.

In addition to the shortening of issues by generalisation, practice has also simplified them by abandoning to a great extent counter issues. Counter issues of contributory negligence, privilege, and the like, which were sometimes taken, are now unknown, and would be held to be incompetent. A counter issue is, of course, out of place where the defence consists simply of a denial of the facts relied on by the pursuer. If on the proof the issue is not proved, the case fails, and if it is proved, the defender has no further answer. But where a defender would have a good defence although the pursuer succeeded in proving his issue, that is the proper occasion for taking a counter issue.

The number of kinds of issues now in use has also decreased, since from the time when proof before a Lord Ordinary was introduced, there has been a growing disinclination to go before a jury, except in actions of damages and in certain actions of reduction (see JURY TRIAL).

Where particular Issue necessary.—Particular issues are allowed in two classes of cases: (1) where a pursuer puts his case on some special averment, and (2) where the defender rests his defence on a ground not directly raised by the pursuer. An example of the first class is found in a case where pursuer, having put his case on record upon employment by the defender, was held bound to put in issue "while in the employment of" (*Conroy*, 1895, 3 S. L. T. 33; but see *M'Sorley*, 1893, 20 R. 722). In another case a pursuer, who said that he was in a railway station "for the purpose of meeting a passenger," was required to put that in issue (*Wilson*, 1873, 1 R. 172). Where also liability was sought to be established upon an unusual and

novel conjunction of circumstances, the ordinary bare form of issue was departed from, and a very precise and full issue adjusted (*Scott's Trs.*, 1889, 17 R. 32). In some cases falling under the second description the defender may obtain a counter issue, as where he pleads *veritas*, and in some he will be able to get in his proof without a counter issue, as where he pleads contributory negligence, or privilege, but certain cases remain where he can insist upon having the pursuer's issue framed so as to raise his defence. Thus the words "travelling as a passenger" were inserted in an issue, to raise the defence pleaded by a railway company that pursuer was travelling unlawfully and without a ticket (*Hamilton*, 1857, 18 D. 999; *Little*, 1877, 15 S. L. R. 12); and where it was pleaded that pursuer was not lawfully on certain premises the issue bore "while engaged in laying a line of rails" on defenders' premises (*Scoullars*, 1868, 6 M. 1128).

The negligent exercise of statutory powers, to the injury of a neighbour's premises, has also been accorded a special issue: the object being to keep the point before the jury, that the mere fact that the defenders conducted operations which resulted in damage is not in itself a ground of liability. The issue, therefore, asked—

> Whether , the defenders, carried on operations for the construction of a sewer in an unskilful and negligent manner, in consequence of which the pursuer's property was injured?

(*M'Bride*, 1894, 21 R. 620).

Actions of Damages.—All issues in these cases contain the words "to the loss, injury, and damage of" the pursuer. The question sent to the jury, therefore, is not only that of loss or damage and the amount thereof, but also that of legal liability, or the invasion of a legal right of the pursuer (*Duncan*, 1839, 6 Cl. & Fin. 894).

Schedule of Damages.—This is a statement of the amount claimed, which comes at the end of the issue. It must be the same as the amount in the original, or restricted, conclusion of the summons. In most cases it is a random sum, and the jury may find it or any smaller sum to be due. The jury may not, however, find a larger sum, as in Scotland at no time can the pleadings be amended so as to enlarge the conclusions (C. of S. Act, 1868, s. 29), although in England there appears to be such a power, even after a verdict is returned (*The Dictator*, 1892, P. 65).

Where there is more than one issue, it may be necessary to have a schedule of damages for each, or one schedule may do for all. When the conclusion is for a lump sum on one or similar grounds of action, as in the case of different issues of slander founded on the same letter, it is the practice to put that sum in a schedule appended to the last issue, and not to split it up under the different issues. The jury may then award the whole sum under any one issue (*Falconer*, 1893, 20 R. 765). But where the acts complained of are different, as in the case of information of an alleged crime to the police, and repetition of the charge to bystanders afterwards, the proper course is to have separate conclusions and separate schedules of damages (*Douglas*, 1893, 20 R. 793). On the other hand, there may be two schedules of damages to one issue. This occurs in an action raised by a workman against his employer both at common law and the Employers Liability Act of 1880, in which case the alternative sums sued for are both scheduled (*Gaudie*, 1894, 22 R. 1; *M'Sorley*, 1893, 20 R. 722). Where there is a relevant case under the Act and a doubtful one at common law, both sums may be put in the schedule (*Henderson*, 1892, 19 R. 954). Where the sum claimed is made up of separate items, as damage to

different crops and parts of a farm through flooding, the separate items may be stated in the schedule (*Hill*, 1856, 18 D. 722).

Plurality of Parties.—Where there is more than one pursuer in an action of damages, each must take a separate issue. This is obviously necessary in slander actions, where one might succeed while another might fail in showing that the words complained of were "of and concerning" him (*Mitchell*, 1894, 21 R. 367; *Harkes*, 1862, 24 D. 701). In an action for personal injury, where the ground of action is the same, and liability, if established, would be established for all, the same result is attained by taking one issue with separate schedules of damages. If the pursuers are not related, separate sums will of course be concluded for, but if, as in the ordinary case under the Employers Liability Act, members of a family are suing on account of the death of a parent, a lump sum may be concluded for and may be split up in the schedule, or a lump sum may be scheduled and the jury may apportion it in their award. When there is only apparent and not real plurality of pursuers, as in the case of the sole partner of a firm and the firm, since the partner will be able to recover under one issue any damages which may be due, two issues will not be allowed (*Smith*, 1882, 10 R. 291).

Where several defenders are called as having conspired to do a certain act, or as having been concerned in the commission of an act involving fraud or moral delinquency (*Palmer*, 1894, 21 R. H. L. 39, 42), one issue should be taken against all (*M'Cosh*, 1832, 10 S. 579). When it is a question whether there is joint liability or whether one is liable and the other not, the course now followed is not to allow a general issue against "the defenders" and then separate issues against each (as was done in *North British Railway*, 1865, 3 M. 340, 346), but to allow one issue upon which a verdict of joint fault or of fault against one or other of the defenders may be returned. In the case of an action of damages for personal injury, the issue approved of ran: "*Whether on or about and near the pursuer was injured through the fault of the defenders, or one or other and which of them, to the loss, etc.?*" (*Caughie*, 1897, 35 S. L. R. 3; *Rattray*, 1866, 4 M. 499). In another case, where one defender was alleged to have concurred in a slander uttered by the other, the issue ran: "*Whether the defenders A. B. and C. D., or either of them and which, did falsely, etc.?*" (*Jack*, 1891, 19 R. 1). It should be pointed out, however, that the practice has not been uniform, and that in cases where only one defender could be found liable (*London, etc.*, 1867, 4 S. L. R. 167 (contract); *Cooper*, 1893, 1 S. L. T. 56 (*culpa*)), and where both or either might be found liable, two issues have been allowed (*Dakers*, 1889, 27 S. L. R. 230; *Palmer*, 1893, 20 R. 275). Separate issues were also allowed, according to a practice declared to be "quite settled," in an action against an agent and his client for wrongful use of diligence, and the full amount of damages concluded for was inserted in each schedule (*Smith*, 1882, 10 R. 291, 299, 302; *Inglis*, 1861, 23 D. 1240).

Forms of Issues.

Negligence.—Personal injury to stranger (*Messer*, 1897, 35 S. L. R. 42)—

> Whether on or about the 3rd day of January 1897 the pursuer was injured in his person (or if claim by a relative—the pursuer's son, *or* father, *or* as the case may be, was killed), while within the Leith Docks (*or* at or near Cramond Brig, *or* as the case may be), through the fault of the defenders, to the loss, injury, and damage of the pursuer?
>
> Damages laid at £ .

The expression "fault of the defender" includes the fault of "those for whom he is responsible," and it is unnecessary to put that in the issue.

Master and servant—

Whether, on or about 6th December 1892, the pursuer, while employed at the defender's works at Newton (*or* at or near some place, as the case may be), was injured, etc.!

Damages laid at £ .

If there is also a claim under the Employers Liability Act, there is added—

Or under the Employers Liability Act, 1880, £ .

It is unnecessary, for the purpose of the claim under the Statute, to take another issue in which employment by the defender is put (*M'Sorley*, 1893, 20 R. 722; *Goudie*, 1894, 22 R. 1). But if an action is raised under the Employers Liability Act alone, then the record must be framed upon employment by the defenders, and consequently the words *while in the employment of the defenders* will have to go in the issue (*Conroy*, 1895, 3 S. L. T. 34).

In cases such as the above it is not usual to put in issue what was the agent of the injury,—in *Messer's* case it was the fall of a staging, and in *M'Sorley's* of a red-hot piece of steel,—but in some cases it has been considered necessary to connect the defenders with the agent of the injury where it has not been the property of the defenders. Thus in a case against a railway company the issue was (*Gray*, 1890, 18 R. 76)—

Whether [*date and place*], the pursuer was bitten by a dog which had been placed in the defenders' custody for transit from Kelso to Perth, or elsewhere, through the fault, etc.!

In a similar case, where an infuriated bullock had escaped from the defender's auction mart, the issue bore: " . . . *by a bullock, the property or in the lawful possession of the defender*" (*Brown*, 1895, unreported).

Wrongful Invasion of Rights of Person and Property.—Where the primary question for the jury was whether a landlord committed a trespass by invading his tenant's lands before the expiry of his lease, the following was adjusted (*Gibson*, 1894, 21 R. 441)—

Whether, on or shortly before 12th May 1893, the defender wrongfully placed a quantity of bags of manure, furnished with a tarpaulin covering, on the ground then in the occupation of the pursuer, under lease between him and the defender of the farm of Airds, in the parish of Crossmichael; and whether, on or about the said day, the pursuer was injured in his person through his horse taking fright at the said bags or tarpaulin, to his loss, etc.!

Case by tenant against landlord for damage from excessive stock of game (*Broadwood*, 1855, 17 D. 1139)—

Whether in 1851 the defender wrongfully preserved, and had in excessive quantities upon the said farm, game of various kinds, whereby the crops of the said year in the schedule hereunto annexed, or part of the said crops, were destroyed or injured, to the loss, etc.!

Where pursuer was seeking damages for the death of his child, who, while suffering from an infectious disorder, had been removed, while unfit to be removed, by the defenders to their hospital without a warrant, which was necessary under sec. 42 of the Public Health (Scotland) Act 1867, the issue ran (*Mitchell*, 1893, 20 R. 253)—

Whether , defenders, wrongfully removed *C. D.*, the pursuer's son, now deceased, from the pursuer's dwelling-house in Torry, to his loss, etc.!

An issue of assault asks simply "*Whether* *pursuer did assault the defender, etc.?*" Confining in asylum should be characterised as *illegally and wrongfully* (*Macintosh*, 1865, 2 M. 389, 1261, Pat. 1292; see also *M'Cosh*, 1832, 10 S. 579).

Apprehension.—Case in which the question was raised of the liability of an employer for the act of his servant in pretended exercise of the powers conferred by the Merchant Shipping Amendment Act, 1862 (*Lundie*, 1894, 21 R. 1085)—

Whether, on or about 10th August 1893, on board defender's steamer *Chevalier*, at Fort William, *J. J. L.*, an officer in the service of the defender, acting within the scope of his authority, wrongfully and illegally caused the pursuer to be apprehended and taken in custody to the police office at Fort William, to the loss, etc.?

Case in which defender instructed apprehension of person without accusing him of any crime (*Peffers*, 1894, 22 R. 84)—

Whether, on or about 4th June 1874, the defender wrongfully ordered Constable Briggs, police constable, Colinsburgh, to apprehend the pursuer, and whether Constable Pattison, acting on that order, apprehended the pursuer, to the loss, etc.?

The considerations requiring an averment of malice and want of probable cause belong to the question of relevancy rather than that of issues (see MALICIOUS PROSECUTION and CIVIL PROCESS, ABUSE OF), but where they are necessary in order to make the action relevant, they must also be put in issue. That is to say, if privilege appears on the pursuer's own statements, the appropriate words rebutting privilege must be put in issue; if it does not so appear, it must be dealt with when it emerges at the trial (*Milne*, 1892, 20 R. 95: *Reid*, 1892, 19 R. 775). The pursuer may then prove malice and want of probable cause if he has averred them on record, but not otherwise (*Ingram*, 20 R. 771). If the pursuer's record discloses privilege, and he has no averment of malice, or if, where want of probable cause is necessary, it shows that there is probable cause, he will not be allowed an issue at all (*Bruce*, 1892, 19 R. 482; *Craig*, 1876, 3 R. 441). A pursuer does not require malice or want of probable cause in issue merely because he has averred them on record. These expressions, when not requisite to the relevancy of an action, are held to have been inserted *ob majorem cautelam* in the matter of pleading, and are not held to be part of the pursuer's case. Case against police constables (*Young*, 1891, 18 R. 830)—

Whether, on or about 5th November 1890, the said *J. M.* and *M. M.* maliciously and without probable cause apprehended the pursuer at or near the house of her mother at 31 Willowbank Crescent in Glasgow, and conveyed her to the Cranstonhill Police Office in Glasgow, to the loss, etc.?

Information of crime given to the police (*Douglas*, 1893, 20 R. 794)—

Whether [*date and place*] the defender maliciously and without probable cause, caused the pursuer to be apprehended on a charge of theft, and thereafter to be searched by a police officer at Millport, to the loss, etc.?

The same *res gestæ* may not be made the foundation of two issues. It was held incompetent to take one issue upon wrongful apprehension of pursuer as *in meditatione fugæ*, and another upon wrongful incarceration following thereon (*M'Meekin*, 1881, 8 R. 587), and the same would apply to criminal proceedings.

Diligence.—Sequestration (*Kinnas*, 1882, 9 R. 698; *Beaumont*, 1895, 2 S. L. T. 454)—

Whether [*date*] the defender wrongfully (*or* maliciously and without probable cause) applied for, procured, and maintained sequestration of the estates of *J. & W. K.*, to their loss, etc.?

Cessio (*Smith*, 1882, 10 R. 291)—

Whether [*date*] the defender wrongfully presented, or caused to be presented, in the Sheriff Court of at a petition praying that the pursuer, the said *A. B.*, be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and having obtained the Sheriff's warrant thereon, published, or caused to be published, a notice of said petition in the *Edinburgh Gazette*, to the pursuer's loss, etc.?

Case of wrongful charge and service of notice of cessio directed against the agent of the creditor (*M'Robbie*, 1891, 18 R. 470) ran—

Whether in the Sheriff Court , the defender , having obtained decree against pursuer for , did wrongfully charge him, or cause him to be charged, on said decree, and [*date*] did wrongfully serve notice of cessio on him, etc.?

Landlord's Sequestration.—The form is: "*Whether , the defender, wrongfully sequestrated the effects of the pursuer, etc.?*" (*Watson*, 1878, 5 R. 843; see also as to oppression of sequestration legally obtained *M'Leod*, 1829, 7 S. 396; *Gray*, 1891, 19 R. 25.)

Arrestment (*Gordon*, 1886, 14 R. 75; *Meikle*, 1862, 24 D. 720)—

Whether [*date*] the defenders maliciously and without any probable cause (*or* wrongfully) used or caused to be used against the pursuer an arrestment in the hands of *A.* [*designing him*] for the sum of £ , less or more, and caused the same to be continued until on or about , to the loss, etc.?

Poinding.—The issue is in general terms: "*Whether defender wrongfully caused a poinding to be executed of effects belonging to pursuer*," adding anything, such as the issue of a warrant of sale, or a sale, which may have followed thereon (*Inglis*, 1861, 23 D. 1240; *Beattie*, 1846, 8 D. 930).

Interdict (*Kennedy*, 1877, 5 R. 302; *Fife*, 1895, 23 R. 8, 10; *Moir*, 1832, 11 S. 32)—

Whether the defenders, by means of an interdict obtained by them against the pursuer, on or about [*date*] wrongfully prevented the pursuer from proceeding with building operations then in the course of being executed by him on his premises, in or near [*place*], to his loss, etc.?

Breach of Agreement to stop Proceedings (*Gibson*, 1897, 24 R. 556; *Sturrock*, 1890, 18 R. 109)—

Whether , defenders, wrongfully and in breach of their agreement with the pursuers not to do so, took decree in absence against the pursuers in the Court, to the loss, etc.?

If decree is taken after payment has been made, the issue is: "*Whether , the defenders, wrongfully and maliciously took a decree, etc.?*" (*Rhind*, 1893, 21 R. 275, 278.)

Breach of Promise and Seduction.—A pursuer complaining of breach of promise of marriage and seduction is entitled to an issue on each head, with relative schedules of damages (*Paton*, 1857, 20 D. 258; *Forbes*, 1868,

6 M. 770). In the case of breach of promise the issue runs (*Colvin*, 1890, 18 R. 115)—

Whether, in or about the month of June 1879, the defender promised to marry the pursuer? and whether the defender wrongfully failed to implement his said promise and engagement, to the loss, etc.?

In the case of seduction following upon a distinct promise of marriage, the pursuer may put in issue whether, upon the faith of the promise, she allowed the defender to seduce and have carnal intercourse with her; but some pursuers have been allowed to found upon a less distinct justification for surrendering their persons (*Gray*, 1878, 5 R. 971; *Forbes*, 1868, 6 M. 770)—

Whether, in the course of the period between May 1866 and October 1877, the defender courted the pursuer, and professed honourable intentions towards her? and whether, by means of such courtship and professions, the defender seduced the pursuer, and prevailed upon her to permit him to have carnal connection with her, to her loss, etc.?

A form of issue in an action of damages against a person committing adultery with pursuer's wife ran: "*Whether the defender did seduce and commit adultery with* , *in the house* [specified], *and did maintain an adulterous connection with her* [places specified]*?*" (*Glover*, 1856, 18 D. 609; see also *M'Donald*, 1885, 12 R. 1327.)

Reduction of Deeds.—Total incapacity (*Munro*, 1874, 1 R. 522; *Rooney*, 1895, 22 R. 761)—

Whether the [*describe deed by name, date, and No. of Process*] is not the deed of the said (*alleged granter*)?

Informality of execution (*Collie*, 1891, 18 R. 419)—

Whether *A. B.* and *C. D.*, the alleged witnesses to the said [*deed*], or either of them, did not see the said *X. Y.* subscribe the same, and did not hear him acknowledge his subscription?

Facility and Circumvention.—An issue of "undue influence" will not be allowed (*Rooney*, 1895, 22 R. 761; *M'Callum*, 1894, 21 R. 824)—

Whether, on or about , the said *A. B.* was weak and facile in mind, and easily imposed upon; and whether the defender, *C. D.*, taking advantage of his said weakness and facility, did by fraud or circumvention impetrate from him the said [*deed*], to the lesion of the said *A. B.*?

Fraud (*M'Laurin*, 1875, 3 R. 265; *Thoms*, 1865, 4 M. 252, 256; but see more particular issue adjusted in *Collie*, 1891, 18 R. 419)—

Whether the pursuer was induced to grant the said deed by fraudulent misrepresentation (*or* fraudulent concealment) practised by ?

Essential Error (*Stewart*, 1890, 17 R. H. L. 25)—

Whether in granting the said letter (*or* other writ), the pursuer (*or* said deceased *or* others) was under essential error as to its import and effect, induced by the said *P. G.*?

Force and Fear (*Gelot*, 1870, 8 M. 649, 651)—

Whether the bill of exchange [*No. of Process*] was obtained by *A. B.* [*designed*] from the said *C. D.* by force and fear, without his having received any value therefor?

Prescriptive Rights.—Right-of-way (*Paterson*, 1893, 20 R. 371)—

Whether, for forty years and upwards, or for time immemorial prior to 1892, there has been a public road or right-of-way for carts, horses, cattle, and foot-passengers, or any and which of them, leading from *A.*, in the county of *B.*, in a south-westerly direction past *C.* to *D.*, in said county, as shown and coloured red on the plan [*No. of Process*] herewith produced, and marked thereon with the letters *X. Y. Z.*?

A prescriptive right to servitude-of-way in the same case was put in issue—

Whether for [*time*] the pursuers in the issues, as proprietors of [*lands*], and their predecessors and authors in said lands, have, by themselves and their tenants, servants, and occupants, possessed a road for carting, etc.?

A prescriptive right to property is put in issue (*Mushet*, 1856, 18 D. 322) "*Whether the pursuers for the prescriptive period possessed as their property the lands described, etc?*"

Nuisance (*Cooper*, 1863, 2 M. 116, 1 M. 497)—

Whether during the years , or part thereof, there were thrown off from the defenders' works near *X.*, smoke, dust, and gaseous discharges, by which the pursuers' house and grounds at *Y.* were deteriorated, and the comfort of their occupation impaired, to the nuisance of the pursuers, and to their loss, etc.?

It was held competent under this issue to return a verdict for damages caused by smoke alone, if dust and gas were also discharged (2 M. 117). The questions of the character of the locality, and of the pursuer having come to the nuisance (*Cooper*, 1 M. 502), and also whether the nuisance has been legalised by prescription, may be tried without a counter issue. An issue of nuisance by pollution of a river was granted in the general terms: "*Whether , defenders, did, by discharging refuse or impure water at or near their mills, pollute the water of the stream?*" (*Duke of Buccleuch*, 1866, 4 M. 475, 481).

Slander.—An example of an issue of spoken slander in its simplest form is (*Reid*, 1892, 19 R. 775)—

Whether, on or about 14th October 1891, in the house 42 Street, , occupied by *S. M.*, the defender falsely and calumniously stated to the said *S. M.* (or in the presence and hearing of *W. E.*, *F. L.*, or one or more of them) that the pursuer had poisoned his wife, Mrs. *A. M.*, or used words of like import and effect, to the loss, injury, and damage of the pursuer?

Damages laid at £ .

The time when, place where, and persons to whom the slander was uttered must all go in issue, and must be specifically stated (*Broomfield*, 6 M. 992). The issue may bear "stated to the pursuer," if only he was present (*M'Kay*, 1883, 10 R. 537). As to the degrees of latitude allowed, see Cooper on *Defamation*, p. 212. When the slander has been uttered in writing, the person to whom it has been sent must be stated. If it has been published in a newspaper, however, the fact of publication merely is put in issue (*Seaton*, 1890, 17 R. 680, 18 H. of L. 20; *Godfrey*, 1890, 17 R. 1108).

When the words complained of require an innuendo, there follows in the issue after the words complained of, "*meaning thereby that the pursuer*" was or had done something as innuendoed (*Ingram*, 1893, 20 R. 771). If, however, the statement complained of is lengthy, it is usually set forth in a schedule, and the issue asks "*Whether* (or, *it being admitted that*) *pursuer said* (or *wrote or published*) *the words in the schedule?*" and then proceeds, "*and whether said words* (or *letters, etc.*) *falsely and calumniously meant, etc.?*" (*Crabbe*, 1895, 22 R. 860, 866). It is also usual, where a lengthy

statement is scheduled, to put in "*Whether said statement is in whole or in part of and concerning the pursuer, and falsely*," etc. (*Crabbe, supra*; *Knarston*, 1894, 2 S. L. T. 311; *Murdison*, 1896, 23 R. 467). The words "*of and concerning*" should also go in whenever the language complained of is not of necessity applicable only to the pursuer.

The words upon which an innuendo is based must be put in the issue as well as in the record (*Stephen*, 1865, 3 M. 571; *Milne*, 1892, 20 R. 95). Although only part of an article or letter is complained of and innuendoed, the defender is entitled to have the whole article set before the jury, so that they may judge of its tenor as a whole (*Powell*, 1896, 23 R. 534; *Burns*, 1896, 23 R. 507; *Crabbe*, 1895, 22 R. 860). When the words have been used in a language other than English, it is not now the practice to insert them in the original, but to set them forth in a translation (*Anderson*, 1891, 18 R. 467).

The innuendo put in issue must appear, in substance at least, on the record (*Moore*, 1893, 20 R. 712; *Campbell*, 1882, 9 R. 467), except where an innuendo, by focusing a lengthy statement, is practically a summary of the language complained of (*Wright*, 1889, 16 R. 1004); and all the innuendoes intended to be founded on should appear in the issue (*Scoullar*, 1852, 14 D. 920). Two innuendoes founded on the same statement may go in one issue (*Oliver*, 1895, 3 S. L. T. 214); and alternative innuendoes, independent of each other, have also been allowed (*M'Culloch*, 1850, 13 D. 334). But two issues will not be allowed on the same *res gestæ*, as, for instance, for slander and malicious information given immediately after to the police (*Gray*, 1896, 4 S. L. T. 53; *M'Meekin*, 1881, 8 R. 587); but a repetition of the charge to members of the public after information given will found an additional issue of slander (*Douglas*, 1893, 20 R. 793).

When a general charge, such as that of dishonesty, is made, and specific instances in support of it are given, the person complaining of the general charge may select the instances he puts in issue, and is not compelled to insert them all, subject always, as pointed out, to inserting the whole article in the schedule (*Powell*, 1896, 23 R. 534; *Burns*, 1896, 23 R. 507).

False Statement inducing Public Hatred.—Where the defender was alleged to have said that pursuer used language with reference to a section of the community, which language would have rendered pursuer opprobrious to that section, and the defender was further alleged to have said so with the design of thus injuring the pursuer, and that a specified injury followed in consequence, an issue was adjusted asking whether defender used the words complained of, and "*Whether the said statements are false, and were made with the design of exposing, and did expose, the pursuer to public hatred and contempt, to the loss, etc.?*" (*Paterson*, 1893, 20 R. 744). It was subsequently remarked, however, that it was desirable to adhere to established styles (*M'Laughlan*, 1894, 22 R. 38, 42), and an issue in that form has not since been allowed (*M'Laughlan, supra*; *Waddell*, 1894, 21 R. 883; *Burns*, 23 R. 507).

Holding up to Public Hatred.—An issue has been allowed, though rarely, in which the word "falsely" does not appear. The leading case (*M'Laren*, 1856, Glegg on *Reparation*, App. 497) is one in which a parliamentary candidate had been attacked in a series of newspaper articles, allegorical and sarcastic, and the issue was—

> Whether said articles, passages, and fictitious advertisements, or any parts thereof, are of and concerning the pursuer, and whether the pursuer is thereby calumniously and injuriously held up to public hatred, contempt, and ridicule, to his loss and damage?

In a subsequent case (*Cunningham*, 1868, 6 M. 926) of a similar kind an issue was allowed of holding up to "*public ridicule and contempt*," without "falsely" being inserted, but this case has not been followed as a precedent, "*hatred*" being considered essential (*M'Laughlan*, 1894, 22 R. 38, 42). But an issue without "falsely" has been suggested in other cases (*Macdonald*, 2 June 1813, F. C.; *Friend*, 1855, 17 D. 548, 551; *Macfarlane*, 1887, 14 R. 870).

Counter Issue.—Except for the purpose of proving *veritas* in an action of damages for slander, the counter issue has fallen into disuse. Contributory negligence may always be proved without a counter issue; privilege does not require one (*Wright*, 1889, 16 R. 1004; *Holehouse*, 1853, 15 D. 665); and, as has been seen above, certain defences to nuisance may also be instructed without it. Any defence, also, which depends upon *res gestæ* may be set up without a counter issue, as these may always be proved (*Bryson*, 1844, 6 D. 363; *Campbell*, 1855, 17 D. 1132; *Jackson*, 1884, 11 R. 460; *Shaw*, 1888, 15 R. 865, 871; *Craig*, 1871, 9 M. 973; *Glebe Sugar Co.*, 3 S. L. R. 33; *Ogilvy*, 1816, 14 S. 729). In an action for damages to crops by game a counter issue of miscropping was refused for the same reason (*Milne*, 5 S. L. R. 268). A counter issue of *compensatio injuriarum* is not allowed, because the defence is incompetent (*Bertram*, 1885, 12 R. 798).

Veritas, however, in an action of damages for slander, can only be proved by way of a counter issue (*M'Neil*, 1847, 10 D. 15; *Torrance*, 1868, 7 M. 243; *Craig*, *Jackson*, *supra*). How near to proving *veritas* a defender may go, under cover of *res gestæ*, or of showing provocation or his state of information at the time (*Jackson*, *supra*), it is difficult to say (*Henderson*, 1895, 23 R. 25, 32). The case last cited, however, has done much to remove the hardship under which defenders lay in respect of having relevant proof of justification or explanation refused because it encroached on *veritas*. In that case the pursuer obtained an issue whether the defender falsely or calumniously stated that a clause in a deed had been added by the pursuer after execution, meaning thereby that the clause had been fraudulently interpolated after execution. The defender admitted that he had made the statement, stated that it was true, and denied the innuendo. It was held competent to prove that the clause was added after execution, since that was a fact relevant to the defence. Had the evidence not been admitted, the defender would have had no way of establishing his defence, for the law assumed that his statement, being defamatory, was false (*Glebe Sugar Co.*, 3 S. L. R. 33; *Fletcher*, 1885, 12 R. 683, 685), and would not allow him an issue of *veritas* on part of the pursuer's issue only (*Bertram*, 1885, 12 R. 798).

Although the necessity for taking a counter issue has been somewhat altered by *Henderson's* case, the nature and form of the issue have been left untouched. It must be in such form that an affirmative answer asserts the truth of the statement of which pursuer complains. For instance, if pursuer has taken an issue whether defender stated that he had poisoned X. Y., the counter issue would be—

Or Whether [*place and date*] the defender poisoned *X. Y.*

A counter issue as to time and place (*Balfour*, 1852, 15 D. 913; *Hunter*, 1894, 21 R. 850), and in its relation to the record, is subject to the same rules as an issue (*Rankin*, 1859, 9 D. 1048).

A counter issue of *veritas* may be taken although the defender denies having used the words complained of (*Mason*, 1851, 13 D. 1347).

A counter issue should meet completely the issue against which it is taken (*Bertram*, 1885, 12 R. 798; *Milne*, 1893, 21 R. 155; *Henderson*, 1895, 23 R. 25; *Martin*, 1895, 2 S. L. T. 489). If the principal issue contains a particular and specific charge or charges, the counter issue asks, as above, if such was the fact (*Powell*, 1896, 23 R. 534). If a general allegation is complained of, however, the counter issue may specify instances which will instruct the truth of the general charge, or it may put the general charge and leave the proof to be led to depend on the defender's record. The second is the course now followed, and when the charge complained of amounted to one of addiction to excessive drinking the counter issue was (*Hunter*, 1894, 21 R. 850)—

> Whether the pursuer, from November 1881 downwards, was addicted to taking strong drink to excess, and whether this was notorious among the parishioners and congregation of Carsybairn?

As a counter issue containing particulars will, if affirmed, mean success for the defender, the particulars must be sufficient to justify the libel (*Burnet*, 1896, 24 R. 156; *M'Cubbing*, 1894, 2 S. L. T. 253; *Mitchell*, 1893, 1 S. L. T. 146). When a general issue is granted, it will be for the jury to consider whether a sufficient number of instances have been proved to sustain the counter issue, but a counter issue will not be allowed unless the record contains a sufficient averment (*Hunter*, *supra*; *Hamilton*, 1895, 3 S. L. T. 15).

Where the principal issue contains an innuendo, the rule is that the counter issue must meet the whole innuendo (*Bertram*, *supra*; *British Workman's Assurance Co.*, 1892, 4 S. L. T. 420; *Blasquez*, 1889, 16 R. 893).

The rule that a counter issue must meet the principal issue does not mean that in every case the counter issue must repeat the language of the principal issue. Where the libel practically was that pursuer kept one of the most squalid, dirty, and drunken hotels in Scotland, the defender was allowed a counter issue whether there was an excessive amount of drinking in the hotel, and whether the hotel was, on the days of the defender's visit, in a state of squalid untidiness and dirt (*M'Iver*, 1873, 11 M. 777; *Macleod*, 1891, 18 R. 811; *M'Kerchar*, 1892, 19 R. 383).

[Cooper on *Defamation*; Macfarlane and Cleghorn on *Issues*; Birnie on *Issues*.]

Iter, one of the recognised rural servitudes in Roman law, is the right of walking or using a pathway over ground belonging to another. *Iter* is thus a lesser right than *actus*, the right to drive either a beast or a carriage. A special interdict (*de itinere actuque privato*) was available to secure to the dominant proprietor free passage over the burdened land, and damages for interruption (*D.* 43. 19. 3. 3; *D.* 8. 5. 2. 3.). Though the Roman-law servitude *iter* corresponds generally to a right of footpath in Scots law, the tripartite division of servitudes of way has never had in Scotland the same practical significance that the distinction between *iter*, *actus*, and *via* had in Rome.—[Stair ii. 7. 10; Ersk. ii. 9. 12; Rankine on *Landownership*, 3rd ed., p. 393.] See Actus; Via.

Jails.—See Prisons.

Jedge and Warrant.—In burghs-royal the Dean of Guild Court has a common-law jurisdiction to examine into the condition of ruinous and suspected buildings, and, if necessary, to order them to be taken down. Further, it has power to declare by *jedge* and *warrant* that the expense of repairing or taking down and rebuilding ruinous tenements shall be a charge and real burden thereon. This procedure is generally resorted to in cases where there is some defect in the titles, or where there are several owners, or where the tenement is in the hands of adjudgers or other real creditors. The person who obtains the jedge and warrant in his favour will be entitled to possess the subjects until he has reimbursed himself by his intromissions for the expense he has properly incurred, but so soon as he is repaid, he must relinquish the possession and discharge the burden (*Gregory*, 19 July 1788, F. C.). Where the subject is possessed by a creditor, adjudger, or otherwise, and the person having right to the reversion or property either cannot be found or takes no charge of the property, the possessor may apply to the Dean of Guild for a *decree* declaring the cost of the repairs "a real and preferable debt affecting the said tenement," and for a *warrant* to possess the tenement until the sums expended, with interest, be repaid. The extract decree is the voucher of the debt, and the recording of it in the Dean of Guild's books is held legal notice of the burden. Where the tenement is ruinous, and has on that account been uninhabited for three years, a judicial procedure is authorised by Statute (1663, c. 6), by which the magistrates or Dean of Guild may summon all concerned to repair or rebuild the house. On their failure to do so, the house or area may be valued and sold. If the persons having right to the subjects are known, the price is paid to them; if not, it is deposited or consigned with the magistrates for the benefit of all having interest, and the purchaser gets a title from the magistrates, which is declared to be perfectly secure. If no one buys the area or ruinous tenement, the magistrates may order the tenement to be rebuilt and sold, the price being disposed of as before, and the purchaser getting a title from the magistrates, which is indefeasible. On this Statute it has been held that the magistrates are entitled, before consignation, to deduct from the price the expenses of the valuation and sale as taxed by the Auditor of Court (*Pollock*, 1861, 23 D. 555).

The procedure is as follows: An application is presented to the Dean of Guild at the instance of anyone having interest, setting forth the ruinous state of the buildings in question, and craving the Court to ordain the heritors to rebuild, and, failing their doing so, to grant warrant to the petitioner to do the work at their expense; to find and declare the expense of the work and of the process, and the act and warrant, a real and preferable burden and lien on the respective parts of their property; to authorise the petitioner to set and possess the subjects, and uplift the rents till he shall be fully paid; and to find the defenders liable in the expense of this process. On this petition a deliverance is given by the Dean of Guild appointing all concerned to be summoned, an execution is returned by the officer, and a visit appointed. After the visit, the answers to the petition, if any, are considered by the judge; and after the defenders have failed to rebuild their parts of the tenement, warrant is granted to the petitioner to build according to the plans produced. On the completion of the building a petition is presented craving the Court to visit the work, cognosce the

petitioner's accounts, declare him a real and preferable creditor for the principal sum of £ , as also for the sum of £ , being the expenses of process, and of the jedge and warrant to follow hereon, and to grant warrant to him to possess the said subjects till payment. A remit will then be made to visit the work, examine the accounts, and to report; and warrant will thereafter be granted or refused, as the case may be (see *Jurid. Styles*, 4th ed., vol. i. p. 584).

Applications for jedge and warrant are now somewhat rare, as the procedure to accomplish the same object is now mostly provided either by special Acts applicable to the larger burghs (*e.g.* The Edinburgh Municipal and Police Acts, 1879 and 1882), or by the Burgh Police (Scotland) Act, 1892, in the burghs to which it applies. Under the last-mentioned Act (which, however, reserves the jurisdiction of Dean of Guild Courts existing at the commencement of the Act), applications for the sale of ruinous buildings fall to be made to the Sheriff, and may be at the instance of the burgh prosecutor, the commissioners appointed under the Act, or their surveyor or sanitary inspector, or at the instance of the owner or party interested in any such houses, buildings, or areas. (For the statutory procedure regarding the valuation, sale, completion of purchaser's title, apportionment of price, etc., see the Burgh Police (Scotland) Act, 1892, ss. 195–200. For forms, etc., see Appendix to Irons, *Law and Procedure of the Dean of Guild Court*; cf. also Bankt. iv. 20. 2; Bell, *Com.* i. 784; Rankine on *Landownership*, 567.)

Jettison.—See Average; Adjustment; Marine Insurance.

Jews.—Several Statutes have been passed during the present reign respecting the Jews, and most of the disabilities to which they were formerly subjected in respect of their religious opinions have now been removed. But a Jew (though an Englishman born) is still subject to the following disqualifications, viz. that of being incompetent to fill certain high offices in the State (from which Roman Catholics are also excluded), and of being (like Roman Catholics) unable to present to any ecclesiastical benefice, the right of appointment to which may belong to any office in Her Majesty's gift which he may happen to fill (21 & 22 Vict. c. 49, s. 4). In such cases the right of presentation, in case of a vacancy, will devolve upon the Archbishop of Canterbury for the time being. A Jew, however, provided he be the owner of an advowson in his own right, may present to it (Stephen, *Com.* ii. p. 712). In regard to their disqualification for the higher offices in the State, it is provided (21 & 22 Vict. c. 49, s. 2) that "nothing herein contained shall extend, or be construed to extend, to enable any person or persons professing the Jewish religion to hold or exercise the office of guardians and justices of the United Kingdom, or of Regent of the United Kingdom, under whatever name, style, or title such office may be constituted, or of Lord High Chancellor, Lord Keeper, or Lord Commissioner of the Great Seal of Great Britain or Ireland, or of the office of Lord Lieutenant or Deputy or other Chief Governor or Governors of Ireland, or Her Majesty's High Commissioner to the General Assembly of the Church of Scotland."

By the Religious Opinions Relief Act (9 & 10 Vict. c. 59) many Acts which imposed penalties and disabilities in respect of religious opinions were repealed; and it was further provided (s. 2) that in respect

of their schools, places of worship, education, and charitable purposes, and property held therewith, Jews should be subject to the same laws as Protestant Dissenters.

Liberty of religious worship was secured to them by 18 & 19 Vict. c. 86, s. 2; and by 29 & 30 Vict. c. 22 it was made unnecessary to make and subscribe certain declarations as to qualification for offices and employments in England imposed by 8 & 9 Vict. c. 52, entituled "an Act for the relief of persons of the Jewish religion elected to municipal offices."

Prior to 1858 a Jew could not vote in the House of Commons except under a ruinous penalty. But in that year an Act was passed (21 & 22 Vict. c. 49) enabling either House to dispense with the use of the words, "On the true faith of a Christian," by resolution in individual cases; and in 1860 another Act (23 & 24 Vict. c. 63) gave power to either House to make a standing order to the same effect. Meantime, in 1858, a single form of oath had been prescribed (21 & 22 Vict. c. 48), instead of the three oaths of allegiance, supremacy, and abjuration; and finally, in 1866 (29 Vict. c. 19, ss. 1, 4), the words which caused the difficulty were omitted from the statutory form required. By the Oaths Act of 1888 (51 & 52 Vict. c. 46) it was provided that in all places and for all purposes where an oath is or shall be required by law, an affirmation may be made.

It is provided by the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16, s. 21), that a child or young person or woman shall not, saving as in the Act provided, be employed on a Sunday in a factory or workshop. The saving relates to Jewish factories and workshops, as to which it is provided (s. 51) that no penalty shall be incurred in respect of any work done on Sunday in a workshop or factory by any person or woman professing the Jewish religion, provided that the workshop or factory is in the occupation of a person professing the Jewish religion, and is on Saturday closed, and is not open for traffic on Sunday. If all the children, young persons, and women in the workshop or factory are of the Jewish religion, a Jewish employer may, by notice publicly fixed, give any two of the public holidays fixed by 38 & 39 Vict. c. 13, in lieu of Christmas Day and Good Friday (41 & 42 Vict. c. 16, s. 50).

Subject to the provisions of the recent Statutes relating to marriages and prohibited degrees, the matrimonial law for the Jews consists of their own laws or usages. Marriages amongst persons professing the Jewish religion are expressly excepted from the operation of the Marriage Acts (see 26 Geo. II. c. 33, and 4 Geo. IV. c. 76). By 6 & 7 Will. IV. c. 85, it is enacted that all persons professing the Jewish religion may continue to contract and solemnise marriages according to their own usages: and every such marriage is declared and confirmed good in law, provided that the parties both profess the Jewish religion, and that due notice shall have been given, and the certificate for the marriage shall have issued in conformity with the provisions of the Act. By this enactment, Jews, upon giving notice to the superintendent registrar of the district in which they are dwelling, and obtaining his certificate, are empowered to contract and solemnise marriage in any place sanctioned by their "usages," and they are not restricted to the district of the superintendent registrar to whom the notice has been given (see also 3 & 4 Vict. c. 72, s. 5). By the Marriage and Registration Act of 1856 (19 & 20 Vict. c. 19, s. 21) it is provided that the marriages of Jews may be solemnised by licence (which licence the superintendent registrar to whom notice of the intended marriage shall have been given is thereby authorised to grant in the form

of Sched. C annexed to the Act). As to methods of proof of Jewish marriages, see Hammick, *Marriage Law of England*, p. 159.

By the Jewish religion, marriages are allowed within certain degrees of consanguinity and affinity prohibited by our law, *e.g.* marriage with a deceased wife's sister. Similarly, according to the Jewish ecclesiastical law, divorces may be obtained on grounds not recognised by the law of Scotland, *e.g.* incompatibility of temper (on this subject, see Hammick, *op. cit.* p. 164; *Moss*, 1840, 1 Man. & G. 232).

By the ancient law of England mixed marriages were regarded as felonies. But in *Goodman* v. *G.* (28 L. J. Ch. p. 745) the Court of Appeal presumed a valid marriage between a Jew and a Christian. It appears that the stricter Jewish teaching is that such marriages are, for religious purposes, invalid (Phill. *Eccl. Law*, 2nd ed., p. 563). For the findings of the Report on Mixed Marriages, issued by the Canon Law Committee of the English Church Union on 16 June 1891, see Phill. *op. cit.* p. 563.

Jobber.—There are two classes of members of the London Stock Exchange, brokers and dealers, or jobbers. Jobbers, who are peculiar to the London Exchange, being unknown either in provincial Exchanges or Continental Bourses, are middlemen, having no direct dealings with the outside public, but buying from and selling to them through the brokers. A jobber is prohibited from dealing in more than one class of securities—or "market"—at any one time, and his remuneration does not, as in the case of a broker, take the form of commission, but is represented by the difference in the prices at which he buys and sells the same security, the difference being known as the "turn of the market."

Litigation between members, or at the instance of one member against the principal of another, is forbidden by the rules of the Exchange; but the rules do not affect the right of an outside vendor or purchaser to sue a member, and a jobber's true relations to "outsiders" have been established by a number of decisions (see *Nickalls*, 1875, L. R. 7 H. L. 530; *Maxted*, 1869, L. R. 4 Exch. 81; *Peppercorne*, 1872, 26 L. T. 656; *Queensland Investment Co.*, 1896, 12 T. L. R. 502). Briefly, it may be said that although a jobber in the first place buys or sells in his own name, he does so on the implied condition that he shall not be liable if, before a certain day, he supplies the name of a person able and willing to take his place. Thus the obligation of a purchasing jobber is that on "name-day" he will either himself take and pay for the shares, or he will pass to the vendor's broker the name of a purchaser who will accept a transfer of, and pay for them. The vendor is given ten days in which to satisfy himself as to the *responsibility* of the purchaser, but if satisfied on that point he is entitled to assume that the name submitted is that of a person able and willing to accept the shares; and if the name given be that of one who is incapable—*e.g.* of a pupil or insane person—or who has not consented, the jobber remains liable. And this is so whether the vendor has or has not exercised his right of inquiry as to the purchaser's ability to perform his contract. Such inquiry might have disclosed the purchaser's want of *capacity*; but this the vendor is entitled to assume, and, inquiry or no inquiry, the jobber is liable. Thus a vendor sold certain shares through a broker to a jobber: the jobber passed to the vendor's broker the name of a purchaser, in whose favour the vendor executed a transfer and received payment for the shares; the purchaser turned out to be a minor, legally incapable of accepting the shares, and the vendor being compelled to pay calls on them, the jobber had to make

good to him the amount of the calls (*Nickalls, supra*). The jobber can proceed against the party who furnished him with the name of the incapable person; but he cannot deny his liability to the vendor on the ground that there is another person who is ultimately liable (*Nickalls*, 1871, 23 L. T. 689; *Pepper-corne, supra*; *Queensland Investment Co., supra*). When, however, the ten days given for inquiry have expired, no question can be raised with the jobber as to the purchaser's *responsibility*. Apart from special agreement, the jobber gives no undertaking that the name of the ultimate purchaser will be registered. The jobber is discharged from liability if he gives the name of a transferee to whom no reasonable objection is taken, and who is able and willing to accept and pay for the shares, and by whom a transfer is accepted and the price paid. The liability to register is thenceforward on the transferee (*Coles*, 1868, L. R. 4 Ch. 3; *Grissel*, 1868, L. R. 4 C. P. 36).

[Broadhurst, *Law and Practice of the Stock Exchange*; Lindley, *Company Law*, 500 *et seq.*; Buckley, *Companies Acts*, 152.]

See BROKER; AGENCY; STOCKBROKER; etc.

Joint Adventure.—Distinctions were formerly drawn, and are perhaps still attempted to be drawn, between joint adventure or joint trade on the one hand, and partnership proper on the other. Thus Erskine, iii. 3. 29, says: "A copartnership is a collective and permanent society in which all the *socii* are, in regard to strangers, considered as one person, and consequently are bound *singuli in solidum* for the company's debts. A joint trade, on the contrary, is only a momentary contract where two or more persons agree to put a sum of money into a common stock, to be employed as an adventure in a particular course of trade, the produce of which, after the trading voyage is finished, is to be divided among them according to their several shares in the adventure." Whatever be the importance of this distinction in emphasising the fact that a joint adventure is confined to a particular adventure, speculation, course of trade, or voyage, all the legal results of partnership follow once it has been formed. It is established by the same evidence as partnership (*Ferguson*, 1836, 14 S. 871). It is in fact a kind of partnership. Ld. Eldon, in *Davidson*, 1815, 3 Dow, 218, said it was as proper a partnership as any other; but Mr. Bell prefers to call it a limited partnership. He states that it may take place either with unknown or dormant partners, or with partners who are known, but who use no firm or social name. According to him there is a difference between the responsibility of partners of a firm to persons dealing with them, and that of joint adventurers, namely, that the former are responsible "for every engagement *bonâ fide* relied on and not beyond the limits of the company's line of trade," while in the latter case there is no such responsibility; that is, that there is no responsibility beyond the limits of the adventure. As Ld. Pres. Campbell said, in *Withers, Birch, & Co.*, 2 Bell's *Com.* 540, the distinction means that in proper copartnery *socii* are liable for the actings of one another, even where not *in rem versum*, while joint adventurers are so liable only for furnishings actually made to the concern. This distinction, however, could not now be maintained.

It is clear that the partners of a joint adventure are responsible, just as in proper or ordinary partnership, both for the obligations undertaken by all the partners, as well as for those undertaken on their behalf, within the limits of the adventure, by any one of their number (*British Linen Co.*, 1853, 15 D. 277). On the other hand, the partners of a joint adventure are not responsible to the persons who advance money or furnish

goods to individual members to enable them to join the adventure, as it only becomes responsible for its partners' obligations after it has been formed; just as in partnership the person who advances money to enable another to become a partner in a firm has no claim against it for repayment of the sum advanced (*White*, 1841, 3 D. per Ld. Gillies, p. 340).

In these circumstances, it must now be admitted, it is thought that there is no difference in the legal responsibility of partners of a joint adventure from that of partners in ordinary or proper partnership,—in other words, that there is no distinction between joint adventure and partnership,—though perhaps in early cases the concern, especially if it were a joint adventure, was not held responsible for the particular act of the partner in circumstances where a different conclusion would now be drawn. There is at least, however, no case where a concern was not held responsible for the act of the partner because it was called a joint adventure and not a partnership (*Crook*, Mor. 14596; *Donaldson*, Mor. 14609; *Jardine*, 1828, 6 S. 564).

The name "joint adventure" is nevertheless still used as descriptive of a kind of partnership, though, as we have seen, the contract is indistinguishable from partnership (see *Young*, 1887, 14 R. 490; *Stewart*, 1893, 20 R. 260; *M'Gee*, 1895, 22 R. 274). Several of these cases where the term "joint adventure" rather than "partnership" is used to define the contract have occurred since the Partnership Act, 1890, was passed, although that Statute, particularly secs. 1 (1) and 32 (*b*), ignores the existence of any distinction between joint adventure and partnership.

The distinction is not recognised in the law of England.

[Lindley, *Partnership*, 27.] See PARTNERSHIP.

Joint and Several Rights.—Where a right is held by two or more persons jointly, each is entitled only to a share *pro rata*. Each may assign, dispose of, or discharge his share, and no more. But if it be taken to them jointly and severally, each may act in regard to it as in his own right to the extent of his share, and as mandatary for the others to the extent of their shares (Bell, *Prin.* s. 52). Owners of property *pro indiviso* have right to the use and fruits proportional to their respective shares, but the whole property cannot be disponed (although the right of each may be disponed or adjudged separately) without the consent of all. And their combined consent is required for all acts of alteration and management except such as are rendered necessary to prevent the subject from going to waste. See COMMON PROPERTY.

No effectual diligence can be used against joint property for a debt of one of the co-owners (*Fleming*, 1828, 7 S. 92 (poinding); *Lucas's Trs.*, 1894, 21 R. 1096 (arrestment); *Glen and Others*, 1896, 3 S. L. T. 361 (poinding); as to an action of maills and duties, see *Schaw*, 1889, 16 R. 336, per Ld. Shand). But a *pro indiviso* proprietrix was held to have no title to object to an action of maills and duties by her creditor in a bond and disposition in security over her share of the property, the action being to recover the rents to the extent effeiring to her share (*Schaw, supra*). Joint rights are to be distinguished from several rights in a common subject. Riparian proprietors have each a distinct and several right to the use of water flowing through their properties; members of the public have each a distinct and several right to the use of a public road. But commoners have a joint right of commonty; partners have a joint right in the partnership property; and proprietors of surrounding estates have a joint right in inland lochs. In

the case of *Blackie* (1884, 11 R. 783; 1886, 13 R. H. L. 78) the market gardeners of Edinburgh claimed a right of using the market in common, but that was not a joint right; each had a distinct and several right. Lairholders in a cemetery have not a joint right, but several rights, in regard to the management of the cemetery (*Cunningham*, 1871, 9 M. 869). Similarly, a person who has a servitude of common pasturage has a right of use in common with the proprietors, and a railway company with running powers on the line of another company has a right of use in common with the owning company; but these are not examples of joint rights. They are distinct and several rights in a common subject (*Gordon*, 1850, 13 D. 1).

The general rule is that where rights are enjoyed severally they are enforced severally, and where they are owned jointly their enforcement is by joint action. Any person who has a right unshared may make it good by action solely at his own instance, but it is not necessary to raise separate actions when persons have identical although several interests (*Forbes*, 1824, 2 S. 603; *Downie*, 1825, 4 S. 167; *Torrie*, 1849, 12 D. 328; 1852, 1 Macq. 65; *Blackie, supra*). Riparian proprietors may combine in suing an action of interdict against manufacturers who pollute the water (*Cowan & Sons*, 1876, 4 R. H. L. 14); and a landlord and tenant may raise a joint action to interdict any person from trespassing on the property (*Jolly*, 1828, 6 S. 872). A joint action for damages by one person who was injured and the representative of another who was killed in the same accident was held to be competently brought (*Revey*, 1841, 3 D. 888). But where an action of reparation is jointly brought in respect of a common injury, separate conclusions must be inserted in regard to the several pursuers, and separate issues taken (*Fleshers of Dumfries*, 10 Dec. 1816, F. C.; *Harkes*, 1862, 24 D. 701). When a joint action was brought by five pursuers, and two died during the process, the remaining three were allowed to proceed without the heirs of the deceased having sisted themselves, the remaining pursuers having each a right in himself to sue the action (*Hay*, 1861, 24 D. 116; *Butchart*, 1841, 3 D. 1040). But there can be no joint action where the interest of the pursuers or their ground of action is not identical. Persons whose interests are merely similar cannot combine in an action against a common debtor (*Midwinter*, 1751, 1 Pat. 488). It has been held in the Outer House, although on a reclaiming note the point was not made the basis of decision, that two heritable creditors with separate bonds and dispositions in security cannot combine in an action of poinding the ground against the common debtor (*Douglas*, 1884, 12 R. 10); and it has been held that the creditors in two bonds granted by the same debtors, who raised a joint action against the agent for the grantors on the ground that he had delivered the bonds knowing that some of the signatures were forged, had no common but rather adverse interests, and that their summons, which had no separate conclusions, was incompetent (*Gibson*, 1866, 5 M. 113). When an action by several pursuers is held incompetent on the ground of want of common interest, it may be allowed to proceed at the instance of one (*Gray*, 1741, Mor. 11986; *Bonthron*, 1828, 7 S. 215; *Douglas*, 1884, 12 R. 10).

The rule that owners of a joint right must combine in suing an action based on that right is subject to this exception, that any one of them may sue alone when the object of the action is (1) the division of the right, or (2) the prevention of injury to, or the recovery of damages in respect of injury to, the right. But when damages are sought they can only be recovered in so far as effeiring to the share of the pursuer. When the

action is founded on contract it must be at the joint instance of all the owners of the right, unless it appears that the contract was made not with all, but with those who sue, acting as mandataries or *negotiorum gestores* for all (*Grozier*, 1871, 9 M. 826; *Lawson*, 1850, 13 D. 175; *Johnston*, 1855, 17 D. 1023; *Bow*, 1825, 4 S. 276). The instance properly used in the case of particular forms of joint right, *e.g.* trustees, executors, partners, members of a club or other voluntary association, will be dealt with under their respective headings or in the article on TITLE TO SUE. The rules stated here determine those cases which do not fall under such special examples. One person having a share in a joint right under agreement cannot sue for implement (*Ditrick*, 1885, 12 R. 416); and an action of removing cannot be sued except with consent and concurrence or authority of all the co-proprietors (*Bruce*, 16 Nov. 1808, F. C.; *Murdoch*, 1679, 3 B. S. 297; *Grozier*, 1871, 9 M. 826). One of several *pro indiviso* proprietors is not entitled to raise an action against a neighbouring proprietor to have the extent of the property declared (*Millar*, 1861, 23 D. 743). A part owner of a ship cannot raise an action for demurrage (*Scotland*, 1830, 9 S. 25); but he may sue for injury to the ship, and recover damages so far as effeiring to his share in the vessel (*Lawson*, 1850, 13 D. 175). A partner may recover damages for injury received by slanderous statements about the firm (*Williams*, 1841, 3 D. 600). One *pro indiviso* proprietor was held entitled to sue an action of declarator of his right and for removal of buildings erected on the property (*Johnston*, 1855, 17 D. 1023; cf. *Lade*, 1863, 2 M. 17). Two out of five joint adventurers were found entitled to sue another of their number, after the adventure was at an end, for count and reckoning and payment of their share of the balance (*Pyper*, 1878, 6 R. 143); and this case was followed in another by two joint adventurers against a third on an agreement between them. After the action was raised, one of the pursuers was sequestrated, and his trustee refused to join in the action. The case was called in the name of the other pursuer, and insisted in to the extent of recovering half the sum (*Shaw*, 1893, 20 R. 718). And action was sustained against one of the partners of a company by the others for payment of a sum arising out of certain branches of the business (*M'Intyre*, 1831, 9 S. 284).

When one joint owner raises an action alone, he should call the others as defenders (*Johnston, supra*; *Lade, supra*), or at least the action should be intimated to them (*Lawson, supra*).

See also CLUB; COMMON GABLE; COMMON INTEREST; COMMON PROPERTY; COMMONTY; EXECUTORS; JOINT ADVENTURE; PARTNERSHIP; TRUST; TITLE TO SUE; etc. For rights of fee and liferent, see CONJUNCT RIGHTS; LIFERENT AND FEE.

Joint Committee.—*COUNTY COUNCIL.*—A county council, or county councils and town councils (including police commissioners of a burgh or police burgh (Local Government Act, 1889, s. 76 (10)), may from time to time join in appointing out of their respective bodies, a joint committee for any purpose of the Local Government Act, 1889, in which they are jointly interested (s. 76 (1)). The county council may delegate any powers which they exercise to the committee, provided they do not delegate any power of raising money by loan or rates (s. 76 (2 and 3); see Local Government Act, 1894, s. 34). Subject to the powers delegated, any joint committee, in respect of any matter delegated to it, has the same power as the councils appointing it (s. 76 (4)). The members of a joint committee

are appointed at such times and in such manner as may be from time to time fixed by the council who appointed them, and the joint committee holds office for such time as may be fixed by such council (s. 76 (5)). The number of members of a joint committee is fixed by arrangement of the councils appointing.

Chairman.—The joint committee elects a chairman, who holds office for such period as is fixed at the time of his election; and where there is an equality of votes for two or more persons as chairman, one of those persons is elected by lot. The chairman has a casting as well as a deliberative vote (s. 76 (7)).

Costs.—The costs of a joint committee are defrayed by the councils by whom its members were appointed in the proportion agreed to by them. The proportion of the costs falling to be defrayed by any county council or town council is paid out of the county fund or burgh fund, as the case may be, and is provided for by a rate imposed and levied as nearly as possible in the same manner and subject to the same provisions as if the costs had been incurred by the county council or by a district committee, or by the town council, as the case may be (s. 76 (8)).

Quorum and Proceedings.—The councils appointing a joint committee may, jointly, from time to time make, vary, and revoke regulations respecting the quorum, proceedings, and place of meeting of the joint committee (s. 76 (8)).

Under sec. 15 of the Local Government Act of 1889 the Secretary for Scotland may transfer to a county council the powers, duties, and liabilities of certain Government departments and other authorities. Where such powers, duties, and liabilities arise within two or more counties, they may be transferred to the county councils of such two or more counties jointly, and may be exercised and discharged by a joint committee of such councils (s. 15 (3)).

Roads and Bridges.—Where a bridge (not turnpike previous to 1878) is not wholly situated in one county or burgh, the management of the bridge, failing agreement, is vested in a joint bridge committee appointed by the trustees or local authorities chargeable with the cost of maintenance and rebuilding, unless on an application of either party to determine otherwise. The committee is appointed annually, not more than five persons representing each road authority. The joint bridge committee appoints its chairman and remunerates its officers. In case of a difference of opinion, the representatives of each road authority have one vote, and where there is equality in voting the question is referred to a standing arbitrator, to be named annually, or, failing such nomination, the Sheriff of any adjoining county (Roads and Bridges Act, 1878, ss. 38 and 39).

Rivers Pollution Prevention Act, 1876, 39 & 40 Vict. c. 75.—The Secretary for Scotland, by provisional order made on the application of the council of any of the counties and burghs concerned, may constitute a joint committee or other body representing all the counties and burghs through or by which a river or any part or tributary thereof passes, and may confer on such committee all the powers of a sanitary authority under the Rivers Pollution Prevention Act, 1876. The Secretary for Scotland may make provisions respecting the constitution and proceedings of the said committee or body, and may provide for the payment of the expenses of such committee or body by the counties and burghs represented by it, and for the audit of the accounts of such committee or body, and their officers (Local Government Act, 1889, s. 55).

Parish Council.—Any parish council, or parish councils and

county councils or district committees, or town councils or burgh commissioners, may, from time to time, join in appointing, out of their respective bodies, a joint committee for any purpose of the Local Government (Scotland) Act, 1894, in which they are jointly interested. The provisions of sec. 76 of the Local Government Act, 1889, with regard to the appointment and management of joint committees apply to joint committees of a parish council.

Joint Obligations.—See CONJUNCTLY AND SEVERALLY; CO-OBLIGANT.

Joint Stock Companies.

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1. Common-Law Companies.

Joint stock companies were recognised in Scotland prior to the Companies Acts. The Bubble Act of 1719 (6 Geo. I. c. 18), which declared such companies illegal and public nuisances, and their promoters punishable by the criminal law, was never enforced in Scotland, though it was pleaded in 1730 in *Masons of Lanark*, Mor. 14554. The leading features of a joint stock company—viz. the separate *persona* of the company, the right to sue and be sued in the company's name, with the names of some of the directors added (see *Insurance Co.*, 5 S. 348), the transferability of the stock (see Ld. Curriehill in *Drew*, 1865, 3 M. 385, 392, and Ld. Pres. Inglis in *Muir*, 1878, 6 R. 392, 399), and the management of the company's affairs by directors and officials, not by the shareholders—were not opposed to the common law of Scotland. As in the case of partnerships proper, debts must first be constituted against the company before any shareholder can be called on to pay; and the liability of members is unlimited, notwithstanding the decision in *Stevenson* v. *M'Nair*, 1757, Kames, *Select Dec.* 191, which was never followed. Such companies cannot hold land in the corporate name. It must be held in the name of trustees for the company.

It is unnecessary to detail the Acts of 1825, 1826, 1834, and 1844, which gave facilities for the incorporation of companies, and for their suing and being sued. Other Acts were passed in 1844 and 1848 regarding the incorporation and winding up of companies, but these did not apply to Scotland; nor did the Act of 1855 (18 & 19 Vict. c. 133), which first introduced limited liability. The first Act dealing with the incorporation, regulation, and winding up of joint stock companies, limited and unlimited, which included those established in Scotland, was that of 1856 (19 & 20 Vict. c. 47), amended in 1857 and 1858. These are now repealed by the Companies Act, 1862 (25 & 26 Vict. c. 89). By that Act (s. 4) no common-law company or partnership consisting of more than twenty (or in case of banks, ten) members can be formed after 2 November 1862; and provision is further made for common-law companies being wound up by the Court, but not voluntarily or under supervision (ss. 199–204).

2. Chartered Companies.

These are proper corporations created by royal charter granted by the Crown in the exercise of its prerogative, or by special Act of Parliament. Their characteristics or *naturalia* are: a separate *persona*; a corporate name under which they are entitled to act and contract, to sue and be sued, and to hold land and other property; perpetual succession; a common seal; power to act by a majority and to make bye-laws; and the privilege of limited liability. In regard to the last point, it has been said that "the corporation, being a separate person, has its own estate and its own liabilities, and the corporators are not liable for the corporation, but only to the corporation within the limit of the obligation they have undertaken to subscribe to the corporate funds. *Si quid universitati debetur, singulis non*

debetur; nec quod universitas debet, singuli debent" (Ld. Pres. Inglis, 1878, 6 R. 401). Indeed, it is said that the Crown cannot, at common law, create a corporation with unlimited liability on the part of its members (per Ld. Deas in *Sanders*, 1879, 7 R. 157, 168). At anyrate, it was assumed, in 1826, that the Crown would not do so without statutory authority (per Ld. Pres. Inglis, 162), and accordingly it was enacted, by 6 Geo. IV. c. 91, s. 2, that in any future royal charter for the incorporation of any company it should be lawful to provide that the members should be individually liable for the debts of the corporation to such extent and subject to such restrictions as the Crown should deem proper and should declare in the charter. This was repealed but in substance re-enacted by the Letters Patent Act, 1837, "letters patent" being substituted for "charter." The Royal Bank of Scotland, in 1727, and the British Linen Company Bank, in 1819 (though its original letters patent were granted in 1746), were incorporated by royal charter at common law, and with the Bank of Scotland, which was incorporated by a special Act of the Scots Parliament in 1695, were known both popularly and legally as the "chartered banks" (1 Bell, Com. 101, 102). The Commercial Bank of Scotland was established in 1810, and the National Bank of Scotland in 1825, and both obtained in 1831 royal charters under the Act 6 Geo. IV. c. 91, with the liability of the shareholders unlimited. This was done by declaring that nothing contained in the charters should limit the responsibility of the partners under their original constitutions. From this time (1831) it may fairly be said that the meaning of the term "chartered banks" was more comprehensive, and included the two new banks as well as the three old ones (per Ld. Pres. Inglis, 7 R. 162, and Ld. Shand, 172); but *per incuriam*, Ld. Pres. Inglis in *M'Kinnon*, 1884, 11 R. 676, 680, misstates the import of *Sanders'* case, as confining the term to the three old banks. But the term does not include banks registered and incorporated under public Statutes, like the Companies Act, 1862 (*Sanders, supra*). The Scotch banks other than the original "chartered" ones have now registered as "limited" companies with reserve capital under the Companies Act, 1879.

Chartered companies cannot be dissolved at the will of their members, but only by public authority, *e.g.* by surrender duly made to and accepted by the Crown. Their rights may also for due cause be forfeited, the forfeiture being declared by the Court. They may also be extinguished by becoming incapable of fulfilling the purposes of their institution.

Royal burghs had an express or presumed authority delegated to them from the Crown to erect guilds or trade societies into corporations, with the usual corporate rights. The writ or charter was issued under the burgh seal, and was called a "seal of cause." Many of these exist and are fully recognised in Scotland. Lords of regality and barons also exercised similar powers of erecting corporations within their burghs of regality and barony. See further on this subject, and on the difference between the law of corporations in Scotland and England, *University of Glasgow* v. *Faculty of Physicians and Surgeons, Glasgow*, 1834–1840, 13 S. 9, 2 S. & M'L. 275, 15 S. 736, and 1 Rob. App. 397.

3. Companies under the Companies Clauses Acts.

Companies were also incorporated by special Acts of Parliament for the purpose of carrying out large enterprises of a public nature, such as waterworks, gasworks, railways, harbours, etc. By those Acts the companies

were incorporated with all the powers and privileges of complete corporations, and the Act contained in full detail the constitution, regulations, and powers of the company. It also contained the compulsory powers, privileges, and monopolies which Parliament conferred for carrying out the public enterprise. As such Acts came to be more numerous, the system was adopted in 1845 of throwing into general Acts the statutory provisions common to the constitution of all such companies and to the different enterprises concerned. Thus there were passed in 1845 and subsequent years "Clauses Acts" applicable to companies to be in future incorporated by Act of Parliament for the execution of undertakings of a public nature, and also the acquisition of lands for public works, and the construction of railways, waterworks, gasworks, harbours, etc. It is provided that these Acts shall apply to companies and undertakings authorised in future, and shall be incorporated with the special Act and construed along with them except so far as varied or excepted by the special Act. But provision is also made for the partial incorporation of the portions of the Acts applicable to different subjects. If the special Act does not expressly or by necessary implication exclude it, the general Act is to be taken as incorporated.

The Companies Clauses Consolidation Acts applicable to Scotland are the following: 1845, 8 & 9 Vict. c. 17; 1863, 26 & 27 Vict. c. 118; and 1869, 32 & 33 Vict. c. 48. They contain a code regulating the constitution and management of such companies. Their provisions differ in many particulars from those of the Companies Acts, and notably in the absence of any winding-up clauses. But such companies (except railway companies) may be wound up under the Companies Act, 1862, s. 199 (*Barton Water Co.*, 1889, 42 Ch. D. 585; *Boro' of Portsmouth Tramways Co.*, [1892] 2 Ch. 362). As to a railway company, it is, as Ld. Cairns expresses it (*Gardner*, 1867, 2 Ch. 201, 217), "a going concern with internal and parliamentary powers of management not to be interfered with; a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under the contract pledging it as security, be destroyed, broken up, or annihilated." See DEBENTURE and DEBENTURE STOCK, where the difference between the rights and remedies of creditors of companies under the Companies Clauses Acts and the Companies Acts is explained.

Again, companies under the Companies Clauses Acts may, unlike those registered under the Companies Acts, issue shares at a discount (see Acts 1845, s. 63; 1863, s. 21; 1869, s. 5; and *Klenck*, 1888, 16 R. 280, per Ld. Shand). Generally, the powers of such companies which go beyond the common law are somewhat jealously scrutinised (*Scottish Drainage Co.*, 1889, 16 R. H. L. 16). For decisions of the Scottish Courts under the Companies Clauses Acts, see Shaw's *Digest*, *voce* "Railway," pp. 1527–1530; and Deas on *Railways* (Ferguson's edition), Part II.

4. COMPANIES REGISTERED UNDER THE COMPANIES ACTS.

The Statute 59 & 60 Vict. c. 14 provides that the following Acts may be cited as the Companies Acts, 1862–1893, namely—

The Companies Act, 1862, 25 & 26 Vict. c. 89.
The Companies Seals Act, 1864, 27 & 28 Vict. c. 19.
The Companies Act Amendment Act, 1867, 30 & 31 Vict. c. 131.
The Companies Arrangement Act, 1870, 33 & 34 Vict. c. 104.
The Companies Acts Amendment Act, 1877, 40 & 41 Vict. c. 26.

The Companies Act, 1879, 42 & 43 Vict. c. 76.

The Companies Acts Amendment Act, 1880, 43 Vict. c. 19.

The Companies (Colonial Registers) Act, 1883, 46 & 47 Vict. c. 30.

The Companies Act, 1886, 49 & 50 Vict. c. 23.

The Companies Memorandum of Association Act, 1890, 53 & 54 Vict. c. 62.

The Companies (Winding-up) Act, 1890, 53 & 54 Vict. c. 63.

The Directors Liability Act, 1890, 53 & 54 Vict. c. 64.

The Companies (Winding-up) Act, 1893, 56 & 57 Vict. c. 58.

[*Note.*—The Winding-up Acts, 1890 and 1893, do not apply to Scotland.]

The Companies Act 1862 was intended to form a complete code of company law for the whole United Kingdom.

Illegality of Unregistered Associations.—This Act begins by providing (s. 4) that no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of the Act for the purpose of carrying on any business which has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under the Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries. In the case of banking the number is limited to ten. The title and preamble of the Act use the expression "trading companies and other associations," but sec. 4 uses the general words "business that has for its object the acquisition of gain." This stands in contrast to companies formed to promote art, science, religion, charity, or other like objects not involving acquisition of gain (s. 21; per Jessel, M. R., 10 Ch. 546); and covers all commercial undertakings, including farming (*Harris*, 1865, 1 C. P. 148). It also includes mutual insurance, loan or benefit societies, institutions in which the gain may consist of indemnity against loss, and is made not by the society but by some of the members (*Padstow Association*, 1882, 20 Ch. D. 137; *Arthur Average Association*, 1875, 10 Ch. 542; *Shaw*, 1883, 11 Q. B. D. 563); but does not include a combination of persons for holding securities in trust, even when there is power to realise and reinvest (*Smith*, 1880, 15 Ch. D. 247); nor a combination for acquiring land and reselling it in allotments to the members (*Siddall*, 1885, 29 Ch. D. 1); nor a society for making loans to the members out of a subscribed fund, the loans being put up to auction or balloted for (*Jennings*, 1882, 9 Q. B. D. 225). But it has been held in England that where the property of an association is vested in a body of trustees for it, less than twenty in number, and such trustees carry on the business, *not as agents of the association*, but independently in their own names and on their own personal responsibility, the association does not "carry on business" (*Crowther*, 1884, 32 W. R. 330; *Wigfield*, 1881, 45 L. T. 612; and *Smith*, *supra*). If the persons who carry on the business are agents, not trustees, the association is illegal (*Poppleton*, 1885, 51 L. T. 602).

The effect of this prohibition is that a company formed in defiance of it is an illegal association, its business is illegal, and the law can take no cognisance of its existence, or aid in enforcing obligations either for or against it. Nor can it be wound up as an unregistered company under sec. 199 of the Companies Act, 1862 (cases of *Arthur*, *Padstow*, and *Shaw*, *supra*; and *South Wales Co.*, 1876, 2 Ch. D. 763). But apparently in England

such a company may, as an illegal association, be wound up in Chancery (*Smith* and *South Wales Co., supra*); and in Scotland the Court of Session, in the exercise of its *nobile officium*, would probably appoint a judicial factor to wind up its affairs. It has been held that a company originally formed of fewer than twenty members becomes illegal whenever more than that number joins it, but upon registration the illegality is cured for the future, and prior obligations will become enforceable by the company where the debtor has upon notice recognised the company as registered (*Thomas*, 1885, 14 Q. B. D. 379). But though an unregistered company has no legal existence as such, its members may be beneficial owners in fact of its property, and one stealing or embezzling it may in England be prosecuted criminally (*Tankard*, [1893] 1 Q. B. 548). This it is thought would also hold in Scotland; indeed in the case of theft and some other crimes no difficulty would arise, as it is not now necessary to libel or prove who the owner is. But what of forging the name of such a company? It is thought the same principle would apply.

Formation of Company.

Having thus cleared the ground by prohibiting large and fluctuating bodies of persons trading without incorporation, the Legislature provides, by sec. 6 of the Act of 1862, very simple machinery for the formation of a company. "Any seven or more persons associated for any lawful purpose, may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability." The effect of this section has lately been considered by the House of Lords in *Salomon*, [1897] App. Ca. 22, the so-called "one-man company" case, and the true meaning of the Legislature must now be taken to be that when the formalities prescribed by the Companies Act have been complied with, and there is a memorandum subscribed by seven persons for one share each, however small (s. 8), and duly registered (ss. 17, 18), the company comes into existence as a real independent legal entity or *persona*, and cannot be treated as a sham or an *alias* for the promoter, merely because six of the seven subscribers are his nominees or even trustees—mere so-called dummies. Nor does it signify what were the motives or schemes of the promoter.

Not only trading companies may register under the Act, but companies formed for promoting commerce, art, science, religion, or charity, or other useful object, and where any profits are to be applied in promoting the company's objects, and not divided among the members (Companies Act, 1867, s. 23). Friendly and industrial societies may convert themselves into companies under the Act. Unlimited companies may re-register with limited liability (Companies Act, 1879, s. 4). Insurance companies must register (Companies Act, ss. 3, 209, and 210). A trade union cannot register, being specially provided for by the Trades Unions Act (34 & 35 Vict. c. 31, s. 5), nor can a foreign company register, but it may carry on business here, being accorded recognition by the comity of nations (*Bulkeley*, 1871, 3 P. C. 764; *Bateman*, 1889, 6 App. Ca. 386).

The Memorandum of Association.

The memorandum of association which is to form the basis of incorporation must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of, and attested by, one witness at least (Companies Act, s, 11). There must be not less than seven sub-

scribers (*National Debenture Corporation*, [1891] 2 Ch. 505). In England an agent may subscribe and need not be authorised by deed (*Whitley Partners*, 1886, 32 Ch. D. 337). In Scotland mandate, even to purchase heritage (which implies the signing of a writing), may be proved by parole; but in *Second Edinburgh Starr-Bowkett Society*, [1892] 19 R. 603, it was held that the words "testified by their signatures" in the Building Societies Act, 1874 (which are substantially the same as "subscribing their names" in the Companies Act), did not warrant signature by mandataries to an instrument of dissolution. A foreigner may subscribe (*Reuss*, 1873, 5 H. L. 176, 199). A married woman with estate from which the *jus mariti* and right of administration are excluded may subscribe alone, and with her husband's concurrence if the right of administration be not excluded (*Biggart*, 1879, 6 R. 470; Married Women's Property (Scotland) Act, 1881). A minor having curators may subscribe along with them; and even a minor without curators may subscribe, but the transaction would be open to reduction at his instance on the ground of minority and lesion within the *quadriennium* (*Hill*, 1880, 7 R. 68). The law in England is quite different.

When subscribed and stamped, the memorandum, together with the articles (if any) (Companies Act, s. 12), is to be taken to the registrar of Joint Stock Companies to be registered. It is the duty of the registrar merely to see that the documents presented are in proper form. If they are *ex facie* regular, his duty is to retain and register them (*Nassau Phosphate Co.*, 1876, 2 Ch. D. 610; *Peel's* case, 1866, 2 Ch. 682; *Reuss, supra*). On registration, the registrar gives his certificate of incorporation (Companies Act, s. 18), and this certificate is conclusive that all the formalities required by the Act have been complied with; but it is not conclusive if the company is one not authorised to register under the Act (*Northumberland Banking Co.*, 1858, 2 De G. & J. 357), *e.g.* where there are six subscribers only instead of seven. The duty chargeable on registration on the nominal capital of a company limited by shares is now an *ad valorem* stamp duty at the rate of two shillings for every £100 (Stamp Act, 1891, s. 112).

Company Limited by Shares.—Companies registered under the Companies Act may be limited either by shares or by guarantee, or may be unlimited. Unlimited companies are almost extinct. Companies limited by guarantee will be mentioned later. The normal type is a company limited by shares. In forming such a company the first subject of consideration is the memorandum of association.

Form and Contents of Memorandum.—The memorandum of association is, as Ld. Cairns well described it, the charter of the company. Its form and contents are prescribed by the Act (Companies Act, s. 12, Sched. 2). It must contain, in the case of a company limited by shares, the following particulars:—

1. The name of the proposed company, with the addition of the word "Limited" as the last word in such name.
2. The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situated.
3. The objects for which the proposed company is formed.
4. A declaration that the liability of the members is limited.
5. The amount of capital with which the company is proposed to be registered, divided into shares of a certain fixed amount.

1. *Name.*—No company is, by sec. 20 of the Companies Act, 1862, to be registered under the same name as that of a subsisting company, or so nearly

resembling it as to be calculated to deceive. This is only a statutory declaration of the general law which prohibits one person from appropriating another's trade name (*Hendricks*, 1882, 30 W. R. 168; *Merchant Banking Co. of London*, 1878, 9 Ch. D. 560; *The General Reversionary Investment Co.*, 1888, 1 Meg. 65). Instances of similarity where an injunction has been granted in England are: *Lee*, 1869, 5 Ch. 155; *Hendricks, supra*; *Tussaud & Sons*, 1890, 44 Ch. D. 678; *Rendle*, 1890, 63 L. T. 94. Instances where an injunction has been refused are: *London Assurance Co.*, 1863, 32 L. J. Ch. 664; *Merchant Banking Co. of London, supra*; *Australian Mortgage, Land, and Finance Co.*, W. N. 1880, 6. See Scotch case of *Smith*, 1888, 16 R. 36.

A company may change its name, by special resolution, with the approval of the Board of Trade (Companies Act, s. 13), and the Court may make a change of name a condition of confirming an alteration of memorandum (*Scott. Accident Co.*, 1896, 23 R. 586).

The name of a company may sometimes be important in construing its objects as defined by its memorandum (*The Crown Bank*, 1890, 59 L. J. Ch. 739).

2. *Situation of Registered Office.*—The place where the registered office of a company is situated constitutes generally the domicile of the company, but not necessarily (*Calcutta Jute Co.*, 1876, 1 Ex. Div. 428; *Laidlay's Trs.*, 1890, 17 R. H. L. 67).

3. *Objects Clause.*—But by far the most important matter for consideration is the objects for which the company is formed, and the reason is that the objects defined in the memorandum circumscribe the sphere of the company's activity. A company has no capacity or competency to make contracts and do acts outside the ambit of its memorandum. This is the well-known and wholesome doctrine of *ultra vires*. The Legislature gives a trading company its charter of incorporation for definite though often very wide purposes. It is not its policy to give the company a roving commission to do whatever a private individual might do. Shareholders subscribe their money on the faith of its being used for particular purposes, not employed in any miscellaneous enterprises, however promising or profitable, which a majority of the shareholders may decide on. Even the whole shareholders have not power to do so (*Ashbury Co.*, 1875, 7 H. L. 653, 672); in this respect differing from the whole partners of a common-law partnership, who have such power. This doctrine of *ultra vires* is, however, to be reasonably understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised will not (unless expressly prohibited) be held *ultra vires* (*A.-G.* v. *Gt. Eastern Ry. Co.*, 1887, 5 App. Ca. 478).

A trading company may, accordingly, do what is ordinarily and reasonably done in such business as it carries on. It may, for instance, while it is a going company, give a bonus to its servants with a view to getting better work out of them (*Hampson*, 1876, 45 L. J. Ch. 437; *Henderson*, 1888, 40 Ch. D. 170); or vote a gratuity to its officers (*Fraser*, 1880, 7 R. 961; *Cameron*, 1896, 23 R. 1092; *Hutton*, 1883, 23 Ch. D. 654). An insurance company may pay claims outside its policies (*Taunton*, 1864, 2 Hem. & M. 135). A banking company may guarantee interest on debentures of a new company, the formation of which is important to the bank (*West of England Bank*, 1880, 14 C. D. 317). An hotel company may let part of its premises, if it does not require the whole of them (*Simpson*, 1860, 8 H. L. 714). A mining company may buy the surface, though it has no power by its memorandum to acquire land (*John*, 1889, 1 Meg. 191). A trading

company may, if authorised by its constitution, take shares in another company (*Fraser*, 1879, 6 R. 1259; *Barnett's Banking Co.*, 1867, 3 Ch. 112); it may sue or be sued in respect of a libel (*Metropolitan Saloon Omnibus Co.*, 1859, 4 H. & N. 87; *Studdert*, 1886, 33 Ch. D. 528; *Gordon*, 1886, 14 R. 75; *British, etc., Co.*, 1887, 14 R. 818), though a municipal corporation cannot (*Manchester Corporation*, 1890, 1 Q. B. 94); it may pay a reasonable amount, by way of brokerage, for placing its shares (*Metropolitan Coal Consumers Assoc.* [1895] 2 Q. B. 604), as it may for advertising the company. It has the same right as an individual of compromising claims against it or any dispute whatever (*Bath's* case, 1878, 8 Ch. D. 334; *Assets Co.*, 1885, 13 R. 281). It may, having power to borrow, grant heritable security (*Paterson's Trs.*, 1885, 13 R. 369). It may, having power to do so, and having lent money on a second bond, buy in the property when exposed by the first bondholder (*ib.*). But it may not, in the latter case, grant a bond of corroboration of the first bond, or a cautionary obligation to the first bondholder (*Shiell's Trs.*, 1884, 12 R. H. L. 14; *Life Assoc.*, 1886, 13 R. 750).

Bills of Exchange.—A power to accept bills of exchange or issue negotiable instruments is not given to a company by the Companies Act, 1862, s. 47, as an incident of its incorporation (*Peruvian Rwys. Co.*, 1866, 2 Ch. 617); but a company may accept bills of exchange, or issue negotiable instruments, where the terms of the memorandum of association authorise upon a fair construction the issue or acceptance of such bills or negotiable instruments, or where the business of the company is one which cannot, in the ordinary course, be carried on without bills. The test is, in the absence of express power, what is necessary to carry on the business under ordinary circumstances and in the usual way (*Cunningham & Co.*, 1887, 36 Ch. D. 538; *Atkin*, 1889, 61 L. T. 23). The liability of directors on bills may be put thus: If directors state that they are signing a promissory note or acceptance on behalf of or on account of the company, they do not make themselves personally liable; but if directors sign a promissory note or acceptance merely describing themselves as directors, and not stating that they are acting on behalf of or on account of the company, they will be personally liable (*Dutton*, 1871, 6 Q. B. 361; see also *Chiene*, 1848, 10 D. 1523; *Brown*, 1875, 2 R. 615). They must show on the face of the note or bill that they are signing only as agents.

"*Incidental or Conducive*" *Clause.*—A concluding general power is commonly inserted in the objects clause, "to do all such other things as are incidental or conducive to the attainment of the above objects, or any of them," and these words may in exceptional cases enlarge the company's powers. In *Peruvian Rwys. Co.*, 1866, 2 Ch. 617, Ld. Cairns held that they gave a power to a railway company which was to pay for its concession by instalments,—a power which it would not otherwise have had—of giving bills of exchange; but if a company is formed for a definite purpose, *e.g.* to buy a particular mine, say in Australia, it cannot buy one instead in South Africa because the memorandum adds "or elsewhere" (*Haven Gold Mining Co.*, 1881, 20 Ch. D. 151); nor can the company's prospectus be invoked to enlarge the construction of the company's memorandum (*German Date Coffee Co.*, 1881, 20 Ch. D. 185).

Acts ultra vires.—On the other hand, it is *ultra vires* of a company—to give a few instances—to purchase its own shares (*Trevor* v. *Whitworth*, 1887, 12 App. Ca. 409; *General Property Co.*, 1888, 16 R. 282; *Cree*, 1879, 6 R. H. L. 90), or to accept a surrender of shares which will result in an illegal reduction of capital (*Hope*, 1876, 4 Ch. D. 327; *Craig*, 1891, 18 R.

389); or to issue its shares at a discount (*Klenck*, 1888, 16 R. 271; *Ooregum Gold Mining Co.*, [1892] App. Ca. 125); or to contract not to exercise powers given it for the public benefit (*Ayr Harbour Trustees*, 1883, 8 App. Ca. 623; *Malleson*, [1894] 1 Ch. 200); or to subscribe (apart from an express authority) to a public object, such as the Imperial Institute (*Tomkinson*, 1887, 35 Ch. D. 625); or to pay dividends out of capital or by the issue of capital (*Guiness*, 1883, 22 Ch. D. 342; *Beaumont*, 1868, 6 M. 1027); or to borrow beyond the limits defined in its articles (*Wenlock*, 1884, 10 App. Ca. 354); or to pay out of its funds for sending stamped proxies to shareholders (*Studdert*, 1886, 33 Ch. D. 528). In cases of this kind the question arises, Is it a limitation of the constitution of the company, or does it merely restrict the agency of the directors? Is the act *ultra vires* of the company, or only of the directors? (*Irvine*, 1876, 2 App. Ca. 366, 374). If it be a mere restriction on the agency of the directors, and the act be *intra vires* of the company, the shareholders may ratify it; but if the act be *ultra vires* of the company, it is incapable of ratification; "where there could be no mandate there cannot be any ratification" (Ld. Selborne); "the company cannot homologate or adopt a nullity, for that is equally *ultra vires*" (Ld. Kinnear); (*Ashbury Rwys. Co., supra*, 7 H. L. 695; *General Property Co., supra*, 16 R. 291); and any shareholder may get an interdict to restrain it (*Simpson*, 1860, 8 H. L. Ca. 712; *Lee* v. *Crawford*, 1890, 17 R. 1094). Bar or estoppel does not apply in a case of *ultra vires* of the company, but it does in a case of *ultra vires* of the directors (Lindley, 5th ed., 52; *George Newman & Co.*, [1895] 1 Ch. 674; *London and New York Corpor.*, [1895] 2 Ch. 860; see also *Sandys*, 1888, 42 Ch. D. 98; and *Bishop* v. *Balkis Co.*, 1890, 25 Q. B. D. 512).

4. *Liability Limited.*—The next statement required in the case of a limited company is that the liability is limited. "Limited liability" is in law merely a special kind of contract which anyone may enter into if the party with whom he contracts consents: unlimited insurance companies often limited the claims of policy-holders to the assets. The peculiarity of the privilege which the Legislature has conferred on companies registering under the Companies Act, 1862, is in allowing a company to import this term of limited liability into all its contracts merely by notice; but in granting the privilege the Legislature has taken all possible precautions to ensure that everyone dealing with the company shall be made aware of the limitation. It is for this reason that it requires the company (ss. 41 and 42) always to add the word "Limited" to its name (*Atkin* v. *Wardle*, 1889, 61 L. T. 23), to state in its memorandum of association that the company's liability is limited, to keep the word "Limited" painted outside its office, to have it engraven on its seal, and to use it on all the company's money and business documents. Severe penalties are attached in case of breach. The company is liable to a penalty of £5 per day; and directors and managers permitting it to a like penalty; besides, directors, managers, or officers using a seal or issuing money or other documents without the word "Limited," are liable to a penalty of £50, and are personally liable on the documents issued (*Penrose*, E. B. & E. 499). By the Companies Act, 1867, the Legislature made the experiment of allowing companies while trading with limited liability to make the liability of the directors by the memorandum unlimited. This was in imitation of the French system of *société anonyme en commandite* with an unlimited liability on the part of the *gérant*; but the power has not in practice been made use of.

5. *Capital.*—The last statement to be contained in the memorandum is the amount of the capital with which the company proposes to be registered,

divided into shares of a certain fixed amount. This is the nominal capital of the company, as distinguished from its subscribed capital. Nothing more need be stated under this clause; but it is usual to add powers to increase capital, to divide it into shares of larger or smaller amount, to convert paid-up shares into stock, and to reduce capital. These powers must be contained in the articles as originally framed or as altered by special resolution (Acts 1862, s. 12; 1867, ss. 9 and 21; and Act 1877). With these exceptions, until the Companies Memorandum of Association Act, 1890, no change could be made on the memorandum; and the changes authorised by that Act apply only to the "objects" clause, not to the "capital" clause.

Preference Shares.—It is also usual in this clause to state whether any and what part of the original capital is to have a preference, and to specify whether the preference applies to dividend or capital, or to both. It is also usual in this clause to give power to issue increased capital with or without preference. But it is enough if the power be contained in the articles (*Harrison*, 1875, 19 Eq. 358; *S. Durham Brewery*, 1885, 31 Ch. D. 261). If there were no power in the memorandum or articles to confer a preference, it was, until recently, held that equality was to be presumed, and the company had not, and could not acquire, power to issue shares with a preference (*Hutton* v. *Scarborough Hotel*, 1865, 2 Drew. & Sm. 514, 521, 4 De G. J. & S. 679; *Ashbury* v. *Watson*, 1885, 30 Ch. D. 376; *Ramsbotham*, 1891, 18 R. 558; *Milford Haven Co.*, 1895, 22 R. 577). But that view was shaken by Ld. Macnaghten in *British and American Corpor.*, [1894] App. Ca. 399, and overruled by the Court of Appeal in Chancery in *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361. The Court in Scotland has not had an opportunity of considering the point since the judgment in *Andrews'* case; but in *Waverley Hydro. Co.*, 1895, 23 R. 136, the former law was assumed, and the allottees of preference shares so deemed to be illegal were held to be not shareholders but creditors of the company. The most usual course is, in stating the capital of the company in the memorandum, to reserve power to attach to any class of shares, original or increased, any preferential, deferred, qualified, or special rights, privileges, or conditions, and then in the articles or resolutions to declare what the conditions are. Thus, as stated by Ld. Kinnear in *Milford Haven Co.'s* case, 22 R. 581, "the terms upon which the shares are to be held must be fixed once for all when the shares are issued"; and a subsequent issue of shares in violation of these terms was set aside.

It is to be observed, however, that if power be reserved in the memorandum or articles to issue shares with a preference over already issued shares, the company could not only do so, but probably could not by special resolution waive or contract itself out of the power (*Hyderabad Deccan Co.*, 1896, 75 L. T. 23). See the bearing of *Walker*, 1879, 12 Ch. D. 705; *Malleson*, [1894] 1 Ch. D. 200.

Preference quoad Dividend.—Preference shareholders can only claim such preference as may be conferred by the memorandum, articles, or resolutions, and a preferable right to dividend will not confer a preferable right in distribution of capital or surplus assets (*Griffith*, 1877, 5 Ch. D. 894; *Monkland Iron and Coal Co.*, 1883, 10 R. 494; *Partick Gas Co.*, 1891, 18 R. 1017). The general expression "a preferential dividend of — per cent. per annum," without addition or qualification, imports a "cumulative" dividend, and entitles the preference shareholder to payment of arrears of dividend out of the first profits of the company, but not to interest on the arrears (*Partick Gas Co.*, 1888, 15 R. 711, following *Henry* v. *G. N. Rwy. Co.*, 1857, 1 De G. & J. 606, and *Webb*, 1875, 20 Eq. 556). Preference *quoad* capital

must be clearly expressed (*Bangor Slate Co.*, 1875, 20 Eq. 64). But a power authorising the increase of capital to be made in such manner, to such amount, and with and subject to such rules, regulations, privileges, and conditions as the company in general meeting may think fit, is sufficient to authorise the issue of shares with a preference *quoad* both dividend and capital (*Harrison*, 1875, 19 Eq. 358). The expression a preference dividend "out of the net profits of each year," or similar words, imports a dividend contingent on the profits of the year, and non-cumulative (*Staples*, [1896] 2 Ch. 303; *Niddrie and Benhar Coal Co.*, 1891, 18 R. 805).

Quoad Capital.—Preference *quoad* capital means priority in distribution in a winding-up; and, similarly, it imports postponement in cancelling capital in a reduction. Preference shareholders take their shares subject to the statutory liability to reduction. In a reduction the loss falls on those who would have to bear it first in a liquidation (*Bannatyne*, 1887, 34 Ch. D. 287, per L. J. Cotton, 299, 300; *Floating Dock of St. Thomas*, [1895] 1 Ch. 691, per. J. Chitty, 699; *London and New York Co.*, [1895] 2 Ch. 860, 867, 868). Unless otherwise stipulated, after repayment of preference and ordinary share capital, surplus assets fall to be distributed among preference and ordinary shareholders rateably in proportion to the shares held, not to the amounts paid on the shares (*Birch* v. *Cropper*, 1889, 14 App. Ca. 525).

Conversion of Ordinary into Preference Shares.—Where shares are to a considerable extent unpaid (say £2 out of £5), it is sometimes desired to convert the unpaid part into preference shares, and pay them up; and finding difficulty in accomplishing this otherwise, private Acts of Parliament have been got for that purpose by the following limited companies, viz. the Australian Mortgage and Agency Company, the American Mortgage Company of Scotland, and the Realisation and Debenture Corporation of Scotland, in 1894, 1895, and 1896 respectively. The present writer has suggested that the purpose might be accomplished under the Companies Acts, and without recourse to an Act of Parliament, as follows: (1) Divide each share into a £2 and £3 share (Act 1867, s. 21); (2) Let shareholders pay up the £3 shares; and (3) Surrender the £3 shares and receive in exchange new preference shares of £3 each, created for the purpose, an agreement under Act 1867, s. 25, being filed with the registrar (*Teasdale*, 1873, 9 Ch. 54; a judgment of Lord Justices James and Mellish, followed by Justice Stirling in *Eichbaum*, [1891] 3 Ch. 459). This course is not opposed to *Trevor* v. *Whitworth*, 1887, 12 App. Ca. 409, and appears to be supported by *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361.

Alteration of Memorandum.

Under the Companies Act, 1862, a company could not, as we have seen, alter its memorandum of association except by increasing and consolidating its capital. The Acts of 1867 and 1877 allowed a company to reduce its capital, subject to very stringent conditions, but, with these qualifications, a company was strictly bound to the objects stated in its memorandum, and the doctrine extended even to conditions in the memorandum not required by the Act to be stated therein (*Ashbury* v. *Watson*, 1885, 30 Ch. D. 376). This inability to alter seriously hampered companies. A company might desire to take up a new branch of profitable business, but with its existing memorandum it could not do so. Its only course was to wind up and come out as a new company. The Companies (Memorandum of Association) Act, 1890, now meets this difficulty. It gives power to a company by

special resolution to alter the provisions of its memorandum or deed of settlement with respect to the "objects" of the company, so far as may be required for any of the following purposes :—

(*a*) To carry on its business more economically or more efficiently;

(*b*) To attain its main purpose by new or improved means;

(*c*) To enlarge or change the local area of its operations;

(*d*) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company.

(*e*) To restrict or abandon any of the objects specified in the memorandum of association or deed of settlement.

Such a resolution is not, however, to take effect until confirmed by the Court on petition, and before confirming it the Court is to be satisfied (s. 2) that the interests of debenture-holders and of creditors are safeguarded. The Court is also to have regard to rights and interests of the members or any particular class of them, as well as the creditors, and in confirming the resolution it may make it on terms or impose conditions, as, *e.g.*, altering the name where the proposed modification of the memorandum would make it misleading (*Alliance Marine Assurance Co.*, [1892] 1 Ch. 300; *National Boiler Insurance Co.*, [1892] 1 Ch. 311; *Indian Mechanical Gold Extracting Co.*, [1891] 3 Ch. 538; *Scottish Accident Co.*, 1896, 23 R. 586). The Court may, in lieu of requiring alteration of the company's name, direct the order to be advertised (*Copper Mines Tinplate Co.*, W. N. 1897, 20). In *Fleetwood Estate Co.*, W. N. 1897, 20, the Court added words to the resolution so as to limit the extended objects, following *Spiers & Pond*, 1895, W. N. 135.

It will be observed that the Legislature has carefully specified the various puposes for which alteration is to be allowed, and the proposed alterations made by the resolution of shareholders must be confined to those purposes; and objects "entirely foreign to the original purposes of the memorandum of association" will not be sanctioned (Ld. Kinnear in *Glasgow Tramways Co.*, 1891, 18 R. 675, 684); nor will the Court confirm general powers to acquire other businesses or to amalgamate (*Young's Paraffin Co.*, 1894, 21 R. 384). At the same time the power under head (*d*) to carry on some business which may be conveniently or advantageously combined is pretty wide, and has been held to extend, in the case of an investment company, from Foreign, Colonial, or British Government or municipal securities to securities of any company incorporated under Foreign, Colonial, or British law, the name of the company being altered (*Foreign and Colonial Government Trust*, [1891] 2 Ch. 395; *Government Stocks Investment Co.*, [1891] 1 Ch. 649; [1892] 1 Ch. 597). In *Scottish Accident Co.*, *supra*, a company established for insuring against "accidental injuries to human life" obtained confirmation of a resolution to carry on life, sickness, employers' liability, and fidelity insurance; see also *National Boiler Co.* and *Alliance Marine Co.* (*supra*).

The Act has been found very useful, and companies of all sorts have availed themselves of its facilities, of which the cases cited are samples.

To obtain the confirmation of the Court to the alteration, a petition must be presented to one or other Division of the Court, and holders of debentures or debenture stocks receive intimation by advertisement or service; and all concerned, creditors or shareholders, are entitled to appear and oppose the confirmation. The practice is to remit to a professional man to report, and thereupon to dispose of the petition, or require such evidence by proof or otherwise as may appear necessary (*Western Ranches Co.*, 1897–98). Such a petition may be carried through in vacation (Act, 1886, s. 5).

Articles of Association.

In the case of a company limited by shares the memorandum may be, and usually is, accompanied when registered by articles of association. If no articles are registered, the model articles, the regulations of Table A, are to apply. Having received the imprimatur of the Legislature, they cannot be held *ultra vires* (*Lock*, [1896] A. C. 461). These articles, which are to be expressed in separate paragraphs numbered arithmetically and printed (Companies Act, ss. 14, 16), are the company's rules of internal management and government (*Laurence*, 1866, 2 Ch. 424). Like the memorandum, the articles are to be stamped as a deed and signed by each subscriber in the presence of, and be attested by, one witness at least. When registered, they bind the company and its members as if each member had subscribed his name and affixed his seal (Companies Act, s. 16). Their relation to the memorandum of association is very clearly expressed by Ld. Cairns in *Ashbury Ry. Co.* v. *Riche*, 1885, 7 H. L. 653. "The articles of association," he says, "play a subsidiary part to the memorandum of association. They accept the memorandum of association as the charter of the company, and so accepting it the articles proceed to define the duties, the rights, and the powers of the governing body, as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made."

The articles cannot alter or vary that which would be the result of the memorandum standing alone (*Guiness*, 1872, 22 Ch. D. 376), but the memorandum and articles, as contemporaneous documents, must be read together, so that if there be any ambiguity in one the other may explain or interpret it (*Anderson's* case, 1877, 7 Ch. D. 99; *Phœnix Bessemer Steel Co.*, 1875, 44 L. J. Ch. 685; *Pyle Works*, 1890, 44 Ch. D. 534; *City of Edinburgh Brewery Co.* v. *Gibson*, 1869, 7 M. 886); or if the memorandum be silent on a matter not required to be stated therein, the articles may supplement it (*Harrison*, 1875, 19 Eq. 358).

Articles a Contract by Shareholders inter se.—Two points require attention in connection with a company's articles. The first is that the articles are merely a contract by the shareholders *inter se*; the terms on which they agree that the business of the company shall be carried on. They do not constitute a contract with a person outside the company (*Eley*, 1876, 1 Ex. D. 88; *Henderson* v. *Stubbs Ltd.*, 1894, 22 R. 51), or even with a person who is a signatory of the memorandum and articles (*Dale* v. *Plant*, 1889, 61 L. T. 207). If, for instance, the articles nominate a solicitor or a surveyor to be the solicitor or surveyor of the company, the solicitor or surveyor so nominated cannot sue the company as having contracted to appoint him (*Empress Engineering Co.*, 1880, 16 C. D. 125; *Rotherham Alum and Chemical Co.*, 1883, 25 Ch. D. 103). The nomination in the articles merely amounts to an authority to the directors by the company, *i.e.* the shareholders, to appoint the person in question; not to a *jus quæsitum tertio*.

Constructive Notice of Company's Constitution.—The next point to be borne in mind is that everyone dealing with the company, whether shareholder or outside creditor, must be taken to have notice of its memorandum and articles, and to deal with the company on the basis of its constitution as therein declared (*Marshall*, 1868, 7 Eq. 137; *Oakbank Oil Co.*, 1882, 8 App. Ca. 71; *Small* v. *Smith*, 1884, 10 App. Ca. 138). But this constructive notice extends only to the "external position" of the company, not to its "indoor management," to use the language of Ld. Hatherley (*Land*

Credit Co. of Ireland, 1868, 4 Ch. 469). With respect to the indoor management—the internal regulations of the company—a person dealing with the company is entitled, if everything is *ex facie* regular according to the company's constitution, to presume *omnia rite acta* (*Royal British Bank*, 5 El & Bl. 248, 6 El. & Bl. 327; *Howard*, 1888, 38 Ch. D. 156; *Heiton*, 1877, 4 R. 830). Some articles are imperative, others directory (see *Norwich Yarn Co.*, 1856, 22 Beav. 160; *Foss* v. *Harbottle*, 1842, 2 Hare, 461).

Some other Clauses.—Most of the ordinary provisions in articles are dealt with hereafter under their several headings, but it may be noted here, in regard to a clause in articles providing that any member who commences legal proceedings against the directors shall forfeit his shares on being paid their market value, that it does not apply to an action to restrain the directors from doing illegal acts. Any such stipulation is bad (*Hope*, 1876, 4 Ch. D. 327). Articles, again, sometimes give directors a discretion as to refusing inspection of the company's books to a shareholder. This will not entitle the directors to resist a diligence to recover documents in adverse litigation by a shareholder (*Gouraud*, 1888, 57 L. J. Ch. 498). Nor has it any application when the company is being wound up (*Yorkshire Fibre Co.*, 1870, 9 Eq. 650; *Davis*, 1868, 16 W. R. 668).

Alteration of Articles.—A company's articles may always be altered by special resolution (Companies Act, s. 50) within the limits of its memorandum (*Ashbury Co.* v. *Riche*, 7 H. L. 671, 678), and it is not competent to the company to except any article from alteration (*Walker*, 1879, 12 Ch. D. 705; *Malleson*, [1894] 1 Ch. 200). Directors cannot, of course, by any resolution of their own alter the articles (*Ranken*, W. N. 1897, 157). A company desirous of taking power to do something not within its articles must first alter the articles and then exercise the power. It cannot do both simultaneously (*West India, etc., Co.*, 1873, 9 Ch. 11 *n.*; *Hippisley*, 1873, 9 Ch. 1; *Patent Invert Sugar Co.*, 1886, 31 Ch. D. 166). Nor can a company, by a resolution, do in a particular case what is contrary to the regulations as they stand. That is not making a regulation, but a *privilegium* (*Imperial Hydro. Hotel*, 1882, 23 C. D. 1).

Promoters and Promotion.

Before explaining further the internal administration of the company, it is right to refer to the methods by which companies are generally formed, and the law applicable thereto. The constitution of a company, sketched above, is merely a means to an end—the carrying on by the company of some business, the working of a mine or a patent. It is the person called a promoter who determines what this end shall be, and who sets the statutory machinery of formation in motion. Promoter is a term not of law but of business, summing up, as Bowen, L. J., said, a number of business operations familiar to the commercial world by which a company is generally brought into existence (*Whaley Bridge*, 1879, 5 Q. B. D. 109). Promoter in the Directors Liability Act, 1890, s. 3, subs. (2), means a person who was a party to the preparation of the prospectus otherwise than in a professional capacity. Preparing or settling the prospectus, forming the company, negotiating agreements between vendors and an intended company, obtaining directors, making contracts for the company, or otherwise actively engaging either alone or in co-operation with others in the formation of a joint stock company will make a man a promoter (*Bagnall*, 1877, 6 Ch. D. 382; *Emma Silver Mining Co.*, 1879, 11 Ch. D. 936); but a mere projector is not a promoter (*Erlanger*, 1887, 3 App. Ca. 1235). Whether a person is or is not a promoter is a question of fact, not

of law, and must in each case be determined with due regard to all the circumstances (*Whaley Bridge, supra*). This is all that can be said. Persons combining as promoters of a joint stock company are not partners so as to be liable for each other's acts (*Hamilton*, 1858, 5 Jur. 32; *Reynell*, 1846, 15 M. & W. 517, 529), but they may be (*ib.* See also *Molleson*, 1881, 8 R. 630). Promoting syndicates, incorporated and unincorporated, are very common now.

Promoters, as Ld. Cairns remarks in *Erlanger* (*supra*, 1236), "stand undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how and when, and in what shape and under what supervision it shall start into existence and begin to act as a trading corporation." It is the promoter who selects the directors, who gives them such powers as he chooses. It is he who settles the regulations of the company—regulations under which the company as soon as it comes into existence may find itself bound to anything, not in itself illegal, which the promoter may have chosen. This control of the promoter over the company involves a correlative responsibility, and out of this responsibility arises the doctrine, now well settled, of the fiduciary relation of the promoter towards the company he creates. It is an artificial doctrine, an extension of the doctrine of agency, a sort of agency by anticipation; for the promoter is not strictly speaking an agent of or trustee for the company before incorporation, and he cannot be agent for a non-existent company; but it is a salutary and necessary fiction of equity for the protection of the company which afterwards consciously and voluntarily adopts and becomes a party to the transaction. In virtue of this fiduciary relationship the promoter, or even the firm of which he is a partner, is accountable to the company for all moneys secretly obtained by him from it. *Secretly*, that is the gist of the wrong (*Huntington Co.* v. *Henderson*, 1877, 4 R. 294; *Mann* v. *Edin. N. Tram. Co.*, 1891–2, 18 R. 1140, 19 R. H. L. 7; *Scott. Pacific Co.*, 1888, 15 R. 290). The law does not say a promoter may not make a profit out of a company he promotes, provided he makes full and fair disclosure to the shareholders of the company of what he is getting, and they assent to it. The ground of objection in law to a secret commission paid by the vendor to one standing in a fiduciary relation to the purchaser (the company) is that it is a bribe paid by the vendor to the purchaser's agent for bringing the purchaser to terms. It therefore enhances the price against the purchaser. It is against trust law for an agent, without the knowledge of his constituent, to make profit of his office. The law assumes that it is done at the cost of the constituent, and admits of no evidence to the contrary (Ld. Young, 4 R. 301). There are three ways in which a promoter may get a profit legitimately. He may get it: (1) from the company; (2) from the company's vendor; or (3) he may be at once vendor and promoter, and get it in that way. (1) If, for instance, the articles of a company provide that promotion money, a sum say of £10,000, shall be paid by the company to its promoter for his services, nothing, legally speaking, can be said against it (per Ld. Young, 4 R. 302; *Scott*, 1870, 42 Sc. Jur. 212). (2) The promoter may receive a commission from the vendor in cash or fully-paid shares, provided it be disclosed. (3) The third case, where the promoter is also vendor, is well exemplified in *Erlanger*, *supra*. The vendor-promoter there—a syndicate, of which Baron Erlanger was the animating spirit—had an island to sell, rich in phosphates. The syndicate formed a company to buy it, but the board of directors with which they furnished the company they created

were their own nominees—mere dummies; under these circumstances the company was held entitled to rescission of the contract for sale. There is nothing, as Ld. Cairns pointed out, to prevent an owner of property from promoting a company to buy it, but if he does so it is incumbent upon him —the promoter-vendor—to provide the company with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. The good sense of this is obvious. Instead of claiming the secret profit from the promoter, the company may rescind the contract (Ld. Cairns, 3 App. Ca. 1238; and as to the rights of the company where rescission has become impossible, see *Cape Breton*, 1886, 29 Ch. D. 795, and *Ladywell Mining Co.*, 1887, 35 Ch. D. 413). A vendor-promoter will not be less a promoter by putting in a nominee-vendor to sell to the company (*Glasier* v. *Rolls*, 1890, 43 Ch. D. 442).

Preliminary Agreements.

In the process of promoting, a preliminary agreement is almost indispensable; the directors must be able when the company is formed to come forward with a well-defined scheme, and tell the public that there is a property which the company has acquired or can acquire, and on what terms. For this purpose a preliminary agreement is prepared, and it takes commonly one of two forms: (i.) an agreement by the vendor with a trustee for the company, defeasible on non-adoption by the company; or (ii.) a draft agreement by the vendor with the company. In either case the agreement is referred to in the articles of the company when formed as proposed for adoption by the company, and the articles constitute an authority to the directors to adopt it; but such authority does not relieve the directors of the duty, as agents of the company, of taking the terms of the proposed agreement into careful consideration as business men, and seeing that the company is not being taken advantage of. The improvident adoption by directors of cut-and-dried agreements made by promoters, in their own interests, with the company, is one of the most common causes of ruin to companies.

Adoption of Agreement.—Where the agreement is executed by the vendor and an agent or trustee for the intended company, the company, after its incorporation, and acting through the directors as its executive, requires "consciously" and "voluntarily" to adopt the contract, *i.e.* enter into the contract by taking the place of the agent or trustee; "and it is not equivalent to this if the company merely act as if, contrary to the fact, the contract had from the beginning been obligatory on it" (Lord President in *Tinnevelly Co.*, 1894, 21 R. 1009). In England this is done by a supplementary agreement indorsed on the original agreement, and executed by the vendor, the agent or trustee, and the company, whereby the company adopts the agreement, and declares that it shall be binding on the company to the same effect as if the company had been in existence at its date, and had now ratified it. The trustee is also discharged. It takes this form because it has been held in England that a nullity cannot be ratified—that there can be no "effective ratification of a contract which could not have been binding on the ratifier at the time it was made, because the ratifier was not then in existence" (*Empress Engineering Co.*, 1880, 16 Ch. D. 125; *Northumberland Avenue Hotel*, 1886, 33 Ch. D. 16). In Scotland the homologation or adoption of engagements absolutely null is quite recognised (1 Bell, *Com.* (M'L. ed.) 140); and it is thought that adoption

of the agreement, in pursuance of the memorandum and articles, by minute of the board intimated to the vendor and the trustee would make it binding between the parties; but a supplementary agreement is quite appropriate. Even in England, if the agreement be actually carried out upon resolutions of the directors, the transaction will not be opened up (*Howard*, 1888, 38 Ch. D. 156).

Where the original agreement is in draft, and is not signed till after the incorporation of the company, no such questions arise; but then the vendor is not effectually bound, and may raise his terms against the company.

Stamps.—Under the Stamp Act, 1891, particularly s. 59, agreements for the sale of property to a company are to be charged with *ad valorem* duty as conveyances on transfer; but from such property the following exceptions *inter alia* are made: (1) heritage, the duty being paid on the conveyance thereof; (2) property abroad, on which no duty is chargeable here; (3) goods, wares, and merchandise, including moveable plant, all which pass by delivery without a conveyance. In regard to goodwill, if it be specified in the agreement as included in the sale, *ad valorem* duty will be payable (see *Wilson*, 1895, 23 R. 18; and Alpe, *Stamp Duties*, 5th ed., 101–124).

The Prospectus.

Where a company is a public company as distinguished from a private company, that is to say, when it intends to appeal to the public to subscribe its capital, the first step after registration of the company is to issue a prospectus. The proper function of a prospectus is to invite the public to take shares in the new company. When the shares have been allotted, its office is exhausted, and the liability of those who issue the prospectus to the allottees does not follow the shares into the hands of the transferees (*Peek* v. *Gurney*, 1873, 6 H. L. 377).

Duty of those who issue.—The prospectus issued to the public is the basis of the contract to take shares (*Pulsford*, 1855, 17 Beav. 87), and those who put before the public such a prospectus to induce them to embark their money in a commercial enterprise ought, as Ld. Herschell said in *Derry* v. *Peek*, 1889, 14 App. Ca. 337, 376, to be vigilant to see that it contains such representations only as are in strict accordance with fact. This duty, which requires in these days to be emphasised, is well stated by the late Vice-Chancellor Kindersley in words which Ld. Hatherley called a "golden legacy." "Those who issue a prospectus," said the Vice-Chancellor, "holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares" (*New Brunswick Central Rwy. Co.*, 1860, 1 Drew. & Sm. 381), approved by Ld. Chelmsford (*Central Rwy. Co. of Venezuela*, 1867, 2 H. L. 113).

Disclosure of Contracts.—In supplement of the common law the Legislature in the Companies Act, 1867, inserted a section (s. 38) requiring every prospectus to specify "the dates and names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of the prospectus"; in default, the prospectus to be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares

in the company on the faith of such prospectus unless he should have had notice of such contract. The section is not confined to contracts imposing an obligation on the company, but includes every contract made before the issue of the prospectus the knowledge of which might have an effect upon a reasonable subscriber for shares in determining him to give or withhold faith in the promoter, etc. Nor is the section limited to contracts entered into between promoters and others *as such*, but includes contracts made with a person who afterwards becomes a promoter, etc., provided the company be entitled to the benefit and liable to the obligations of the contract before the issue of the prospectus (*Gorer's* case, 1875, 1 Ch. D. 182; *Twyeross*, 1877, 2 C. P. D. 469). The remedy is given to the individual shareholder against promoters and others for indemnity or damages, not against the company for rescission of the contract. Nor is the remedy given to the company against promoters and others. A shareholder pleading the section must prove that he relied on the prospectus (*M'Morland's Trs.*, 1896, 24 R. 65). The section includes parole as well as written contracts (*Capel*, 1888, 36 W. R. 689). It is no defence to non-disclosure that the promoter or director *bonâ fide* believed that the contracts need not by law be set out (*Twyeross, supra*). While, however, disclosure of the dates and names of parties to contracts, in compliance with this section, will avoid the statutory consequences, it may not be such disclosure of material facts as is required at common law (*Aaron's Reefs*, [1896] A. C. 273; *Sale Hotel*, 1897, W. N. 175).

Waiver Clause.—The difficulty of knowing what contracts to disclose, sometimes a disinclination to disclose them, has led to the adoption of a waiver clause in prospectuses. The validity of such a clause has never been adjudicated upon; but as this is not a statutory provision affecting the constitution of the company, but only a personal remedy for an individual, he appears entitled to contract himself out of the remedy.

Directors Liability Act.—In the Directors Liability Act, 1890, the Legislature has gone a step further, and has made liable for "untrue statements" in a prospectus, not only persons who are directors at the time of the issue of the prospectus, but every person who has authorised himself to be named in the prospectus as a director or as having agreed to become, either immediately or after an interval of time, a director, and every promoter of the company and every person who has authorised the issue of the prospectus. If a person's name is improperly inserted as director, he is to be entitled to indemnity or contribution (ss. 4, 5). See further on this Act, *infra*, p. 117.

Fraud and Misrepresentation.

Apart from the constructive fraud created by the Act of 1867, s. 38, those who issue prospectuses, and the companies on whose behalf they are issued, incur liability. If the company adopt or approve of a prospectus or other document containing misrepresentations or concealing material facts, the document becomes the representation or concealment of the company, and the company cannot retain benefit from a transaction, or enforce a contract so induced, but must surrender what is taken under it. Directors or others are liable in damages to persons defrauded by their false and fraudulent representation or concealment. Hence the remedy of a party so induced to contract with a company to his loss is twofold: (1) rescission of the contract; (2) damages.

(1) *Rescission.*—By an action of reduction against the company he may rescind the contract and demand restitution, tendering restitution in return. If mutual restitution be impossible, this remedy is lost. If he do not within

reasonable time after learning of the fraud challenge the contract, he is bound by it. Further, he may, while ignorant of the fraud and without any fault or delay on his part, lose this remedy by the occurrence of material changes affecting the company (*Graham* v. *Western Bank*, 1865, 3 M. 617; *Addie* v. *Western Bank*, 1865–67, 3 M. 899; 5 M. H. L. 80; *Oakes* v. *Turquand*, 2 H. L. 325; *Houldsworth* v. *City of Glasgow Bank*, 1879–80, 6 R. 1164, 7 R. H. L. 53; *Stone*, 3 C. P. D. 282).

The statements in the prospectus are the basis of the contract between the shareholder and the company, and, if false, the company cannot hold to the contract (*Ranger*, 1857, 5 H. L. 86; *Reese River Silver Mining Co.*, 1867, 2 Ch. 615; *Central Rwy. Co. of Venezuela*, 1867, 2 H. L. 99; *Lynde*, [1896] 1 Ch. 178). It is only necessary to prove that there was a material misrepresentation (*Derry* v. *Peek*, 1889, 14 App. Ca. 337, 359). It makes no difference that the misrepresentation was an innocent one (*Arkwright*, 1880, 17 Ch. D. 320). The misrepresentation must, however, be one of fact (*Eaglesfield*, 1876, 4 Ch. D. 709), and the shareholder must prove that he took the shares on the faith of it (*Jennings*, 1853, 17 Beav. 239); but it is not necessary that the misrepresentation should be the sole inducement (*Nicol's* case, 1859, 3 De G. & J. 420; *Arnison*, 1889, 41 Ch. D. 369). A contract to take shares induced by misrepresentation or fraud is not, however, void, but voidable only, at the option of the party defrauded. Until avoided it is valid (*Oakes* v. *Turquand*, 1867, 2 H. L. 375). The question therefore arises, Has the claimant for rescission with notice of the misrepresentation or fraud elected to affirm the contract, as, *e.g.*, by dealing with the shares, or not? (*Clough* v. *London and N.-W. Rwy. Co.*, 1871, 7 Ex. 35; *Nicol's* case, *supra*; *Briggs*, 1866, 1 Eq. 483; *Mount Morgan West Gold Mines*, 1887, 56 L. T. 622). If he has, his remedy is gone. Delay in rescinding is not only evidence of an intention to affirm, but is a bar to rescission on another ground, viz. that the shareholder's name being on the register may have induced other persons in the meanwhile to alter their position (*Cachar Co.*, 1876, 2 Ch. D. 417). A man must not play fast and loose—he must not say, I will abide by the company if successful, and I will leave the company if it fails (*Ashley's* case, 1870, 9 Eq. 263); nor is it enough for the shareholder to repudiate (*Hare's* case, 1869, 4 Ch. 503). He must follow up the repudiation by taking steps to have his name removed from the register (*Scottish Petroleum Co.*, 1883, 23 Ch. D. 413). If he does so—if he commences an action to rescind before winding-up begins—he has a right to have his name removed from the register though a winding-up order is made before judgment for rescission (*Reese River Co.*, *supra*; *Boyle*, 1885, 33 W. R. 450). If he does not, winding-up is an absolute bar to relief, because the rights of creditors have intervened (*Oakes*, *supra*). The declared insolvency and stoppage of the company is also a bar (*Tennent*, 1879, 6 R. 554, and (H. L.) 69).

Illustrations.—A *suppressio veri* in the prospectus may entitle a shareholder to rescission, but it must be a suppression of something which ought to be disclosed (*New Brunswick and Canada Rwy. Co.*, 1862, 9 H. L. 724). The following misrepresentations have been held to entitle to rescission: as to the persons to be directors (*Scottish Petroleum Co.*, *supra*; but see *Chambers*, 1891, 18 R. 1039); as to the price to be paid for a concession (*Central Rwy. Co. of Venezuela*, *supra*); as to there being a contract when there was only negotiation (*Ross*, 1868, 3 Ch. 682); that a mine was "working" when it was worthless (*Reese River Co.*, *supra*); as to shares having been subscribed when the subscription was only a sham (*Arnison*, *supra*). Cases in which it was held there was no sufficient misrepresentation are: *Bellars*, 1884, 13 Q. B. D. 562; as to prospective profits (*Moore*, 1887, 56 L. J. Q. B. 235); as to

manufacturing capacity (*Denton*, 1866, 2 Eq. 352, and *British Burmah Lead Co.*, 1887, 56 L. T. 815). Misrepresenations made by directors to a general meeting, and afterwards adopted and circulated by the company, will entitle a person who, on the faith of them, buys shares either from a shareholder or the company to rescind his contract (*New Brunswick Co.*, 1864, *supra*, p. 725; *Nicol's* case, *supra*; see, however, *Worth*, 1859, 4 Drew. 529).

(2) *Damages.*—The other remedy of a shareholder who has been induced to take shares by fraudulent misrepresentation or concealment in the prospectus is an action of damages against the directors or promoters, or one or more of them individually. This remedy is not competent against the company. It is inconsistent with his character as still a partner of the company (*Houldsworth*, 7 R. H. L. 53, 5 App. 317). But if necessary for full redress, the shareholder may have both remedies (Lindley, p. 73). An action for deceit differs essentially from one brought to obtain rescission (*Derry* v. *Peek*, *supra*). In an action of damages the plaintiff had, prior to the Directors Liability Act, 1890, to prove (i.) actual fraud; (ii.) that the fraud was an inducing cause to his contracting, and misled him; and (iii.) that he suffered loss as a natural consequence (*Tulloch*, 20 D. 1045, 3 Macq. 783; *Addie*, *supra*; *New Brunswick Co.*, 1864, *supra*; *Smith* v. *Chadwick*, 1883, 9 App. Ca. 187; *Derry* v. *Peek*, *supra*). It was necessary to prove not only that the representation was false in fact, but that the person making it knew it to be false, or at least did not believe it to be true. It was not enough to show that a person *bonâ fide* believing the statement he made to be true, had not reasonable grounds for the belief (*Lees* v. *Tod*, 1882, 9 R. 807, 852–854; *Brownlie*, 1878, 5 R. 1076, 1091, 1092; *Weir*, 3 Ex. Div. 238; *Derry* v. *Peek*, *supra*). The Directors Liability Act, 1890, passed immediately after *Derry* v. *Peek*, has now made it no longer necessary in an action against directors based on deceit, to prove actual fraud. It is sufficient *primâ facie* that the directors or persons responsible for the prospectus have made "untrue statements" therein. Once this is proved, the onus is cast on the directors to prove that they had reasonable ground to believe, and did up to the time of the allotment of shares believe, that the statements were true. (As to what is reasonable ground to believe, see *Glasier*, 1890, 42 Ch. D. 458; *Arnison*, *supra*; *Peek* v. *Derry*, 1887, 37 Ch. D. 541.) If the untruth be contained in an extract from a report by an accountant, engineer, valuer, or other expert, the onus lies on the directors to show that the extract was a fair representation of the report. Yet even then the director will be liable if it be proved that he had no reasonable ground to believe that the person making the report was competent to make it.

A deceived shareholder may keep the shares (*Arnison*, *supra*), and insist in an action of damages. Such an action is, in England, barred at the end of six years (21 Jac. I. c. 16); but in Scotland, apart from mora and acquiescence, there is no bar except the long negative prescription.

A person who makes a false report or valuation recklessly or with gross negligence, knowing it is to be used to induce third persons to advance money on the faith of it, is personally liable to the persons so deceived (*Cann*, 1888, 39 Ch. D. 39; *Scholes*, 1890, 63 L. T. 837, 64 L. T. 674).

Underwriting Agreements.

Promoters of companies do not always trust to a prospectus to get the capital they want. To guard against the contingency of failure, the company's capital is often underwritten in whole or in part before issue. The form which the underwriting agreement usually takes is that of a letter addressed by the underwriter to the promoter, undertaking

—that is, offering to undertake—for a commission to subscribe or find responsible subscribers for say 10,000 shares—the underwriter's liability to be reduced rateably in the proportion in which the shares are subscribed by the public, and authorising the promoter, in the event of the underwriter not subscribing or finding responsible subscribers, to send in on the underwriter's behalf an application for the proper amount of shares, which the underwriter is in that event bound to take. It was until recently supposed that a company could not properly pay for the placing of its shares (*Lydney and Wigpool Iron Co.*, 1886, 33 Ch. D. 85; *Faure Electric Co.*, 1889, 40 Ch. D. 141); but the dicta in these cases have been reconsidered in *Metropolitan Coal Consumers Assoc.*, [1895] 2 Q. B. 604; and it must now be taken that a limited company may pay a reasonable commission for getting its share capital subscribed, as it may for advertising the company's properties. What was allowed in that case as reasonable was an ordinary broker's commission of 2½ per cent., but there are many companies which could not be brought out on those terms, and there appears to be no objection in principle to a reasonable underwriting commission, the rate of which will vary according to the nature of the enterprise. Such contracts must be disclosed under Act 1867, s. 38, or their disclosure waived. Where a high rate of commission has to be paid to underwriters, it should be paid, if at all, by the promoter-vendor, and this is now the usual course.

Underwriting agreements have been frequently before the Courts of late. Underwriters' defences fall into two classes: either that some condition precedent has not been fulfilled (*Harvey Oyster Co.*, [1894] 2 Ch. 474; *Brussels Palace of Varieties*, 10 T. L. R. 72), or that there was no authority on the promoter's part to apply. On the latter point two cases are instructive: *Henry Bentley & Co.*, 1894, 69 L. T. 204, and *Consort Deep Level Gold Mining Co.*, [1897] 1 Ch. 575. In the former (*Bentley & Co.*) there was on the face of the underwriting letter an apparent authority to the promoter to apply to the company for shares on the underwriter's behalf, qualified by a private letter between underwriter and promoter, but unknown to the company, and the underwriter was held barred from denying the authority. In *Consort Deep Level Co.* the defect of authority was apparent on the face of the application presented to the company, and the Court of Appeal decided there was no estoppel. An underwriting offer, like any other offer, must be accepted, and the acceptance communicated to the offerer, to constitute a contract in law; see also *Sangster*, 1893, 9 T. L. R. 441, and *Hemp Yarn and Cordage Co., Hindley's* case, [1896] 2 Ch. 121.

Special Companies.

Private Companies.—There is a class of trading companies now very numerous—known as "private" companies. A private company is in all respects, in formation and constitution, the same as an ordinary trading company, with this difference, that the private company does not appeal to the public for its capital. The genesis is this: A firm, or it may be a single trader (*Salomon*, [1897] A. C. 22), wishes to get the advantages of incorporation, and to obtain them the partners avail themselves of the machinery provided by the Companies Acts. The business goes on just as before, only that the firm is clothed with a corporate character. Many advantages flow from incorporation, advantages which are forcibly pointed out by Mr. Palmer (*Co. Pre.*, 6th ed., 444). The chief of these advantages is, of course, that of trading with limited liability—a protection specially valuable to members of a firm in consequence of the serious risks which a partner, by the law, runs from the negligence or fraud of his copartner.

There is the further advantage, that the powers of the directors of a company can be defined by articles of which all persons dealing with the company have notice. The restriction in a partnership deed on the powers of a partner is of no efficacy against outsiders dealing with the firm. The company can borrow very advantageously on debentures, which an individual or a firm cannot. Lastly, the continuity of a company is not disturbed either by the bankruptcy, lunacy, or death of individual shareholders, as a partnership is. This convenience is especially found where the principal partner in a firm dies. Such a partner must either direct his capital to be withdrawn—at great inconvenience to the firm—or authorise his executors to carry on the business, at great risk to his estate and to the executors personally. With a private company he can bequeath his shares to trustees, who can let the management continue without risk to themselves, and without serious risk—under limited liability—to the estate. Special provisions are usually inserted as to transfer of shares, *e.g.* that no share shall be transferred to a person not a member, so long as any member is willing to purchase (see Palmer, *Co. Pre.*, 6th ed., 463 *et seq.*).

Companies not Formed for Gain.—Besides trading companies formed for the acquisition of gain, the Companies Acts provide for the incorporation of associations not formed for the acquisition of gain, but to promote commerce, art, science, religion, charity, or any other useful object (Companies Act, 1867, s. 23). An association of this kind may, on proving to the Board of Trade that it is the intention of the association to apply its profits or income in promoting its objects, and not to permit payment of any dividend to the members,[1] obtain from the Board of Trade a licence to register with limited liability without the addition of the word "limited." This licence may be granted subject to conditions. The name club, society, chamber, or association can be used instead of company, which is a convenience. An association of this kind cannot hold more than two acres of land without the sanction of the Board of Trade (Companies Act, s. 21). The powers given by these sections have been largely used; for instance, for athletic and football clubs, for improving the breed of coach horses, for training the deaf, for working ladies' guilds, for musical societies, for law societies, for club-houses, for chambers of commerce, for charity. But the Board of Trade now refuses to register golf clubs, and, it is presumed, other athletic clubs. The most convenient way of constituting such a society is as a company limited by guarantee. The Board of Trade require the memorandum and articles to be settled by their counsel at the expense of the promoters, and a fee of five guineas for that purpose must accompany the application.

Shares.

"A share in a company," says M. R. Lindley, "signifies a definite portion of its capital . . . a definite proportion of the joint estate after it has been turned into money, and applied as far as may be necessary in payment of the joint debts. But it includes a right to receive dividends, and ordinarily it confers a right to vote," p. 449. A shareholder has merely a right to a share in the profits of the trading, and to transfer his share to another. He has no right to sell any part of the property which belongs to the company as an undertaking. The business of the company is an entirety (*Bank of Hindustan*, 1870, 6 C. P. 74; *Zuccani*, 1888, 60 L. T. 23). A share is moveable or personal estate (Companies Act, s. 22), and in England is a chose in action (*Colonial Bank*, 1880, 11 App. Ca. 426).

[1] This does not prevent the association paying interest to a member on money borrowed from him.

Allotment of Shares.—If a company's capital is only partially subscribed, the directors have the difficult task of deciding whether they will go to allotment or not. There is nothing in the Companies Acts to lead to the conclusion that no business can be carried on until the whole of the proposed capital has been subscribed (*M'Dougall*, 1864, 10 Jur. 1043), and a shareholder cannot therefore get his money back on that ground, or on the inadequacy of the subscription, for each coadventurer has subscribed on the faith of all being embarked in one common undertaking (*Baird* v. *Ross*, 1856, 2 Macq. 61); but a company may, by its articles, provide—it rarely does—that the business of the company shall not be commenced until a definite amount or the whole capital has been subscribed (*Ornamental Pyrographic Woodwork Co.*, 1864, 2 H. & C. 71). The subscription of the fixed amount is then a condition precedent to commencing business (*Peirce*, 1870, 5 Ex. 209; *North Stafford Steel Co.*, 1867, 3 Ex. 172; *Scottish Petroleum Co.*, 23 Ch. D. 413); and pending it the company remains in a state of suspended animation. If there is nothing about it in the articles, the directors must exercise their discretion as business men in going to allotment. When the subscriptions are so few that the scheme must necessarily become abortive, the directors ought to return the shareholders' money (*Elder*, 30 L. T. 285); but directors cannot be held liable for misfeasance in going to allotment on insufficient applications if they have acted *bonâ fide* (*Madrid Bank*, 1866, 2 Eq. 216; *Grimwade*, 1885, 52 L. T. 409).

Agreement to take Shares.—A man can only become a member of a company by contract (*Hamley's* case, 1877, 5 Ch. D. 706), and the contract must be with the company or those acting with its authority (*Molleson* v. *Fraser's Trs.*, 8 R. 630). In ordinary circumstances, to constitute a binding contract to take shares in a company, there must be an application by the intending shareholder, an acceptance by the company, and a notice of that acceptance to the applicant (*Scottish Petroleum Co.*, 1882, 23 Ch. D. 430). The application need not be in writing (*Goldie* v. *Torrance*, 10 R. 174; *Bloxam*, 1860, 33 Beav. 529). As to an application through an agent, see *Fraser*, 1871, 24 L. T. 746; *Pugh's* case, 1872, 13 Eq. 566; *Levita*, 5 Ch. 489; and *Coventry's* case, [1891] 1 Ch. 202. A mere expression of "willingness" to take shares is not an application (*Mason* v. *Benhar Co.*, 1882, 9 R. 883). Acceptance of an application is ordinarily evidenced by allotment, but it may be evidenced in other ways (*Best's* case, 1865, 2 De G., J. & S. 656; *Great Northern Salt Works*, 1890, 44 Ch. D. 483). The shares need not be numbered (*Adam's* case, 1871, L. R. 13 Eq. 483). An acceptance must be unconditional. If it introduces a new term, it is not an acceptance, but a new offer (*Duke*, 1849, 2 Ex. Rep. 290; *Pentelow's* case, 1869, L. R. 4 Ch. 179). Notice of the allotment need not be formal (*Richards*, 6 C. P. 591); if brought home to the applicant *aliunde* it will bind him (*Wallis'* case, 1868, 4 Ch. 325, *n.*; *Fletcher*, 37 L. J. Ch. 49). When sent by post the contract is complete as soon as the acceptance is put in the post, though it never reaches the applicant, the principle being that the applicant has made the post-office his agent to deliver the offer and receive the acceptance (*Household Fire Insurance*, 1879, 4 Ex. D. 216; *Henthorn*, [1892] 2 Ch. 27; but see Ld. Shand in *Mason* v. *Benhar Co.*, *supra*, p. 890). A person telegraphing is to be treated as speaking at the place at which the message is to be delivered (*Cowan*, 1886, 20 Q. B. D. 640). An application may be withdrawn at any time before acceptance is notified to the applicant (*Hebb's* case, 1867, 4 Eq. 9; *Ritso*, 4 Ch. D. 774); and orally (*Truman's* claim, [1894] 3 Ch. 272). Sometimes an application is

conditional. When this is the case the question arises whether the condition be a condition precedent or subsequent. *Consolidated Copper Co.*, 1877, 5 R. 393; *Wood's* case, 1859, 3 De G. & J. 85; *Perrett's* case, 1873, 15 Eq. 250; *Howard's* case, 1866, 1 Ch. 561; *Gorrissen's* case, 1873, 8 Ch. 507, illustrate the former; *Elkington's* case, 1867, 2 Ch. 511; *Fisher's* case, *Sherington's* case, 1885, 31 Ch. D. 120; *Bridger's* case, 1870, 5 Ch. 305; *Jackson* v. *Turquand*, 1869, 39 L. J. Ch. 11; *Barrett's* case, 1865, 2 Drew. & Sm. 415, the latter. An agreement to take paid-up shares cannot be converted on a winding-up into an agreement to take shares not fully paid up (*Waterhouse*, 1870, 8 M. H. L. 88; *Anderson's* case, 1877, 7 Ch. D. 95; *Addlestone Linoleum Co.*, 1888, 37 Ch. D. 171; *Macdonald & Sons*, [1894] 1 Ch. 89).

Payment for Shares.—When the Legislature in the Companies Act sanctioned the principle of limited liability, it made it the price of the privilege that the capital should be real, not a sham, and to this end it required the capital to be paid up in full, and no shares issued at a discount (*In re Almada and Tirito's* case, 1888, 38 Ch. D. 415; *In re Addlestone Linoleum Co.*, 1888, 37 Ch. D. 191; *Ooregum Co.* v. *Roper*, [1892] App. Ca. 125).

But though payment in full was required by the Companies Act, that Act said nothing about the mode of payment, and accordingly a company often accepted from a shareholder payment for shares in kind—an hotel company, for instance, in plate or furniture (*Elkington's* case, 1866, 2 Ch. 511; *Pellatt's* case, 1866, 2 Ch. 527). This practice was susceptible of great abuse: it tended to make the capital a sham without any certain criterion of value, and in order to put a stop to it the Legislature in the Companies Act, 1867 (s. 25), provided that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares." If there are cross money payments presently enforceable—if the shareholder owes the company £100 on his shares and the company owes the shareholder £100, it is a useless formality for the shareholder to hand the money over the counter to the company and for the company to hand it back again to the shareholder (*Spargo's* case, 1872, 8 Ch. 407; *Maynard*, 1873, 9 Ch. 60). This, therefore, is payment in cash (*Barrow-in-Furness Investment Co.*, 1880, 14 Ch. D. 403; *Carriage Co-operative Supply Association*, 1884, 27 Ch. D. 322; *Johannesburg*, [1891] 1 Ch. 129; *Laroeque*, [1897] A. C. 358). But a mere agreement by a company to pay a sum of money contemporaneously with an agreement by an intended payee to take shares is not "payment in cash" (*Arnot's* case, 1887, 36 Ch. D. 702; *Coustonholm Co.*, 1891, 18 R. 1076); still less is a stipulation for prepayment of shares by set-off of a debt payable in future "payment in cash" (*Kent's* case, 1888, 39 Ch. D. 259); or an arrangement to receive fully-paid shares as the value of advertisements in a newspaper (*White*, 1879, 12 Ch. D. 511). Nor is the crediting of estimated but undivided profits to bonus shares issued by the company a payment in cash (*Scottish Heritages Co.*, 1898, 5 S. L. T. No. 419).

Registered Agreements.—The alternative which the Legislature offers in lieu of payment in cash is a registered agreement duly made in writing. The conditions of this registered contract are conveniently summarised by Fry, L. J., in *New Eberhardt Co.*, 1890, 43 Ch. D. 129. First, there must be, on or before the date of the issue of the shares, a contract (see *Smith* v. *Brown*, [1896] App. Ca. 614); secondly, that contract must be duly made in

writing: and thirdly, that contract must be filed with the registrar. To constitute a contract "duly made in writing" the allottee of the shares must sign as well as the company. A parole acceptance by the allottee is insufficient. The contract need not, however, specify the numbers of the shares (*Forde's* case, 1885, 33 W. R. 839). The articles of association are not a "contract in writing" within sec. 25 (*Pritchard's* case, 1872, 8 Ch. 956). Thus where articles of association duly registered provided that the company should enter into an agreement to purchase a mine in consideration in part of certain fully-paid shares, this was held not a "contract duly made in writing" between the vendor and the company within sec. 25. The effect of such a clause is simply to give the directors authority to make such a contract. The shares subscribed in the memorandum are thereby issued, and are not protected by a subsequent contract (*Dalton*, 66 L. T. 704). The contract to be registered must be with someone external to the company (*Crickmer's* case, 1874, 10 Ch. 614); but the person external to the company need not be a person unconnected with the company—he may be, for instance, a director or promoter (*Anderson's* case, 1877, 7 Ch. D. 105). The contract must also show a consideration for the shares (*Crickmer's* case, *supra*), and it must be an adequate consideration, that is, the equivalent of cash; for a registered contract under sec. 25 regulates only the mode of payment: it does not exempt the shares from being paid up in some value (*Addlestone Linoleum Co.*, 1888, 37 Ch. D. 205; *Almada and Tirito Co.*, 1888, 38 Ch. D. 425; *Eddystone Marine Insurance Co.*, [1892] 2 Ch. 423). The law may be stated thus: If on the face of the contract it appears that the directors have in the exercise of their discretion accepted the consideration, whatever it be—land, copyrights, a concession, as the equivalent of the cash payable on the shares allotted, the Court will not go into the adequacy of the consideration (*Wragg Limited*, [1897] 1 Ch. 796); but if there be anything to impeach the *bona fides* of the transaction, the Court will go behind it and direct an inquiry as to the value of the property comprised in the contract (*Pell's* case, 1869, 5 Ch. 11). The contract must be registered "on or before" the issue of the shares, *i.e.* must be substantially contemporaneous with the issue of the shares. Where owing to inadvertence it has not been registered in time, the Court has allowed registration *nunc pro tunc* even after winding up (*Preservation Syndicate*, [1895] 2 Ch. 768; *Pool's* case, 1887, 35 Ch. D. 579); but it must be satisfied that there are no creditors, or that if there are, they consent. It is not sufficient to refer to the consideration as stated in a document not filed (*Kharaskhoma*, [1897] 2 Ch. 451). If shares have been duly issued as fully paid under a registered contract, the protection of the contract enures for the benefit of a transferee of the shares issued under it, though the transferee has paid nothing, and has been presented with the shares by the company's vendor. Where a company's vendor stipulates to be paid in fully-paid shares, but no contract is registered to make the shares—in law—fully paid, if in such a case the shares have been allotted to the vendor and registered in his name, and he knows it, he will be liable as a contributory: but if he has not acquired the full status of a shareholder, and the contract is still incomplete, he will not be made a contributory, because a person who has only agreed to take shares which are fully paid up is not to be compelled to take something quite different (*Arnot's* case, 1887, 36 Ch. D. 702, 711; compare *Sandys*, 1889, 42 Ch. D. 98).

Certificates.—A share or stock certificate, as Ld. Cairns said in *Shropshire Tramways Co.*, 1874, 7 H. L. 509, is a solemn affirmation under the seal of the company, that a certain amount of shares or stock stands in the

name of the individual mentioned in the certificate. Share certificates are the proper documentary evidence of a shareholder's title (*Société Generale de Paris*, 1886, 11 App. Ca. 29; Companies Act, s. 31), and every shareholder is commonly by the articles (Table A, Art. 2) entitled, on payment of 1s. or other small fee, to a certificate specifying the shares held by him, and the amount paid up thereon. The certificate does not itself give a title, but the certificates are the indicia of title which a transferee must have for production to the company before he can get his title perfected by registration (*Colonial Bank*, 1886, 11 App. Ca. 437; *Shropshire Union Ry. Co.*, *supra*). If the certificates are not forthcoming on a transfer, their non-production puts the transferee on inquiry, and prevents him setting up the title of a buyer for value without notice, for *non constat* the transferor may not have pledged them (*Société Generale de Paris*). By giving a certificate the company arms the transferee with the power of holding himself out to all the world as the owner of the shares, and a *bonâ fide* buyer from such transferee may therefore under the doctrine of bar or estoppel maintain an action against the company, not as the real owner of the shares, but as a person whom the company is bound to treat as the real owner (*Simm*, 1879, 5 Q. B. D. 188; *Tomkinson*, [1893] App. Ca. 396). The company is barred or estopped from disputing the terms of the certificate. If it bears that the shares are fully paid, a transferee acquiring shares in reliance on that representation cannot be made liable for calls (*Burkinshaw*, 1878, 3 App. 1004; *Bloomenthal*, [1897] A. C. 156; *Scottish Heritages Co.*, 1898, 5 S. L. T. No. 419). It is different where the transferee, being a director, or allottee, knew the true state of the shares (*London Celluloid Co.*, 1888, 39 Ch. D. 190). The doctrine of bar also applies in favour of a nominee of an original allottee (*Parbury's* case, [1896] 1 Ch. 100; but see *Furness & Co.*, 1893, 21 R. 239).

A "certification" is different from a certificate (*Bishop*, 1890, 25 Q. B. D. 512; *Concessions Trust*, [1896] 2 Ch. 757). It is generally a marking—"certificate lodged"—on the margin of the transfer, and is a representation that the transferor has produced such documents as show a *primâ facie* title in him to the shares in the transfer (per L. J. Lindley, 25 Q. B. D. 519).

Founders' Shares.—Founders' shares originated with private companies. Thence they came to be frequently adopted by trading companies that were not private, being found convenient (1) as a consideration for getting the company's capital underwritten or other costs of promotion, and (2) as a bonus to applicants for shares, one founders' share for, say, twenty ordinary shares subscribed. Founders' shares are usually issued of a lower denomination, and entitle the holders to half or one-third of the company's profits after payment of 7 or 10 per cent. to the ordinary shareholders, sometimes also to half the surplus assets on a winding up.

Calls.—See CALL, vol. ii. p. 276. It may here be added that directors are trustees of the call-making power, and must exercise it in the interests of the shareholders, and not for their own ends (*Gilbert's* case, 1870, 5 Ch. 559; *Odessa Tramways Co.*, 1878, 8 Ch. D. 235).

Payments in advance of Calls.—These may be made under an article in terms of or similar to Table A (7); and the advance bears interest, which is a debt and may be paid even out of capital. The advance is a loan till a call is made; but the loan is not repayable (*Lock*, [1896] 1 Ch. 397; [1896] A. C. 461); and after creditors are paid, the rights of shareholders in advance will be adjusted in a winding up, for which purpose an equalising call may require to be made.

Calls paid up under Act 1867, s. 24 (2) *ad fin.*, are in a different position. These are not advances, but true payments of capital, and do not bear

interest, but draw dividend from profits. A similar adjustment will be made in a winding-up.

Transfer and Transmission of Shares.

Shares of companies are property, and under the Companies Act, s. 22, are "capable of being transferred in manner provided by the regulations of the company." Every shareholder has therefore a right *primâ facie* to transfer them (*Cawley*, 1889, 42 Ch. D. 209, 231; *Bahia and San Francisco Ruy. Co.*, 1868, 3 Q. B. 595). A director has the same right as an ordinary shareholder to transfer his shares (*Jessopp's* case, 1859, 2 De G. & J. 649; *Gilbert's* case, 1869, 5 Ch. 559), including his qualification shares (*South London, etc., Co.*, 1888, 39 Ch. D. 331). A voluntary winding-up being in contemplation will not prevent shareholders in a solvent company, though cognisant of the fact, transferring their shares (*Taurine Co.*, 1883, 25 Ch. D. 118). But a shareholder may bind himself not to transfer his shares for a limited time. The power to transfer may also be restricted by the directors having a more or less wide power to reject transferees. Otherwise the right is absolute.

There is no obligation imposed on a transferor of shares of seeing that a transferee is a proper person, but if he does not get a proper person as transferee—if he transfers, for instance, to a pupil—he runs the risk of having the shares thrown back on him (*Parsons & Spong's* case, 1868, 8 Eq. 656). For a person once a shareholder remains a shareholder until he executes a valid transfer or his shares are duly forfeited (*Heritage's* case, 1869, 9 Eq. 5). A buyer of shares impliedly agrees to indemnify the seller —to place himself exactly in the same position (for better or worse) as between himself and the company as that in which the seller stood (*Mayhew's* case, 1854, 3 De G., M. & G. 848). If therefore he requires, as he may do, the seller to transfer to a nominee of his, the transfer which the buyer procures to be executed to such nominee must be such as completely to relieve the transferor from all future liability (*Maxted*, 6 Ex. 151). After the agreement for sale the registered owner is a trustee for the buyer of any benefit accruing, such as a dividend or an option to take new shares (*Black*, 1878, 4 Ex. D. 241; *Stewart*, W. N., 1874, 171, 178). A seller of shares is bound, if the contract fixes no date, to deliver the certificates within a reasonable time (*De Weal*, 1886, 12 App. Ca. 141). The absence of certificates on a transfer puts the transferee on inquiry (*Société Generale de Paris, supra*). On a sale of bank shares the numbers of the shares must be specified (Leeman's Act, 1867; *Perry* v. *Barnett*, 1884, 15 Q. B. D. 388), otherwise the sale is null (*Nelson Mitchell*, 1878, 6 R. 420).

Form of Transfer.—If a company's regulations prescribe a particular course for a shareholder ceasing to be such, he can only cease to be a shareholder by pursuing that course (*Burgate*, 1851, 3 H. L. 312). The form of the transfer depends on the regulations of the company (*Société Generale de Paris, supra*). If the regulations are silent, the rule as to the form of transfers may be interpreted by the practice of the company (*Marino's* case, 1867, 2 Ch. 596). Shares in a company domiciled abroad, *e.g.* in the United States, can only be transferred by an instrument effectual by the law of the United States for that purpose (*Colonial Bank*, 1890, 15 App. Ca. 281).

Directors' Duty as to registering Transfer.—If the directors have no discretion in accepting transferees, their function when a transfer is presented is purely ministerial. They are entitled to examine it, to satisfy themselves that it is in order and the transferee genuine. They are bound to act promptly and according to the usual course of business, and not carelessly or

purposely to delay (*Nation's* case, 1866, 3 Eq. 77). If a transfer be real, *i.e.* a transfer out and out of all the transferor's interest, it will be upheld, although it be made to a mere pauper, and for the avowed purpose of relieving the transferor from any future liability (*R.* v. *Lambourne Valley Rwy. Co.*, 1889, 22 Q. B. D. 466). It is the fault of the regulations of the company if they admit of persons becoming shareholders who are of no means (*King's* case, 1871, 40 L. J. Ch. 366). Most companies' articles consequently contain a power to the directors to veto transfers. This power is only available while the company is a going one (*City of Glasgow Bank*, 1879, 4 App. Ca. 573). Like other powers of directors, it is a fiduciary one (*Gresham Life Assurance Society*, 1872, 8 Ch. 449), not to be arbitrarily or capriciously exercised (*Bell Brothers*, 1891, 65 L. T. 245), for so exercised it might mean confiscation. The directors' duty is, keeping in view the terms in which their power is expressed, fairly to consider the fitness of the proposed transferee at a board meeting (*Ceylon Land and Produce Co.*, 1893, 7 T. L. R. 692). If the power to reject a transfer is limited to shares not fully paid up, this points to a pecuniary responsibility of the transferee as the principal element to be regarded by the board. Directors cannot under a power veto a transfer because they disapprove of the purpose for which it is made, *e.g.* to multiply votes, if there is no objection to the transferee (*Moffatt*, 1877, 7 Ch. D. 605; *Pender*, 1877, 6 Ch. D. 70). It seems doubtful whether directors of a company could properly refuse to approve a transfer to a nominee of a rival company (*Robinson*, 1865, 1 Eq. 32). A director may approve a transfer to himself (*Burke*, 1870, 6 Ch. 262). As to transfer to minor, see *Hill*, 1879, 7 R. 68.

If the directors have fairly considered the question at a meeting, and there is no evidence to show that they have acted corruptly or capriciously, the Court will not interfere with their discretion (*Gresham Life Assur. Society*, *supra*). But where there was evidence that the chairman and others of the directors had been actuated by feelings of hostility to the transferor, the Court overruled the rejection (*Ceylon Land and Produce Co.*, *supra*). The directors are not bound, either out of Court or in Court, to give their reasons for disapproving the transfer, and their not doing so will, therefore, not make the Court draw unfavourable inferences against them (*Coalport China Co.*, [1895] 2 Ch. 404); but if they choose to give their reasons, the Court will consider whether they are legitimate or not (*Bell Brothers*, *supra*).

On a sale of shares according to the custom of the Stock Exchange (making the price payable on the seller handing over a duly-executed transfer and the certificate), there is no implied undertaking by the seller that the directors shall accept the buyer as a transferee, and that if they do not accept him the price shall be refunded (*London Founders' Assoc.*, 1888, 20 Q. B. D. 576; *Harrison*, 1885, 28 Ch. D. 363). The transferee takes the risk.

A power is also given (Table A, 10) to refuse registration of a transfer made by a member who is indebted to the company. Under the Companies Clauses (Scotland) Act, 1845, s. 17, a member is disentitled to transfer shares on which calls are in arrear, which is a more limited protection to the company. The wider remedy is not inconsistent with, but is not so strong, as the Scots common-law right of retention (*Bell's Tr.*, 1886, 14 R. 246; *Stringer*, 1882, 9 Q. B. D.). The indebtedness must be determined as at the date when the transfer is presented (*Cawley*, 1889, 42 Ch. D. 209). As to the effect of the Companies Clauses Act, see *Hubbersty*, 1867, 2 Q. B. 471; *Watson* v. *Eales*, 1857, 23 Beav. 294; and *Hoylake Rwy. Co.*, 1874, 9 Ch. 257. Where a shareholder whose calls were in arrear had induced

the company to postpone making a call, and immediately transferred his shares, the Court refused on equitable principles to order the company at the instance of the transferor to register the transferee (*Parker*, 1867, 2 Ch. 685).

Misdescription of the transferee is another ground on which the directors may veto a transfer (*Payne's* case, 1869, 9 Eq. 223; *William's* case, 1869, 9 Eq. 225, *n.*; *Roger's* case, 1872, 25 L. T. 406), because it prevents the directors exercising any real judgment. But see *Master's* case, 1872, 7 Ch. 292, and European arbitration cases collected in Buckley, 7th ed., 39.

If directors come to the conclusion that they cannot go on, and must wind up, it has been held that they should pass a resolution to allow no more transfers (*Nation's* case, 1866, 3 Eq. 77; *Lowe's* case, 1869, 9 Eq. 595). And where by a circular the directors have announced the insolvency of the company, and convened a meeting to pass a winding-up resolution, the directors are not entitled to pass transfers or alter the register after the issue of the circular (*N. Mitchell*, 1878–79, 6 R. 420, also H. L. 66; *A. Mitchell*, 6 R. 439, also H. L. 60; *Macdonald's Trs.*, 1879, 6 R. 621; *Myles*, 1879, 6 R. 18).

Shares may be transferred, after a voluntary winding-up, with the sanction of the liquidator (Companies Act, ss. 131 and 153; *Benhar Co.*, 1879, 6 R. 706; *National Bank of Wales*, [1897] 1 Ch. 298).

Forged Transfers.—A forged transfer of stock or shares does not affect the title of the stockholder to the stock and the dividends on it (*Davis*, 1836, 2 Bing. 393; *Waterhouse*, 1879, 41 L. T. 553), and the true owner of the stock or shares is entitled to require the company to recognise him as still being the holder of the stock or shares purported to be transferred (*Sloman*, 1845, 14 Sim. 475), and to have the alleged transfer and registration cancelled (*Johnston*, 1870, 9 Eq. 181). Thus where a trustee of Bank of England stock had forged his co-trustee's name to a power of attorney, and sold the stock and absconded with the proceeds, the bank was ordered to re-invest the stock in the name of the innocent trustee. The trustee has a right in such a case to say to the bank, "You must make the account stand as it ought to stand without regard to the unauthorised transfer" (*Sloman, supra*; *Taylor*, 1860, 28 Beav. 287; *Barton* v. *North Staffordshire Rwy. Co.*, 1889, 38 Ch. D. 458). Companies commonly protect themselves against forged transfers by sending a notice to the registered shareholder informing him that a transfer has been presented for registration, but a shareholder's disregarding such a notice from the company will not bar him, if the transfer is a forgery, from compelling the company to restore his name to the register (*Barton* v. *L. & N.-W. Rwy. Co.*, 1889, 24 Q. B. D. 77). Suppose, however, that a person innocently brings a forged transfer to the company, and that the company registers it, does it by so registering impliedly guarantee the genuineness of the transfer to the bringer? The answer is No. The company owes no duty to the bringer to make inquiries whether the transfer is genuine or not; the company is not precluded from saying to him, to use Ld. Bramwell's words, "You brought us a forged transfer, we believed it to be genuine, and we have registered you as a stockholder; but we are not estopped from saying that the transfer was forged and that you have no real title" (*Simm*, 1879, 5 Q. B. D. 203, 204; *Waterhouse, supra*). But if a company registers a person claiming under a forged transfer and issues him a certificate, it thereby enables him to hold himself out as a true owner, and a *bonâ fide* buyer from him may therefore, under the doctrine of bar or estoppel, maintain an action against the company, not as the real owner of the stock, but as a person whom the company is bound to treat as the real owner (*Simm, supra*; *Bahia and San Francisco Rwy. Co.*, 1868, 3 Q. B. 584; *Shaw*, 13 Q. B. D. 103). The measure of damages

in an action against the company, based on such a bar or estoppel for misrepresentation of title, is the market value of good shares at the date when the buyer was deprived, by the intervention of the true owner, of the shares which he was led to believe were his.

The Forged Transfers Act, 1891, and the amending Act, 1892, were passed "for preserving purchasers of stock from losses by forged transfers." They give power to a company to make compensation by a cash payment out of the company's funds for any loss arising from a transfer of any shares or stock in pursuance of a forged transfer, or of a transfer under a forged power of attorney; and the company may, by a small fee, by insurance, reservation of capital, accumulation of dividends, or in any other manner it may resolve upon, form such compensation fund. The company may also borrow for the purpose on the security of its property. It may impose reasonable restrictions on the transfers of shares and powers of attorney to transfer. The company is to be surrogated to any rights of the payee of the compensation. The Act applies to losses and forgeries before 1891.

Transmission of Shares.—In addition to allotment and transfer, shares are acquired by transmission from deceased shareholders. The provisions of different companies vary considerably on this head, but in ordinary circumstances the presentation to the company of the confirmation or probate in favour of the executor entitles him to be registered, and if he authorises or afterwards adopts this step, he therefore becomes a shareholder to all effects (*Buchan*, 1879, 6 R. 567, and H. L. 44; *M'Ewen*, 1879, 6 R. 1315; *Bell*, 6 R. H. L. 55; *Gordon*, 7 R. 55). But the executor may wish to transfer shares to someone else, either on sale or by arrangement, and for that purpose he is not bound to go upon the register, and may execute a transfer without doing so (Companies Act, s. 24). He is entitled to reasonable time for consideration and to find a purchaser, and may in the meantime send in his title to be noted and may draw dividends. The confirmation or probate is a sufficient warrant for that, but the executor does not thereby become a partner (*Buchan, supra*). How long the executor is entitled to occupy this position is not clear. The articles of the company commonly contain provision authorising the company after a definite time to sell or forfeit the shares, and thus compel the executor to act. So long as the name of the deceased remains on the register, his estate is liable for all obligations connected with the shares, and the executor distributing the estate without making provision therefor is personally liable (see *Heritable Securities Association*, 1893, 20 R. 675; *Stewart*, 1871, 9 M. 810). But if the executor gives no express or implied authority to place his name on the register, he does not become a partner. Authority by the executor to the law agent, to complete the executor's title, is not authority to place him on the register (*Stott*, 1879, 6 R. 1126; *Wishart*, 1879, 6 R. 1341). An executor's authority to place on the register may be recalled before it has been acted on, and if it has not been acted on before the commencement of the liquidation, or before the declared insolvency of the company, it is held recalled, and the entry, if made, can receive no effect (*Macdonald*, 1879, 6 R. 621; *Myles*, 1879, 6 R. 718). But it is different in the case of a transfer on sale (*Howe*, 1879, 6 R. 1194; *Stenhouse*, 7 R. 102; *Turnbull*, 11 S. 487; *Allan*, 15 D. 725). It is no part of the duty of a trustee in bankruptcy, or of a *curator bonis* for a lunatic, to go upon the register, but their titles may be noted and dividends drawn (*Myles, supra*; *Lindsay*, 1879, 6 R. 671). But if a trustee in bankruptcy, *curator bonis*, judicial factor, or other officer authorises the company to register the shares in his name, he is liable as a shareholder (*Lumsden* v. *Peddie*, 1866, 5 M. 34). Authority to place on the register will be inferred

from acting as a shareholder, or from authorising or approving of the purchase of shares, though the transfer was not signed by all the trustees (*Roberts*, 1878, 6 R. 805; *Ker*, 1879, 6 R. H. L. 52; *Cunninghame*, 6 R. H. L. 99). Parole evidence will be admitted to explain writings bearing on the authority to register (*Stott, supra*; *Gillespie*, 1879, 6 R. 813). One of a body of trustees or executors (except the last) ceases, by resignation intimated to the company, or by death without intimation, to be a shareholder (*Sinclair, Tochetti, Oswald, Low*, 1879, 6 R. 461, 571, 789, 830).

Lien of Company.—At common law a Scotch company has a lien or right of retention over the company's shares belonging to a shareholder, in security and satisfaction of debts due by him to the company (*Bell's Tr.*, 1886, 14 R. 246). This entitles the company not only to refuse to register a transfer, but to sell the shares in satisfaction of the debt. The articles of a registered company usually give it a "first and paramount or permanent lien" upon the share of every shareholder for all debts due from him to the company. Without such a provision a company in England has no lien or charge (*Dunlop*, 1882, 21 Ch. D. 583). When a company with such a lien receives notice of a charge on the shares, it cannot set up its lien against the person entitled to the charge in respect of a debt subsequently accruing due from the shareholder to the company (*Bradford Banking Co.*, 1886, 12 App. Ca. 29; and see *New London, etc., Bank*, 1882, 21 Ch. D. 302).

Register of Members.—As we have seen, this is a very important record, particularly with reference to transfers and transmissions of shares. Every company under the Companies Act is required under a penalty to keep such a register and to enter therein—(1) the names, addresses, and occupations of such members, the number of shares held, and the amount paid up thereon; (2) the date of every member's entry on the register; (3) the date at which any person ceased to be a member (Companies Act, s. 25). The register is *primâ facie* evidence of the truth of the matters required to be entered in it. This is an exceptional privilege, and therefore the prescribed mode of keeping the register must be strictly complied with (*Bain*, 1850, 3 H. L. 1). In an action for a call, it is sufficient to produce the register with the defendant's name in it as a shareholder, and it is then for him to rebut the evidence (*West Cornwall Rwy. Co.*, 1850, 15 Q. B. 521). The register is the only evidence of the right to vote (*Pender*, 1877, 6 Ch. D. 70). The register is required by sec. 32 of the Companies Act to be open to the inspection of any member gratis, and of any other person on payment of a shilling. This provision opening the register to the inspection of all the world is part of the policy of the Legislature in conceding limited liability. It is to enable persons dealing with the company to know to whom and to what they have to trust (*Oakes* v. *Turquand*, 1867, 2 H. L. 367). The right to inspect carries with it the right to take copies (*Mutter*, 1888, 38 Ch. D. 92). A shareholder cannot be refused inspection because he is using his right in the interests of a rival company (*ib.*).

Annual List of Members.—The company is also required, under a penalty, immediately after the annual meeting of the company, to send to the registrar a list of members with certain particulars of their holdings, etc., and to keep a copy of the list in the register (Companies Act, ss. 26 and 27). The company is also empowered (s. 33) to close the register, on giving notice by advertisement, for any time not exceeding in whole thirty days in each year. This power is exercised at the time of the annual meeting; and except by this means the company cannot, in case of a panic, prevent shareholders leaving the company, except by the drastic method of passing a winding-up resolution. The circumstances in which the directors may or

may not refuse to register transfers have already been referred to (pp. 124–6, *supra*).

Notices of Trust.—It is declared (s. 30) that no notice of any trust, expressed, implied, or constructive, is to be entered on the register; but this does not apply to Scotland, where the practice has always been to disclose trusts. The effect, however, is only to earmark the shares as belonging to the trust, and safeguard the interests of beneficiaries, not to affect the liability of the trustees as the shareholders of the company (*Muir*, 1878, 6 R. 392). A person obtaining an allotment of shares, and authorising his name to be placed on the register, is not entitled to have it removed on the ground that by agreement with the directors his name was entered there only that he might place the shares among persons willing to take them (*Miln*, 1887, 15 R. 21).

Rectification of Register.—The register being then the authentic evidence of the constituency of the company, it is very important that it should truly represent that constituency, that is, should contain the names of the persons, and only of the persons, who are from time to time the real shareholders, and for this purpose the Legislature has in sec. 35 of the Companies Act supplied a summary mode of rectifying the register. This section provides that "where the name of any person is without sufficient cause entered in or omitted from the register of members of any company under the Act, or if default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member, the person or member aggrieved or any member of the company" may apply to the Court for an order for rectification. It has been decided, after some fluctuation of judicial opinion, that the Court has jurisdiction under this section to make a summary order for rectification in all cases that it may think fit, whether as between the company and a shareholder, or between two disputant shareholders *inter se* (*Shaw*, 1887, 2 Q. B. D. 463); but the jurisdiction is a discretionary one, and there are cases in which the Court will not try by this summary machinery what is appropriate only to an action of reduction, *e.g.* a challenge on the ground of misrepresentation in the prospectus (*Ruby Consolidated Mining Co.*, 1874, 43 L. J. Ch. 633; *Blaikie* v. *Coats*, 1893, 21 R. 150); but extensive use has been made of this section in the case both of going companies and companies in liquidation, where the question is whether the petitioner agreed to become a member, or authorised his name to be placed on the register (*City of Glasgow Bank* cases, 6 R.); and cases of the liability of husbands and wives and of trustees and executors were so tried, also some cases of misrepresentation (*Chambers*, 1891, 18 R. 1039; *Blakiston*, 1894, 21 R. 417), and a case of the issue of shares at a discount (*Klenck*, 1888, 16 R. 271)—all of which involved an inquiry into disputed facts. The Court may, under sec. 98 of the Companies Act, rectify the register after a winding-up order has been made. A company is by the Companies Act, 1880, empowered to keep a colonial as well as a home register.

Directors.

Nature of Office.—A company as an abstract entity cannot act of itself. It must act by agents. Those managing agents are commonly known as directors. At one time it was usual to speak of directors as trustees, but this view has been considerably modified. "They certainly are not trustees," said Kay, J., in *Faure*, 1890, 40 Ch. D. 150, "in the sense of that word as used with reference to an instrument of trust, such as a marriage settlement or will. They are managing agents of a trading association." The company property is not vested in them. The element of truth in speaking of

directors as trustees is, that the fiduciary relation of the ordinary agent is in their case accentuated by the fact that their principal—the company—is a mere abstraction, thus relegating to the directors very wide discretion in the management of the company's funds and the exercise of the company's powers.

Appointment.—Directors are usually named in the articles of association, and their number fixed. It varies from three to seven, seldom more, a large number weakening the sense of individual responsibility. Under the articles contained in Table A the number of the directors and the names of the first directors are to be determined by the subscribers of the memorandum (Art. 52), and till they are so determined the subscribers of the memorandum are to be deemed to be directors (Art. 53). The power thus given to the subscribers of the memorandum—the statutory directors as they may be called—to appoint remains in force until an appointment of directors has been made. It is not lost by the fact that the first general meeting has been held without directors being appointed thereat (*John Morley Building Co.*, [1891] 2 Ch. 393), but to be exercisable the company must have been first registered (*Möller*, 1 Meg. 274). The subscribers need not meet for the purpose of appointing, as directors must. It is enough if they have determined the number and names of the directors in any way, *e.g.* by writing (*Great Northern Salt Co.*, 1890, 44 Ch. D. 472), but in such a case—where they do not meet—all the subscribers must sign, and not merely a majority (*John Morley Building Co., supra*). A majority of the subscribers of the memorandum assembled at a meeting is, however, competent to appoint directors (*York Tramways Co.*, 1882, 8 Q. B. D. 685; *Johannesburg Hotel Co.*, [1891] 1 Ch. 125), but not a meeting of less than a majority (*London and Southern Counties Freehold Land Co.*, 1885, 31 Ch. D. 225). The notice of meeting must be a reasonable one. Two days is enough (*John Morley Building Co., supra*; and see *London Freehold Land Co., supra*). Art. 35 of Table A requiring seven days' notice of meeting does not apply to a meeting of the subscribers of the memorandum. It has been held in an Irish case (*Ballina Light Rwy. Co.*, 1888, 21 L. R. Ir. 501) that if the subscribers of the memorandum are by the articles to appoint the first directors, and until directors are so appointed are to have the powers of directors, and the subscribers make default in appointing, they are chargeable in equity as if they had duly appointed themselves.

Directors, other than the first directors, are elected at the ordinary general meeting of the company in each year. If any dispute arises as to the propriety of a director's election, the proper course is to call a general meeting of the company and get the thing set right (*Wandsworth Gas Co.*, 1870, 22 L. T. 405; and see *John Morley Building Co., supra*). It is entirely a matter for the company, not the Court; the Court will not compel a company to take a person as managing director whom the company does not desire to act as such (*Bainbridge*, 1889, 41 Ch. D. 474). Mutual confidence is the basis of the relation. Nor will the Court give effect to an agreement by which one company is to have the right of imposing directors on the shareholders of another company (*James*, 1873, 6 H. L. 335). Directors who act as such, knowing their appointment to be invalid, thereby render themselves liable for any act of commission or omission on their part in the same way and to the same extent as if they had been *de jure* directors (*Western Bank*, 1872, 11 M. 96; *Coventry and Dixon's* case, 1880, 14 Ch. D. 670).

Retirement of Directors.— Under Table A, Art. 58, the whole of the directorate are to retire from office at the first general meeting, and one-third in each successive year; but the article now most generally adopted provides for retirement of one-third only of the directors at the first general

meeting, as well as at general meetings in subsequent years, such one-third being selected by ballot in the first year, and afterwards those who have been longest in office. Any casual vacancy in the board may usually be filled up by the directors, but the appointee holds so long only as the vacating director would have retained his office. "Casual vacancy" means any vacancy not occurring by efflluxion of time, that is, any vacancy occurring by death, resignation, or bankruptcy (*York Tramways Co., supra*). As retiring directors are eligible for re-election, the services of valuable directors are secured to the company. Directors may vacate office by becoming bankrupt, or lunatic, or insolvent, or by non-attendance for a long period at board meetings, by ceasing to hold their qualification, by resignation, and in other ways. A director being merely a member of a firm, or director of a company, contracting with the company whose director he is, does not thereby vacate his office, but is only disentitled to vote in regard to that transaction, and there is usually a clause in the articles to that effect.

Defects in Authority of Directors. — Disqualifications of this kind or defects in the appointment of directors might cause serious inconvenience to persons dealing with the company in ignorance of them, and sec. 67 of the Companies Act accordingly provides that "until the contrary is proved, all appointments of directors, managers, or liquidators shall be deemed to be valid, and all acts done by such directors, managers, or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications." Art. 71 of Table A reproduces the same protective principle, omitting the words "until the contrary is proved." It has been held that sec. 67 is not restricted to dealings with the outside public, but applies to dealings with shareholders, and will validate, for instance, a call made by *de facto* directors, though after the call is made it is discovered that the directors were appointed at a general meeting called on insufficient notice (*British Medical Assoc.*, 1889, 61 L. T. 384); but the section only validates acts done before the invalidity of the appointment is shown (*Old Bridport Brewery Co.*, 1866, 2 Ch. 191; *Branksea Island Co.*, 1890, 1 Meg. 12). Where, however, a minimum number of directors is prescribed in such terms as to be imperative and not merely directory, a call made by a board below the minimum will be invalid and incapable of enforcement (*Bottomley*, 1880, 16 Ch. D. 681). But if there be a clause providing that continuing directors may act notwithstanding any vacancy in the board, this will validate acts done when the board has fallen below the minimum (*York Tramways Co., supra*; *Scottish Petroleum Co.*, 1883, 23 Ch. D. 413). Such a clause would not justify the permanent reduction of the board below the prescribed minimum. It would, it is thought, apply merely till the next meeting of the company, when the vacancy should be filled up. There is nothing to prevent a director of a company becoming director of a rival company in the absence of any special prohibition in the articles (*London and Mashonaland Exploration Co.* v. *New Mashonaland Co.*, W. N. 1891, 165).

Qualification of Directors.—Table A requires no qualification in a director, that is, he need not be a member of the company. But, as a rule, articles now contain a qualification clause, on the principle that a director should have a substantial stake in the company. The qualification may not apply to directors nominated in the articles (*Consolidated Copper Co.*, 1877, 5 R. 393). A director required to qualify need not take his qualification shares from the company (*Brown's* case, 1873, 9 Ch. 102). To render a director liable as a shareholder there must be a contract by him to take the shares. The mere acceptance of the office of director, or even acting as such, does not constitute such a contract (*Wheal Buller*

Consols, 1888, 38 Ch. D. 42; *Onslow's* case, 1888, 57 L. J. Ch. 338 *n.*); but only a contract to qualify as a director, *i.e.* to acquire shares within a reasonable time, either from the company or some outside person (*Hutchinson's* case, [1895] 1 Ch. 226); but acceptance or acting may be evidence from which a contract may, in the circumstances, be inferred (*Brown's* case, *supra*; *Lord Inchiquin's* case, [1891] 3 Ch. 28; *Hercynia Copper Co.*, [1894] 2 Ch. 403; *Cammell*, [1894] 2 Ch. 392; *Dunster's* case, [1894] 3 Ch. 473; *Konrath's* case, 1893, 3 R. 288). The form in *Isaacs'* case, [1892] 2 Ch. 158 (and *Hercynia* was similar), providing that if a director shall fail to acquire his qualification within a month he shall be "deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him," is effectual to fix the director, and is now commonly adopted. Even when there is a contract established, the director has a reasonable time for acquiring the qualification (*Karuth's* case, 1875, 20 Eq. 506; *Brett and Hewitt's* case, 1883, 25 Ch. D. 283); and if the company is wound up before a reasonable time has expired, he cannot be fixed as a contributory (*Bolton & Co.*, [1894] 3 Ch. 356).

Powers of Directors.—Directors are special agents of the company in respect of the powers vested in them by the articles, but they may also be regarded as general agents of the company in matters not specially provided for and not foreign to the objects of the company. Their powers under the articles are usually of the widest description (*Ernest* v. *Nicholls*, 1856, 6 H. L. 419). By Art. 55 of Table A they may exercise all the powers of the company except such as are required to be exercised by the company in general meeting, and this policy is a sound one. Directors are business men managing a trading association, not like trustees vested with property to preserve and ultimately divide; they have to carry on, consolidate, and extend the company's business, enter into contracts, invest or spend the company's funds, appoint and dismiss servants, decide upon dividends, make calls, issue debentures, pass transfers *cum multis aliis*; and for these things they require a free hand. "In my opinion," said James, L. J., in *A.-G.* v. *Great Eastern Rwy.*, 1879, 11 Ch. D. 480, "the majority of managing partners may be trusted and ought to be trusted in determining for themselves what they may do and to what extent they may go in matters indirectly connected with or arising out of their business relations with others." Accordingly, acts within the company's powers bind the company, and that even although the conditions or regulations prescribed to the directors by the company may not have been complied with, provided the person transacting with the directors acted *bonâ fide* and without notice of the irregularities. The acts were in substance within the powers of the company, and the other party was entitled to assume that all prescribed directions were duly complied with; *omnia rite acta* (*Heiton*, 1877, 4 R. 830; *Brown's* case, 1886, 13 R. 515). If, for instance, a share certificate which is *ex facie* regular is issued, the company cannot set up against the shareholder that the certificate was forged by its secretary (*Shaw*, 1884, 13 Q. B. D. 193; *County of Gloucester Bank*, [1895] 1 Ch. 629; see *Totterdell*, 1866, 1 C. P. 674). This principle—the right of a stranger dealing with the company to presume *omnia rite acta* as regards matters of "indoor management"—is constantly invoked where there have been irregularities as well as defects of authority in the directors, and is essential to business. But it must always be taken in conjunction with the other principle, which requires persons dealing with a registered company to acquaint themselves with its constitution, that is, its memorandum and articles, and the law or statutes applicable thereto (*Royal British Bank*, 1857, 6 El. & Bl.

327). The distinction is well illustrated in that case. There directors had, by the company's articles, a general power to borrow with the assent of a general meeting. Without such assent their power was limited by the articles to £1000. The directors without the assent of a general meeting issued debentures for £3000. If the debentures had been issued to a stranger this would have been good for the whole amount, for the lender could have no means of knowing whether the internal regulations had been complied with or not, the debentures being *ex facie* regular, but the debentures were issued to the directors, who had the means of knowing that the internal regulations had not been complied with, by obtaining the assent of a general meeting, and the Court held that the directors could only hold them for £1000.

Directors' Powers held in Trust.—Directors are trustees of their powers for the company, and must exercise them for the benefit of the company, and not to promote their own private interests (*Brown*, 1859, 19 Beav. 104; *Aberdeen Rwy. Co.* v. *Blaikie*, 1851, 1 Macq. 471; *Poole Jackson and White's* case, 1878, 9 Ch. D. 322; *Cawley & Co.*, 1889, 42 Ch. D. 233). They must not use powers given to them for one purpose for another (*Bennett's* case, 1855, 5 De G., M. & G. 297). They cannot, for instance, wrest a power given them of sanctioning transfers to carry out an arrangement contrived and disguised for the purpose of affecting the retirement of a large body of shareholders; so if directors are exercising their powers *malâ fide*—hurrying on a general meeting in order to prevent unregistered transferees recording their votes—the Court will restrain them (*Cannon*, 1875, L. R. 20 Eq. 669). So also in regard to the powers of directors to allot shares, make calls, receive payment of calls in advance, forfeit shares, or employ funds of the company (*Parker*, 1874, 10 Ch. 96; *Gilbert's* case, 1870, 5 Ch. 559; *Sykes'* case, 1872, 13 Eq. 255; *Harris*, 20 Beav. 384).

Delegation of Powers.—Directors, being agents, cannot, unless expressly empowered to do so, delegate their authority (*Cobb*, 1870, 6 Q. B. 936), *e.g.* their power of allotting shares (*Leeds Banking Co.*, 1866, 1 Ch. 561). They may employ skilled agents, such as actuaries or valuers, to assist them in the preparation of the balance-sheets and estimates, for instance, or a manager to assist them in carrying on the business, but they must not surrender their judgment to anybody (*Leeds Estate Co.*, 1887, 36 Ch. D. 786; *Cartmell's* case, 1874, 9 Ch. 696). Where articles authorise directors to delegate to a committee, as Art. 64 of Table A does, and they do so without fixing a quorum, it has been held in England that the whole committee must act (*Liverpool Household Stores Association*, 1880, 59 L. J. Ch. 624).

Illustrations of Directors' Powers.—To take a few examples of what directors may do and what they may not do. They may make a moderate expenditure on advertisements in launching the company, that is, on introducing it to the notice of the public (*Faure Electric Accumulator Co.*, 1889, 40 Ch. D. 115); on the same principle the Court of Appeal has now decided that directors may pay a reasonable amount by way of brokerage or commission—2½ per cent. in the particular case—to a stockbroker for placing the company's shares (*Metropolitan Coal Consumers' Association*, [1895] 2 Q. B. 604).

If directors have exercised a *bonâ fide* discretion in proceeding to allot shares, however unwisely, the Court will not treat the allotment as invalid (*Madrid Bank*, 1866, 2 Eq. 216), but a director may be guilty of misfeasance if, though acting *bonâ fide*, he allows shares to be allotted to his pupil children (*Crenver and Wheal Abraham United Mining Co.*, 1872, 8 Ch. 45). An allotment made at a board of directors is bad if due notice has not been sent of the board meeting (*in re Portuguese C. Copper Mines*, 1889, 42 Ch.

D. 161; *Homer District Gold Mines*, 1888, 39 Ch. D. 549). But where an allotment of shares has been made by an insufficient board, but is afterwards ratified by a full board, the ratification relates back and makes the allotment good, though the applicant has in the meanwhile withdrawn his application (*in re Portuguese C. Copper Mines, supra*). The first directors of a company allotting shares without having acquired that share-qualification, does not invalidate the allotment.

Directors may pay dividends and the Court will not interfere, unless the dividend is at variance with the articles of association (*Oakbank Oil Co. v. Crum*, 1882, 8 App. Ca. 65). They may, if authorised by the articles, forfeit or cancel shares (*Marshall*, 1868, 7 Eq. 136). They may make a *bonâ fide* compromise (*Assets Co.*, 1885, 13 R. 281; *Lord Belhaven's* case, 1864, 3 De G., J. & S. 41), for a company has the same power of compromising any dispute as an individual (*Bath's* case, 1878, 8 Ch. D. 340), though it cannot let a shareholder off his contract to take shares, for such a release is no compromise (*Adams'* case, 1871, 13 Eq. 482). They may exercise their discretion in determining whether or not to sue debtors to the company (*Forest of Dean Coal Mining Co.*, 1878, 10 Ch. D. 452). They may pay just debts of the company in the ordinary course of business down to the date of winding up, even though the creditor is a debtor (*Willmott*, 1887, 31 Ch. D. 151). They may, if authorised to borrow, issue debentures at a discount (*Compagnie Generale de Bellegral*, 1876, 4 Ch. D. 470). They may accept prepayment of shares, if the articles allow prepayment, including their own (*Sykes'* case, 1871, L. R. 13 Eq. 260; *Poole Jackson and Whyte's* case, 1878, 9 Ch. D. 322). They may, as incidental to their office, rectify the register of shares to prevent errors, though not so as to vary rights (*Shortridge* v. *Bosanquet*, 1852, 16 Beav. 97; *Hartley*, 10 Ch. 157). When directors do acts in excess of their powers, but not in excess of the company's, the shareholders may ratify such acts by the resolution of a general meeting (*Grant*, 1889, 40 Ch. D. 135), and if they have done so, no liability will attach to the directors (*Liverpool Household Stores*, 1890, 59 L. J. Ch. 616). There must be knowledge of the substance of what the directors did, though not necessarily of the whole circumstances of it. Ratification "must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances" (per Willes, J., 7 C. P. 57; *Phosphate of Lime Co.*, 1876, 7 C. P. 43; *La Banque Jacques Cartier*, 1887, 13 App. Ca. 111; and see *Bolton Partners*, 1889, 41 Ch. D. 295).

But in imputing ratification by acquiescence to a company, it is to be borne in mind that shareholders have a right to assume (unless they are informed to the contrary) that their directors are managing the company in accordance with their powers (*Riche*, 1873, 9 Ex. 228). If the shareholders do not ratify the *ultra vires* acts of their directors, the directors stand personally liable on what is known as an implied warranty of authority. The principle is this: when an agent makes a contract on behalf of his principal he impliedly warrants that he has authority to bind that principal, and if it turns out that he has no authority to bind his principal, and the principal repudiates the obligation, and loss is thereby occasioned, then an action on the warranty can be maintained (*Beattie*, 1871, 7 Ch. 777; *Collen*, 8 El. & Bl. 657). Instances are where directors have, without having any authority, accepted bills (*West London Commercial Bank*, 1884, 13 Q. B. D. 360), drawn cheques (*Cherry*, 1869, 3 C. P. 24), borrowed money (*Richardson*, 1870, 6 Q. B. 276), or issued debentures (*Weeks*, 1873, 8 C. P. 427). But the misrepresentation as to the agent having power to bind his principal must be a misrepresentation of fact and not of law (*Beattie, supra*). The measure

of damages for breach of warranty is what the plaintiff has lost by losing the contract which the defender-director warranted his authority to make (*National Coffee Palace Co.*, 1883, 24 Ch. D. 367; *Meek*, 1888, 21 Q. B. D. 126).

Fraud by Directors.—Directors may not only exceed their authority, but abuse it. They may be guilty of fraud. In such a case the rule of law is that a company is liable for all the acts of its servant within the scope of his authority, however much the servant acting as such may have abused that authority. There is no difference between fraud and any other wrong (*Barwick*, 1866, 2 Ex. 265; *Mackay*, 1873, 5 P. C. 394; *Houldsworth*, 1880, 7 R. H. L. 53, and Scotch cases cited by Ld. Selborne, p. 57). A banking company was, for instance, held liable where the manager had, by a lying telegram, got a bill accepted in which the bank was interested (*Mackay, supra*). So where a bank manager had given a fraudulent guarantee of a person's solvency (*Swift*, 1872, 8 Q. B. 244). So where a secretary had fraudulently issued share certificates (*Clavering*, 1891, 18 R. 652). It is not necessary that the company should have derived any benefit from the fraud (*British Mutual Banking Co.*, 1887, 18 Q. B. D. 717). But to render the company liable the agent must have been acting for the company, not for himself, *i.e.* to promote his own private ends (*British Mutual Banking Co., supra*; *Gibbs*, 1875, 4 R. 630).

Fraud of Co-directors.—A director is not responsible for the fraud of his co-directors, but only for his personal acts, or for such acts of his colleagues or subordinates as he has either authorised or adopted (*Inglis*, 1861, 23 D. 561; *Land Credit Co. of Ireland*, 1870, 5 Ch. 772; *Denham & Co.*, 1884, 25 Ch. D. 752; *Thomson*, 1895, 22 R. 432). A director is not liable, for instance, if a cheque drawn with his sanction for a proper purpose is misappropriated by a co-director (*Perry's* case, 1876, 34 L. T. 717), but if a fraudulent act is being done by his co-directors it is not enough for a director to protest (*Joint Stock Discount Co.*, 8 Eq. 381; *Grimwade*, 1885, 52 L. T. 417; *Ramskill*, 1886, 31 Ch. D. 100). What will constitute notice to a director of a fraudulent or *ultra vires* act on the part of his co-directors was discussed in *Ashurst*, 1875, 20 Eq. 225; *Reese River Silver Mining Co.*, W. N. 1867, 139. Notice may be implied from a director, though he has not been present at the meeting at which the wrong thing was done, hearing minutes recording the transaction read and confirmed, and see *Hampshire Land Co.*, [1896] 2 Ch. 743. The presumption is that a director will not disclose his fraud to his co-directors (*Kennedy* v. *Green*, 1835, 3 Myl. & K. 699).

If directors wrongfully exclude a co-director from acting as such, and thus inflict an individual injury on him, he can, in England, obtain an injunction to restrain them from doing so (*Pulbrook*, 1878, 9 Ch. D. 610), and a similar remedy, or by declarator, could be got in Scotland.

Fees.—A director is not, from the mere fact of being a director, entitled to any remuneration for his services. His position is not that of a servant but of a managing partner holding a fiduciary relation to the company (*M'Naughton*, 1882, 10 R. 111; *Hutton*, 1883, 23 Ch. D. 672). To recover remuneration he must show a contract (*Dunston*, 1820, 3 Barn. & Ald. 125), otherwise the fees are in the nature of a gratuity voted. Commonly the articles fix a remuneration, and if they do so it is an authority to the directors to pay themselves the amount of such fees (*Melhado*, 1873, 9 C. P. 503). A person, however, who acts as director, with articles before him fixing the directors' fees, enters into a contract with the company to serve as a director at the rate of the remuneration contemplated by the articles (*Swabey*, 1889, 1 Meg. 385), and for fees so agreed to be paid he may sue the company (*Eden*, 1889, 23 Q. B. D. 368; *in re Dale & Plant*, 1890, 43 Ch. D. 255). Where there is no contract a trading company may do what

is ordinarily and reasonably done in such business as it carries on, with a view either to getting better work from its servants or attracting customers, but it can only vote its directors or officials a gratuity while the company is a going concern (*Hutton, supra*: see also *Fraser*, 1880, 6 R. 961).

If directors improperly pay themselves remuneration they will be ordered to repay it, *e.g.* where no remuneration was by articles to be paid unless the company paid a dividend of £5 per cent., and a dividend of £5 per cent. had been paid, but never earned (*Leeds Estate Co.*, 1887, 36 Ch. D. 808; and see *Whitehall Court*, 1887, 56 L. T. 280; *Wood's Ship and Woodite Protection Co.*, 1890, 2 Meg. 164).

There is no rule that directors' fees are only to be paid out of profits (*Lundy Granite Co.*, 1870, 26 L. T. 673). It has been held that directors may prepay their shares to discharge fees and advances due to them (*Mason and Others'* case, 1882, 30 W. R. 378; *Poole's* case, 1878, 9 Ch. D. 328; but see *Sykes'* case, 1871, 13 Eq. 255, and *Washington Co.*, [1893] 3 Ch. 95). It was held by Pearson, J., that a director-shareholder cannot prove for fees voted him by a general meeting in competition with creditors, such fees being due to him "in his character of a member" under subsec. 7 of sec. 38 of Companies Act (*Leicester Club Co.*, 1885, 30 Ch. D. 629), but Kay, J., held that this does not apply to arrears of salary due to a managing director (*Dale & Plant*, 1889, 43 Ch. D. 255). It was recently held by Wright, J., that ordinary directors were entitled to rank as ordinary creditors for fees due at the commencement of the liquidation (*Beckwith*, 1898, W. N. p. 9).

Directors' Liability.—Misfeasance.—Directors as agents merely of the company cannot be held personally liable for a breach of contract by the company, but whenever an agent is liable to third parties, directors will be liable; for instance, on a warranty of authority. When the liability would attach to the principal, and the principal only, the liability is the liability of the company (*Ferguson*, 1866, 2 Ch. 89). Nor can directors be held liable for being defrauded: so to hold would make their position intolerable (*Land Credit Co. of Ireland*, 1870, 6 Ch. 772). Acts of misconduct by directors are commonly spoken of, in England, as misfeasance; and the word being used in the Companies Act, 1867, s. 165, is adopted in Scots law. In that section it is associated with "misapplication or retainer" of the company's funds, and "breach of trust" in relation to the company. "Misfeasance is either the doing of a wrongful act, or the improper performance of a lawful act" (Sweet, *Law Dict.*). It would perhaps be more correct to describe acts of misconduct of directors as breaches of duty, for their liability is correlative to, and flows from, their duty. While directors acting within the scope of their authority have a large discretion, and are not liable to the company or shareholders for loss arising through errors of judgment, they are liable where the loss arises from culpable neglect of duty, or wilful default, including fraud, or where they act beyond, or in violation of, their powers, and loss is incurred (*Tulloch*, 1858, 20 D. 1045, 3 Macq. 783; *Western Bank*, 22 D. 447, 4 M. 1071, 11 M. 96; *Caledonian Her. Sec. Co.*, 1882, 9 R. 1115). Directors are also personally liable for loss arising from fraudulent misrepresentation inducing the purchase of shares, whether from the company or in the open market (see Ld. Pres. Inglis in *Houldsworth*, 1879, 6 R. 1168; *Tod* v. *Lees*, 1882, 9 R. 807). Directors, as Jessel, M. R., said in *Forest of Dean Coal Mining Co.*, 1878, 10 Ch. D. 452, are bound to use fair and reasonable diligence in the discharge of their duties, and to act honestly, but they are not bound to do more. The law requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs (*Rae* v. *Meek*, 16 R. H. L. 31 (35)). Directors are not liable in more; indeed they have a wider

discretion, being managing partners and not merely trustees of funds (per Jessel, M. R., *supra*). They are not of course liable, as already stated, for a mere error of judgment (*Turquand* v. *Marshall*, 1868, 4 Ch. 386; *Grimwade*, 1884, 52 L. T. 409; *London Financial Association*, 1884, 26 Ch. D. 146). Thus where a company was formed expressly for the purchase of a bill-broking business which was known to have a large amount of ill-secured debts, the directors were held not liable for completing the purpose, although the transaction turned out absolutely ruinous (*Overend, Gurney, & Co.*, 1872, 5 H. L. 480); a director joining the board after an improper investment had been made would not be liable for authorising further expenditure in reasonably nursing the security with a view to its ultimate recovery (*City of Glasgow Bank* v. *Mackinnon*, 1882, 9 R. 535); so directors were held not liable for approving a transfer of shares from a solvent to an insolvent shareholder, they having exercised a *bonâ fide* though erroneous judgment (*Faure Electric Accumulator Co.*, 1888, 40 Ch. D. 141); nor will they be held liable for going to allotment on an insufficient subscription if they have exercised a *bonâ fide* discretion in the matter (*Madrid Bank*, 1866, 2 Eq. 216; *Liverpool Household Stores*, 1890, 59 L. J. Ch. 621). Directors are entitled in administering the affairs of the company to rely on information furnished to them by the proper officers of the company, and are not bound to make personal investigation into its books and accounts (per Ld. J. C. Inglis in *Dobbie* v. *E. & G. Bank*, Irvine Smith's *Report*, p. 330; Ld. Pres. Colonsay in *Addie* v. *Western Bank*, 3 M. 901; *Lees* v. *Tod*, 9 R. 807).

There are several classes of misfeasance. The principal is misapplying the funds of the company. It is a well-settled principle that the governing body of a trading corporation cannot in general use the funds of the community for any purpose other than those for which they were contributed (*Pickering*, 1872, 14 Eq. 322). If directors apply the funds of the company to *ultra vires* purposes, they are liable to replace them, however honestly they may have acted, *e.g.* if they have misapprehended the scope of the company's objects (*Cullerne*, 1890, 39 W. R. 89; *Liverpool Household Stores, supra*). A director cannot justify sanctioning an improper payment by asserting ignorance of the purposes for which the money was meant to be applied (*Land Credit Co.*, 1869, 8 Eq. 12; *National Funds Assurance Co.*, 1878, 10 Ch. D. 128). Thus a director who signs cheques for the company is bound to inform himself of the purpose for which the cheques are being given (*Joint Stock Discount Co.*, 1869, 8 Eq. 381; and see *Marzetti's* case, 1880, 28 W. R. 541). Other instances of misapplication are spending money in rigging the market (*Marzetti's* case, *supra*), in buying the company's shares (*Evans* v. *Coventry*, 1856, 8 De G., M. & G. 845; *Trevor* v. *Whitworth*, 1887, 12 App. Ca. 409), in bribing bankers to open an account (*Imperial Land Co. of Marseilles*, 1870, 10 Eq. 298), in paying dividends out of capital. This last is the commonest mode of misapplying a company's funds. The proof failed in the case of *Mackinnon, supra*, 9 R. 535.

If directors declare a dividend or bonus relying on a balance-sheet *bonâ fide* made out with proper assistance, and showing as accurately as circumstances will permit the financial position of the company up to that date, the Court will not, without strong reasons, declare the dividend improper (*Stringer's* case, 1869, 4 Ch. 475; *Rance's* case, 1870, 6 Ch. 104); but directors cannot delegate their responsibilities to agents. Though they may employ accountants and actuaries, they must still exercise their judgment as business men upon the balance-sheets and estimates submitted to them (*Leeds Estate Building Co.*, 1887, 36 Ch. D. 787). The principal cases on payment of dividends out of capital, besides the above, are *Flitcroft's* case, 1882, 21 Ch. D. 519; *Denham*, 1883, 25 Ch. D. 752; *Oxford Building Society*, 1886, 25

Ch. D. 502; *Municipal Freehold Land Co.*, 1890, 63 L. T. 238; *National Funds Assurance Co.*, 1878, 10 Ch. D. 126; *Masonic and General Life Assurance Co.*, 35 Sol. J. 529. As to what are profits for purposes of dividends, see *Dividends, infra*, p. 142. A distinction is drawn, in England, between misfeasance and nonfeasance, the latter corresponding to negligence, which, as in Scotland, must be gross or culpable (*Overend, Gurney, & Co., supra*).

Joint and Several Liability.—Where directors are liable for losses arising from culpable neglect and violation of duty or excess of powers, the liability is joint and several against those who held office when the negligence, etc., occurred (*Western Bank* v. *Douglas*, 1860, 22 D. 447); and in the case of dividends improperly paid out of capital, the directors at the time when such dividends were respectively paid are jointly and severally liable for the amount so paid away in each year of their directorship, and will be ordered to repay the amount with interest at 4 or 5 per cent., without prejudice to any right they may have to recover from each shareholder the amount he has received (*Leeds Estate Co.*, 1887, 36 Ch. D. 787; and prior cases), but no case of an application to recover from a shareholder is reported.

Secret Commission.—The commonest kind of misconduct by directors is the taking of secret profits, already mentioned in reference to promoters, *supra*, p. 112. The rule that an agent cannot make any profit out of his agency without the consent of his principal applies with peculiar stringency between directors of joint stock companies and their shareholders (*Hay's* case, 1875, 10 Ch. 593; *Boston Deep Sea Fishing Co.*, 1888, 39 Ch. D. 339). A director must not put himself in a position in which his duty and his interest conflict (*Parker* v. *M'Kenna*, 1874, 10 Ch. 96). A director must not, for example, accept a retaining fee in the shape of shares, commission, or anything else of value from a vendor or promoter of the company or any other person with an adverse interest (*Benson*, 1842, 1 Y. & C. C. C. 326). A director, secretary, or other agent of a company accepting a secret present from the company's vendor or promoter receives it to the use of the company, and if it be in shares, is liable to account, at the option of the company, either (by way of damages) for the value of the shares at the time they were presented to him, or for the shares themselves and their proceeds if they have increased in value (*Huntingdon Copper Co.*, 1877, 4 R. 294; *Scottish Pacific Co.*, 1888, 15 R. 290, where the directors' firm was held liable; *Edinburgh Northern Tramways*, [1892] 20 R. H. L. 7; *Pearson's* case, 1877, 5 Ch. D. 336; *M'Kay's* case, 1875, 2 Ch. D. 1; *Carling's* case, 1875, 1 Ch. D. 115; *Nant-y-glo Iron Works*, 1878, 12 Ch. D. 738; *Newman & Co.*, [1895] 1 Ch. 685). Directors may accept a present of shares if the transaction is open and known to the shareholders (*British Seamless Paper Box Co.*, 1881, 17 Ch. D. 467). In this case the company was a private one, consisting of eight members only, who knew all about the transaction. It was thus not a *secret* profit. If articles sanction a director making a profit out of a contract with his company, provided he declares his "interest" in such contract, it is not enough for him to state that he has an interest; he must state the nature of it (*Imperial Mercantile Credit Association*, 1871, 6 H. L. 198; *Turnbull*, 1894, W. N. 4). The cases in which directors, in disregard of this elementary principle of agency, have accepted their qualification from promoters or vendors are unfortunately numerous. *De Bussche's* case, 1877, 5 Ch. D. 306; *Carriage Co-operative Supply Association*, 1884, 27 Ch. D. 322, are two of the cases in which the directors have been required to account.

Sale to or by the Company.—If a director sells his own property, or property in which he is interested, *e.g.* a coal mine or a ship, to the company without disclosing his ownership or interest, the company is entitled on

discovering the truth to rescind or ratify the contract of purchase at its option (*Cape Breton Co.*, 1885, 29 Ch. D. 795 (affirmed *sub nom. Bentinck* v. *Fenn*, 1887, 12 App. Ca. 652); *North-West Transportation Co.*, 1887, 12 App. Ca. 589); the same holds in regard to property sold to one for whom a director acts as agent (*Bennett*, 10 Ves. 381, 400); but to establish a case of misfeasance in such a case it must be shown that the company has suffered, *e.g.* that the price at which the director sold his own property to the company without disclosure was in excess of the real value of the property (*Bentinck* v. *Fenn*, *supra*).

A director cannot act as solicitor or agent for one transacting with the company; and if he does, the transaction may be set aside (*Bennett*, *supra*).

Criminal Liability.—The Court in England may, under sec. 167 of the Companies Act in a winding up by the Court, and under sec. 168 in a voluntary winding up, direct the liquidator to prosecute directors. The Court has refused to do so where the funds were very small and the creditors opposed (*Eupion Fuel and Gas Co.*, W. N. 1875, 10; *in re Northern Counties Bank*, 1883, 31 W. R. 546), but the creditors' opposition must be *bonâ fide* (*Charles Denham & Co.*, 1884, 32 W. R. 970; and see *R.* v. *Stuart*, [1894] 1 Q. B. 310). In Scotland the Court would, if it thought fit, direct the papers to be laid before the Lord Advocate, or the liquidator could do so at his own hand. The Crown initiated proceedings against the City of Glasgow Bank Directors in 1879.

Board Meetings.—"Whatever authority," says Turner, L. J., in *Nicol's* case, 1859, 3 De G. & J. 440, "is given by shareholders to directors is given to them as a body and not to each of them individually, the reason of their being required to act together being, of course, that the company may have the benefit of their collective wisdom (*D'Arcy*, 1867, 2 Ex. 158; *Portuguese Consolidated Copper Mines*, 1889, 42 Ch. D. 167). The same holds in regard to trustees (*Wyse*, 1881, 8 R. 983). The directors are to bind the company only when acting as a board (*Gt. Northern Salt*, 1889, 59 L. J. Ch. 288). But a contract made by the directors may bind a company though the directors have never met—though their signatures have been collected at their private houses—if the person with whom the contract is made has a right to presume *omnia rite acta* (*Bonelli Telegraph Co.*, 1871, 12 Eq. 246; *D'Arcy*, *supra*)." It is a corollary from this principle that the company is entitled to have its directors act when assembled in council, that every director who is within reach must have notice of every board meeting of the company (*Halifax Sugar Co.*, 1889, 59 L. J. Ch. 593). If notice of a meeting is not given or sent to all the directors to whom it could be given or sent, the meeting is a bad one, and an allotment of shares, for instance, made at it is invalid (*Portuguese Consolidated Copper Mines*, *supra*; *Homer District Gold Mines*, 1888, 39 Ch. D. 546). Notice need not be given of the special business to be transacted at the meeting (*La Compagnie de Mayville*, [1896] 1 Ch. 788). Board meetings are usually held at the head office of the company, but there is nothing in the general law to prevent directors holding their meetings at such places as they think proper (*Regent United Service Stores*, 1878, 8 Ch. D. 83). The directors usually elect a chairman of their meetings (Table A, Art. 67). The directors cannot act by a quorum unless the articles authorise it, but they may act by a majority (*York Tramways Co.*, 1882, 8 Q B. D. 698).

Management of Company.

Accounts.—Directors must cause proper books of accounts to be kept; and, if Article 78 of Table A be adopted, such books, subject to reasonable restrictions as to time and manner imposed by the company in general meeting, may be open to inspection of members during business hours; but

inspection may be, and often is, restricted or excluded by the articles of association, which, however, may be altered by special resolution of the company. The directors are also bound by its articles, which usually take some such form as Table A (Articles 79–82), to cause a revenue account and balance-sheet in the form appended to Table A to be prepared and laid before the company once in each year. But they are not bound personally to investigate the company's books, but are entitled to rely upon materials laid before them by the officers of the company. Directors who have omitted this duty may be held jointly and severally liable to repay sums by way of dividend improperly paid out of capital in consequence (*Oxford Benefit Building Society*, 1887, 35 Ch. D. 502; and see *Leeds Estate Co.*, 1887, 36 Ch. D. 809). But if reports and balance-sheets submitted by directors have been prepared by the manager and certified by the auditor as correct, the directors will not be held liable (*Lees* v. *Tod*, 1882, 9 R. 807; *Denham*, 1883, 25 Ch. D. 752). If directors declare a dividend or bonus relying on a balance-sheet *bonâ fide* made out with proper assistance, and showing as accurately as circumstances will permit the financial position of the company up to that date, the Court will not, without strong reasons, declare the dividend improper (*Rance's* case, 1871, 6 Ch. 104); but directors cannot delegate these responsibilities to agents. They may employ accountants and actuaries, but, as already indicated, they must still exercise their judgment as business men upon the balance-sheets and estimates submitted to them (*Leeds Estate Co., supra*).

Auditors.—Auditors, whether appointed by articles on the lines of Table A, 83 *et seq.*, or under the Companies Act, 1879, are the agents of the shareholders (*Nicol's* case, 1859, 3 De G. & J. 440). They are also officers of the company, and liable as such under the Companies Act, s. 165. Their duties and liabilities have been very fully discussed lately in *Kingston Cotton Mills Co.*, No. 1, [1896] 1 Ch. 6; No. 2, [1896] 2 Ch. 279. They are appointed by the shareholders (after the first year), and it is part of their duty to protect the shareholders against the directors and other officials of the company. It is not part of their duty to consider whether its business is prudently conducted, but they are bound to report whether the balance-sheet exhibits a correct view of the financial position of the company at the time of audit. It is their duty to convey information to the shareholders, and not merely so to express themselves as to arouse inquiry on the part of the more vigilant or intelligent shareholders. If they fail in this duty, they may be found liable to make good a dividend improperly paid out of capital (*London and General Bank*, No. 2, [1895] 2 Ch. 673).

Balance-sheets.—Balance-sheets are for the protection of shareholders, but for the protection of the public the Legislature has further required (Companies Act, s. 27) every company under the Act with a capital divided into shares to send to the Registrar of Joint Stock Companies every year, under a penalty, a summary of its capital and a list of members. The chief cases illustrating this duty of the company are: *Gibson* v. *Barton*, 1874, 10 Q. B. 329; *Edmonds* v. *Foster*, 1876, 45 L. J. M. C. 41; *Breton M. and Life Assoc.*, 1888, 39 Ch. D. 61; *R.* v. *Newton*, 1879, 48 L. J. M. C. 77; *R.* v. *Catholic L. and F. Instit.*, 1883, 48 L. T. 675.

Books.—Entries in the books of a company are evidence against the company in respect of the matters to which the entries relate, in the same way as the books kept by a tradesman are (*Brunsea Island Co.* (No. 1), 1888, 1 Meg. 12, 23; *British Linen Co.*, 15 D. 314). A secretary of a company has no lien over its books for a debt due to him by the company (*Gladstone*, [1896] 23 R. 783; see also *British Canadian Co.*, 1886, 14 R. 160). Directors can create no lien on the company's books (*Capital Fire Insur. Assoc.*, 1883, 14 Ch. D. 408), nor can a mortgagee of the general

effects of the company seize them (*Clyne Tinplate Co.*, 1882, 47 L. T. 439).

Secretary.—The secretary of a company is a mere servant (*Barnett*, 1887, 18 Q. B. D. 815). He has no power to make representations as to the state of the company's business (*Partridge*, 1872, 16 Sol. J. 199); but he will be liable along with the directors if he joins in fraudulent misrepresentations, and he cannot plead that he was acting under instructions (*Cullen*, 1862, H. L. 24 D. 10). Nor has he power to strike a name off the register (*Wheatcroft's* case, 1872, 29 L. T. 326).

Interference of Court.—The Court never interfere to prescribe to trading companies what they should do as to their own internal affairs (*Lambert*, 1882, 30 W. R. 914). Nothing would be more mischievous than such interference. The limit which the Court has laid down is a very definite and intelligible one. The sole question is whether the step about to be taken is within the competence of the shareholders as a body. If it is, the matter must be left to their discretion (*Macdougall*, 1865, 2 Hem. & M. 534). So with directors' management. If they keep within their powers the Court will not interfere. Even if the matter be beyond the powers of the directors, still, if it be within the powers of the company, the Court will not interfere, but will leave the objecting shareholder to submit it to the domestic tribunal of the company, viz. a meeting of shareholders, who have power to ratify or adopt what the directors have done (*Foss* v. *Harbottle*, 2 Hare, 461; *Orr* v. *Glasgow, etc., Rwy. Co.*, 1860, 3 Macq. 799; *Lee* v. *Crawford*, 1890, 17 R. 1094; *Grant*, 40 Ch. D. 135; *Isle of Wight Rwy. Co.*, 1884, 25 Ch. D. 330). For instance, the Court will not interfere with the discretion of directors in making a call (*Bailey*, 12 Beav. 433; *Orr*, *supra*), or in attributing certain items of expenditure to capital instead of income (*Bridgewater Navigation Co.*, [1891] 1 Ch. 170), or in forming a reserve fund if the articles render such reserve fund optional, or in paying losses within an excepted risk under a fire policy (*Tannhorn*, 1864, 10 Jur. N. S. 291), or to force directors on a company, though duly elected, against the wish of a general meeting (*Harben*, 1883, 23 Ch. D. 40), or to compel directors to summon a meeting (*Macdougall*, 1875, L. R. 10 Ch. 606). A shareholder who objects to the mode in which (though within its powers) the company's business is carried on should retire. He cannot dissolve or wind up the company against the wish of the other shareholders. Even where fraud is alleged to have been perpetrated by the directors on the company, still, as such a transaction may, in the option of the shareholders not implicated in it, be either repudiated or adopted, the Court will not interfere at the instance of a minority until the matter has been brought before the shareholders, and then only if the majority support the challenge, or the minority supporting it are overborne by a majority interested or implicated in the transaction under challenge (Lindley, p. 581).

But it is different if the acts of the directors are *ultra vires* of the company, and so incapable of being validated or adopted by the shareholders. In such a case the Court will interfere at the suit of a minority, however small (*Natusch*, Gow on *Partnership*, App. 398, a judgment of Ld. Eldon; and numerous later cases. See *Hoole*, 1867, 3 Ch. 262, and *Bloxam*, 1868, 3 Ch. 337 (cases of illegal payment of dividend); *Burns* v. *N. B. Rwy. Co.*, 1863, 368 Jur. 286). And the Court will interfere, either by injunction or by exacting an undertaking, to prevent directors acting *ultra vires* before the company can meet, if their so acting will be likely to do serious harm, such as transferring a shipping company's business from London to Southampton (*Harben*, 1883, 23 Ch. D. 32); and it will also interfere to prevent a majority benefiting themselves at the expense of the minority by, for instance, com-

promising an action for a consideration and appropriating the consideration among themselves (*Menier*, 1874, 9 Ch. 350).

Dividends.

Dividends mean *primâ facie* a share of profits, and in accordance with this the company's articles commonly provide that no dividend shall be payable except out of profits arising from the business of the company—indeed, payment out of capital is *ultra vires* of the company. What are profits available for dividend is one of the problems of political economy. "Profits" were defined in *Mersey Docks*, 1882, 8 App. Ca. 903, for income tax purposes, as "the incomings of a concern after deducting the expenses of earning them"; and see *Glasier*, 1889, 42 Ch. D. 453. For the purpose of ascertaining profits there is sometimes adopted what is known as the "single account system," a balance-sheet including by reference a profit and loss account (Palmer, *Co. Pre.*, 6th ed., 418; *Lubbock*, [1892] 2 Ch. 198; *Verney*, [1894] 2 Ch. 239); sometimes the double account system, that is, a separate account of capital and revenue (Buckley, *Companies*, 7th ed., 554). The Courts have repeatedly held that there is no obligation on a company to make up lost capital before paying dividends (*Lee* v. *Neuchatel Asphalte Co.*, 1889, 41 Ch. D. 1). The rationale of it is that the capital of the company is invested in property of various kinds, which is liable to fluctuations in value. It may depreciate. It may be lost. It is embarked in a commercial venture, and must run the risks of it. A submarine telegraph company, for instance, may lose one of its cables, or a steamship company one of its liners, and yet be doing a flourishing business, which justifies the directors in paying a dividend; and to say that it must not pay any dividend until it has made good the lost capital out of the profits of the remaining capital, would paralyse trade. So if the property depreciates in value from external causes,—for instance, land owing to agricultural depression,—such a loss need not be made good. But a company cannot pay dividend without providing for repairs and depreciation of plant occasioned by using it in the ordinary course of the company's business—a tram company, for instance, must keep its line in proper working condition (*Dent*, 1880, 16 Ch. D. 384; *Davison*, 1880, 16 Ch. D. 347). A rise in the value of the company's property cannot conversely be discounted as dividend (*Salisbury*, 1870, 22 L. T. 839). A distinction is drawn between fixed and circulating capital. Fixed capital appears to be that from which the return is got by holding and drawing the income from its use or employment; while circulating capital is that from which the profit is got by parting with it, or turning it over, and so receiving back (if the operation be successful) an enhanced shareholders, it goes to the fiar (*Bouch*, 1887, 12 App. Ca. 385). So in equivalent, which represents both capital and profit. Hence, as Lindley, L. J. ([1894] 2 Ch. 266), observes, "if the income of any year arises from a consumption in that year of what may be called circulating capital, the division of such income as dividend, without replacing the capital consumed in producing it, will be a payment of a dividend out of capital." In that sense capital consumed in earning the return requires to be replaced; the increase only is the profit. But if capital, whether fixed or circulating, be absolutely lost, it does not require to be replaced out of profits. The company may go on trading and earning profits upon its diminished capital. In *City Property Investment Co.*, 1897, 35 S. L. R. 249, the Court decided that certain permanently depreciated stocks and shares in which the company dealt, and which they continued to hold, formed circulating capital and required to be made good out of profits before the company could pay dividend. In *Lee* (*supra*) the Court of Appeal in Chancery had previously held

that where the company's capital is invested in a wasting property, such as a quarry or a patent, the company may, if its memorandum contemplates its doing so, distribute the whole of the profits derived from the working, without setting apart any of it to form a sinking fund to replace the waste. A company is under no obligation—this seems the principle of the decision—to carry on the business in perpetuity; but the so-called profits in such a case are profits only in a conventional sense, agreed, that is, between the shareholders as such, not profits in the ordinary commercial sense, and it is very difficult to see why they do not constitute a return of capital to the shareholders. Dividend can be declared only out of profits, but profits may be, and in most cases are, reached by estimate. The profits may be considered as earned though they do not exist in the shape of money in the coffers of the company or its bankers; and money may require to be borrowed to pay the dividend (*Stringer's* case, 4 Ch. 475).

Paying a dividend is an act of the shareholders, not of the directors (*Denham & Co.*, 1884, 25 Ch. D. 763), but it is done on the recommendation of the directors, and it is usually provided that the dividend they recommend shall not be exceeded. As a rule, the Court will not interfere with directors in the matter of dividends, unless they are doing something *ultra vires* the company (*Lever*, 1894, W. N. 21; *Kemp*, [1894] 3 Ch. 690; *Lee*, *supra*; *Rance's* case, 1870, 6 Ch. 104; *Lambert*, 1882, 30 W. R. 413), as paying dividends out of capital. Sometimes a larger amount of capital is paid up on some shares than others. *Primâ facie* where this is the case the company has no power to pay a dividend in proportion to the amounts respectively paid up, but must pay in proportion to the number of the shares. The company may, however, take such a power by its articles as originally framed, or as altered by special resolution (*Oakbank Oil Co.*, 1882, 8 App. Ca. 65), and it commonly does so (Table A, Art. 72). A provision in the articles was so construed in *Tharsis Co.*, 1882, 9 R. 1191.

Bonus Dividend.—The general doctrine used to be stated that a liferenter was not, but a fiar was, entitled to the benefit of an extraordinary dividend or bonus (*Rollo*, 1803, H. L. 4 Pat. 521; *Cumming*, 1824, 2 S. 620). The rule, however, was recently stated thus in the House of Lords: Where a company has power to determine whether profits reserved and temporarily devoted to capital purposes shall be distributed as dividend or permanently added to its capital, the interest of the liferenter depends upon the decision of the company. Further, the liferenter is entitled only to the dividend which the company declares. Where a substantial bonus is not a money payment, but a proportional share of the increased capital allotted to the *Armitage*, [1893] 3 Ch. 337, reserve funds reared out of profits went in a winding up to the fiar, for, though profits, they were not profits declared in dividend or *bonus* (see also *Last*, 1884, 12 Q. B. D. 389). But the mere fact of moneys being taken from undivided profits and carried to a reserve fund is not equivalent to their capitalisation; and accordingly, distributions in money of accumulated (but uncapitalised) profits, though under the name of "bonus," go to the liferenter (*Alsbury*, 1890, 45 Ch. D. 237; see also *Malam*, [1894] 3 Ch. 579).

Guarantee of Dividends.—Dividends are sometimes guaranteed for three or four years by the vendor of the company. In such a case, when the company is wound up before the expiration of the guarantee, the question arises, Was the guarantee fund meant by the contract to form part of the property of the company, or was it a trust fund appropriated for the benefit of the shareholders? This depends on the construction of the document. In the cases of *Stuart's Trust*, 1876, 4 Ch. D. 213, and *Richardson*, 1885,

W. N. 31, it was held to belong to the company, and to be payable to the liquidator; in the case of *South Llanharran Co.*, 1879, 12 Ch. D. 503, the opposite result was reached. If it were ascertained that the price payable to the vendor was enhanced by this guarantee, the question might arise whether the payments under the guarantee did not amount to paying dividends out of capital (see Cotton, L. J., 510).

Income Tax.—The effect of the Income Tax Act, 1853, s. 2, Sched. D, is *inter alia* to make every person resident in the United Kingdom liable on the profits accruing from any trade, whether carried on in the United Kingdom or elsewhere; and also to make the profits of any trade carried on in the United Kingdom liable, whether or not the trader be resident in the United Kingdom, or even be a subject of Her Majesty. A company is resident where its registered office is situated (*Calcutta Jute Mills*, 1876, 1 Ex. D. 437), and is liable on the profits of its whole business (*London Bank of Mexico*, [1891] 2 Q. B. 378), although part be carried on at home and part abroad (*San Paulo Rwy. Co.*, [1895] 1 Q. B. 580). But as to a separate business carried on abroad, the trader can only be assessed in respect of so much of the profits as is remitted to this country (*Colquhoun* v. *Brooks*, 1889, 14 App. Ca. 493; see as to a colonial income tax, *Spiller*, [1897] 1 Ch. 911).

Again, it is to be observed that the balance of profits and gains is assessable, which means for income tax purposes the balance arrived at by setting against the receipts the expenditure necessary to earn it (*Gresham Life Co.*, [1892] A. C. 309). The Income Tax Acts provide that interest on loan capital is not to be deducted; and if profit in the sense above stated be earned, it is of no consequence how it is destined—whether to reserve, to dividend, or carried forward (*Mersey Docks*, 1883, 8 App. Ca. 891; *Edin. S. Cemetery Co.*, 1889, 17 R. 154).

Security over Shares.

Shares in a company may form a security for loan or other obligations; but to do so effectually the shares must be transferred to and registered in the name of the lender (*Morrison*, 1876, 3 R. 406). If the transfer be delivered executed by transferor and transferee (lender), the latter may at once complete his title to the shares by presenting the transfer for registration, subject to any right the directors may have to reject transferees (*Bell's Trs.*, 1886, 14 R. 246), even within sixty days before the borrower's bankruptcy (*Guild*, 1884, 22 S. L. R. 520); but it is otherwise if the arrangement is merely that the borrower shall execute a transfer when desired (*Gourlay*, 1887, 14 R. 403). As to security by means of Blank Transfers, see vol. ii. 146. Mere deposit of share certificates, in Scotland, creates no security over the shares (*Christie*, 1862, 24 D. 1182; *Robertson*, 1891, 18 R. 1225; *Scot. Prov. Inst.*, 1888, 16 R. 112). See Gloag and Irvine on *Rights in Security*, ch. xv.

Meetings of Company.

The policy of the Legislature disclosed throughout the Companies Acts is that the shareholders should manage their own affairs, and the machinery for obtaining this "domestic forum," as it has been termed, is a general meeting of shareholders. An appeal to a general meeting is the proper and only remedy of shareholders who complain merely of mismanagement (*Isle of Wight Rwy. Co.*, 1884, 25 Ch. D. 333). A general meeting is, by sec. 49 of the Companies Act, 1862, to be held once at least in every year, and the first—or, as it is commonly called, the statutory general meeting—must be held within four months after registration of the memorandum (Companies Act, 1867, s. 39). Table A provides for one general meeting of shareholders in each year, unless otherwise prescribed

by the company in general meeting. This is the ordinary general meeting; but in addition to this the directors may, whenever they think fit, convene an extraordinary general meeting, and they are bound to do so upon a requisition made in writing by one-fifth of the members of the company. If the directors on being duly requisitioned fail for twenty-one days to convene a meeting, the requisitionists may convene it themselves (Table A, Arts. 32–34; *Macdougall*, 1874, 10 Ch. 606).

The notice of meeting prescribed by the Companies Act, 1862, s. 52, is a seven days' notice in writing, which by Table A, Art. 35, may be sent by prepaid letter to the shareholder's registered address (*London and Mediterranean Bank*, 1868, 37 L. J. Ch. 537). The section only applies to shareholders who can be reached by ordinary British post—not to shareholders in America, for instance (*Union Hill Silver Co.*, 1875, 22 L. T. 400). It need not be in the precise terms of the Companies Act, 1862, s. 52, or of the company's regulations. It is enough if the regulations are substantially complied with (*British Sugar Refining Co.*, 1857, 3 Kay & J. 408), the true canon of construction of a commercial notice being, "What is the fair business-like meaning which business men in the position of shareholders would put on the document when they received it?" (per Bowen, L. J., in *Alexander*, 1889, 43 Ch. D. 147). But it is not enough in calling an extraordinary meeting to say "special business" (*Wills*, 1850, 4 Ex. 869), nor as a notice of a confirmatory meeting to send a newspaper containing a marked report of the first meeting (*Alexander, supra*); nor is a notice that a meeting will be held in a certain contingency good, *e.g.* if the resolution be passed by the first meeting (*ib.*). Apart from forms, a notice of meeting may be bad by reason of its emanating from a board of directors irregularly constituted. If this is the case—if the board summoning the meeting is composed of persons some of whom are not legally directors—it makes the general meeting irregular, and vitiates all the resolutions passed at it (*Harben* v. *Phillips*, 1883, 23 Ch. D. 14). But a mere irregularity in summoning the board of directors which convenes the meeting—a director, for instance, receiving only a few minutes' notice of the board meeting—will not invalidate the proceedings at the general meeting (*Brown* v. *Le Trinidad*, 1887, 37 Ch. D. 1); nor will the Court interfere, for such short notice is a mere irregularity which the persons who have committed it can at once set right by calling a fresh meeting with all due formality, and it is a fixed and salutary rule of the Court, as Lindley, L. J., said in the latter case, not to interfere for the purpose of forcing companies to conduct their business according to strict rules.

By Table A, Art. 39, the chairman of the board of directors is to preside; failing him, or if he is late, the members are to choose one of their own number to be chairman (Art. 40, Companies Act, s. 52). The chairman of a general meeting has *primâ facie* authority to regulate all the details of proceedings (not provided for by the articles), and to decide all incidental questions which arise at such meeting and require prompt ruling. If his decision is challenged, a majority of those present must decide (*Indian Zoedone Co.*, 1884, 26 Ch. D. 70; *Wandsworth Gas Light Co.*, 1870, 22 L. T. 404). But a chairman cannot dissolve a meeting before it has finished the business for which it was convened (*National Dwellings Society*, [1894] 3 Ch. 159). To constitute a valid meeting there must be a proper quorum (*Cambrian Coal Co.*, 1875, 23 W. R. 405) present not only at the beginning, but when the business is transacted (*Henderson*, 1894, 21 R. 674). A quorum for a general meeting may be fixed by reference to the holding of capital, say a minimum of 10 persons holding no less

than $\frac{1}{10}$th of the capital of the company, or by number as in Table A, Art. 37, thus: If the numbers of the company are under 10, 5; one for every 5 additional members over 10 up to 50; and one for every 10 additional members after 50. One shareholder cannot hold a meeting (*Sharp*, 1886, 2 Q. B. D. 26; *Sanitary Carbon Co.*, W. N. 1877, 223).

Minutes of Meetings.—It is the duty of directors to cause accurate minutes of what takes place at its general meetings to be kept (*Law's* case, 1862, 1 De G., J. & S. 509), and these minutes, if purporting to be signed by the chairman, are evidence in all legal proceedings (Companies Act, s. 67).

Resolutions.

Resolutions by a general meeting are of three kinds—(1) ordinary, (2) special, (3) extraordinary.

Ordinary Resolution.—Where a company's regulations provide that certain acts shall be done by the company in general meeting, such as borrowing money, declaring a dividend, or appointing directors, an ordinary resolution passed by a majority of members present is sufficient (*North-West Transportation Co.*, 1887, 12 App. Ca. 589).

Special Resolution.—But there are other acts, vital to the interests of the company, which require a fuller representation of the constituency of the company and a more mature deliberation, and for these a special resolution or an extraordinary resolution is often required. Where, for instance, a company is proposing to alter its memorandum of association (under the Companies Memorandum of Association Act, 1890), and embark in a new business, or to alter its articles generally (Companies Act, s. 50), or sell its undertaking and assets under sec. 161 of the Companies Act, or reduce its capital (Companies Act, 1867, s. 9), or wind up (without insolvency) (Companies Act, s. 129 (2)), a special resolution is required. A special resolution is a resolution passed by not less than three-fourths of the members present, in person or by proxy (where proxies are allowed), at a general meeting of which notice specifying the intention to propose such resolution has been duly given, and confirmed by a similar majority at a meeting held after an interval of not less than fourteen free days and within a month (Companies Act, s. 51; *Railway Sleepers Supply Co.*, 1885, 29 Ch. D. 204; *Miller's Dale Lime Co.*, 1886, 31 Ch. D. 211). Observe, both under sec. 51 and Act 1870, sec. 2, it is only a majority of three-fourths of those present personally or by proxy who must agree (*California Redwood Co.*, 1885, 13 R. 335).

A copy of any special resolution must be registered with the Registrar of Joint Stock Companies (Companies Act, s. 53). A declaration by the chairman of a meeting that a resolution has been carried, and an entry to that effect in the books of the company, is sufficient evidence of the fact (s. 51 and Table A, Art. 42; see *Brynmawr Coal and Iron Co.*, W. N. 1877, 45; *Indian Zoedone Co.*, 1884, 26 Ch. D. 70). But where the minute itself shows that the resolution had not been passed by the statutory majority, the declaration of the chairman will not validate the resolution (*Cowan*, 1892, 19 R. 437).

Extraordinary Resolution.—A resolution is extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution (Companies Act, s. 129). Winding up on insolvency proceeds on an extraordinary resolution.

Voting.—Voting depends on the articles, but, in default of any provisions therein, every member is, by the Companies Act, s. 52, to have one vote. Sometimes a scale is adopted. Preference shareholders, again, sometimes have no vote, and a vendor's vote on his shares may be restricted. *Primâ facie* a majority of the shareholders duly convened upon any question

with which the company is legally competent to deal is binding on the minority, and consequently on the company (*North-West Transportation Co., supra*). A majority at a meeting (where no poll is demanded) is ascertained by counting hands, according to the common-law rule (*Horbury Bridge Co.*, 1879, 11 Ch. D. 109). Proxies, it has now been definitely decided, cannot be counted on a show of hands (*Ernest*, [1897] 1 Ch. 1). The register is the only evidence by which the right of members to vote at a general meeting can be ascertained: the question of beneficial ownership cannot be entered into (*Pender*, 1877, 6 Ch. D. 70). A shareholder may transfer some of his shares to nominees to increase his voting power (*ib.*), for a shareholder's vote is a right which he may use as he pleases: even to promote, for instance, his private interest against the interests of the company (*North-West Transportation Co., supra*).

Poll.—A right to a poll is by common law incident to any election at a public meeting by show of hands (*Campbell*, 1836, 5 A. & E. 865). It is usually an appeal to the whole constituency of the company, as distinguished from the members present at the meeting (*R.* v. *Wimbledon Local Board*, 1882, 8 Q. B. D. 459), and made demandable by five members (Companies Act, s. 51, Table A, Art. 43; *Phœnix Electric Co.*, 1883, 31 W. R. 398).

Reduction of Capital.

Reduction of Capital.—The Companies Act permitted a company to increase its capital by the issue of new shares, to consolidate its capital, and to convert paid-up shares into stock, but it permitted no reduction of a company's capital. The capital—the subscribed capital, that is—was to be paid up in full, and it was to be inviolable. That was the price of the privilege of limited liability (*Alexandra Palace Co.*, 1882, 21 Ch. D. 160), and it was a sound and salutary principle, nor has the Legislature departed from it. It has, however, in the Companies Acts, 1867, 1877, and 1880, sanctioned the reduction by a company of its capital, both called up and uncalled, in certain cases; but in conceding this privilege it has fenced it round with so many safeguards, including the confirmation of the Court, that no injustice is likely to be done.

A company desirous of reducing its capital must, if it has not the power in its original regulations (articles or memorandum), in the first place acquire the power by altering its articles to that effect by special resolution (two meetings *ut ante*), and thereafter exercise the power by another special resolution (Act 1867, s. 9). It cannot create and exercise the power simultaneously (*Patent Invert Sugar Co.*, 1885, 31 Ch. D. 166). But the first meeting exercising the power may be held immediately after the second meeting creating the power, and so practically the purpose may be accomplished at meetings on three days within a month's time. It must, immediately after passing the resolution reducing capital, add the words "and reduced" to its name, until such date as the Court may fix (Act 1867, s. 10). But the use of these words between the passing of the resolution and the presentation of the petition to the Court for confirmation is dispensed with where the reduction does not involve *either* the diminution of any liability to pay capital, *or* the payment to any shareholder of unpaid capital, leaving it, however, imperative, even in such cases, between the presentation and the disposal of the petition (Act 1877, s. 4). In these excepted cases it is common now to ask in the meantime for a dispensation on presenting the petition till its disposal, when the question is finally dealt with (*Albany Co.*, 1895, and *Colonial Co.*, 1896, 23 R. 272 and 547). In that class of cases, no interest of creditors being concerned, the use of the words is usually altogether dispensed

with. In other cases the use is imperative till the Court disposes of the petition, and then it is usual to prescribe a period varying from days to months.

The modes of reducing capital are enumerated in Act 1877, s. 3, but it does not profess to be exhaustive. It applies to capital whether paid up, subscribed, or unissued; and includes (1) cancelling lost capital; (2) cancelling capital unrepresented by available assets; (3) paying off capital in excess of the wants of the company; (4) cancelling issued but unpaid capital: and (5) cancelling unissued shares. The resolution should show to which of these operations the reduction belongs, and the petition should state the reasons for it. Creditors may be materially interested in (3) and (4); hence the Court is required to see that they are cited, a list of them prepared, and their consent to the reduction given, or their debt discharged, secured, or determined (Act 1867, s. 11; *Lawson*, [1895] 2 Ch. 726). The Court, when satisfied of the loss, etc., averred (*City Property Co.*, 1896, 23 R. 400), will, after remitting to a professional man to report on the reasons for the reduction and the regularity of the proceedings, and allowing all concerned to be heard, confirm the reduction and adjust a minute setting forth the state of the capital as altered (Act 1867, s. 15; 1877, s. 4), and the minute will be registered with the special resolution. The Court does not confirm (5), *supra* (Act 1877, s. 5).

The Court will confirm reduction effected in any of the other ways; but refused to do so, in the case of lost capital, by converting £1 shares fully paid into £1 shares with fifteen shillings paid (*Morrison & Co.*, 1892, 19 R. 1049). Where, however, it was stated that part of the capital could be dispensed with, and the resolution to reduce bore that it was done "upon the footing that the amount returned, or any part thereof, may be called up again," the Court held the reduction competent, and confirmed it (*Scottish Vulcanite Co.*, 1894, 21 R. 752, following *Fore St. Warehouse Co.*, 1888, W. N. 155). The Companies Act, 1880, authorised the return of undivided profits in reduction of paid-up capital, the unpaid capital being thereby increased by a similar amount. This is not really a "reduction" of capital, and is not called so, but a change of its location from the coffers of the company to the pockets of the shareholders. A reduction of capital by borrowing money to pay it off is competent (*West End Café Co.*, 1894, 21 R. 381), and reduction may be accompanied with increase of capital. The capital reduced need not be rateably distributed over the whole shareholders, and one class of shares may be cancelled, provided the rights secured to individual shareholders or classes are not invaded, and for this end shareholders as well as creditors are entitled to be heard. But the Court will insist upon a fair and equitable allocation, and one in terms of the company's contract with its shareholders (*Barrow Hæmatite Co.*, 1888, 39 Ch. D. 582; *Floating Dock of St. Thomas*, [1895] 1 Ch. 691; *Dicido Pier Co.*, [1891] 2 Ch. 354; *London & N. Y. Co.*, [1895] 2 Ch. 860; *Bannatyne*, 1886, 34 Ch. D. 303). The correlative to priority in repayment of capital is postponement in reduction, and, accordingly, shares preferred *quoad* capital are postponed in a reduction (*ib.*; *Quebrada Co.*, 1889, 40 Ch. D. 363). Reduction by cancelment of shares of individuals is competent, and may be carried out if fair and equitable (*British and American Corpn.*, [1894] App. Ca. 399: *Banknock Co.*, 1897, 24 R. 476). A reduction may be sanctioned though the voting powers are affected (*Colmer*, [1897] 1 Ch. 524).

Great accuracy in setting forth the condition of the company's capital in the resolution to reduce is required (*Scottish Manitoba Co.*, 1892, 20 R. 31); and it may be noted that the petition for confirmation may be carried through in vacation (*Niddrie & Benhar Co.*, 1892, 19 R. 820). See *ante*, p. 109, foot.

Company buying its own Shares—Forfeiture and Surrender.—It is a principle of the Companies Acts, and the result of the leading provisions regarding the contribution and disposal of capital, that, apart from the statutory reduction already mentioned, and forfeiture and surrender of shares now to be explained, shares once issued cannot be disposed of otherwise than by transfer or transmission, and particularly cannot, in the case of limited companies, be surrendered or sold to the company. A limited company has no power to buy its own shares; and although the power be given in the articles or even in the memorandum, it would be inept. It is opposed to the Companies Act, particularly secs. 8, 12, and 38, and the whole meaning of the reduction sections in the Act of 1867 (*Trevor* v. *Whitworth*, 1887, 12 A. C. 409).

It has been held to be otherwise with unlimited companies (*Borough Commercial Society*, [1893] 2 Ch. 242). The purchase is *ultra vires* of a limited company and void (*General Property Invest. Co. Limited*, 1888, 16 R. 282). But a purchase or redemption by a company of its shares from one or more shareholders, if carried out as a reduction of capital, is not open to objection. It is subject to the conditions of the Acts of 1867 and 1877, and to the discretion of the Court (*British and American Corpn.*, [1894] A. C. 399). Forfeiture of shares is contemplated by the Companies Act, s. 26, and Table A (17–22), on account of non-payment of calls, and is a proceeding at the option of the company and *in invitum*. It is the means of getting quit of impecunious shareholders; it is a recognised incident of shareholding, and puts the company in a position to place the shares in other hands, and so get the balance of capital paid. There is no reference to surrender of shares in the Acts, but it is admitted by the Courts on the principle that it has the same effect as forfeiture in regard to impecunious shareholders, who, however, are assenting parties to the procedure. But it does not involve any payment by the company of its capital, and only exonerates those who have shown themselves unable to pay. A surrender in return for money would be a sale, however disguised. Accordingly, in *General Property Invest. Co.* v. *Craig*, 1891, 18 R. 389, a surrender not involving any payment to the company, even although it did not reserve right to recover unpaid calls, was, in the circumstances, sustained as *intra vires*, and not a reduction of capital.

Power to forfeit and accept surrenders must be conferred by the articles as originally framed or as altered by special resolution; and when exercised, must strictly conform to the procedure prescribed in the articles (*Johnson*, 1877, 5 Ch. D. 687; *Garden Gully Co.*, 1875, 1 App. Ca. 39). The articles almost always provide that, notwithstanding forfeiture, calls due at its date shall be exigible; without this clause, calls due could not be enforced (*Stocken's* case, 1868, 3 Ch. 412). A forfeited member is liable to be put upon the B list as a past member if liquidation supervenes within a year after the forfeiture (*Marshall*, 7 Eq. 129, 138). It is different where a contract to take shares has been rescinded on the ground of fraud, for in that case the person should never have been a shareholder (*Wright*, 1871, 7 Ch. 55). Again, where a person has been induced by fraud to take shares which are afterwards forfeited for non-payment of calls, he ceases to be a shareholder, and becomes merely a debtor to the company for what he was formerly liable as a member, viz. a call, and may repudiate the contract, and defend an action for calls on the ground of fraud (*Aaron's Reefs*, [1896] A. C. 273). Moreover, the forfeited shareholder is not barred from his defence by the supervening liquidation of the company (*Mount Morgan Co.* v. *M'Mahon*, 1891, 18 R. 772).

Borrowing Powers.

Borrowing Powers of a Company.—As already stated under article Debenture and Debenture Stock, vol. iv. p. 103 (*q.v.*), ordinary trading companies whose regulations are silent on the subject of borrowing have an implied power to borrow for the purposes of the business; but the power may be expressly limited, and many companies have no implied power to borrow. If a trading company has a limit assigned in its memorandum or articles, it is *ultra vires* of the company to lend beyond it, and, being null, it cannot be ratified; and the only remedy of the lender is to prove beneficial application of the loan to the company's purposes. If the limit be in the memorandum, the limit may be altered or removed by special resolution under the Memorandum of Association Act, 1890, confirmed by the Court; if the limit be in the articles, it may be altered or removed by a special resolution under sec. 50 of the Companies Act; but in both cases the change applies to future loans, and prior ones cannot be ratified. But if the company, having wider power of borrowing, commits a limited power to the directors, and they exceed it, the lender will not be affected by the restriction unless he was aware of it, and, in any case, the shareholders may homologate or ratify the directors' actings. It is thought this summary is in accordance with the Companies Acts, and Lindley, L. J.'s, exposition thereof, *Company Law*, 186–196. See also *Wenlock*, 10 App. Ca. 354, 36 C. D. 674, and 19 Q. B. D. 155; *Blackburn Building Company*, 9 App. Ca. 857, and 22 Ch. D. 51; *General Auction Co.*, [1891] 3 Ch. 432; *Chapleo*, 1881, 6 Q. B. D. 696. A trading company having power to borrow, may do so in any manner it finds most convenient, including bills, debentures, debenture stock, and overdrafts; and may grant appropriate securities over the company's property and rights, including uncalled capital; and must keep a register of mortgages (Act 1862, s. 43); but the power to grant such instruments is usually given in the memorandum or articles.

Contracts by Companies.—A company formed under the Companies Act can only enter into contracts which are within the company's powers as defined by its constitution, its memorandum and articles of association (*Ernest*, 1857, 6 H. L. 420). Everyone, shareholder or stranger, must be taken to deal with the company on these terms, that is, with notice of its constitution (*Royal British Bank*, 1857, 6 El. & Bl. 332; *Marshall*, 1868, 7 Eq. 137). But he is not fixed with notice of private bye-laws passed by the directors (*Royal Bank of India's* case, 1869, 4 Ch. 252), or bound to see that every formality prescribed by the articles has been strictly performed. He is entitled to assume that all things have been done regularly if he has no notice of irregularity (*Eagle Co.*, 4 Kay & J. 540; *Heiton*, 1877, 4 R. 830; *Browns*, 1886, 13 R. 515; *County Life Assurance Co.*, 1870, 5 Ch. 288; *Howard*, 1888, 38 Ch. D. 156). The Companies Act, 1867, s. 37, provides in what form a company may contract. Shortly, contracts which, if between private persons, would have to be in writing and under seal, must be under the company's seal. Contracts which, if between private persons, would have to be in writing and signed, may be, in case of a company, signed by an authorised agent of the company (*Beer*, 1875, 20 Eq. 412). A trading company's contracts made in the ordinary course of its business need not be under seal (*South of Ireland Colliery Co.*, 1869, 4 C. P. 617; Companies Act, 1867, s. 37 (3)).

Domicile of Companies.—The domicile of a trading company, as that of an independent legal person, is quite distinct from the domicile of the persons who compose it (*Calcutta Jute Co.*, 1876, 1 Ex. D. 428). It is its

principal place of business, that is, the place where the administrative business of the corporation is carried on (Dicey, *Conf. L.* 154). This is not necessarily the place where the company's manufacturing or other business operations are carried on; nor is it necessarily the place of the registered office of the company (see *San Paulo Rwy. Co.*, [1896] A. C. 31). Where a company has a branch but not its registered office in Scotland, at which branch contracts are entered into and claims settled, the Scotch Courts have jurisdiction. But the office of an agent is not the office of the company (*Laidlaw*, 1890, 17 R. 544); and where a company has several places of business or branch offices in different counties, the Sheriff within whose jurisdiction a contract was entered into has jurisdiction in actions relating to it (*Harris*, 1875, 2 R. 1003; see Mackay, *Manual*, p. 65). A foreign company can contract to have a domicile, for the purpose of being sued, within the jurisdiction (*Société Industrielle des Metaux* v. *Huelva*, W. N. 1889, 32). Conventions have been entered into by this country with Germany, France, Belgium, Italy, Spain, Greece, and other foreign countries, mutually securing to commercial and industrial companies the exercise of their rights, and the right of appearing before tribunals.

Foreign Companies.—A foreign corporation carrying on business in this country through a branch office resides in Britain, and is liable to be sued in the same manner as a British corporation (*Haggin*, [1893] 23 Q. B. D. 519). On the same principle, a foreign or colonial company carrying on business in Britain through a branch office may be ordered to be wound up in Britain (*Marshall*, 1895, 22 R. 697); but the winding up here will only be ancillary if the company is also being wound up abroad (*Matheson Brothers*, 1884, 27 Ch. D. 225; *Commercial Bank of South Australia*, 1886, 33 Ch. D. 174; *Queensland Merc. Co.*, 1888, 15 R. 935).

Actions by and against Companies.—Where there is a corporate body capable of holding property and sustaining the relations of debtor and creditor, etc., the corporate body is the proper party to sue and be sued in all matters relating to such property and relations. The only exception is where the corporate body has got into the hands of directors or of the majority, and such directors or majority are using their power for the purpose of doing something fraudulent against the minority, who are overborne by them (*Maedougall* v. *Gardiner*, 1875, 1 Ch. D. 13; *Menier* v. *Hooper's Telegraph Works*, 1874, L. R. 9 Ch. 350; *Pender* v. *Lushington*, 1877, 6 Ch. D. 70). There aggrieved members may sue.

Companies Limited by Guarantee.

The other class of limited companies sanctioned by the Companies Acts is companies "limited by guarantee," as distinguished from "limited by shares." Sec. 7 of the Companies Act provides that the liability of members may be limited in either the one way or the other; and secs. 8 and 9 state what particulars the memorandum of association is to contain in the alternative cases. In the case of a company "limited by shares," the amount of the capital and the denomination of the shares must be specified. In the case of a company "limited by guarantee," there is no such requirement, but there is instead an undertaking by the members to contribute to the assets of the company, in the event of its being wound up, to an amount not exceeding a specified sum. But sec. 14 and the corresponding Form C contemplate a company "limited by guarantee" either having or not having "a capital divided into shares," and provide that the articles shall state the amount of such capital, and the members shall subscribe the memorandum (or articles) for the number of shares they take. Thus

there may be two kinds of companies limited by guarantee; and the case of *Malleson*, [1894] 3 Ch. 538, shows that there may be a third, viz. a company originally limited by guarantee and without a capital divided into such subscribed shares, but yet having the interests of the members for the time in the undertaking expressed fractionally in shares registered in their names. This was done by a series of resolutions altering the articles. These shares were not subscribed shares importing either payment or liability to pay money, but merely defined the proportion in which the members were to be interested in the surplus assets, if any. This method was adopted in order to retain the benefits of a company limited by guarantee, including exemption from *ad valorem* duty on capital, and at the same time to have the interests of members defined in shares, and transmissible as such. Since *Malleson's* case the Registrar of Joint Stock Companies in England takes no objection to the registration of such altered articles.

Companies limited by guarantee afford a convenient form for clubs and associations not requiring the capital or the interests of the members to be expressed in cash terms. See *ante*, p. 120.

It is to be observed that it is not competent for the company or its executive to create a security over the guarantee obligations in favour of any particular creditor, for the guarantee fund has no existence till liquidation, and must be preserved to be called up and administered in the liquidation (*Robertson* v. *B. L. Co.*, 1891, 18 R. 1225). The same holds in regard to the guarantee capital under the Act of 1879 (*Pyle Works*, 1890, 44 Ch. D. 534, per Lindley, L. J., 584; *Bartlett*, 1897, W. N. 174).

Unlimited Companies.

The provisions of the Companies Acts, except those bearing on limited liability, apply, generally speaking, to unlimited companies; but the following points of difference will be kept in view:—

1. The memorandum specifies only the names, the place of the registered office, and the objects, but not the capital (Companies Act, s. 10). But the articles state "the amount of capital with which the company proposes to be registered," and the members require to subscribe for one share at the least (s. 14).

2. The name of an unlimited company does not require to be published at its places of business, or on its business paper (s. 41), nor does it require to keep a register of mortgages and charges.

3. A contributory in the winding up of an unlimited company has a right of compensation (or set-off), which a contributory in a limited company has not (Companies Act, s. 101, confirmed by Act 1867, s. 6). It appears to amount to this: that when an order is made on a contributory in an unlimited company to pay debts, including directors' calls due by him to the company (but excluding liquidator's calls), the Court may allow him to set off any money due to him by the company on any independent dealing or contract. No doubt this is not consistent with the reasoning in *Whitehouse*, 1874, 9 Ch. D. 595 (599), a judgment of M. R. Jessel, which proceeds on the ground that liquidators' calls, and directors' calls enforced by a liquidator, are not debts due to the company, but to the liquidator, a statutory trustee, and a different *persona*; but that ground of judgment has since been repudiated by L. JJ. Cotton and Lindley in *Pyle Works*, 1890, 44 Ch. D. 534 (575) (583) (585).

4. An unlimited company may purchase its own shares and thereby reduce its capital without the authority of the Act of 1867 (*Borough Coml. Soc.*, [1893] 2 Ch. 242).

5. An unlimited company may, with the assent of three-fourths of its members, register as a limited company under Part VII. of the Companies Act.

6. Under the Companies Act, 1879, an unlimited company may register as a limited company, and increase its capital or set apart a portion of its uncalled capital, such capital so increased or set aside to be capable of being called up only in and for the purposes of a winding up. Under this Act the banks in Scotland, now called limited, were registered, with large reserve capital; but there is unlimited liability *quoad* the note issue (s. 6).

Winding up.

A registered company may be rendered notour bankrupt (Bankruptcy Act, 1856, ss. 4 and 8; *Clarke*, 1884, 12 R. 347), but cannot be sequestrated. It cannot be put an end to except by means of the machinery of a winding up (*Dunblane Hydro. Co.*, 1884, 12 R. 328; *Princess of Reuss and Bos.*, 1871, L. R. 5 H. L. 193).

Companies which may be wound up.—Any company registered under the Act and not dissolved (*Coxon*, 1891, 64 L. T. 444) may be wound up, and it makes no difference that the sphere of the company's operations is out of the United Kingdom (*Smyth & Co.* v. *Salem Flour Mills Co.*, 1887, 14 R. 441), or its members all foreigners (*General Company for Promotion of Land Credit*, 1870, L. R. 5 Ch. 363); but besides these the Act provides for the winding up of unregistered companies, *i.e.* companies not registered under the Companies Act, 1862 (Companies Act, s. 199; *Marshall*, 1895, 22 R. 697). Railway companies incorporated by Act of Parliament are excepted from the jurisdiction. Under this section (s. 199), the Court has made orders for winding up canal and dock and water companies, chartered companies, friendly societies, illegal associations, building societies, foreign companies with a branch office in England, mutual marine insurance companies, tramway companies, savings banks, and many other associations. A trade union cannot, however, be wound up, or a club (*St. James' Club*, 1852, 2 De G., M. & G. 383), or a foreign company with only an agent in England. The machinery for winding up an unregistered company is analogous to that for a registered company *mutatis mutandis* (see Companies Act, ss. 200–204).

Winding up is of two kinds—(1) winding up by the Court, (2) winding up by the shareholders themselves, either purely voluntary or under the supervision of the Court. The Companies Acts contemplate *primâ facie* a voluntary winding up, and 90 per cent. of the liquidating companies are so wound up; but there are still a large number of cases in which creditors and contributories of a company—creditors especially—are entitled to invoke the assistance of the Court to administer the company's estate and affairs. The statutory machinery for this purpose is set in motion by a petition (*Martin*, 1879, 7 R. 352; *Bradford Navigation Co.*, 1892, 41 L. J. Ch. 340; *New Zealand Banking Co.*, 1867, L. R. 4 Eq. 226).

The Court.—The Court is defined by the Companies Act, 1862, s. 81, to mean the Court of Session in either Division thereof. Under sec. 121 of the same Act it is competent for the Lord Ordinary on the Bills during vacation to order a contributory to pay calls, in the winding up. Under the Companies Act, 1886, the Court is interpreted as meaning the Court of Session in either Division thereof, and in the event of a remit to a permanent Lord Ordinary, such Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills (s. 5). The Act of 1886 further provides (s. 5 (1)) that certain orders or judgments pronounced by the Lord Ordinary on the Bills in vacation shall not be subject to review. All other orders and judgments issued by the Lord Ordinary on the Bills in vacation shall

be subject to review (s. 5 (2); *Portobello Pier Co.*, 1886, 24 S. L. R. 1). In that case it was decided that in virtue of sec. 5 of the Act of 1886 it is competent for the Lord Ordinary on the Bills to make initial or first orders in liquidation proceedings. The reclaiming note must be presented within fourteen days from the issuing of the interlocutor. It is, however, provided that, notwithstanding the presentation of the reclaiming note, certain judgments shall be carried out and have effect until the reclaiming note is disposed of (s. 5 (2)).

Winding up by the Court—Who may petition.—A winding-up petition may be presented by the company itself, by a creditor, by a contributory, or by all or any of them (Companies Act, s. 82). The object of a creditor's petition, which is by far the most common kind of petition, is to obtain payment of his debt. A creditor's petition, as Jessel, M. R., said in *St. Thomas Dock Co.*, 1876, 2 Ch. D. 118, ought to be presented with no other object. The assignee of a debt may petition; but a creditor who has presented a petition cannot sell his debt and the right to proceed with the petition (*Paris Skating Rink*, 1877, 5 Ch. D. 962). The executor of a creditor (*Masonic General Life Assurance Society*, 1886, 32 Ch. D. 372); a debenture- or bond-holder whose interest is in arrear may petition (*Macdonnell's Trs.*, 1884, 11 R. 912): and a secured creditor may present a winding-up petition (*Moor*, 1879, 10 Ch. D. 681; *Commercial Bank of Scotland*, 1886, 14 R. 147; *Chapel House Colliery*, 1883, 24 Ch. D. 259; *Central Railway Company of Monte Video*, 1879, 11 Ch. D. 372). A petitioner's statutory right to make an application for winding up cannot be affected by restrictive conditions in the articles of association of the company (*Peveril Gold Mines*, 1897, 14 T. L. R. 25).

A contributory other than an original allottee cannot, except in the event of the members being reduced in number to less than seven, present a petition unless his shares have been held by him for at least six months in the eighteen months previously to the commencement of the winding up, or have devolved upon him through the death of a former holder (Companies Act, 1867, s. 40). This rule is to prevent shares being transferred to anybody, the nominee, perhaps, of a rival in trade, to qualify him to present a petition. As to "held," see *Wala Wynaad Indian Gold Mining Co.*, 1882, 21 Ch. D. 849. A bankrupt shareholder cannot present a petition, for he is not a contributory, though his trustee is (*ib.*). A shareholder being in arrear with calls will not prevent the Court making a winding-up order, at anyrate if he pays the calls into Court (*Diamond Fuel Co.*, 1879, 13 Ch. D. 406). A fully-paid shareholder is still a contributory, and as such may present a winding-up petition (*National Savings Bank Association*, 1865, L. R. 1 Ch. 547). But as a fully paid-up shareholder is under no further liability, he must satisfy the Court, before it will make an order, that there will be a substantial surplus divisible among the shareholders (*Rica Gold Washing Co.*, 1879, 11 Ch. D. 36; *Iron Colliery Co.*, 30 W. R. 388), of actual or at least probable assets (*Lancashire Brick and Tile Co.*, 1865, 34 Beav. 330; *Diamond Fuel Co.*, 1879, 13 Ch. D. 408; see, however, *Rica Gold Washing Co.*, 1879, 11 Ch. D. 36). The expenses of a second petition will not be allowed unless there is reasonable apprehension that the first may be withdrawn (*Edinburgh Theatre Co.*, 1877, 4 R. 1140).

Mismanagement is not a ground for a shareholder presenting a petition. He should get the directors to call a meeting (*Professional Benefit Building Society*, 1871, L. R. 6 Ch. 862). Nor is the fact that the shareholder has been induced to take the shares by fraud or misrepresentation. His proper remedy is rescission (*Union Hill Silver Co.*, 1870, 22 L. T. 402).

Reasons for Winding up by the Court.—The petitioner must bring his case within the statutory jurisdiction. The circumstances under which a company may be wound up by the Court have been carefully defined by the Legislature (Companies Act, s. 79). They are as follows:—"(1) Whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; (3) whenever the members are reduced in number to less than seven; (4) whenever the company is unable to pay its debts; (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up." It is only in these cases that an order for winding up by the Court can be made (*Langham Skating Rink Co.*, 1877, 5 Ch. D. 683; *Irrigation Co. of France*, 1871, 40 L. J. Ch. 435). If the facts in a winding-up petition do not bring the company within one of these five cases, the Court will not take upon itself, under sec. 79 (5), to determine whether it is for the interest of the shareholders generally that the company should be wound up; that must be settled by a domestic tribunal of the shareholders, *i.e.* a statutory majority of three-fourths, under sec. 129 (2). All the clauses have undergone a microscopic scrutiny by the Court. The first calls for no comment. The shareholders themselves invite the intervention of the Court. As to the second, non-commencement of business is only meant to be one test of whether the company is in such a state that it ought to be wound up (*Metropolitan Railway Warehousing Co.*, 1867, 15 W. R. 1121; and see *Capital Fire Insur. Assoc.*, 21 Ch. D. 209). The Court will not make a winding-up order on the ground of suspension, unless satisfied that there has been an intention on the part of the company to abandon its business, or an inability to carry it on (*Alliance Heritable Security Co.*, 14 R. 34; *Tomlin Patent Horse Shoe Co.*, 1886, 55 L. T. 314; *Middlesborough Assembly Rooms Co.*, 1880, 14 Ch. D. 104). An abandonment of one object is not an abandonment of all (*Norwegian Titanic Iron Co.*, 1865, 35 Beav. 223; *Patent Bread Machinery Co.*, 1866, 14 W. R. 787). The third clause—reduction to less than seven members—is illustrated in *South London Fish-market Co.*, 1888, 39 Ch. D. 324. The fourth clause, "whenever the company is unable to pay its debts," is much the commonest ground for winding up. Here the Legislature has not left it to the Court to ascertain insolvency, but has furnished in sec. 80 certain tests. A company is to be deemed unable to pay its debts whenever a creditor for £50 has served a demand for payment, and the company has neglected for three weeks (*Catholic Publishing Co.*, 1864, 2 De G., J. & S. 116) to pay, give security for, or compound the debt. The Court is bound to treat such "neglect" to comply with the statutory demand as conclusive evidence of the company's insolvency (*Imperial Hydropathic Hotel Co.*, 1882, 49 L. T. 160). But debt means debt absolutely due (*Bristol Joint Stock Bank*, 1890, 44 Ch. D. 703). Mere omission need not be "neglect" if there is reasonable cause (*London and Paris Banking Corpn.*, 1874, L. R. 19 Eq. 444), such as the debt being disputed (*Cunningham*, 1886, 14 R. 87). In the case of a secured creditor, in order to obviate a winding up the security must be such as will command in the market the amount of the debt founded on (*Commercial Bank of Scotland*, 1886, 14 R. 147). A company is also deemed insolvent when it allows the inducie of a charge to expire without payment (*Cowan*, 1892, 14 R. 437). So also if apart from these tests, the company is proved to be unable to pay its debts (*Macdonnell's Trs.*, 1884, 11 R. 912). The fifth and last ground for winding up is where it is in the opinion of the Court "just and

equitable" that the company should be wound up. At an early period it was held—unfortunately, as Lindley, L. J., recently said—that "just and equitable" in (5) must be confined to cases *ejusdem generis* with those before enumerated (*Wear Engine Works Co.*, 1874, L. R. 10 Ch. 191; *Anglo-Greek Steam Co.*, 1866, L. R. 2 Eq. 6; but see now *Sailing Ship "Kentmere" Co.*, W. N. 1897, 58; *Amalgamated Syndicate*, W. N. 1897, 152). If the company is a "bubble," for instance (*Anglo-Greek Steam Co., supra*; *London and County Coal Co.*, 1866, L. R. 3 Eq. 355), it may be wound up, or if the substratum of the company is gone (*Suburban Hotel Co.*, 1867, L. R. 2 Ch. 750); if, for instance, the company is formed to work a particular gold mine, and no title to it can be obtained (*Haven Gold Mining Co.*, 1882, 20 Ch. D. 151); or to work a mine which turns out a failure, though there are large subsidiary powers in the memorandum of association (*Red Rock Gold Mining Co.*, 1889, 61 L. T. 785); or to work a patent for making coffee out of dates, and the patent cannot be obtained (*German Date Coffee Co.*, 1881, 20 Ch. D. 169); or to buy land which is not discoverable on the map (*Nijlstroom*, 1889, 60 L. T. 478); or to work a concession for laying a submarine cable, which is found to be void (*International Cable Co.*, 1890, 2 Meg. 183; see also *Crown Bank*, 1890, 44 Ch. D. 634); or if a complete deadlock as to the company's affairs has arisen (*Sailing Ship "Kentmere" Co., supra*). In these and other similar cases the impossibility of carrying out the principal object of the company makes a winding-up order just and equitable, and the fact that a majority of shareholders want to go on will not prevent the Court making the order on a shareholder's petition (*Bristol Joint Stock Bank*, 1890, 44 Ch. D. 703). But the Court must be satisfied that the substratum of the company is really gone (*Cox* v. *Gosford Ship Co.*, 1894, 21 R. 334). The company being a losing concern (*Suburban Hotel Co.*, 1867, L. R. 2 Ch. 745; *Factage Parisien*, 1865, 13 W. R. 214), or the directors being guilty of misconduct (*Anglo-Greek Steam Co.*, 1866, L. R. 2 Eq. 1; *Professional Benefit Building Society*, 1870, L. R. 6 Ch. 862), or the shareholders few and the assets small (*Second Commercial Benefit Building Society*, 1879, 48 L. J. Ch. 753; *Natal Co.*, L. R. 3 Ch. 355), does not make it "just and equitable" that the company should be wound up. If there is a probability of a surplus, the Court will have regard to the wishes of the shareholders, rather than the creditors (*Chillington Iron Co.*, 1885, 29 Ch. D. 159). The latest case on the subject is *Brinsmead & Co.*, [1897] 1 Ch. 406. When a petitioning creditor's debt is established, a winding-up order is, speaking generally, *ex debito justitiæ* (*Bowes* v. *Hope Mutual Life Insur. Society*, 1865, 11 H. L. 402; *Western of Canada Oil Co.*, 1874, L. R. 17 Eq. 1; *Chapel House Colliery Co.*, 1883, 24 Ch. D. 259), but not as against the wishes of a majority of creditors (*Great Western (Forest of Dean) Coal Consumers Co.*, 1882, 21 Ch. D. 773; *Uruguay Central Rwy. Co. of Monte Video*, 1879, 11 Ch. D. 372). The petition will be refused if it is being resorted to for the purpose of obtaining some undue advantage (*Anglo-American Brush, etc., Co.*, 1882, 9 R. 972). For the Court is bound, under the Companies Act, s. 91, to have regard to the wishes of the creditors generally (*Western of Canada Oil Co.*, 1873, L. R. 17 Eq. 5; *West Hartlepool Iron Works Co.*, 1875, L. R. 10 Ch. 618). There is this further qualification of the *primâ facie* right to a winding-up order, that the Court is not bound to set the winding-up machinery in motion if there are no assets, or such as there are will be exhausted by the debentures (*St. Thomas Dock Co.*, 1866, 2 Ch. D. 119; *Great Western (Forest of Dean)*, *supra*; *Chapel House Colliery Co.*, 1883, 24 Ch. D. 259), and winding up cannot therefore accomplish the purpose for which the machinery was invented by the Legislature (*Fraternity*

of Free Fishermen of Faversham, 1887, 36 Ch. D. 339). But the onus is on the company, not the petitioner, to prove the futility of the order (*Fraternity of Free Fishermen of Faversham, supra*). If it is doubtful whether the winding up will produce assets, an inquiry may be directed (*Olathe Silver Mining Co.*, 1884, 27 Ch. D. 278; *Bahia Central Sugar Factories*, 1890, 34 Sol. J. 156).

A shareholder *in a limited company* presenting a winding-up petition is in a very different position from a creditor. A shareholder has no right to stop the company's business when a large majority of shareholders wish to go on (*Middlesborough Assembly Rooms*, 1880, 14 Ch. D. 104). *A fortiori* if he is a fully-paid shareholder (*Patent Artificial Stone Co.*, 1864, 34 Beav. 185).

Winding up, Voluntary.—The policy of the Companies Acts is to let the shareholders manage their own affairs, and part of those affairs is the winding up of the company (*Wear Engine Works Co.*, 1875, L. R. 10 Ch. 191), and of this privilege companies avail themselves largely, 90 per cent. being so liquidated.

Reasons for Winding up.—Sec. 129 of the Companies Act, 1862, defines the circumstances under which a company may be wound up voluntarily. They are: "(1) Whenever the period (if any) fixed for the duration of the company by the articles of association expires, or whenever the event (if any) occurs upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.

"(2) Whenever the company has passed a special resolution requiring the company to be wound up voluntarily.

"(3) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same."

An extraordinary resolution is one passed in such a manner as would, if it had been confirmed by a subsequent meeting, have consituted a special resolution. There must be a proper quorum at the meetings as required by the articles (*Cambrian Peat Co.*, 1875, 23 W. R. 405). The notice of meeting called to pass an extraordinary resolution for winding up need not follow the precise words of sec. 129 (3), but it must be such as to give the shareholders to understand that an extraordinary resolution to wind up will be proposed (*Wilson*, 1876, 3 R. 474; *Sdeuard*, 1876, 3 R. 577; *Bridport Old Brewery Co.*, 1867, L. R. 2 Ch. 191; *Silkstone Fall Colliery Co.*, 1876, 1 Ch. D. 38). There need not be evidence that the company is insolvent to justify the meeting in resolving on a voluntary winding up (*London Flour Co.*, 1868, 19 L. T. 138). The declaration of the chairman of the meeting that a resolution has been passed for voluntary winding up is sufficient evidence without the chairman making an affidavit (*Brynmawr Coal and Iron Co.*, 1877, W. N. 1877, 45). The extraordinary resolution need not be registered (*Outlay Assurance Society*, 1886, 34 Ch. D. 480), but it must be advertised in the *Gazette*. The commencement of the winding up is the date of the confirmatory resolution (*Taurine Co.*, 1883, 25 Ch. D. 138; and see *West Cumberland Iron and Steel Co.*, 1889, 40 Ch. D. 361).

Supervision Order.—Under sec. 147 of the Companies Act, the Court has jurisdiction to make an order directing the voluntary winding up to continue, but subject to the supervision of the Court. It is a matter of discretion, as to which the Court will have regard to the wishes of creditors and contributories (Companies Act, s. 149; *Bank of Gibraltar and Malta*, 1866, L. R. 1 Ch. 73; *New Oriental Bank Corpn.*, 1893, 41 W. R. 16). Only

the company or a creditor or contributory can petition for a supervision order (*Pen-y-van Colliery Co.*, 1877, 6 Ch. D. 477); but the Court will not make a supervision order on the petition of a contributory, unless the resolution for voluntary winding up has been unfairly obtained (*Beaujolan Mine Co.*, 1867, L. R. 3 Ch. 15), *à fortiori* if the petitioning contributory's shares are fully paid up (*Irrigation Co. of France*, 1871, L. R. 6 Ch. 176). It is no relevant answer to the petition that the adoption of the resolution forms part of a fraudulent scheme, and that the company is able to carry on its business (*Monkland Co.*, 1886, 14 R. 242). A creditor cannot object to a supervision order being granted, on the ground that his interest will be prejudiced thereby (*Lawson & Co.*, 1886, 14 R. 154). As to a creditor's petition, see *Zoedone Co.*, 1883, 49 L. T. 654; *Chepstow Bobbin Mills Co.*, 1887, 36 Ch. D. 563). A supervision order leaves the liquidator free to exercise all the powers of a voluntary liquidator; it only provides means by which a creditor or anyone interested can come to the Court and ask it to exercise its powers of supervision (*Westbourne Grove Drapery Co.*, 1878, 27 W. R. 37); but the applicant does so at his own risk as to expenses (*New York Exchange Co.*, 1888, 39 Ch. D. 419). The Court in making a supervision order may appoint an additional liquidator (Companies Act, s. 150). In *Brightwen & Co.*, 1878, 6 R. 244, the Court refused the application for an appointment of an additional liquidator for the reason that the petitioning creditors were small in number and represented comparatively insignificant interests, and the liquidator suggested was not resident within the Court's jurisdiction. A supervision order operates like a winding-up order as a stay of actions and executions (Companies Act, ss. 151, 148). A voluntary winding up is no bar to a creditor having the company wound up by the Court, if the Court is of opinion that the rights of the creditor will be "prejudiced by a voluntary winding up" (Companies Act, s. 145). See as to this, *New York Exchange Co.*, 1888, 39 Ch. D. 415.

Liquidator.—The liquidator is in a judicial winding up appointed by the Court (C. A., 1862, s. 92), and in a voluntary winding up, by the company in general meeting (s. 133 (3)). If in a voluntary winding up there has been no appointment made by the company, the Court may, on the application of any contributory, appoint a liquidator or liquidators (s. 141). Further, in a voluntary liquidation the company may by extraordinary resolution delegate to the creditors the power to appoint liquidators (s. 135). In a petition for winding up and appointment of a liquidator, an objection to the person proposed in the petition as liquidator should be stated by counsel verbally without lodging answers (*Hume*, 1876, 3 R. 887). In *Gilmour's Trs.*, 1883, 20 S. L. R. 811, the omission to keep a proper register of mortgages when secretary of the company was held not to be a good objection to the appointment. In a petition for a supervision order it is not proper to pray for confirmation of an appointment of a liquidator (*Monkland Co.*, 1886, 14 R. 242).

A liquidator is an agent, not a trustee (*Knowles*, [1891] 1 Ch. 717). He differs from a trustee in bankruptcy in one important respect, that he has not the assets of the company vested in him (*Gray's Trs.*, 1881, 9 R. 225). Consequently he must sue in name of the company (*Munro*, 1896, 3 S. L. T. 413). The liquidator represents the creditors only because he represents the company, and through the company the rights of the creditors are to be enforced (*Waterhouse*, 1870, 8 M. H. L. 88). So far as he represents the company, he has only the rights of the company, but so far as he represents creditors through the company, he has more extensive rights (*London Celluloid Co.*, 1888, 39 Ch. D. 204). He may, for example, resist rescission where the company could not (*Tufnell & Ponsonby*, 1885, 29 Ch. D.), or call

up the amount unpaid on shares, though the company has agreed that the shares should be paid up by instalments (*Cordova Union Gold Co.*, [1891] 2 Ch. 580).

The powers of a liquidator are shortly these: To bring or defend actions, carry on the business of the company so far as necessary for the winding up, sell the property of the company, prove rank and claim in the bankruptcy of contributories, to draw, accept, make, and indorse bills of exchange and promissory notes, and generally to do all such things as are necessary for winding up the affairs of the company and distributing its assets (s. 95). In a judicial liquidation these powers are only exercisable with the sanction of the Court (*ib.*). No judicial sanction is required in a voluntary liquidation (s. 133), though when it is under supervision the powers are subject to restrictions which the Court may impose (s. 151). The liquidator can only carry on the business of the company so far as may be necessary for the beneficial winding up of the same (*Wreck Recovery Co.*, 1880, 15 Ch. D. 353). He is not entitled to postpone realisation on the speculative chance that the assets may increase in value (*Liquidator Burntisland Oil Co.*, 1892, 20 R. 180).

The liquidator is furnished with the power, under secs. 159 and 160 of the Companies Act, 1862, to compromise with debtors, creditors, and contributories of the company. In a winding up by or under the supervision of the Court, the compromise requires to be sanctioned by the Court, in a voluntary winding up by an extraordinary resolution of the company. In the case of *Mitchell*, 1880, 8 R. 135, the compromise in settlement of calls was on the footing of complete surrender of his estate, which was held to include his right to a share in the surplus assets of the company. Similarly, in *Tennent*, 1879, 6 R. 973, it was held that a complete surrender must carry the contributory's right or alleged right of action against the directors for misrepresentation or fraud in inducing him to take the shares. As additional illustrations of compromise, see *Bank of Hindustan*, 1869, L. R. 2 P. C. 501; *Pearson*, 1872, L. R. 7 Ch. 309; *Roberts*, 1872, L. R. 7 C. P. 629. The Court has no jurisdiction to compel a liquidator to consent to a compromise (*International Contract Co.*, 26 L. T. 358; *Wright*, 1870, 5 Ch. 437).

The insolvency or winding up of a company is not of itself a breach of a contract by the company (*Agra Bank*, 1867, L. R. 5 Eq. 165); for instance, for the delivery of goods (*Halliday*, 1858, 2 De G., J. & S. 312). The liquidator has the option of completing (*Asphaltic Wood Pavement Co.*, 1885, 30 Ch. D. 216); but the company may, by winding up, disable itself from completing a contract, and it is then liable in damages. Whether a liquidator has made himself personally liable or not in contracting is a question depending largely on fact (*Original Hartlepool Collieries Co.*, 1882, 51 L. J. Ch. 508).

The liquidator of a company in a judicial winding up has the largest power under sec. 95 of the Companies Act to sell the assets of the company by private contract or public auction, *en bloc* or in parcels (*Oriental Bank Corporation*, 1887, 56 L. T. 868). This equally applies in a voluntary winding up. A claim of the company against ex-directors for misfeasance may be sold by a liquidator as part of the company's assets (*Park Gate Waggon Works Co.*, 1881, 17 Ch. D. 234).

By some strange oversight creditors of a company in voluntary winding up have no right given them to apply to the Court, the Legislature having, seemingly, assumed the solvency of companies winding up voluntarily. The result is that a liquidator under a voluntary winding up has the exclusive

right to consult the Court on questions arising between him and creditors (Companies Act, 1862, s. 138). The usual mode is to make the creditors parties to the proceedings (*Molleson*, 1884, 11 R. 415). This procedure has been adopted as a means of settling questions between liquidators, contributories, creditors, and others (*Geddes' Trs.*, 1880, 7 R. 731; *Monkland Co.*, 1883, 10 R. 494; *Mitchell*, 1881, 8 R. 134). The claimant may also bring an action (*Poole Firebrick Co.*, 1873, L. R. 17 Eq. 268). In England the Court has jurisdiction (under ss. 133, 138), and will generally exercise it, to stay actions by creditors after a voluntary winding up has commenced (*Thurso Gas Co.*, 1889, 42 Ch. D. 486; *Westbury* v. *Twigge & Co.*, [1892] 1 Q. B. 77; *Sabloniere Hotel Co.*, 1866, L. R. 3 Eq. 75); but in staying an action the Court will give the creditor his costs of action down to the time when he had notice of the winding up, and allow him to add such costs to his debt (*in re Keynsham Co.*, 1863, 33 Beav. 124; *Walker* v. *Banagher Distillery Co.*, 1876, 1 Q. B. D. 129; *Rose* v. *Garden Lodge Co.*, 1878, 3 Q. B. D. 235). Interest on a debt of the company stops running from the commencement of the voluntary winding up (*Imperial Land Co. of Marseilles*, 1871, L. R. 11 Eq. 499), but without prejudice to any claim if there are surplus assets.

The liquidator in a voluntary winding up displaces the directors and becomes in their stead the agent of the company. The directors may still, however, with the liquidator's sanction, or the sanction of a general meeting, exercise their powers if necessary, for instance, a power of enforcing payment of calls by sale or forfeiture (*Fairbairn Engineering Co.*, [1893] 3 Ch. 450). As agent of the company, a voluntary liquidator is not personally liable in damages to a shareholder for delay in performing his duties—in distributing, for instance, the consideration, cash, and shares on a reconstruction under the Companies Act, s. 161, if such delay was due to an honest error of judgment, and was not wilful or fraudulent (*Knowles* v. *Scott*, 1891, 64 L. T. 135). The liquidator may in a voluntary winding up apply under sec. 138 to the Court to decide any question fairly arising in the winding up (*Union Bank of Kingston-on-Hull*, 1880, 13 Ch. D. 809); for example, as to the compromise of a claim against the company (*Miller*, 1866, L. R. 2 Ch. 692), adjusting rights of contributories (*Anglesea Colliery Co.*, 1865, L. R. 1 Ch. 555), determining the rights of different classes of shareholders to surplus assets (*Monkland Iron and Coal Co.*, 1883, 10 R. 494; *Eclipse Gold Mining Co.*, 1873, L. R. 17 Eq. 490), proceeding against directors for misfeasance (*Bank of Gibraltar and Malta*, 1865, L. R. 1 Ch. 69), stay of winding-up proceedings (*South Barrule Slate Co.*, 1869, L. R. 8 Eq. 688), examination and production of documents, etc., under sec. 115 (*Hersee's* case, 1880, 15 Ch. D. 139).

In a voluntary winding up the appointment of a liquidator or liquidators must not be made until after the confirmatory resolution has been passed, otherwise it is invalid (*Indian Zodone Co.*, 1884, 32 W. R. 481); but liquidators may be appointed at the same meeting at which the confirmatory resolution is passed, immediately after it (*Welsh Flannel and Tweed Co.*, 1875, L. R. 20 Eq. 361), or immediately after an extraordinary resolution to wind up has been passed (*Oakes*, 1867, 2 H. L. 354). A plurality of liquidators should not be appointed "joint liquidators" (*Western Bank*, 1860, 22 D. 499; see also *Metropolitan Bank* 1876, 2 Ch. D. 366). The secretary of the company, from his acquaintance with the affairs of the company, is a proper person to be, and often is, appointed liquidator (*London and Australian Agency Corpn.*, 1873, 29 L. T. 417). In dealing with contributories, the liquidator should not apply to the Court under sec. 138 for a declaration

that an alleged contributory is liable, but should put his name on the list and leave him to apply to the Court to strike it off (*Cornwall Brick Co.*, W. N. 1893, 9).

A liquidator can obtain decree for calls though he has gone to reside in England during the course of the liquidation (*Robertson*, 1875, 3 R. 17). If he unsuccessfully pursues an action, he is personally liable in expenses to the successful party (*Liquidator Consol. Copper Co., etc.*, 1877, 5 R. 393; *Ferrao*, 1874, L. R. 9 Ch. App. 355). Probably, on the analogy of *Craig*, 1896, 24 R. 6, a decree against him "*qua* liquidator" would not import personal liability.

Removal of Liquidator.—A liquidator may be removed under secs. 93, 141 of the Companies Act, authorising removal on "due cause shown," wherever it is for the benefit of all those interested in the company being liquidated. It is not necessary that there should be any personal unfitness (*Adam Eyton*, 1887, 36 Ch. D. 299). It is ground for removal if the same person is liquidator of two companies whose interests are conflicting (*City and County Investment Co.*, 1872, 25 W. R. 342); if he is obstructing an action by a contributory to recover money improperly received by the directors and by the liquidator himself when secretary (*Sir John Moore, etc., Co.*, 1879, 12 Ch. D. 325); if he insists on prosecuting an action against the wishes of the creditors where the assets are deficient (*Tavistock Iron Works*, 1871, 19 W. R. 672); or if there is any corruption or impropriety on his part (*London Flour Co.*, 1868, 16 W. R. 553); but it is no ground that the liquidator has an interest in a syndicate which buys the liquidating company's property, if there is no evidence that the liquidator has abused his position (*Llynvi and Tondu Co.*, 1889, 6 T. L. R. 11), or that he has refused to employ a solicitor pressed on him by the creditors (*Plymouth Patent Sugar Refining Co.*, W. N. 1870, 84), or that he was formerly connected with the company as a shareholder and a director (*M'Knight & Co.*, 1892, 19 R. 501), or that a lay liquidator is willing to act gratuitously (*in re Civil Service Stores*, W. N. 1884, 158). Removal will not affect the liability to account (*Tatum*, 1889, 6 Morr. 107; *Rogers*, 1887, 4 Morr. 57).

Remuneration of Liquidator.—In a voluntary liquidation the remuneration of the liquidators may be fixed by the company in general meeting. It is included in the expenses properly incurred in the winding up, which are payable out of the assets of the company, in priority to all other claims (ss. 133 (3) and 144). In a winding up by or under the supervision of the Court, the Court determine the amount of payment, by percentage or otherwise, and the proportion due to each liquidator where there are more than one; further, the Court has power to settle the question of priority as it thinks fit, in the event of the assets being insufficient to meet the company's liabilities (ss. 93, 151, and 110). In the case of *Liquidator* v. *City of Glasgow Bank*, 1880, 7 R. 1196, the remuneration was by commission.

Contributories.—It is one of the first duties of the liquidator to prepare a list of contributories. In a judicial winding up it is settled by the Court, in a voluntary winding up by the liquidator, and in a winding up under supervision it is prepared by the liquidator and sanctioned by the Court. The list of contributories is prepared from the register of members, but is not conclusive, and is subject to rectification on application to the Court (*Caledonian H. S. Co.*, 1882, 9 R. 1130). The list is known as the "A List," and contains the names of those who are members in their own right, and those who are representative of and liable for the debts of others (C. A., s. 99). In the winding up by the Court, notice is sent to each shareholder, intimating that the liquidator proposes to put his name on

the list in respect of certain shares. No notice is required in voluntary winding up (*Brighton Arcade Co.*, 1868, 3 C. P. 175), but it is usually sent. If the calls payable by the contributories on the "A List" are insufficient to pay the debts of the company, a new list is made up, called the "B List," containing the names of shareholders who have transferred within a year prior to the liquidation shares which were liable in payment of calls. The conditions on which the members of the "B List" are liable are laid down in sec. 38 of the Companies Act, 1862: (1) No past member shall be liable to contribute if he ceased to be a partner more than a year before the winding up begins; (2) no past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time he ceased to be a member; (3) no past member shall be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them under the Act; and (4) in cases of companies limited by shares or by guarantee, no past member shall be liable beyond the amount unpaid on his shares, or under the guarantee (*Couper*, 1882, 9 R. 1130).

The money realised from the B contributories is paid into the general fund, and applied in dividends to creditors *pari passu*. It is not specially appropriated to the unpaid part of the "old debt," that is, debt existing when the individual past members paying their quota ceased to hold shares (*Webb* v. *Whiffen*, 1872, 5 H. L. 711). The question whether or not a person is a contributory resolves itself into the question whether or not he is a member, a definition of which is contained in sec. 23 of the Companies Act. That section enacts: "The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed," and "every other person (*i.e.* other than subscribers of the memorandum) who has agreed to become a member under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." Among others, the following were held to have become members, and therefore contributories: A firm (*Newham*, 1867, L. R. 4 Eq. 135); pupil or minor (*Hill*, 1879, 7 R. 68); married woman (*Biggart*, 1879, 6 R. 470); liferenter and fiar (*Wishart*, 1879, 6 R. 823); participating policyholder (*Winstone*, 1879, 12 Ch. D. 239).

Trustees and Executors.—Trustees are personally liable for calls on shares of which they are the registered holders (*Lumsden*, 1865, 3 M. H. L. 89; *Muir*, 1879, 6 R. H. L. 21), as also are executors (*Buchan*, 1879, 6 R. H. L. 52). But trustees and executors are entitled to be indemnified out of the trust or executry estate if the deed appointing them gives them power to hold the shares (*Cunningham*, 1879, 6 R. 1333; *Brownlie*, 1879, 6 R. 1233). In the absence of such authority they must, after entering on the administration of the estate, realise the shares timeously, otherwise they will not be entitled to apply the trust or executry funds in payment of calls. A trustee, always assuming that he has the authority to hold the shares, has the right to be provided with funds out of the estate administered by him, to meet a call as soon as it is made (*National Financial Co.*, 1868, L. R. 3 Ch. 791); but he cannot maintain an action for indemnity while the liability is contingent only, that is, when no call has been made, or is likely to be made (*Hughes Hallett*, 1882, 22 Ch. D. 561). If the trustee's own funds are insufficient, the liquidator is entitled to compel him to resort to the trust estate to make up the deficiency (per Ld. Young, in *Cunningham*, *supra*, 1335). As to where a company takes a transfer of its own shares in the name of a director as trustee for it, see *Cree*, 1879,

4 App. Ca. 648; *Hunter*, 1879, 6 R. H. L. 112. See *Agreement to take Shares*, p. 120; *Transfer of Shares*, p. 123; and *Transmission of Shares*, p. 127.

Assets.—The end and aim of the winding-up administration, to sum it up in a few words, is to collect the company's assets and apply them in discharge of the liabilities. A company's assets consist of all its property, including uncalled capital recoverable from past and present members. Winding up differs from bankruptcy in this respect, that in bankruptcy the whole estate is taken out of the bankrupt, and is vested in the trustee; whereas in a winding up the company is not divested (*Oriental Inland Steam Co.*, 1874, L. R. 9 Ch. 960). For the purpose of collecting the assets the Court in winding up has very great powers—power to order any contributory, trustee, receiver, banker or agent, or officer of the company to pay any sum of money or deliver books, papers, estate, or effects to which the company is *primâ facie* entitled (s. 100); power to order payment of debts or dividends improperly received by a contributory (s. 101); power to summon before it any officer of the company or person known or suspected to have in his possession any of the estate and effects of the company or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade dealings, estate, or effects of the company, and to require the person summoned to produce any relevant books or papers. The object of these powers is to get information which will enable the Court to see what course ought to be followed with reference to some matter or some claim in the winding up (*Grey's Brewery Co.*, 1884, 53 L. J. Ch. 262). The power is discretionary (*Imperial Continental Water Corpn.*, 1886, 33 Ch. D. 314). Usually the liquidator makes the application for the order, scheduling the names of the examinees (*Gold Co.*, 1879, 12 Ch. D. 84); but if the liquidator does not wish to do so, or is himself implicated, a contributory may apply (*London and Lancashire Paper Mills Co.*, 1888, 57 L. J. Ch. 766); but a contributory will not be allowed to take advantage of the section in an action which he is bringing against the company or the directors for his own individual benefit (*Imperial Continental Water Corpn.*, 1886, 33 Ch. D. 314; *North Australian Territory Co.*, 1890, 45 Ch. D. 87; and see *Leaver*, 1885, 51 L. T. 817). All sorts of persons may be examined —the company's directors, its solicitors and brokers, a contributory's banker, partner, stockbroker, relatives (*Forbes*, 1872, L. R. 14 Eq. 6; *Paine & Layton*, 1869, L. R. 4 Ch. 215). Every witness summoned is entitled to his reasonable expenses (*Waddell*, 1877, 6 Ch. D. 330). The place where it is held is not a public Court (*Western of Canada Oil Co.*, 1877, 6 Ch. D. 109). An examinee has a right to have his counsel and solicitor present at the examination (*Breechloading Armory Co.*, W. N. 1867, 225). The depositions of an examinee can be used as evidence only against the deponent himself (*Great Western (Forest of Dean) Coal Consumers Co.*, 1885, 33 W. R. 444). The depositions when finished are filed by the examiner, but the leave of the Court must now be obtained to inspect them or take copies.

Surplus Assets.—Surplus assets must, on a winding up, be distributed (if the articles are silent) in proportion to the number of *shares held*, not in proportion to the amounts paid on the shares; it makes no difference (1) that the shares of the company are paid up unequally, some being fully paid, others being paid up only in part; or (2) that the fully paid-up shares were issued separately as preference shares, carrying a preferential dividend of 5 per cent. without any further right to participate in the profits of the business:

or (3) that, by the regulations of the company, dividends on the company's shares are payable in proportion to the amounts paid up (*Birch* v. *Cropper*, 1889, 14 App. Ca. 525). The same principle applies where there has been a loss instead of a gain; the losses must be borne by the shares equally (*Maude*, 1870, L. R. 6 Ch. 51; and see *Weymouth Steam Packet Co.*, [1891] 1 Ch. 66). When all debts have been paid, a call may be made upon the partly paid-up shareholders for the purpose of adjusting the rights between them and the fully paid-up shareholders (*Paterson*, 1875, 2 R. 490). Preference shareholders are not entitled to any priority in the division of a surplus unless the preference attaches not merely to dividend, but to capital (*Monkland Co.*, 1883, 10 R. 494).

Restraint of Action and Diligence—Equalising of Diligence.—The Companies Act, s. 85, provides that the Court shall have power, at any time between the presentation of a petition for winding up and the granting of a compulsory order, to restrain further proceedings in any action, suit, or proceeding against the company; and after an order for winding up has been pronounced, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose (s. 87; *Wyley*, 1864, 33 Beav. 538). But the Court, in Scotland, has no power to stay proceedings by creditors against a company in a purely voluntary winding up (*Sdeuard*, 1876, 3 R. 577; *Benhar Co.*, 1879, 6 R. 316). On this point the English rule is different (*Thurso Gas Co., supra*). No arrangement between a company and three-fourths of its creditors to the effect that a purely voluntary winding up shall operate as a restraint of diligence is effectual (*Clark*, 1878, 5 R. 867). To protect the company's estate against the action of individual creditors, a supervision order may be applied for (*Gardner*, 1883, 10 R. 1138).

In a winding up by or under the supervision of the Court, the winding up, as at the presentation of the petition on which the compulsory or supervision order respectively is ultimately pronounced, is equivalent to completed diligence, as in the case of sequestrations, and no arrestment, or poinding, or poinding of the ground within 60 days prior to the presentation of such petition shall be effectual, except in the last case for the current term's interest and a year's arrears of interest (Companies Act, 1886, s. 3). This provision has no application in the case of a purely voluntary winding up.

Fraudulent Preferences.—Dispositions pending Winding up.—In winding up, as in bankruptcy, it is necessary to provide against illegal preferences. These are struck at by two sections in the Companies Act—sec. 164 (fraudulent preferences) and sec. 153 (dispositions pending winding up).

Calls in Winding up.—See CALL, vol. ii. p. 276.

Interest.—A provision in articles of association for payment of interest on calls is not applicable to calls by the liquidators (*Welsh Flannel Co.*, 1875, L. R. 20 Eq. 361).

Compensation or Set off.—A shareholder in a limited company cannot set off a debt against calls (*Govan*, 1878, 5 R. 581; *Grissell's* case, 1866, L. R. 1 Ch. 528); to allow set off would be in effect to allow a shareholder-creditor preferential payment out of his own calls (*Black's* case, 1872, L. R. 8 Ch. 254). But compensation is admitted in liquidation after creditors have been paid (Companies Act, 1862, s. 101).

Winding up—Creditors.—The object of the winding-up provisions of the Companies Act, 1862, is to put all unsecured creditors upon an equality, and to pay them *pari passu* (*Oak Pitts Co.*, 1882, 21 Ch. D. 329); and with this view the Companies Act provides that all debts payable on a

contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding in damages, shall be admissible to proof against the company. The liabilities of the company are ascertained as they exist at the commencement of the winding up (*General Rolling Stock Co.*, 1871, 20 W. R. 762); but a creditor may come in and prove at any time before final distribution of the assets, so long as he does not disturb any dividend already paid (*General Rolling Stock Co.*, 1872, L. R. 7 Ch. 646; *Hicks* v. *May*, 1872, 13 Ch. D. 236).

Certain classes of debts in winding up, as in bankruptcy, are allowed a preference. These are—(1) Crown debts (*Oriental Bank*, 1885, 28 Ch. D. 643; *Henley & Co.*, 1878, 9 Ch. D. 469); (2) rates and taxes and the salary or wages of any clerk, servant, or workman (Preferential Payments Act, 1888, s. 1 (*a*) (*b*) (*c*). As to the rights of a landlord, see *Wanzer*, [1891] 1 Ch. 305.

Secured Creditors.—A secured creditor of a company can now only rank for the balance of his debt after deducting the value of his security (C. A. 1886, s. 4). At common law such valuation and deduction was not required (*Mollcson*, 1884, 11 R. 415).

Stay of Winding-up Proceedings.—The Court has jurisdiction, under ss. 89, 138 of the Companies Act, to stay all proceedings in a voluntary winding up on the petition of the liquidator (*Steamship Titian Co.*, 1888, 36 W. R. 347; *Halfna Mining Co.*, 1888, 84 L. T. N. 403).

Dissolution of Companies.—After Winding up by Court.—When the affairs of a company have been completely wound up, the Court makes an order that the company be dissolved, and the registrar enters the order in his books (C. A., ss. 111, 112).

After Voluntary Winding up.—In the case of a voluntary winding up, the liquidator calls a meeting of the company by advertisement, lays before it an account of the liquidation, and makes a return of such meeting having been held to the registrar; three months after which the company is dissolved (C. A., ss. 142, 143). In voluntary as well as in judicial winding up a petition or note is presented to the Court by the liquidator for authority to destroy the books, accounts, and documents of the company. In the case of a judicial winding up he will crave for his discharge.

Apart from fraud, the Court has no jurisdiction, when a company has been dissolved, to make a winding-up order reopening the whole matter (*Assets Co.*, 1883, 10 R. 676; *Pinto Silver Mining Co.*, 1878, 8 Ch. D. 273; *Crookhaven Mining Co.*, 1866, L. R. 3 Eq. 69; *Schooner Pond Coal Co.*, 1888, 84 L. T. N. 401).

Striking Name of Company off Register.—Names of companies believed by the registrar to be defunct may, after inquiry, be struck off the register (Companies Act, 1880, s. 7); but the Court has power to restore a name (*Outlay Assurance Society*, 1887, 34 Ch. D. 479; *Alliance H. S. Co.*, 1886, 14 R. 34; *City, etc., Corporation*, [1897] W. N. 162).

Reconstructions.—Reconstructions are frequently resorted to now as a means of extricating a company from difficulties, financial or legal. The most common case is where a company's capital is all paid up and it requires more for the purpose of carrying on its business. In such a case it obtains it by transferring its assets to a new company, the shares in which are allotted to the members of the old company, say £1 shares, on which 15s. is credited as paid up. The uncalled 5s. thus forms a fund for working capital: or the company may desire to carry on a business outside its memorandum, and not attainable under the powers of the Companies (Memorandum of Association) Act, 1890. Sometimes a reconstruction is

the only way of getting rid of onerous preference shares. Reconstructions fall, broadly speaking, into two classes: (1) Reconstructions under the Joint Stock Companies Arrangement Act, 1870, s. 2, and (2) reconstructions by sale and transfer of a company's assets, either under sec. 161 of the Companies Act, or under a power in the company's memorandum. An amalgamation is not a "reconstruction" (*Hooper*, 1892, 41 W. R. 86). What a scheme of arrangement with creditors is to an individual, an arrangement under the Joint Stock Companies Arrangement Act, 1870, is to a company pressed by creditors. The Court may, in such a case—to put it shortly—sanction any compromise or arrangement between a company in winding up, and the creditors of the company, or any class of them, if such arrangement is agreed to at a meeting of a three-fourths majority in value of such creditors or class of creditors. The intention of the Legislature in the Act was that, in the winding up of the companies the Court should be in a position to bind everybody to what the Court thinks is a beneficial compromise to creditors, liquidators, and shareholders (*Nicholl*, 1888, 59 L. T. 863). Under the Act it is competent for classes of creditors to compromise with one another, as well as with the company (*Dominion of Canada Freehold Estate Co.*, 1886, 55 L. T. 347). To obtain the approval of the Court, the scheme must be a proper one, that is, it must be made in good faith, and be fair and reasonable (*Empire Mining Co.*, 1890, 44 Ch. D. 402; *Alabama Rwy. Co.*, [1891] 1 Ch. 239). It is the duty of the Court to see, for instance, that the majority are acting *bonâ fide*, and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent (*Gillies*, 1893, 20 R. 1119). It is also its duty to see that the resolution has been passed *bonâ fide* in the interests of the creditors, and not by debenture-holders, who are also shareholders, to escape liability as shareholders (*Wedgewood Coal and Iron Co.*, 1877, 6 Ch. D. 627). The meeting should adequately represent the entire body of creditors or class of creditors. The majority of three-fourths in value is a majority present at the meeting, not a majority of all the creditors of the company (*California Redwood Co.*, 1885, 13 R. 335; *Bessemer Steel and Ordnance Co.*, 1875, 1 Ch. D. 251). The liquidator is the proper person to preside (*Slater*, W. N. 1887, 139). Debenture-holders in voting must produce their debentures if they pass by delivery (*Wedgewood Coal and Iron Co.*, 1877, 6 Ch. D. 627; and see *Madras Irrigation Co.*, W. N. 1881, 120). The Court may not only sanction a reconstruction scheme, under which unsecured creditors are to be allotted fully paid-up shares in the new company to the amount of their debts, but compel a dissentient minority to surrender their securities and accept in lieu of them fully-paid shares (*Gillies, supra*; *Empire Mining Co.*, 1890, 44 Ch. D. 402; *Alabama Rwy. Co.*, [1891] 1 Ch. 213). Examples of schemes may be found in *Dominion of Canada Freehold Estate Co.*, 1888, 58 L. T. 349; *Dynevor Collieries Co.*, 1878, 11 Ch. D. 605; *Western of Canada Oil Co.*, W. N. 1874, 148. As to the payment of expenses or the remuneration of persons whose assistance is required to carry out the scheme, see *Mortgage Insurance Corporation*, 1896, W. N. 4 (3).

Sale and Transfer of Assets.—Under the method of reconstruction by sale and transfer of assets, the liquidators of a company in voluntary winding up may, with the sanction of a special resolution of the company, receive, in compensation or part compensation for the transfer or sale of the assets to another company, shares, policies, or other like interests of the purchasing company in lieu of cash for distribution among members of the company in winding up (Companies Act, s. 161). Any dissentient member may require

the liquidators to purchase his interest, the price to be determined by agreement, but in the event of a dispute, by arbitration (s. 162).

The meaning of sec. 161, which applies to a winding up under supervision as well as a purely voluntary winding up (*Imperial Mercantile Credit Assoc.*, 1871, L. R. 12 Eq. 514), is that the company in voluntary winding up instead of disposing of its assets for money may dispose of them for shares in any other company or policies or any like interest or future profits or other benefit from the purchasing company, but whatever the benefit is —in whatever shape taken—it is to be given or paid or handed over to the liquidators for the benefit of the contributories of the company wound up, subject to the payment of their debts (*Griffith*, 1877, 5 Ch. D. 898). The sale under sec. 161 must be a sale to another company, or to an agent for a company to be formed (*Hester & Co.*, 1875, 44 L. J. Ch. 757), not an individual (*Bird*, 1874, L. R. 9 Ch. 358), but it may be to a foreign company (*Irrigation Co. of France, Fox*, 1871, 40 L. J. Ch. 439). It may also be only of a part of the business (*City and County Investment Co.*, 1879, 13 Ch. D. 481). The agreement for sale providing for payment of a bonus out of the purchase money to the directors of the old company will not vitiate the agreement (*Southall*, 1871, L. R. 6 Ch. 69). The section does not contemplate the subjecting of the shareholders in the selling company without their unanimous consent to a fresh and original liability, such as guaranteeing the sufficiency of the transferred assets (*Clinch*, 1868, L. R. 3 Ch. 121), or paying on the shares they are to receive a premium to be carried to the reserve fund of the purchasing company (*Imperial Bank of China*, 1868, L. R. 6 Eq. 91); but the shares in the new company not being fully paid up does not make the agreement *ultra vires* (*Nicholl*, 1888, 59 L. T. 862). The general meeting can only decide on the nature of the consideration, not on the mode of its distribution, *e.g.* as between preference and ordinary shareholders (*Griffith*, 1877, 5 Ch. D. 894). Shares in the new company given to the shareholders as consideration for the transfer are not assets of the old company, and cannot be reached by a creditor in an action against the company (*Cardiff Preserved Coal Co.*, 1867, L. R. 2 Ch. 409). A liquidator is not entitled to repayment of his outlays in an unsuccessful attempt to sell the company's assets under sec. 161 (*Millar*, 1891, 18 R. 496).

A shareholder, on a proposed sale and transfer under sec. 161, has three courses open to him—(1) he may assent to the resolution; (2) he may do nothing; (3) he may dissent within seven days and be paid cash for his shares (*Los*, 1868, 11 Jur. N. S. 661). If he contemplates accepting the option of shares in the new company he must act promptly (*Postlethwaite*, 1889, 43 Ch. D. 452), especially if the company's property is of changing value (*Zuccani*, 1889, 61 L. T. 176, and see *Weston*, 1889, 62 L. T. 275).

When a shareholder gives notice of dissent he must in the same notice require the liquidator to purchase his shares (*Union Bank of Kingston-on-Hull*, 1880, 13 Ch. D. 808). The liquidator can then buy off his opposition (*De Rosaz*, 1868, L. R. 4 Q. B. 474). If a dissentient shareholder refuses to accept the valuation put upon his interest by the liquidator, his interest must be settled by arbitration under sec. 162, but he is not relieved from liability to the creditors of the company though he sells his shares to the liquidator. A sale under sec. 161 is binding on the creditors of the selling company; their remedy if they are injured is to apply within a year for a compulsory order or a supervision order (*Imperial Mercantile Credit Assoc.*, 1871, L. R. 12 Eq. 504; *Callao Bis Co.*, 1869, 42 Ch. D. 169; *Vining*, 1870, L. R. 6 Ch. 96).

Power of Sale of Undertaking in Memorandum.—A power to sell the com-

pany's undertaking for such consideration as the company may think fit, and, in particular, for shares, debentures, or securities of any other company, is often now inserted in a company's memorandum, and has this advantage that under it a reconstruction can be carried through without a winding up. See as to such a power, *Cotton*, [1892] 3 Ch. 454; *Grant*, 1889, 40 Ch. D. 135; *New Zealand Co.*, [1894] 1 Q. B. 622.

[*Authorities.*—Lindley on *Companies*, 5th ed.; Buckley on *The Companies Act*, 7th ed.; Chadwick Healey, *Joint Stock Companies*, 3rd ed.; Palmer, *Company Precedents and Winding-up Forms*, 6th ed.; Manson, *Law of Trading and other Companies*, 2nd ed.; Thring, *Joint Stock Companies*, 5th ed.; Brice on *Ultra Vires*, 3rd ed.; Hurrell and Hyde on *Directors*; Hamilton on *Directors*; Lorimer on *Joint Stock Companies.*] [In the above article the authors have, with permission, made full use of the article on COMPANY, by Mr. Manson, in the *Encyclopædia of the Laws of England*, for which they here tender their acknowledgments.]

Jointure—An annuity to a wife heritably secured either by heritable bond and infeftment, or by an infeftment on a bond of annuity (Bell, *Com.*, M'L.'s ed., i. 682; Bell, *Prin.* s. 1947). If a jointure-house be provided, it is by a liferent infeftment, or by an obligation to pay a certain rent in place of a house (Bell, *Prin. ib.*).

Journals of Parliament.—The Journals of the Houses of Parliament are evidence of their proceedings, though not properly records (Bell, *Prin.* s. 2210; Dickson, *Evidence*, s. 1110). They must be proved by examined copies (*ib.*). They are evidence only of the proceedings—not of the truth of the facts set forth in the resolutions (*ib.*; but see *Franklin*, 1731, 17 St. Tri. 635). A copy of a judgment from the minutes of the House of Lords in an appeal, duly certified, is sufficient proof to guide the Court of Session in applying the judgment. Although there be a clerical error in the judgment of the House of Lords, the Court of Session are bound to overlook it, and to pronounce an interlocutor in conformity with the instructions of the remit (*Aberdeen Railway Co.*, 1854, 16 D. 470).

Judex, Judicium.—In Roman actions during the classical period the magistrate did not as a rule himself investigate the facts in dispute between the parties; he remitted the case to a *judex* to inquire into the facts and pronounce judgment thereon. The whole proceedings, therefore, in a civil action fell into two parts—those taking place before the magistrate (*in jure*), and those taking place before the *judex* at the actual trial (*in judicio*).

The *judex* was not a magistrate, but a private citizen appointed by the magistrate to try a particular case. As the office was a *munus publicum*, the *judex*, when appointed, could not decline to act without a lawful excuse. After being sworn to do his duty, the *judex* received from the magistrate a *formula* determining the questions to be decided. The delivery of the *formula* ended the proceedings *in jure*, and was the moment of *litis contestatio*. The parties then appeared *in judicio*, produced witnesses, argued the case, and received the decision of the *judex*. For execution it was necessary to apply again to the magistrate. A *judex* who culpably gave a wrong decision was said to make the cause his own (*litem suam*

facere), and was liable to an action for the damage which the party injured by his decision had sustained (*Inst.* iv. 5 pr.). Frequently the *judex* was aided by legal advisers (*jurisconsulti*) who were said *in consilio adesse*.

Sometimes the *judex* was called an *arbiter*. The cases for which *arbitri* were selected were those in which there was room for the exercise of unfettered discretion, and for the free application of the principles of *bona fides*. Sometimes, again, the *judices* appointed were known as *recuperatores*. *Recuperatores* might be peregrines, whereas only a citizen could be a *judex* proper; and so it seems that the appointment of *recuperatores* was a means of securing an impartial tribunal in cases in which *peregrini* were concerned.

The division of judicial functions between the magistrate and the *judex* continued up to the time of Diocletian. Before this time, in exceptional cases the proceedings took the form of an *extraordinaria cognitio*, in which the magistrate himself issued a *decretum* deciding the case, without making a remit to a *judex*. After Diocletian the *extraordinaria cognitio* wholly supplanted the old mode of procedure, and the functions of the *judex* were merged in those of the magistrate. Thus in the Theodosian Code the term *judex* is used to designate the governor of a province, and, in the time of Justinian, the magistrate was frequently called *judex*.

Judge Advocate; Judge Advocate-General.—A *judge advocate* is the legal assessor of a court-martial (see *Rules of Procedure*). The Judge Advocate-General is the adviser of the Crown in reference to matters of military law.

Judge's Notes.—The notes of the presiding judge at a jury trial take the place of a formal record of the proof. They are conclusive evidence of what took place at the trial (*Dobbie*, 1861, 23 D. 1139). Where the parties agree, the evidence taken down by a shorthand writer, and extended by him, may, with the consent of the judge, be substituted for the judge's notes of the evidence for all purposes (31 & 32 Vict. c. 100, s. 37). The party applying for a new trial is not entitled to obtain a copy of his notes from the judge who presided, unless the Inner House desire such copy (A. S., 16 Feb. 1841, s. 36). In criminal trials, both in the Supreme (23 Geo. III. c. 45) and the Sheriff (9 Geo. IV. c. 29, s. 17) Courts, the judge must take notes of the evidence (Dickson on *Evidence*, ss. 1804, 205, 211, 1120, 1726, 1749).

Judgment.—See DECREE; INTERLOCUTOR.

Judgments Extension Acts.—Where a judgment has been obtained in any Court in either England, Scotland, or Ireland for any "debt, damages, or costs," and it is desired to give effect to the judgment in one of the three countries other than that within which the Court by whom the judgment has been pronounced is situated, this may be effected by registering in the Courts of the country in which it is desired to give effect to the judgment a certificate from the Court that has pronounced the judgment, setting forth its terms. Thus a judgment obtained in any Court in Scotland for any "debt, damages, or costs" may be given effect to in England or Ireland by registering a certificate, obtained from the

Scotch Court, in the Courts of either England or Ireland, and *vice versâ*. This is done in terms of the Judgments Extension Act (31 & 32 Vict. c. 54), which applies to judgments pronounced in the Superior Courts of England, Scotland, or Ireland; and in terms of the Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), which applies to judgments pronounced in Sheriff Courts, and all Courts held under the Small Debts and Debts Recovery Acts in Scotland; to County Courts, Civil Bill Courts, and all Courts in England and Ireland having jurisdiction to hear and determine civil causes, other than the High Courts of Justice; and to Courts of Petty Session and of Bankruptcy in Ireland.

The forms of the certificate to be obtained are contained in the schedules appended to the Acts, and are as follows:—

CERTIFICATE ISSUED IN TERMS OF "THE JUDGMENTS EXTENSION ACT, 1868."

FORM I. *Where Party applying is Plaintiff or Pursuer.*

I, , certify that [*here state name, title, trade, or profession, or usual or last known place of abode of plaintiff or pursuer*] on the day of 18 , obtained judgment against [*here state name and title, trade or profession, and usual or last known place of abode of defendant*] before the Court of , for payment of the sum of , on account of [*state shortly nature of claim or ground of action, with the sum of costs, if any, and in case of a judgment obtained in an action, state whether it was obtained after appearance made by the defendant or after service (personal or otherwise) of the action on the defendant, as the case may be*].

Signed by the proper Officer of the Court
from which the certificate issues.

FORM II. *Where Party applying is Defendant or Defender.*

I, , certify that [*here state name, title, trade, or profession, and usual or last known place of abode of defendant or defender*] on the day of 18 , obtained judgment against [*state name, title, trade or profession, and usual or last known place of abode of plaintiff or pursuer*] before the Court of , for judgment of the sum of £ as costs of suit.

Signed by the proper Officer of the Court
from which the certificate issues.

Minute of Presentation to be appended to either Form.

Presented for registration in terms of "The Judgments Extension Act, 1868."

Signature of (*attorney, law agent, or creditor*)
presenting for registration.

CERTIFICATE ISSUED IN TERMS OF "THE INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882."

I, , certify that [*here state name, business or occupation, and address of person obtaining judgment, and whether plaintiff or defendant*] on the day of 18 , obtained judgment against [*here state name, business or occupation, and address of person against whom judgment was obtained, and whether plaintiff or defendant*] in the Court of , for payment of the sum of on account of [*here state shortly the nature of the claim, with the amount of costs (if any), for which judgment was obtained.*]

[*To be signed by the Registrar or other proper Officer of the Inferior Court from which the certificate issues, and to be sealed with the Seal of the Court.*]

Note of Presentation to be appended to above Form.

The above certificate is presented by me for registration in the Court of , in accordance with the provisions of the Inferior Courts Judgments Extension Act, 1882.

[*Signature and address of solicitor, law agent, or creditor presenting for registration.*]

The second section of the Act of 1868 provides for the extension to Scotland of any judgment for "debts, damages, or costs" obtained in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at Westminster or Dublin respectively. This definition has been held to include a judgment of any Division of the High Court of Justice wherever it may have been pronounced (*English's Coasting and Shipping Co.*, 1886, 14 R. 220, per Ld. Pres. Inglis, 225). The second section of this Act further provides for the registration of the certificate, which has to be produced at the office kept in Edinburgh for the registration of deeds, bonds, protests, and other writs registered in the Books of Council and Session, and is there registered in a book kept for the purpose, and called The Register for English and Irish Judgments, in the same manner as a bond containing a clause for registration is registered. A certificate so registered has the same force and effect as a decree of the Court of Session, and all proceedings may and shall be taken on an extract of such a certificate as if the judgment of which it is a certificate had been a decreet originally pronounced in the Court of Session on the date of such registration. The costs of registering the certificate may be recovered as if they were part of the original judgment. No certificate may be registered more than twelve months after the date of the judgment without leave from the Lord Ordinary on the Bills. It has been held that it is not necessary that a debtor should be domiciled in Scotland in order to enable his creditor to put a judgment obtained in the High Courts of England into effect against him by registration in Scotland (*English's Coasting and Shipping Co., supra*).

The third section of the Act of 1868 provides for effect being given in England and Ireland to a judgment of the Court of Session in Scotland. In this case the certificate of an extracted decreet for the payment of any "debt, damages, or expenses," signed by the extractor of the Court of Session, or by any other officer duly authorised to make and subscribe extracts, or a certificate of an extracted decreet of registration in the Books of Council and Session purporting to be signed by the keeper of the register of deeds, bonds, protests, and other writs registered in the Books of Council and Session, must be produced to the senior Master of the Court of Common Pleas at Westminster, or to the Master of the Court of Common Pleas at Dublin, to be registered in books kept for the purpose, called The Register for Scotch Judgments. The same rules apply as to the effect of such a certificate when registered, and as to the costs in connection therewith, as apply to English judgments registered in Scotland, and leave must be obtained to register the judgment if twelve months have elapsed from the date of its being pronounced. Where a note of suspension of any such decreet has been passed or a sist of execution shall have been granted in Scotland, execution on such a certificate in England is stayed until such sist has expired, or until the reasons of suspension have been repelled. But in order to stay the execution of the registered certificate in England, a further certificate must be produced, signed by the Clerk to the Bill Chamber of the Court of Session, or any judge thereof, certifying that such note has been passed, or that such a sist has been granted. A recent English case illustrates the effect of a registered certificate. *In re Low*, [1894] 1 Ch. 147, the creditor of a deceased debtor who died domiciled in England arrested trifling funds belonging to the debtor in Scotland. He then claimed against the executrix of the deceased both in England and Scotland. In England his claim was disallowed as barred by the Statute of Limitations, but in Scotland he obtained decree. Having registered a

certificate of the judgment of the Court of Session in the English Courts, he claimed the sum to which he had been found entitled in Scotland, and it was held that the terms of the Scotch judgment must be given effect to, in spite of the fact that the claim had already been held in England to be barred. It was held in the same case that after registration it is incompetent to try and show that the judgment obtained was wrong. It has also been held that no Scotch judgment other than one for debt, damages, or costs can be enrolled in the Chancery Division (*in re The Dundee Suburban Rwy. Co.*, 37 W. R. 50). The Act of 1868 further provides that, in so far as relates to execution of the registered certificate of a judgment or decree, the Superior Courts in England, Ireland, and Scotland shall have and exercise the same control and jurisdiction over any judgment or decree, and over any registered certificate of such judgment or decree, as they now have and exercise over any judgment or decree of their own Court (s. 4). Unless the Court on special grounds (see *Dessan*, 1897, 24 R. 976, and *Lawson's Trs.*, 1874, 1 R. 1065) orders otherwise, it is not necessary that a party to an action in Scotland, but resident in England or Ireland, should sist a mandatory, or otherwise find security for expenses in respect of such residence (s. 5). Similarly, a plaintiff in the Courts of England or Ireland who resides in Scotland need not find security for costs in respect of such residence (s. 5). No one bringing an action in any Court in England, Scotland, or Ireland on any judgment or decree which might be registered under the Act in the country in which such action is brought, is entitled to recover the expenses of the suit, unless the Court shall order otherwise (s. 6). And finally, the Act does not apply to any decree pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland (s. 8).

The Inferior Courts Judgments Extension Act, 1882, extends the above facilities to judgments of inferior Courts, and its provisions are similar to those of the Act of 1868. It may be noted that where a judgment obtained in an inferior Court in Scotland cannot be registered in England or Ireland by reason of its being for a greater amount than might have been recovered if the action had been originally commenced in such inferior Court, the certificate may be registered in one of the Superior Courts as if a decree of the Court of Session (s. 9). The Act does not apply where the judgment is pronounced by the Inferior Court of one country against a person domiciled in one of the other two countries as at the date of the commencement of the action, unless the whole cause of action shall have arisen or the obligation to which the judgment relates ought to have been fulfilled within the district of such inferior Court, and the summons was served upon the defender personally within the said district (s. 10). Where an attempt is made to enforce a judgment to which the Act does not apply, by registration against any one, the remedy is to apply for a prohibition or injunction against the enforcement of the judgment to the Superior Courts in England or Ireland, or for the suspension of such enforcement in the Bill Chamber in Scotland, and the unsuccessful party in such proceeding may be found liable in costs (s. 10).

Judicatum solvi, Caution.—See Caution (Judicial).

Judicial Caution.—See Caution (Judicial).

Judicial Committee.—See PRIVY COUNCIL.

Judicial Examination.—See DECLARATION BY A PRISONER.

Judicial Factor—An officer appointed by a competent Court to whose care, under the supervision of the Court, are intrusted estates and interests without a capable owner or administrator, or which are matter of litigation, "to the end that the estates . . . may not suffer in the meantime." For the various circumstances in which a factor is appointed, reference must be made to the different headings of this article. The power of the Court of Session to appoint under its *nobile officium* has been stated to be derived from the Privy Council, but it would appear that the Court deliberately asserted its jurisdiction before the Union and the consequent abolition of the Privy Council (*Carmichael*, 1700, Mor. 7454; Fraser, *P. & C.* 456). "The power which the Court has exercised, and as to which there is no doubt, is a very comprehensive power. It would certainly apply to any case where there is an estate for which no owner can be found, or where the owner is not capable of administering his estate; and it also applies to cases where there is disputed possession, or where the owners are unable to agree in regard to the administration of their estate, as sometimes happens in cases of joint ownership. . . . It is always in its nature an interim appointment" (*Dowie*, 1894, 21 R. 1052, Ld. M'Laren, at p. 1057). Formerly the Court of Session exercised its equitable jurisdiction in session through the Inner House in either Division, and in vacation through the Lord Ordinary on the Bills, whose act was confirmed subsequently by the Court; but by the Distribution of Business Act, 1857, petitions, *inter alia*, for the appointment or exoneration of judicial factors "shall be," in the first instance, enrolled before, and dealt with by, the Junior Lord Ordinary (s. 4), and in vacation petitions for appointment are to be brought before the Lord Ordinary on the Bills (s. 10). This enactment, however, regulates procedure only, and does not affect the Court's power to appoint, where necessary, under the *nobile officium* (Thoms on *Factors*, p. 7, note; see *Collins*, 1882, 9 R. 500).

Jurisdiction to appoint in small estates has been, by recent legislation, extended to the Sheriff Court (Judicial Factors (Scotland) Act, 1880).

The powers and duties of nearly every class of judicial factor came to be regulated in the main by the Act of Sederunt of 13 February 1730, though that Act did not in terms apply to factors other than those *in loco tutoris* and *loco absentis*, and curators *bonis*. As regards these mentioned, the Act of Sederunt was practically superseded by the Pupils Protection Act, 1849 (12 & 13 Vict. c. 51), the minute provisions of which became the code of management for such judicial factors, who were, further, placed under the supervision of the Accountant of Court created by the Act. Finally, by the Judicial Factors (Scotland) Act, 1889, s. 6, all factors and other persons appointed by the Court of Session and Sheriff Court, to administer funds or property belonging to persons or estates in Scotland, were brought under the superintendence of the Accountant of Court, and made subject to the provisions of the Act of 1849, and amending Acts and relative Acts of Sederunt.

The subject will be most conveniently treated under the following heads:—

I. Factor *loco tutoris*.

II. Curator *bonis* to minor.

III. Curator *bonis* to *incapax*.
IV. Factor *loco absentis*.
V. Factor on trust estates and charities.
VI. Factor on intestate estates.
VII. Factor under the Bankruptcy Statutes.

I. FACTOR LOCO TUTORIS.

1. Appointment.

A. Court of Session.—A factor *loco tutoris* is an officer appointed by the Court to administer the estate of a pupil who has no other legal administrator, or where that estate may be in jeopardy. Generally speaking, his powers as regards the estate are the same as those of a tutor. This official, owing to the ease with which he may be appointed, the satisfactory nature of the regulations applicable to the office, and the fact that he serves for hire (Hailes, 360), has superseded to a great extent tutors at law and dative. Indeed, the Court has appointed a factor *ad interim* even though the appointment was opposed by the tutor-at-law on the ground that he was about to serve (*Hart*, 1829, 7 S. 805).

To whom Appointed.—The factor is appointed to the estate of a pupil (*a*) who is resident (*Hay*, 1837, 15 S. 850; *Lamb*, 1857, 19 D. 699); or (*b*) who has heritable property (*Ross*, 1857, 19 D. 699; *Wight*, 1837, 15 S. 1197; see Fraser, *P. & C.* 602), within the jurisdiction of the Scottish Courts. Any unprotected interest valuable enough to justify the expense of a factor is sufficient (see *Dunbar*, 1848, 10 D. 866).

When Factor may be Appointed.—A factor is appointed on application when there are no tutors-nominate appointed or existing; or where they decline (Fraser, *P. & C.* 455–7); or where the guardians (including the father) are unfit to act (*Macintyre*, 1850, 13 D. 951; *Fleming*, 1850, 13 D. 951; *Munnoch*, 1837, 15 S. 1267), or have died, or have been removed (*Wotherspoons*, 1775, Mor. 16372), or have resigned (*Munnoch*, *supra*); or where a joint nomination, or a quorum, or a *sine quo non* (see Thoms, pp. 176, 177, note 1), or all but a *sine quo non* (*Riddell*, 1746, Mor. 16350), fail; or where no tutor-at-law (see *Ogilvy*, and *M'Neill*, 1849, 11 D. 1029, 1030) or tutor-dative is appointed. A factor, however, may be superseded at any time by the tutor-nominate or at-law, unless they have declined (Fraser, *P. & C.* pp. 437 and 484).

It is thought that neither absence from the jurisdiction, unless he was an alien (Fraser, *P. & C.* 173; 33 & 34 Vict. c. 14, s. 2), nor interest, on the part of the tutor-nominate, would justify the appointment of a factor, unless the estate was, in either case, in danger.

Under the Pupils Protection Act, 1849, s. 31, the Court of Session may remove or accept the resignation of any tutor coming under the provisions of the Act, and appoint a factor (cf. *Mackenzie*, 1845, 7 D. 283 (curator *bonis* appointed to call another to account)); and by sec. 10 of the Judicial Factors Act, 1889, where any factor under the Act has died undischarged, or has failed, and there is no successor, and the purposes of the appointment have not been exhausted, the Accountant may apply for the appointment of a factor, who shall investigate the accounts of his predecessor.

Generally speaking a factor will not be appointed where the party is already under guardianship proper (Fraser, *P. & C.* 457). Accordingly,

though the father has nominated no tutors, it is incompetent to appoint the mother factor *loco tutoris* to pupil children, as she is already tutor under the Guardianship of Infants Act, 1886 (ss. 2–8; *Willison*, 1890, 18 R. 228), and can grant a valid discharge for the pupil (*Jack*, 1886, 14 R. 263 (First Div.)). But though the property is in the hands of trustees, a factor may be appointed in the interests of the ward to superintend and call to account (*Dalrymple*, 1836, 14 S. 1011; *Mackenzie*, 1845, 7 D. 283). And where a tutor or curator is in contempt of Court, the Court, without removing the tutor, will appoint a factor until its orders are complied with (*Edgar*, 1893, 21 R. 325; see also at 1076).

Appointment when Father Alive.—Although the father is tutor and administrator-in-law to his pupil children, a judicial factor may nevertheless be appointed to them during his lifetime. Thus where the father's affairs are embarrassed (*Buchan*, 1839, 2 D. 275), and he does not reside in Scotland (*Graham*, 1794, Mor. 16383), or where he is an undischarged bankrupt without a fixed residence (*Johnstone*, 1822, 1 S. 510; *Robertson*, 1875, 3 M. 1077; see *Allan*, 1895, 3 S. L. T. No. 131 (Ld. Low), where the father was sequestrated and was occupying the pupil's heritage without maintaining her), or in prison (*Barclay*, 1698, 4 Bro. Supp. 405), the Court will interfere, apparently on the ground of conflict of interest. Mere poverty, however, is not a ground for superseding the father (*Stevenson's Trs.*, 1856, 19 D. 462; affd. 1861, Macq. 86; *Edmiston*, 1871, 9 M. 987; *Wardrop*, 1869, 7 M. 532); and a petition by the father for a judicial factor was refused where no conflict of interest appeared (*Cochrane*, 1891, 18 R. 456). As a rule there will be no general exclusion of the father, and the appointment will be limited to particular funds (*Robertson*, 1865, 3 M. 1077; *Walton*, 1850, 12 D. 912 (tutor *ad litem*)). The father has been superseded and a factor appointed with special powers, where it was necessary to sell the pupil's estate (*Sawers*, 1850, 12 D. 806), but in later cases fathers have obtained important special powers without even the necessity of finding caution (*Clinton*, 1875, 3 R. 62; see *Campbell*, 1880, 7 R. 1032, and 8 R. 543).

De plano Appointment.—Instances have occurred where the Court (Second Div.) in the original action have appointed a factor on caution, with the usual powers, to administer a sum of damages found due to pupil and minor children (*Collins*, 1882, 9 R. 500; *M'Avoy*, 1882, 19 S. L. R. 441; see *Sharp*, 1885, 12 R. 574 (to be held in trust)). In *Anderson*, however (1884, 11 R. 870), the First Division held that a curator *ad litem* could not discharge a sum of damages so awarded, and refused to appoint a factor in the original action.

B. Sheriff Court.—The Sheriff has the power, at common law, of appointing curators *ad litem*, factors to confirm as executors on behalf of pupils and minors (see *Johnstone*, 1838, 16 S. 541), and incidentally where the appointment of a factor is necessary to do justice in a pending action (as in partnership questions; see *Drysdale*, 1842, 4 D. 1061; cf. *Rowe*, 1872, 9 S. L. R. 493, and *Key*, 1840, 3 D. 252; Thoms, p. 518). He may also appoint under the Bankruptcy Act, 1856, ss. 16 and 37; and for the purpose of regulating interim possession pending appeal (see 31 & 32 Vict. c. 100, s. 79; 19 & 20 Vict. c. 79, ss. 20 and 172).

Further important statutory powers are conferred by the Judicial Factors (Scotland) Act, 1880, and relative Act of Sederunt, 14 January 1881. Where the yearly income of the whole estate does not exceed £100, the Sheriff, or his substitute, of the county where the ward resides may, on summary petition, appoint factors *loco tutoris* and curators *bonis* either to

minors (*Penny*, 1894, 22 R. 5) or persons incapable, with the usual powers (s. 4); and where the ward has left the jurisdiction, and it is necessary to make a new application on the factor's death, removal, or resignation, etc., it must be presented in the Court making the original appointment (*Acc. of Court*, 1893, 20 R. 573). The Sheriff is to ascertain, by "reasonable" evidence, the value of the estate in the mode prescribed (s. 4, subs. 2, 3), and make a finding in his interlocutor to that effect. By subs. 4 all Statutes and Acts of Sederunt applicable to factors appointed by the Court of Session are made to apply to Sheriff Court appointments, which are consequently under the charge of the Accountant of Court.

An appeal may be taken from the Sheriff-Substitute to the Sheriff (subs. 5), whose decision is final (subs. 10); and the Court of Session share with him the power to recall any appointment (subs. 9).

Details as to procedure, caution, discharge, and special powers are prescribed in the Act of Sederunt, 14 January 1881, by sec. 9 of which it is provided that special powers are only to be granted after extract is obtained.

(1) *Who be may Appointed.*—Speaking generally, any male twenty-one years of age within Scotland (*Adie*, 1835, 14 S. 185; *Robertson*, 1846, 9 D. 210; but cf. *Scott*, 1851, 13 D. 951), in solvent circumstances, and not disqualified by incapacity, or interest, or occupation as after mentioned, may be appointed factor *loco tutoris*. While accountants and law agents, from their knowledge of business, are most frequently appointed, the Court will take into consideration all the circumstances of locality, etc., and the special qualifications of the party nominated (*Anderson*, 1854, 17 D. 97; see *Dixon*, 1832, 10 S. 209; *M'Culloch*, 1851, 14 D. 311); and further, where no objection is stated or appears, will usually appoint the petitioner's nominee. Where, however, a law agent is appointed, he cannot charge for professional work done by himself or his firm (*Mitchell*, 1878, 5 R. 1124).

Women, though frequently appointed in earlier times (*Anderson*, 1829, 4 F. 445; *Cumming*, 1848, 20 Sc. Jur. 200; *Thorburn*, 1846, 8 D. 1000; *Galloway*, 1855, 17 D. 321), will not, as a general rule, now be appointed to the office (see *Chalmer's Trs.*, 1897, 24 R. 1047); but, if appointed, the office continues after marriage with the husband's consent (*Lambe*, 1837, 16 S. 222, note). As a mother, however, is now on the husband's death guardian to the pupil children of the marriage (Guardianship of Infants Act, 1886), the necessity for such an appointment does not often arise (*Willison*, 1890, 18 R. 228).

Undischarged bankrupts will not be appointed (*Miller*, 1840, 2 D. 1181); and if the factor become insolvent he will be removed (*Miller*, 1849, 12 D. 911).

It is thought that *servants of the Crown* will not, as a rule, be appointed, and *ministers* of the Church of Scotland will be refused (*Bisset*, 1836, 15 S. 4; *Brodie*, 1867, 3 S. L. R. 223; see *Campbell*, 1849, 12 D. 913): while, on the other hand, unbeneficed clergymen of the Church (*Cairns*, 1838, 16 S. 335) and Dissenting ministers (*Smith*, 1850, 13 D. 951) are held eligible.

Objections to the nominee have been sustained on the grounds of *adverse interest*, and *relationship*, as in *Forbes* (1832, 10 S. 289, stepfather); and *Raeburn* (1851, 14 D. 310, nominee of stepmother). In a case of competition the father's relatives or their nominee will usually be preferred (*Jackson*, 1835, 13 S. 961; cf. *Hastie*, 9 March 1839, F. C.); or the Court may appoint *ex proprio motu* (*Cowan*, 1845, 7 D. 872), or remit to the Sheriff or Clerk of Court to suggest a neutral party (*Brown*, 1848, 11 D. 1027; *M'Intosh*, 1849, 11 D. 1029; cf. *Thomson*, 1839, 14 F. 796). Unless where the children have

conflicting interests (*Wilson*, 1857, 19 D. 286), a factor to one member of a family will usually be appointed to the others (*Carter*, 1857, 19 D. 286). The law agent of the petitioner or the ward would probably not now be appointed (see *M'Intosh*, 1839, 15 F. 155, and cf. *Hepburn*, 1843, 5 D. 655). The Court will decline to appoint when it appears that there have been collusive dealings or bargaining regarding the office (*Doud*, 1847, 9 D. 511, at p. 515; see also authorities in Thoms, 183, note 8).

As the *nearest agnate* is entitled to serve as tutor-at-law, the Court, though it has at times appointed him factor (*Jackson*, 1835, 13 S. 961, Ld. Pres. Hope), does not regard his application favourably, at least for the post of curator *bonis* (*Armit*, 1844, 6 D. 1088, L. J.-C. Hope; *Morton*, 1837, 9 Sc. Jur. 346; *Cameron*, 1849, 12 D. 912), while at the same time it has no difficulty in appointing his *nominee* (*Jackson*, *supra*). But in a recent case, where a widow had petitioned for the appointment of an accountant as *curator bonis* to manage the business of her husband, who was *incapax*, the Court appointed the ward's brother, who was suing a *brieve* of cognition as nearest agnate, because he was well fitted for the post (*Simpson*, 1891, 18 R. 1207). If appointed, the nearest agnate must act gratuitously, the usual course being to give in a minute passing from all claim for commission, or to engross the consent in the body of the petition (*Jackson*, *supra*; *Urquhart*, 1862, 22 D. 932, L. J.-C. Inglis; but cf. *Acc. of Court*, 1866, 4 M. 772).

In general only one person will be appointed, though special circumstances have occurred inducing the Court to appoint more; but it would appear that the Court will not appoint one person, whom failing, another (Fraser, *P. & C.* 463).

If a factor leaves Scotland permanently, he will, on application, be removed from office (*Bell*, 1834, 12 S. 531).

(2) *Petitioners.*—Anyone who can show an interest in protecting the pupil or his estate may petition. This includes *ascendants* (*Cowan*, 1788, Mor. 7452; *Lamb*, *Ross*, 1857, 19 D. 699); *collaterals* (*Wood*, 1849, 11 D. 1494); *next of kin* (*M'Intyre*, 1850, 13 D. 951; *Napier*, 1851, 14 D. 10); *debtors and creditors* (*Wardrop*, 1869, 7 M. 532); English (*Barwick*, 1855, 17 D. 308) or Scottish (*Donaldson*, 1770, Mor. 16364; *Crawford*, 1828, 6 S. 749) *guardians*, and *tutors ad litem* in certain circumstances (*Thomson*, 1841, 16 F. C. 1307; *Pratt*, 1855, 17 D. 1006). The father (*Robertson*, 1865, 3 M. 1077), as well as other parties interested (*Johnstone*, 1822, 1 S. 510 (nearest relatives); *Wardrop*, 1869, 7 M. 532 (debtors); *Graham*, 1794, Mor. 16383 (trustees)), may petition where it is necessary to appoint during his lifetime.

Similarly, where the pupil is *illegitimate* (*Buckie*, 1847, 9 D. 988 (paternal grandmother); *Davison*, 1855, 17 D. 629 (friends)), or a *pauper* (*Black*, 1839, 1 D. 676 (kirk-session)), anyone interested may petition for a factor.

Where the parties interested do not apply, the Accountant of Court, by sec. 10 of the Judicial Factors Act, 1889, may apply to the Court for the appointment of a factor in place of one who has died undischarged, or has ceased to discharge the duties, unless the purposes of the appointment are exhausted; and such factor is to investigate his predecessor's accounts, and claim any balance due.

(3) *Respondents.*—All parties interested should be made respondents by name (*Russell*, 1855, 17 D. 1005 (trustees)); and, although not cited, they may appear, even when the application is made in a summons with other conclusions. Care should be taken to intimate to the nearest agnate,

if not *incapax* (*M'Intyre*, 1850, 13 D. 951; *Buckie*, 1847, 9 D. 988), since he is entitled to be tutor-at-law (*Logan*, 1828, 6 S. 477; *Fowlds*, 1836, 15 S. 244); and the Inner House should be petitioned when it is necessary to dispense with citation of the nearest of kin as being abroad, or in minority (*Carmichael*, 1848, 10 D. 1286).

II. Powers of Factor.

The factor's ordinary powers and duties, based originally on the important Act of Sederunt, 13 February 1730 (for an exhaustive summary of which, see Thoms on *Factors*, 2nd ed., p. 70), are now regulated by the Pupils Protection Act, 1849, the Judical Factors (Scotland) Act, 1880, and relative Act of Sederunt, 14 Jan. 1881, and the Judicial Factors (Scotland) Act, 1889. Under the latter Act the office of the Accountant of Court, created by the Act of 1849, is put upon a new footing (s. 1), and intrusted with the superintendence of all judicial factors appointed either in the Court of Session or Sheriff Court, whereas the Act of 1849 applies only to factors *loco tutoris*, *loco absentis*, and *curators bonis*.

It may be noted generally that recent trust legislation has increased the general powers of judicial factors, and placed them *quoad* powers on the same footing as trustees. The Trusts Amendment Act, 1884 (s. 2), provides that in the construction of the Trust Acts from 1861 to 1884, "trustees" shall include, *inter alia*, "judicial factor," and that "judicial factor" shall include factor *loco tutoris*, so that factors *loco tutoris*, with other judicial factors, have now all the powers contained in sec. 2 of the Trusts Act, 1867, and sec. 3 of the Trusts Act, 1884. (For these, see Trustee.) By the amending Trust Act, 1887, trustees obtain power to make permanent abatement of agricultural rents, and to accept renunciations of agricultural leases, and these powers are bestowed on judicial factors by sec. 19 of the Judicial Factors Act of 1889 (see *Mollcson*, 1890, 17 R. 303), so that the initial provisions of sec. 7 of the Pupils Act, 1849, are to a great extent superseded (see Trustee). While, then, the ordinary powers of factors *loco tutoris* over the estate may be said to be the same as those of tutors,—*i.e.* those necessary "in the ordinary course of factorial management," increased by the trust legislation above noted,—where powers of an extraordinary description are necessary the factor must apply to the appropriate Court. Indeed, it would appear that in many cases application is made even for powers which factors possess at common law, *e.g.* power to enter vassals (*Mackay*, 1796, Mor. 16384; Fraser, *P. & C.* 473, 481).

(1) *Recovery of Estate.*—Having found caution as directed in the Pupils Act, 1849 (see *infra*), and extracted his appointment (s. 2), the factor must (s. 3) within six months lodge with the Accountant of Court a *rental* of all lands under his care, specifying rents, revenues, and profits, existing leases, and other rights affecting the lands, and the burdens thereon; also a *list* of all moneys and funds belonging, and debts due, to the estate, and the interest arising from the same, the documents by which the same are vouched, and the nature and value of any security held; and also an *inventory* of any household furniture, farm stocking, goods or moveables, or rights moveable, forming part of the estate. It is further provided that this *rental* and *list*, when signed by the factor and Accountant (s. 12), shall form a ground of charge against the factor, and that new claims to property subsequently discovered shall be added to it. The *inventory* must show the estate as at the date of the factor's appointment, before he has had any intromissions therewith, or has realised any of the securities (Notes by the

Accountant, see Parliament House Book), and is to be adjusted by the Accountant along with the factor (Pupils Act, s. 12; see ACCOUNTANT OF COURT).

The factor is further bound without delay, after extract, to recover all important writs and documents belonging to the estate, which are also to be produced to the Accountant, to collect all money not securely invested, and to use reasonable diligence in ascertaining the exact nature and amount of the estate under his charge (s. 3).

The factor must do his utmost to recover rents, interests, and debts (*Rennie*, 1849, 11 D. 457; 6 Bell's App. 422); but he must act discreetly, must avoid all unnecessary litigation (*Ross*, 1878, 5 R. 1015), and will not be liable for failing to pursue a hopeless claim (*Condie*, 1834, 13 S. 61; *Watson*, 1623, Mor. 16242 (insolvent); *Serymgeour*, 1673, Mor. 16289 (no proof)). He is entitled, and bound when necessary, to sue a predecessor and use all diligence (*Simpson*, 1855, 17 D. 314). He is liable for *culpa levis in abstracto, i.e.* he must show the same diligence as tutors-at-law, that is, the diligence which it can be shown prudent men employ in the discharge of their duties (Fraser, *P. & C.* 294, 474). The Pupils Act provides (s. 14) that in certain circumstances, whether the sum involved exceeds or is less than £20, the Accountant may dispense with the rules of exact diligence in any matter of factorial management.

Where any portion of the estate is *abroad*, it is advisable to have the extent of the factor's powers as regards foreign estate set forth in his appointment, so as to show any foreign Court which may be resorted to that he is making a claim within those powers (*Mathieson*, 1857, 19 D. 917; see *Fullarton*, 1833, 11 S. 963). Funds furth of Scotland, in the British dominions, are by sec. 13 of Judicial Factors Act, 1889, recoverable by the factor on production of an official extract of his appointment,—which, when used furth of Scotland, must have the seal of the Court of Session attached (A. of S., 26 Nov. 1663).

The petition for appointment ought to state the *value* of the estate (1851, 1 Stu. 112, per Lord President; see Fraser, *P. & C.* 466, note (*a*); *Matthew*, 1851, 14 D. 312); and confirmation to a predecessor, where necessary, must be in the ward's name (*Kirktowns*, 1662, Mor. 16268; *Johnstone*, 1838, 16 S. 541). The same rule applies to the title to heritage which is usually taken in the pupil's name, even though special powers are craved (*Maconochie*, 1857, 19 D. 366, Ld. Curriehill; see, however, sec. 24 of the Titles to Land Consolidation Act, 1868, amended by the Act of 1869, s. 3, providing a simple method for the factor completing title either in the pupil's name or his own).

Although the A. of S., 14 Jan. 1881 (s. 6), provides that "no factor shall be entitled to act until he has obtained extract," and though this may prevent him taking possession of the estate before finding caution, a judicial factor may *raise* an action of damages on behalf of his ward before extract if it is "clearly necessary" in the interests of the ward that it should be raised thus early (*Calver*, 1894, 22 R. 1).

(2) *REALISATION AND INVESTMENT.*—The moveable estate must be prudently and timeously realised (*Wright*, 1701, Mor. 7429: *Accountant*, 1858, 20 D. 1176; *Brownlie's Trs.*, 1879, 6 R. 1233), and properly invested within a reasonable period (A. of S., 1730).

Under the Act of 1849 (s. 13) the Accountant of Court has to consider the investments and their sufficiency (see *Annan*, 1897, 24 R. 851). He has, accordingly, in his notes for the guidance of factors, which all factors

will have before them (see Parliament House Book), directed them, besides producing the evidence of an investment, briefly to describe in their accounts the security, its nature, position, and conditions, and to produce valuation and rental of property on which money has been advanced. The Court do not approve of loans over unfinished properties, the factor being held bound to make good any loss (*Guild*, 1887, 14 R. 944; *Crabbe*, 1891, 18 R. 1066), or of investments in shares, personal bonds or bills, or even of the protracted continuance of such investments found by the factor on his appointment, or of the continuance of the funds in trade or business (*Brownlie*, 1879, 6 R. 1233), and the factor would do well to realise all such *quam primum*. Cautionary obligations ought also to be got rid of (*Erskine*, 1739, Mor. 9002; *Kerr*, 1839, 1 D. 618).

The ultimate responsibility for the sufficiency and legality of all investments rests with the factor (*Annan*, 1897, 24 R. 851), the Accountant only claiming evidence to enable him, in the ward's interests, to judge of their validity and security, and having the right to question any which may appear to him objectionable.

Judicial factors as trustees (Trusts Act, 1884, s. 2) will probably now, as the Accountant advises, be content to confine themselves within the limits of investment indicated by the Act of 1884 (see these set forth at length under CURATOR, *Investment*). Though the Court of Session may have once approved of any special stock, under the provisions of the Act, this will not justify a second investment without further approval, since circumstances may have altered. A further application to the Court is necessary (*Accountant of Court*, 1886, 14 R. 55).

A loan to the Greenock Harbour Trust, a corporation consisting of magistrates and council and elected trustees, on a debenture assigning "rates, duties, and other revenues of the trust," was held not an investment on "real security," nor on a debenture by a municipal corporation in the sense of the Act,—nor a proper investment at common law, as the trust revenue was precarious: and the opinion was expressed that harbour rates were not "rates or taxes" in the sense of the Act. The judicial factor was held personally liable for the capital and interest at three per cent. (*Cowan's Trs.*, 1897, 24 R. 590, 5 S. L. T. No. 82: *Annan*, 1897, 24 R. 851; Article in 5 S. L. T. p. 45).

By the Trusts Amendment Act, 1891, s. 4, provision is made to secure a valuation of the security by an independent valuator, and that the loan shall not exceed two-thirds of the value as stated in the report (see *Wood*, 1893, 1 S. L. T. No. 326; see also sec. 8 of the Act for provision as to removing trustee (factor) insane, incapable, or absent for six months). (For the powers generally of all persons in fiduciary positions *quoad* investments, see TRUSTEE.)

(3) *MANAGEMENT.*—The factor's duty is to manage the estate prudently, as if it were his own. Capital and income will be kept separate. Rents and interest will be collected, taxes and ordinary outgoings paid out of income or capital as may be proper, and the surplus banked for investment, or after investments are made. The ordinary expenses of management will fall upon income, the expense of investment upon capital.

Money must be *banked* at once in the factor's name as such (see *Nairne*, 1863, 1 M. 515) in one of the "banks in Scotland established by Act of Parliament or Royal Charter," in a separate account or on deposit receipt (see *Sanders*, 1879, 7 R. 157); and if more than £50 (£25 in Sheriff Court factories) is kept in the factor's hands beyond ten days, interest at the

rate of twenty per cent. must be paid on the excess. Unless the money is kept innocently the factor is to be dismissed without commission (1849 Act, s. 5), a penalty which has been imposed in various cases (*Accountant of Court*, 1852, 1 Stu. 441; *M'Donald*, 1854, 16 D. 1123; *Maxwell's Trs.*, 1862, 24 D. 1181). The provision as to interest seems to be imperative. A factor is of course liable in interest at common law if he fails to invest the estate (see *Montgomerie*, 4 June 1822, F. C., for former rules as to tutor; Fraser, *P. & C.* 235; but for the later rule as to trustees, which makes them liable for *three* per cent. where they fail to invest, or invest improperly, and for *five* per cent. where they fail to pay money to a beneficiary, see *Paterson*, 1897, 5 S. L. T. No. 85 (Ld. Kyllachy); *Cowan*, 1897, 24 R. 590; also *Inglis*, 1891, 18 R. 487 (Lord Ordinary): *Baird's Trs.*, 1892, 19 R. 1045; *Melville*, 1896, 24 R. 243; *Heritable Securities Investment Association Limited*, 1893, 20 R. 676). In *Morrison* (1890, 17 R. 704) it was held that the penalties prescribed by A. S., 13 Feb. 1730, were in the discretion of the Court.

A factor *loco tutoris*, speaking generally, has the position and liabilities of a proprietor. The miscellaneous powers (and duties, where the circumstances arise) of factors as they stood before the Trusts Act of 1884 are thus summed up by Ld. Fraser (*P. & C.* 480): they may "in virtue of the 'usual powers' enter into submissions relative to claims of a moveable nature, provided the subject be fit for a reference and the referee be suitable (*Corson*, 1835, 13 S. 1093; Trusts Act, 1867, s. 2). They may let heritage (A. of S., 1730) and remove tenants (Trusts Act, 1867, s. 2, subs. 3); serve their ward apparent heir *cum beneficio inventarii* (*Paton*, 1785, Mor. 4071); enter vassals (*Kerr*, 11 Dec. 1857, unrep.; *Mackay*, 1796, Mor. 16384); grant ordinary leases (agricultural, twenty-one years, mineral thirty-one years, Trust Acts, 1867, s. 3, and 1884, s. 2; *Molleson*, 1890, 17 R. 303); make ordinary improvements on the estate (*Home*, 1793, Mor. 16328; *Molleson*, 1895, 3 S. L. T. No. 159, farm and mansion-house), but not those of an extraordinary or unusual nature (*Maitland*, 1863, 1 M. 1104; see *Semple*, 1888, 15 R. 810). They may institute actions for reducing deeds adverse to their ward's interest, for securing any rights belonging to him (*Fraser*, 1850, 12 D. 914), and they may enter appearance and defend any action against him. They may compromise claims against the estate (*Scott*, 1897, 24 R. 462; Trusts Act, 1867, s. 2). . . . The Court have refused to give special power to a factor to raise an action of reduction, leaving him to act according to his own discretion and on his own responsibility. He may collate heritage of his ward with an executor (*Robertson, Petr.*, 14 Jan. 1841, per Lord President; see *Kennedy*, 1843, 6 D. 40). He must pay debts owing by the ward; and accordingly a factor *loco tutoris* may, without special power, grant a feu-right in implement of an obligation to that effect undertaken by the pupil's ancestor (*Thomson*, 1837, 9 Jur. 371). It is within the ordinary powers of a factor *loco tutoris* to thin plantations of growing timber, and to sell off wine which is deteriorating (*Maconochie*, 1853, 2 Stu. 567). . . . In nearly all the matters now stated the modern practice is to ask special power from the Lord Ordinary. This is more particularly the case with regard to entering vassals, making up the ward's title, making (more than ordinary) improvements on the estate (Pupils Act, 1849, s. 7; *Semple*, 1888, 15 R. 810), and letting lands" (see *supra*). It is also within the ordinary powers to discharge an heritable bond (*Wills*, 1879, 6 R. 1096).

The general rule for the factor's guidance, in undertaking extraordinary management, has been stated as follows: "One of the merits of our law with regard to estates under judicial management is that, not merely

formally but in fact, no important or extraordinary step can be taken by the factor on his own responsibility, the Court having first to consider the expediency of what is proposed" (*Drummond's Factor*, 1894, 21 R. p. 934, Ld. Pres. Robertson). The position of judicial factors *quoad* ordinary powers is, as before stated, much simplified by the combined action of the Trusts Act, 1884, s. 3, and the Judicial Factors Act, 1889, s. 19, under which a factor acquires all the ordinary powers allowed to trustees by the Trusts Acts, 1861 to 1891 (see TRUSTEE), so that entering into compromises, granting agricultural and mineral leases, abatement of rent, and accepting renunciations of leases are now within the ordinary powers of a judicial factor (*Molleson*, 1890, 17 R. 303). When the ward's estate consists, in whole or part, of a lease, the factor may remain in possession for a time without being held as adopting the lease, if he does so only to ascertain its value and determine on his future action (see authorities in Thoms on *Factors*, pp. 83, 84).

The factor must recover (Pupils Act, s. 3), and is responsible for the custody of, the pupil's writs (*Haddo*, 1630, Mor. 16254), which must be exhibited to any person entitled to require exhibition (*Webster*, 1857, 20 D. 83).

In any application under the *Entail Acts* where the consent of a pupil is required, the Court is to appoint his tutor or other administrator, or another person, to be curator *ad litem*, who may consent on his behalf, without incurring any responsibility unless it is proved that he acted corruptly (Entail Act, 1882, s. 12; *Maxwell Heron*, 1893, 21 R. 230).

While the pupil, it would appear, is bound in the general case by the factor's actings, until renunciation and repudiation (*Anon.*, 1667, 3 Bro. Supp. 183), which are privileges competent to the pupil (see *Drummond*, 1628, Mor. 8999), and may thus incur a passive title (*Drummond*, 1704, Mor. 16320), no pupil can be made liable as vitious intromitter, because he is incapable of the delinquency (*Kerr*, 1839, 1 D. at p. 628; and 1842, 1 Bell's App. 280; nor, it seems, can his factor's continuance of an account elide prescription which had run against the ward's father (see *Wilson*, 1826, 4 S. 433).

Further, unless the act be inevitable in law, or one which the factor may be compelled to perform (*Garland*, 1841, 4 D. 1; *Stuart*, 1855, 17 D. 380; *Heron*, 1856, 18 D. 917; *Kennedy*, 1843, 6 D. 40), the factor has no power to alter the pupil's succession or the nature of his estate (*Monerieff*, 1856, 18 D. 1286).

A factor who accepts a transfer of stock of a public company on behalf of his ward, and is entered on the register of shareholders, is liable as a shareholder (*Lumsden*, 1866, 5 M. 34; see also *Muir*, 1878, 6 R. 392; affd. 1879, 6 R. H. L. 21; but cf. *M'Lean*, 1879, 6 R. 671).

Under the A. of S., July 1897, any judicial factor or curator *bonis*, or any person temporarily interested in the estate, may, in respect of the poverty of the estate, or other exceptional circumstances, by manuscript note move the Lord Ordinary to modify or remit the fees exigible in the Accountant's office.

Where the Pupil Sues or is Sued.—(1) The factor *loco tutoris* should sue all necessary actions on behalf of the pupil, but a factor appointed after the action is raised in the pupil's name may competently compear (Mackay, *Pract.* i. 312, 313). Where the action is between pupil and guardian, a curator *ad litem* will be appointed (*Macneil*, 1798, Mor. 16384); and the same course is adopted where the guardian has an adverse interest, or is incapacitated or refuses to sue (see PUPIL, CURATOR *ad litem*). (2) In

actions against the pupil, both pupil and guardian should be called as defenders, the conclusions being against both (Mackay, i. 344, 345). If the factor is not called, all decrees in the action are null (*Calderhead*, 1832, 10 S. 582; Mackay, *supra*), but he may be called in a supplementary summons (*Thomson's Trustees*, 1863, 2 M. 114). Where the factor declines to appear or is incapacitated, or has an adverse interest, a curator *ad litem* will be appointed (see PUPIL, CURATOR *ad litem*). A summons by a "factor *loco tutoris* to A. B., a pupil now deceased," was held good (*Paul*, 1841, 3 D. 1145). A judicial factor on the estate of a deceased, who defends an action against him in that capacity, and is found liable in expenses "as judicial factor," is not personally responsible for expenses (*Craig*, 1897, 24 R. 6); but where he is found liable in expenses without any qualification, it would appear that he is liable as an individual (*Patterson*, 1897, 24 R. 499).

Aliment of Pupil.—Although the factor is not, like the tutor, charged with the custody of the pupil (see *Robertson*, 28 May 1814, F.C.; *Macleod*, 1833, 5 Sc., Jur. 71), it is his duty, and within his ordinary powers, to provide for the ward's aliment (*Gordon*, 1832, 10 S. 732; see *Maxwell*, 1747, Mor. 16352); and, if necessary, to raise an action for that purpose against the liferenter of the pupil's lands (*Noble*, 1627, Mor. 16248). When the ordinary income of the estate is insufficient, it is the duty of the factor to apply for special powers to sell heritage (*Finlayson*, 1835, 13 S. 861; *Dunbar*, 1847, 9 D. 1426; *Lindsay*, 1857, 19 D. 455), or borrow (Thoms, pp. 118, 215), or purchase an annuity, etc., (*Innes*, 1846, 8 D. 1211; *M'Gilchrist*, 1855, 17 D. 917; *Paisley*, 1857, 19 D. 653). Where the pupil resides with an indigent mother it may be necessary to apply to the Court to fix the amount to be paid to her for the aliment of the pupil and herself (*Scott*, 1870, 8 S. L. R. 260; see *Gordon*, 1832, 10 S. 742; also *Ross*, 1896, 23 R. (H. L.) 67 (minor—mother—(£300 allowed)). Though he has not the custody, the factor is entitled to interfere where the personal condition of his ward demands it (*Robertson*; *Macleod*, *supra*; *Moncreiff*, 1891, 18 R. 1029); and payments made by third parties, *e.g.* trustees, for the ward's aliment, ought to be made to the person in whose custody he is (*Ferguson*, 1869, 8 M. 155).

(4) *ACCOUNTING.*—The judicial factor, besides lodging the rental, etc., referred to, must of course keep accounts, and his account of charge and discharge must be closed once every year, on a day to be fixed by the Accountant (Pupils Act, ss. 4, 11), and lodged, with the vouchers, in the Accountant's office within one month thereafter, if the date be not prorogated by the Accountant (s. 4). Full information as to the mode of making up the account, and a detailed form, will be found in the useful Notes for the Guidance of Factors issued by the Accountant of Court. The ordinary rules apply. The estate must be credited with all eases and profits received by the factor (A. S., 31 July 1717), and he is not entitled to make any profit out of the estate beyond his commission (see *Guthrie*, 1853, 16 D. 214); in other words, he cannot be *auctor in rem suam* (*q.v.*; CURATOR; Thoms, pp. 85 *et seq.*). Nor can any firm of which he is a partner make profit out of the factory (*Goodsir*, 1858, 20 D. 1141; *Lord Gray*, 1856, 19 D. 1; see *Mitchell*, 1878, 5 R. 1124).

It is the Accountant's duty to *audit* the accounts when lodged,—on the general principle of good ordinary management,—to consider the investments, to fix the factor's commission, and to state the result of the audit in a short report (Pupils Act, s. 13), which the factor may revise on draft (Notes). This report is conclusive against the factor and cautioner, unless

they lodge objections in proper form (ss. 15, 16), which will be disposed of by the Lord Ordinary and the Court. Provision is made in secs. 17 and 34 (in case of discharge) for any party interested, or a succeeding factor, opening up all audits of accounts conducted in their absence.

Unless the estate is unable to bear the expense, the factor *loco tutoris* (like all other judicial factors), or his cautioner, is entitled to petition for an *interim audit* of his accounts, to have the balance in the factor's hands judicially fixed (*Graham*, 1849, 3 D. 1234; Thoms, p. 483, for form of petition). The accounts of the factor will be remitted to the Accountant of Court; and on his report, after objections have been heard, if lodged, and after debate, if required, they will be approved, and the balance ascertained and fixed. The Lord Ordinary's judgment may be reclaimed against in the usual way (see Court of Session Act, 1868, ss. 81 to 88).

Interest.—(1) We have already referred to the interest of 20 per cent. due by a factor who shall keep sums above £50 (£25 in Sheriff Court factories) in his hands unbanked (Pupils Act, s. 5) for more than ten days. It has been held that the Court has no discretion in the matter, even though the parties interested do not press for the penalty; but the penalty will not be exacted after the factor's death (*Macdonald*, 1854, 16 D. 1023; *Ballingall*, 1853, 15 D. 711; *Acc. of Court*, 1852, 1 Stu. 441; cf. *Morrison*, 1890, 17 R. 704, where the factor not being under the Pupils Act, the Court held they had a discretion), nor for the period after his removal (*Maxwell's Trs.*, 1862, 24 D. 1181; see *Methven's Exrs.*, 1851, 13 D. 1262). Banks in Scotland with which money is lodged by a judicial factor on deposit receipt or current account must, once a year, accumulate principal and interest, and on failure will be liable to account as if it had been so accumulated (Pupils Act, s. 37).

(2) In regard to funds which the factor *might have recovered*, the A. S. of 1730, s. 1, provides that the "factor shall be liable for all annual rents thereof" . . . from and after the space of one year "after they might become due, or might have been recovered" (*Maxwell's Trs.*, 1721, Rob. App. 380; *Cranstoun*, 1836, 5 S. 57). The interest is, as a rule, to be at 5 per cent. per annum (*Buchanan*, 1847, 9 D. 700), but, looking to the fall in the rate of interest in recent years, it is doubtful if the rule would be rigidly enforced (see *supra*, *Management*, and rule as to interest due for failure to invest, *Cowan*, 1897, 24 R. 590; also *Paterson*, 5 S. L. T. No. 85). In special circumstances it has been departed from (*Wellwood's Trs.*, 1856, 19 D. 187; *Mackenzie*, 19 Dec. 1818, F. C.). The common-law rules, apart from the Pupils Act, are very fully laid down in *Montgomerie* (1822, 1 S. 421). Interest and principal would probably be accumulated annually, and interest charged on the accumulated sum (*Cranstoun*, 1836, 5 S. 57; *Blair*, 1843, 5 D. 1315),

Where a factor is in advance to an estate, the same general principles will be applied. The rate of interest for which he may take credit was held in *Condie* (1834, 13 S. 61) to be the same as that for which he would have been liable had the balance been against him—5 per cent. (*supra*).

Commission.—The factor's commission is fixed by the Accountant according to his view "of what is just in each particular case," and comes into the next annual account (s. 13; see Notes by Acc.). It is in full of *all* work, professional or otherwise, done by him or by any firm of which he is a partner (*Lord Gray*, 1856, 19 D. 1; *Mitchell*, 1878, 5 R. 1124), in connection with the estate; but he may employ other independent professional persons, whose accounts will form a good charge against the estate (*Barlas*, 1859,

21 D. 725), and his own proper outlays will be allowed (*Morison*, 1847, 9 D. 1483; cf. *Flowerdew*, 1854, 17 D. 263). He must, however, do all proper factorial work himself, and, unless he has special power to appoint sub-factors, any assistant in such work must be paid by himself (*Cranstoun*, 1826, 5 S. 57; *Roxburghe*, 1824, 2 Sh. App. 18).

While a factor is not entitled to act after the expiry of his office (*Duff*, 1849, 11 D. 1054), the factory still subsists for the purpose of accounting (*Jaffray*, 1851, 14 D. 292). The audit, however, applies only up to the date of the termination of the office (*Baird*, 1854, 26 Sc. Jur. 498; cf. *Maxwell's Trs.*, 1862, 24 D. 1181).

(5) *Penalties.*—(1) If the factor misconducts himself, or fails in his duty, he may be fined (*Accountant*, 1852, 1 Stu. 794), and may forfeit the whole or part of his commission, and be suspended or removed from office (*Macalister*, 1853, 16 D. 301; *Wilkie*, 1856, 18 D. 793; see *Wield*, 1851, 24 Sc. Jur. 44), as the Court may decide, in addition to being called upon to make good any damage occasioned to the estate through his misconduct (Pupils Act, s. 6), or he may be merely reprimanded (*Acc. of Court*, 1852, 14 D. 330). The Court may even imprison at common law if the factor be guilty of contempt of Court (*Macalister*, *Wilkie*, *supra*). In earlier days the most frequent failure was neglect to lodge annual accounts, for which, under the A. S. 13 Feb. 1730, the factor became "liable to such a mulct as the Lords of Session shall modify, not being under one half-year's salary" (Fraser, *P. & C.* 478, 479; see *Macdonald*, 1854, 16 D. 1023; *Lowe*, 1872, 11 M. 17).

(2) *Interest.*—As before stated (*antea*, *Management*), if the factor retains in his own hands more than £50 (£25 in Sheriff Court factories) beyond ten days, he shall be charged at the rate of 20 per cent. on the excess, and unless he has acted innocently (*Ballingall*, 1853, 15 D. 711) he shall be dismissed from office and lose his commission (Pupils Act, s. 5; A. S., 14 Jan. 1881). This direction appears to be imperative (*Macdonald*, *supra*), while on the other hand it is in the discretion of the Court to determine whether the penalties of A. S., 13 Feb. 1730, s. 1, shall be inflicted (*Morrison*, 1890, 17 R. 704, where penalties not imposed).

Although the Court still possesses, and may exercise, at common law, control over judicial factors, who are its own officers, defaulting factors are generally dealt with under the regulations of the Pupils Act, 1849. The Accountant (s. 10) is to superintend all judicial factors, and see that they attend to their duties; he may make such requisitions on them as he thinks necessary, and in the event of disobedience may report to the Lord Ordinary, who may recall or vary the requisition (s. 19). The Accountant is required, when necessary, to report to the Lord Ordinary, or the Court, any disobedience of any order, and any misconduct or failure, or any claims arising against a dismissed factor, or a cautioner, or their representatives: and it is "competent for the Lord Ordinary or the Court to deal immediately with the matter as accords of law" (s. 20). The Court, in such cases, usually appoint the factor to appear personally at the bar, and on failure, grant warrant to apprehend (*Jaffray*, 1851, 14 D. 292, 17 D. 71; *Wilkie*, 1856, 18 D. 793). In some cases they have imprisoned for contempt (*Macalister*, 1853, 16 D. 301; *Dewar*, 1854, 16 D. 489), or have directed the matter to be laid before the Lord Advocate. The Accountant is empowered (s. 21), if he shall reasonably suspect malversation or misconduct such as may infer removal or punishment, to lay a case before the Lord Advocate to take proceedings (*Jaffray*, *supra*). The Accountant has also

power to demand exhibition, and take copies of, all entries in bank books connected with the estate (s. 33).

Sheriff Court.—The Sheriff has the same power over factors appointed by him as the Lord Ordinary and the Division have over factors appointed in the Court of Session (Judicial Factors Act, 1880, s. 4).

(6) *Diligence.*—A judicial factor is bound to use the same diligence as a Curator (*q.v.*), namely, that which a prudent man exercises in the management of his own affairs, and is liable for *culpa levis in abstracto.*

III. Special Powers.

The limited powers of factors *loco tutoris* before detailed are insufficient for the beneficial management in all cases of the ward's estate, and accordingly "from a very early period the Court of Session have been in the habit of supplementing the powers" of such factors, by specially authorising them to do what is beyond their ordinary factorial powers. The result of a great number of decisions may, according to the consulted judges in *Somerville* (1836, 14 S. 451), be said to be, that wherever it has been shown that the power craved is either necessary to prevent serious loss to the estate, or expedient in order to secure evident and positive advantage (the act not being an alienation of heritage), or where the interest of third parties connected with the estate requires it, the necessary powers will be granted. Even where there is no absolute necessity for the power,—where the benefit is only contingent, and no positive loss will result from refusal,—the Court have nevertheless granted the powers craved (Fraser, *P. & C.* 492). They have, however, refused to sanction a large expenditure *already* incurred (*Maitland*, 1863, 1 M. 1104: see *Clyne*, 1894, 21 R. 849; and cf. *Drummond's Factor*, 1894, 21 R. 932). According to Lord Fraser (*P. & C.* 499) special power is to be applied for where the acts are important and extraordinary acts of administration, and the general rule with respect to the kind of case where a factor must, or ought to, obtain the Court's sanction has been thus laid down in a recent case: "One of the merits of our law with regard to estates under judicial management is that not merely formally, but in fact, no important or extraordinary step can be taken by a factor on his own responsibility, the Court having first to consider the expediency of what is proposed" (*Drummond*, 1894, 21 R. p. 934). It has accordingly become usual in practice, for the factor's greater security, to apply for the sanction of the Court in matters of more than usual moment, though in many cases the act contemplated may, in fact, fall within his ordinary powers. The cases can hardly be reduced to rule, but those in which application for special powers is now most commonly made are given below. It is to be noted, in this regard, that although the authority of the Court is interposed, (1) it does not render the Act safe from subsequent challenge (*Vere*, 1804, Mor. 16389; *Oxford*, 1684, Mor. 16305; *Eaton*, 9 June 1826, F. C.; *Milne*, 1837, 15 S. 1104; *Wood*, 1855, 17 D. 580; *Auld*, 1856, 18 D. 487; *Jamieson*, 1870, 8 M. 976, Ld. Pres. Inglis; cf. *Maconochie*, 1857, 19 D. 366, and *Muller*, 1854, 16 D. 536; Fraser, *P. & C.* 513); nor (2) does it relieve the factor from responsibility (*Mathieson*, 1857, 19 D. 917). Special powers, with the exception, perhaps, of that to make up title (*Montgomery*, 28 June 1839, 14 F. C. 487; *Ramsay*, 1840, 16 F. 160; Titles to Land Act, 1868, s. 24, and the Amending Act of 1869, s. 3), are very rarely granted at the factor's appointment (*Russell*, 1874, 2 R. 93; *Macfarlane*, 1857, 19 D. 656; see other authorities in Thoms on *Factors*, 108, note (1)).

Special powers are now almost invariably asked by summary petition

to the junior Lord Ordinary (20 & 21 Vict. c. 56, ss. 4, 5, 6), or the Sheriff where competent (Judicial Factors Act, 1880); or (*a*) by note or petition where authority to complete title is asked under sec. 29 of the Titles to Land Act, 1868, as amended 1869, s. 3, or (*b*) by note where the powers set forth in sec. 7 of the Pupils Act, 1849, are craved. In the cases falling under the latter Act, to be afterwards noticed, a written opinion by the Accountant must be lodged with the note, and the rule now is to procure an opinion by the Accountant on the step proposed in all cases, except, perhaps, where authority to complete title is asked (see Notes by Accountant, s. 16). The procedure by note, instead of petition, is also made optional in *all* cases by 1849 Act, s. 7. The petition must crave power to do a specific act (*Romanes*, 1860, 22 D. 627).

The factor, as a rule, is the *petitioner* for special powers; but cases have occurred where, on the factor's refusal, petitions for power to the factor by other parties interested have been granted (*Graham*, 1862, 24 D. 312; *Graham*, 1865, 3 M. 695; *White*, 1849, 11 D. 1031; *Hope*, 1858, 20 D. 390 (creditors)).

(1) *Under the Pupils Act*, 1849.—(1) The Pupils Act, s. 7, enacted that if there was a strong expediency (*a*) for renewing or granting a lease for a period of years, or (*b*) for granting abatement of rent, the procedure for obtaining powers prescribed in the Act might be adopted. (*a*) It is now unnecessary to apply for special powers in this case because, as before pointed out, a judicial factor is now to be regarded a trustee in the construction of the Trust Acts; and by sec. 2 of the Trusts Act, 1867, a trustee, where it is not at variance with the purposes of the trust, may grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural land, and thirty-one years for minerals, and may remove tenants (see *Molleson*, 1890, 17 R. 303; for an opinion as to a factor's power to grant urban leases without judicial authority, see *Carnochan*, 1894, 2 S. L. T. No. 89). (*b*) Again, with regard to abatement of agricultural rent, and accepting renunciation of agricultural or pastoral leases, the combined effect of the Trusts Act, 1887, s. 2, and the Judicial Factors Act, 1889, s. 19, is to put factors on the same footing as trustees, and render application to the Court unnecessary (*Molleson*, *supra*). When, however, it is advisable to renounce a lease, the factor should obtain special powers (*Meikle*, 1823, 2 S. 242; *Turner*, 1862, 24 D. 694; Thoms, pp. 126 and 222).

(2) *Draining, erecting buildings or fences, or otherwise improving the estate*, in a manner not coming within the ordinary course of factorial management. The factor is also directed (s. 7), that if there shall appear to be a strong expediency for taking any of these steps, he must apply to the Court for special powers in the usual way. Special powers are necessary in order to enable a factor to rebuild a mansion-house on the estate, and without these he will be liable for all sums expended in implement of contracts (*Semple*, 1888, 15 R. 810 (curator *bonis* to a minor)), with the right to claim against the estate in so far as it benefits by the expenditure. It is always a question of circumstances whether the operations are such as fall within the ordinary powers, or will occasion extraordinary expenditure for which special authority is necessary (see *Molleson*, 1895, 3 S. L. T. No. 159, where expenditure in improving farms, etc., objected to by the Accountant in his annual audit, was held to fall within the factor's ordinary powers of management).

(3) *Purchase of an Annuity.*—Where a factor having charge of the estate of any person incapable of managing his own affairs deems it proper

for the comfort and welfare of the ward that the whole or part of the estate should be sunk on annuity, he may obtain necessary powers from the Court in the usual way (Pupils Act, s. 7. It is thought this provision applies to a pupil). Such applications were frequent at common law before the date of the Act, and were sometimes of necessity combined with a crave for power to sell heritage in order to procure means to raise the annuity (Thoms, p. 220). It has been decided that the annuity must be purchased from an office in Scotland (*Paisley*, 1857, 19 D. 653).

(2) *Power to Sell Heritage.*—The general rule is that special powers must be obtained to validate a sale (*Campbell*, 1869, 8 M. 227); and these, it appears (see *Trust Legislation, infra*), will only be granted in a case of necessity or great expediency (*Colt*, 3 July 1801, Mor. App. "Tutor"), and probably only in the cases following: (1) Where heritage is rapidly *deteriorating* from want of funds to repair or complete it, and borrowing is inexpedient, a case of necessity may appear, justifying the Court to authorise a sale in whole or part (*Fergusson*, 1836, 14 S. 213; *Kirkland*, 1848, 10 D. 1232); but, where expedient, the Court prefer that a loan should be procured (*Stott*, 1849, 11 D. 1495; *Morrison*, 1855, 18 D. 132; *Tweedie*, 1841, 3 D. 369; see also *Muller*, 1854, 16 D. 536). (2) *To pay debt.* A sale will only be authorised to pay debt or avoid the diligence of creditors where borrowing is in the circumstances impossible (see *Wood*, 1856, 18 D. 732, and 1857, 19 D. 428; *Melville*, 1850, 12 D. 914). (3) Powers have been granted in order *to fulfil an obligation to sell* already incurred by the ward's father (*Crighton*, 1857, 19 D. 429), or the factor's predecessor (*Allan*, 1854, 16 D. 534; see *Hawkins*, 1848, 10 D. 1408, and *Alexander*, 1857, 19 D. 888). (4) It would appear to be advisable to crave powers to implement a decree of a Lord Ordinary or other inferior judge rendering a sale of heritage necessary, and such powers have been granted (*Scott*, 1856, 18 D. 624; see *Rae*, 1858, 20 D. 461; also *Chambers*, 27 May 1856, unreported; Thoms, 103, note (2)). (5) *Sale for aliment of the pupil* may be necessary where the income of the estate is insufficient,—and has been authorised in the following cases: *Finlayson*, 1835, 13 S. 861; 1836, 14 S. 219; *Innes*, 1846, 8 D. 1211; *Dunbar*, 1847, 9 D. 1426; *Lindsay*, 1857, 19 D. 455, where the next heir opposed. Similarly, where the pupil's income is insufficient to aliment those whom he is bound to support, either *ex debito naturali* or *jure representationis*, power to sell or borrow will be granted (*Maconochie*, 1861, 23 D. 740). Power may be craved to sell by public roup at a fixed upset price, which may subsequently be lowered, or by private bargain at the upset price (see *Morrison*, 1855, 18 D. 132). Where power is given to expose at a price fixed, and, failing a sale, to sell by private bargain at the upset price, the Court, though such a course is competent, will not readily approve of a private sale even at a slightly increased price where there has been no prior public exposure (*Drummond's Factor*, 1894, 21 R. 932). The Trusts Act, 1867, s. 3, provides "that all powers of sale conferred on trustees by virtue of the Act may be exercised by public roup or private bargain unless otherwise directed . . . in the authority given by the Court." This section apparently now applies to judicial factors, but it has been held not to apply to a foreign trust possessing heritage in Scotland (*Allan*, 1896, 24 R. 238 and 718).

By the Lands Clauses Act, 1845, s. 7, it is provided that judicial factors and guardians of infants possessed of lands may sell, convey, and dispose of such lands to the promoters of the undertaking; or disburden it of debt or feu-duties (s. 8). But before guardians sell, they must have

the verdict of a jury, or the award of an arbiter, or a valuation by two practical valuators; and the price must be deposited in bank for the benefit of the ward (s. 9).

Where heritage was situated in England, authority was granted to a *curator bonis* to apply to the judge in Lunacy in England, in terms of the Lunacy Act, 1890, for power to sell (*Gordon*, 1895, 3 S. L. T. No. 339).

Moveables.—Although it is unusual, and probably unnecessary, cases have occurred where, in special circumstances, authority has been granted both to buy (*Boyle*, 1852, 14 D. 764) and sell moveables (*Hamilton*, 1839, 1 D. 520; *Mathieson*, 1857, 19 D. 917; *Accountant*, 1858, 20 D. 1174 (bank or other stock)).

(3) *Power to Borrow.*—As in the case of sale, the power will only be granted when necessary, and, as before stated, is preferred, where possible, to a sale, unless the object is too speculative. Authority has been granted to avoid the diligence of creditors (*Campbell's Curator*, 1851, 14 D. 312; *Wood*, 1857, 19 D. 428; *Stott*, 1849, 11 D. 1495); to complete or repair property that is deteriorating (*Robertson*, 1855, 17 D. 1116; *Hood*, 1850, 12 D. 914; *Crawford*, 1839, 1 D. 1183); but not in order to pay legacies (*Lawson*, 1863, 1 M. 424; 1864, 2 M. 422). It was held in *Moncreiff* (1856, 18 D. 1286; see *Maconochie*, 1857, 19 D. 366) that a factor will not be authorised to convert a personal into an heritable debt in order to effect a saving of interest; but in *Grant* (1889, 16 R. 365) a tutor-nominate was empowered to borrow money on a bond and disposition in security at 3½ per cent., in order to pay off provisions to younger brothers and sisters for which the pupil was personally bound, and on which the tutor was paying 5 per cent. No such conversion of debt will be allowed to affect the succession to the pupil's estate (*Sharp*, 1671, Mor. 16285; *Moncreiff, supra*; *Robson*, 1861, 23 D. 429; *Campbell*, 1869, 8 M. 227; Thoms, 69, note (2)). It has been doubted whether the factor can insert a power of sale in the bond, but probably this matter would be specially regulated by the Court on a consideration of all the circumstances (*Stewart*, 1849, 12 D. 73). In a case of necessity, where the pupil was next heir of entail, a factor was authorised to insure the ward's life and borrow on the security of the policy (*M'Gruther*, 1835, 13 S. 569); but power was refused where the ward was only a liferenter (*Stuart*, 1857, 29 Sc. Jur. 483).

(4) *Power to Feu and Grant Long Leases*—At common law absolute necessity is, as a rule, the only ground for obtaining such power (*Vere*, 1804, Mor. 16389; *Finlayson*, 22 December 1810, F. C.; see *Watt*, 1856, 18 D. 652). Therefore, where, owing to the acts of a predecessor of the ward, an adjudication in implement could competently be laid, the Court will grant such power (*Hawkins*, 1848, 10 D. 1408; see also *Alexander*, 1857, 19 D. 888, a very special case; *Ld. Clinton*, 1875, 3 R. 62 (father); *Campbell*, 1880, 7 R. 1032).

(5) *Power to Excamb* appears to be ruled by the principles applicable to selling and feuing.

Trusts Acts, 1867–1884.—With regard to the four powers last mentioned, recent legislation, as before pointed out, ought to be kept in mind. "Trustee" in the Trusts Act, 1857, includes factor *loco tutoris* (1884 Act, s. 2), and sec. 3 of the Act makes it competent for the Court, when it is shown to be "expedient" for the execution of the trust, and not inconsistent with the intention thereof, to authorise the trustees to sell, feu,

borrow, and excamb. There is no decision on the question, but it is doubtful if the Court would hold anything less than *necessity* an *expedient* ground for authorising an alienation, or possible alienation, of the pupil's heritage.

(6) *Power to Make up Titles.*—It would appear that such a power is competent in ordinary course (Fraser, *P. & C.* 481, 499), though many cases exist where the Court have interponed authority (see authorities in Thoms, 217, 218). The question has lost its practical importance since, in nearly every ordinary case, factors will have recourse to the short mode of completing title provided by sec. 24 of the Titles to Land Act, 1868, as amended (sec. 3 of 32 & 33 Vict. c. 116), under which the factor craves power, and by recording the extract decree, completes his title. A report by the Accountant is not necessary, and power may be granted at appointment (see *Jurid. Styles*). In cases of complicated title it is still competent, and may be thought advisable, to use the former cumbrous method.

(7) *Power* (1) *to Collate and* (2) *to Elect.*—(1) The factor will be empowered to collate heritage where it is for the obvious benefit of his ward (*Robertson*, 1841, 3 D. 345; see *Mitchell*, 1847, 10 D. 148). (2) The factor is only bound to elect between the pupil's rights under a will and his legal rights, when the interests of third parties render such a step necessary; otherwise the election may be postponed till the pupil is able to choose for himself (*Cowan*, 1848, 6 Bell's App. 222, L. C. Cottenham; see *Young*, 1880, 8 R. 205).

(8) *Aliment of those Dependent on Pupil.*—Special powers are necessary here, and will, as a rule, only be granted when the persons to be alimented are in want, have a legal claim for support against the pupil, and the pupil is able to afford the expenditure. The parties claiming aliment, or the factor, may present the petition (*Grant*, 1838, 16 S. 652).

As a pupil can have no descendants, he is only bound *ex debito naturali* to support his *ascendants*. The most frequent case is that of a widowed mother with whom he resides (*Jackson*, 1836, 15 S. 313), in which case application is made for aliment for the mother and the pupil (*Grant*, *ut supra*, and 1840, 2 D. 722). Where it is doubtful if there is sufficient estate to support the pupil, no provision will be allowed to any other relation (*Primerose*, 1852, 15 D. 37).

As a general rule a pupil is not bound to support *collateral* relatives,—still less strangers. But where an eldest son succeeds to his father, his brothers and sisters being unprovided for, he is under liability to aliment them (Stair, i. 5. 10; Ersk. i. 6. 58; *Muirhead*, 1849, 11 D. 1262, 12 D. 356; *Robson*, 1861, 23 D. 429). He has also been held bound, so far as *lucratus*, to aliment any *ascendant* who would have had a claim against the deceased (*Buchanan*, 21 January 1813, F. C.; see *Muirhead*, *supra*). Further, the liability seems to attach where one succeeds to a relative even more remote than a father (see Fraser, *P. & C.* 107, 112). In all these cases the requisite power will be granted to judicial factors or trustees (*Scott*, 8 Mar. 1759, Mor. App. *voce* "P. & C." 1; *Fenton*, 1832, 4 Sc. Jur. 457). It has been held that the obligation applies even in the case of succession to moveable estate (*Thomson*, 1678, Mor. 419; *Scott*, 1759, Mor. 440); and in either case the inheritance must be considerable (*Mackintosh*, 1868, 7 M. 67). Where the pupil is *heir of entail* he is not of necessity bound to aliment those to whom the preceding heir of entail would be

liable (*Malcolm*, 1756, Mor. 439; *Jackson*, 1836, 15 S. 313; *Muirhead*, 1849, 11 D. 1263, and 12 D. 356). The common-law rules apply as to the duration and amount of aliment (Ersk. i. 6. 58; Fraser, *P. & C.* 111).

(9) *Payments out of Capital.*—These will only be allowed where necessary in the ward's interests, *e.g.* to aliment (*Pearson*, 1678, Mor. 16296; *Kennedy*, 1860, 22 D. 567), or educate the ward, or teach him a trade (*Duncanson*, 1715, Mor. 8928; *Lyon*, 1665, Mor. 16272; *Mundell*, 1862, 24 D. 327; *Hamilton*, 1859, 21 D. 1379, and 1860, 22 D. 1095).

(10) *Custody of Pupil.*—Although, as already stated, a factor is not entitled, like a tutor, to the custody of the ward, he may interfere where necessary for the ward's welfare (*Macleod*, 1833, 5 Sc. Jur. 271; *Robertson*, 28 May 1814, F. C.). In *Paul* (1838, 16 S. 822) and *Denny* (1863, 1 M. 268) he was held entitled to recover the pupil's person from the mother; and recently, in *Moncreiff* (1891, 18 R. 1029), the factor obtained power to detain the pupil against the wish of the father, resident in Russia. The old rule that a Scots pupil by going to England became liable to be made a ward of Chancery, and to remain there until majority (*Johnston*, 1843, 10 Cl. & Fin. 42), would probably not now be enforced (*Stuart*, 1860, 22 D. 1504, 23 D. 51, 446, 595, 902, and 1861, 4 Macq. 1; see *Scott*, 24 L. J. Ch. 244).

Where the pupil resides *abroad* and possesses heritable estate in this country, it is frequently necessary to appoint a Scots judicial factor to manage such estate (*Buchan*, 1839, 2 D. 275; see *Robertson*, 1865, 3 M. 1077). Where it is proved to be necessary that money should be sent out of the jurisdiction for the ward's support, special power will be granted to the factor to do so on the petition either of himself or the foreign guardian (*Laing*, 1859, 21 D. 1011); and the general rule is that the amount will be limited to what is necessary for the pupil's maintenance (*Murray*, 1849, 11 D. 710; *Allen*, 1855, 18 D. 97 (application by the English guardian); *Laing*, *supra*; see *Murray*, 1852, 2 Stu. 12; and *Lamb*, 1858, 20 D. 1323).

(11) *Power to Carry on Trade.*—There appears to be no reported case in which the Court have authorised a factor to carry on a mercantile business for behoof of the ward, though it seems he may continue an agricultural lease, forming part of the estate, if he procures powers and accepts the responsibility. But the Court may afterwards indirectly approve of the factor's conduct in having carried on a business involving risk, and even sanction a purchase of heritage if it seemed to him the best course in the pupil's interest (see *Macleod*, 1856, 19 D. 133; *Gilray*, 1872, 10 M. 715, and 1876, 3 R. 619). Where there was no risk involved the Court granted authority to a factor to accept shares of a limited company in lieu of his ward's interest as partner in the company that was being converted (*Jamieson*, 1870, 8 M. 976).

Where the ward is heir of a partner in a going business, as the interests of third parties are concerned, the factor *loco tutoris* may obtain special powers,—for example, powers involving a sale of heritage,—on some ground short of the necessity which might in other circumstances have to be averred (*Dickson*, 1836, 14 S. 958; *Ellis*, 1836, 15 S. 262; see *Jamieson*, *supra*, and *Lindsay*, 1848, 11 D. 232). The Court may also be influenced by the fact that the other partners might have power to bring about the same result in some other way.

The same principle applies where the pupil happens to be a *pro indiviso*

proprietor (*Fotheringham*, 1857, 19 D. 964; see *Donaldson*, 1838, 16 S. 813, where sale of heritage authorised on a ground short of necessity).

(12) *Entails.*—The Pupils Act, 1849, s. 7, provides with regard to entails that the factor may be authorised to charge against the future heirs, or otherwise recover, money expended in improvements under the Montgomery (10 Geo. III. c. 51) and Rutherfurd Acts (11 & 12 Vict. c. 36), but that the Court shall not authorise the factor to build or enlarge a mansion-house, or to charge the estate and future heirs to a greater extent than one-half the amount which the heir in possession could have charged under these Acts. This power would be granted if it should turn out there was a "strong expediency" in its favour (s. 7). Later, the Entail Act, 1875, s. 12 (2), provided that "applications, except for authority to disentail, sell, alienate, dispone, charge with debt or incumbrances," might be made by the legal guardian of a pupil or minor (see *Maxwell*, 1877, 4 R. 1112, where it was held that the section was intended merely to regulate procedure). Finally, by the Entail Act, 1882, s. 11, all applications which may competently be made by an heir of entail in possession of full age, except that for authority to disentail, *e.g.* applications for authority to sell, feu, lease, charge with debt, borrow for improvement expenditure, excamb,—may be made by guardians of heirs in possession under age or suffering from incapacity (see also sec. 6 (3) and (4)). The section further provides that the Court shall not grant such application unless they are satisfied that it is for the *benefit* of the heir. An opinion has been expressed, at least as regards the case of a curator *bonis* for an *incapax*, that a petition to borrow and charge need not be preceded by a petition for special powers to make the application under the Entail Acts (*Moncreiff*, 1894, 1 S. L. T. No. 531 (Ld. Low)).

(13) *Effect of the Court's Authority.*—Where a judicial factor or curator *bonis* acts beyond his ordinary powers, without the special authority of the Court, the act is open to reduction (Stair, i. 6. 18; Ersk. i. 7. 17 (Ivory's Note); *Eaton*, 1826, 1 S. 677; *Wallace*, 8 Mar. 1817, F. C.), or, "at least, the guardian must take the whole responsibility on himself" (Fraser, *P. & C.* 513; *Ritchie*, 1834, 12 S. 775). The interposition of the Court does not render the act safe from reduction by the pupil on proof of lesion, or the factor irresponsible,—it only places him *in bonâ fide*. The fact that the factor sells under power of sale does not necessarily ensure the purchaser a good title (*Auld*, 1856, 18 D. 487 (Ld. Pres. M'Neill); see also *Cumming*, 4 Bro. Supp. 459; *Finlayson*, 22 Dec. 1810, F. C.; *Milne*, 1837, 15 S. 1104; *M'Gregor*, 1837, 15 S. 1092).

IV. Termination of Office.

(1) The office terminates, speaking generally, in the same way, *mutatis mutandis*, as that of Curator (*q.v.*) and Tutor (*q.v.*). (2) If the factor is a *female* (unusual now), her marriage does not terminate the factory (*Ritchie*, 14 December 1837, 16 S. 222 (note)). (3) The service of a tutor-at-law (*Bell*, 1734, Mor. 16374), or the appointment of a tutor-dative, terminates the office, and the factory will be recalled if required. (4) When the pupil attains minority the factor becomes *ipso facto* curator *bonis* to the minor, and continues to manage the estate until majority, or choice of curators by the ward (Factors Act, 1889, s. 11). (5) Where the factor is appointed temporarily, or while the father is bankrupt or in prison, the appointment will fall when the necessity giving rise to it ceases to exist.

(6) *Removal.*—(*a*) It was always open to anyone interested to procure the removal of the factor at common law for misconduct, or for failure to comply with the provisions of the Acts of Sederunt, by having recourse to the *nobile officium* of the Court. (*b*) This matter is now provided for by the Pupils Act, 1849, and the Factors Act, 1889 (ss. 7 and 14). The Pupils Act provides for the dismissal of the factor (s. 5) when he retains money in his hands, in contravention of the Act, from other than innocent causes (*Acc.*, 1852, 1 Stu. 441). Further, by sec. 6, if he misconducts himself (*Walker*, 1888, 15 R. 1102 (vouchers tampered with)), or fails in his duty, he is liable *inter alia* to suspension or removal in the discretion of the Court, over and above his liability to the estate for damages. By sec. 19 the Accountant may make requisitions on the factor, and if these are disobeyed he may report this to the Lord Ordinary or the Court, and also any misconduct or failure in duty (s. 20), and the Lord Ordinary or the Court may deal immediately with the matter as accords of law, *e.g.* by removal (*Acc.*, 1853, 16 D. 301; *Wilkie*, 1856, 18 D. 793). Further, the Act provides (s. 21) that if the Accountant suspects malversation and misconduct on the part of the factor, inferring removal or punishment, he may lay a case before the Lord Advocate, who may take such proceedings by petition and complaint as he thinks proper (see *Accountant*, 1851, 14 D. 292, and 1854, 17 D. 71).

The removal ought to be effected by a summary petition to the junior Lord Ordinary, at the instance of anyone interested, where it is founded on *mere delict—e.g.* failure to follow the Pupils Act—or carelessness (*Fisher*, 1865, 3 M. 889; *Stewart*, 1852, 24 Sc. Jur. 233). But if the misconduct is of a nature truly *criminal*, and the procedure is at common law, a petition and complaint to the Inner House, with the Lord Advocate's concurrence, is thought to be the only competent form of process (Shand, *Pract.* 1012; A. S., 11 July 1828, s. 89; Mackay, *Pract.* ii. p. 438).

All applications by the Accountant for removal, except petition and complaint, are now addressed to the junior Lord Ordinary, and the Lord Ordinary on the Bills in vacation.

It was at one time thought that an ordinary petition, at the instance of persons interested, for removal of the factor or recall of appointment on the ground of misconduct, must be presented to the Inner House (Mackay, *Pract.* ii. 357, 378; see *Kyle*, 1862, 24 D. 1083); and application was formerly generally so made (see *Walker*, 1888, 15 R. 1102 (trust estate)), although in practice they have been taken up by the junior Lord Ordinary. The practice of the Court, however, mainly proceeded upon a construction of the Pupils Act, which limited the power of the Lord Ordinary to those cases falling specially upon the Act. But a broader construction has since been adopted, and it was held that the Lord Ordinary might recall all appointments made by him (*Tweedie*, 1886, 14 R. 212; *Masterton*, 1887, 14 R. 712). Finally, in *Souter* (1890, 18 R. 86) it was decided, after consultation with the First Division, that a petition for removal for misconduct was incompetent in the Inner House, and must be presented to the junior Lord Ordinary (see also Judicial Factors Act, 1889, ss. 6, 7, 14). It would, however, appear to be incompetent before the Lord Ordinary on the Bills in vacation (Distribution of Business Act, 1857, s. 10).

(7) *Recall of Factory.*—It is sometimes proper to recall the factory itself, as when the ward has died, or (formerly) become minor, or where a guardian with a preferable claim appears (*Mars*, 1848, 20 Sc. Jur. 308; *Young*, 1839, 1 D. 1242). But where the office has terminated by mere lapse of time, it is usual in practice to dispense with the prayer for recall

and crave only exoneration and discharge in usual form (*Edmond*, 1853, 15 D. 521; cf. *Accountant of Court*, 1853, 16 D. 301). In such a case, even prior to *Tweedie* and *Souter* (*supra*), the petition was held competently presented to the junior Lord Ordinary, even though a crave for recall was made, as it is only accessory to the discharge (*Kyle*, 1862, 24 D. 1083; cf. *Simpson*, 1860, 23 D. 35; *Nairne*, 1862, 24 D. 1086). This seems to be the proper course even where the appointment has been made incidentally in the Inner House.

(8) *Recall of Appointment.*—Where it is desired to remove the factor on grounds falling short of the gravity which justifies a formal removal, *e.g.* where there is only negligence or mere delict, it is usual to petition the Lord Ordinary (to whom the petition is competent) for the recall of his appointment. A crave is added for the appointment of a successor, followed by a crave that the factor should lodge his accounts, that these should be audited, and the balance fixed and paid either to or by the factor, and that thereafter the factor and his cautioner should be discharged (see Thoms, 497). Even where there exists a good ground for asking *removal*, the petition is frequently limited to *recall*. Amongst the usual grounds for recall, some of which are not due to the factor himself, are the following: Neglect of the provisions of the Act of Sederunt, 1730 (*Fisher*, 1865, 3 M. 889); insolvency (*Forsyth*, 1853, 15 D. 708; *Fraser*, 1849, 11 D. 1028); going abroad (*Bell*, 1834, 12 S. 531; *Adie*, 1835, 14 S. 185; *Robertson*, 5 December 1856, unreported); acceptance of an appointment incompatible with factorial duties (*Esson*, 5 June 1857, unreported); absconding (*Gould*, 1849, 11 D. 1028); death of the cautioner (*M'Ewan*, 1857, 19 D. 936); failure to cite parties who should have been made respondents (*Lawson*, 1894, 2 S. L. T. No. 298 (Ld. Low)—appointment recalled and neutral party appointed); or some similar ground (*Thomson*, 1841, 16 F. 1307).

(9) *Resignation.*—It is not clear that a judical factor can resign and procure the recall of his appointment, without at least satisfying the Court that he has some ground. He is not in the same position here as a gratuitous trustee, and, in any event, it is unlikely that he would be allowed to burden the estate with expense capriciously incurred.

Exoneration and Discharge.—The Pupils Act, s. 34, regulates the factor's discharge, which is craved by summary petition in usual form (see *Jurid. Styles*); though sometimes where an extrajudicial discharge has been given, and the funds paid over, authority to the Accountant to deliver up the bond of caution is alone asked. A remit is always made to the Accountant for audit (this is necessary since the Factors Act, 1889, even where the factor is not *loco tutoris* (*Aitken*, 1893, 21 R. 62)); and any person called, or showing an interest, may appear, and, on showing cause, open up the audit of all the factor's accounts. Upon a report by the Accountant, discharge follows. It is a question whether the factor is entitled to raise a multiplepoinding and exoneration instead of presenting a petition (*Campbell*, 1870, 8 M. 227, 988). According to the Notes by the Accountant before referred to, when the factor applies for discharge at the termination of the office, *e.g.* should the wards choose curators on the youngest attaining minority,—he must produce (1) the extract decree of curatory, and (2) a discharge by the minors with consent of their curators, acknowledging that the estate has been accounted for. Where the pupil

dies, a discharge by a representative with a title must be presented. Where the factor is recalled or dies, he or his representatives will only be discharged after audit and accounting to the successor, or consignation (Accountant's Notes; *Tweedie*, 1844, 17 Sc. Jur. 72). The Accountant has power to procure the appointment of a new factor to secure an accounting (1889 Act, s. 10). The interlocutor is final, though in absence, unless appealed from or opened up as in absence within the time appointed for appealing to the House of Lords (1849 Act, s. 34); but the ordinary rules of restitution to the minor within the *quadriennium utile* would seem to apply.

V. Caution.

A factor *loco tutoris*, like other judicial factors, must find caution before he can extract his appointment and enter on his duties. The bond of caution, duly attested, must be lodged with the Clerk of Court within one month from the date of the appointment, when no other date is expressed, otherwise the appointment shall fall, but the Court has a power to extend the period if asked within the month (1849 Act, s. 2; A. S., 11 Dec. 1849, s. 2; but see *Lang*, 1850, 12 D. 943; *Harrowby*, 1856, 18 D. 733; *Campbell*, 1855, 18 D. 292). The Clerk, further, has to be satisfied of the sufficiency of the cautioner, and may himself be held liable as cautioner if he issue extract before caution is found (*Wardlaw*, 1859, 21 D. 940). Thereafter the bond is transmitted to the Accountant of Court as statutory custodier (1849 Act, s. 35). In the *Sheriff Court* the time for finding caution is three weeks, unless the Sheriff, on cause shown, should extend it (A. S., 14 Jan. 1881, s. 5).

There may be one or more *cautioners*. They must be solvent, of full age, resident within the jurisdiction (*Collins*, 1759, Mor. 4648; *Davidson*, 19 Jan. 1815, F. C.), and *sui juris*. An unmarried woman may be a cautioner (*Fraser's Factor*, 1892, 19 R. 500); and the husband of a female factor has been accepted (*Anderson*, 1829, 4 F. C. 445), though the rule is that the cautioner should not be conjunct and confident with his principal.

The Court have power, on cause shown, to limit the amount of caution to be found by judicial factors, tutors, and curators, and may authorise bonds of the British Guarantee Association, or other public company incorporated by Act of Parliament or Royal Charter, to be accepted (1849 Act, s. 27). Up to a comparatively recent date the Court refused to authorise the bond of an association with limited liability, doubting if a company registered under the Companies Acts could be held a "public company incorporated by Act of Parliament" (*Sim*, 1863, 2 M. 205). But in *M'Kinnon* (1884, 11 R. 676) such a registered guarantee association was held as "incorporated," and its bond authorised, caution being limited; and later, on the ground that they had a power at common law to fix the kind and amount of caution to be found by a judicial factor, the Court authorised a similar bond in a case to which the 1849 Act did *not* apply, and restricted the amount (*M'Kinnon*, 1884, 12 R. 184).

The ordinary rules as to caution apply to cautioners for judicial officers (see Cautionary Obligations), and it is only necessary to note shortly the following points: (1) The cautioner is liable even for acts of the factor done in virtue of *special powers* obtained from the Court (*Eaton*, 1826, 4 S. 695; 1828, 3 W. & S. 246), and it is therefore proper that the petition for special powers should be intimated to him (*Accountant*, 1858, 20 D. 1174).

(2) The Court will not accept a bond of caution *limiting the liability* to a fixed sum unless it has itself so prescribed (1849 Act, s. 27); and it appears to be doubtful if a cautioner is liable to summary diligence (Thoms, 431, and authorities there collected).

(3) The guarantee does not terminate by the *death* of the cautioner (*Kerr*, 1839, 1 D. 618), at least where he binds his heirs (Bell, *Prin.* s. 294). There is no duty on the creditor to intimate the bond to the cautioner's representatives (*British Linen Co.*, 1858, 20 D. 557), but the factor must intimate the cautioner's death or insolvency to the Accountant in writing (1849 Act, s. 11).

(4) The cautioner, unless bound for a specified time, has an absolute *right to withdraw* (*Gray*, 1847, 10 D. 145), but he is not entitled to inconvenience parties by a sudden withdrawal without due notice (Bell, *Com.* 384; *Taylor*, 1818, Hume, 114).

(5) The office is not terminated by the effect of the *septennial limitation* (*q.v.*; Ersk. iii. 7. 23; *Kerr*, 1839, 1 D. 618: affd. 1842, 1 Bell's App. 280); nor is the cautioner freed by creditor's delay in proceeding against the factor (*Morland*, 1829, 8 S. 181).

The cautioner must have *attestors* (*q.v.*), and the ordinary rules apply.

VI. Procedure and Expenses.

It is impossible within the limits of an article of this nature to enter fully into the subjects of (1) *procedure* and (2) *expenses*.

(1) It may be enough to refer to what has already been said of *procedure* under the various headings, and to state that, in general, procedure is by summary petition addressed to the junior Lord Ordinary, or the Lord Ordinary on the Bills in vacation (Distribution of Business Act, 1857). Forms of the various petitions will be found in the *Jurid. Styles* (*voce* "Petition"), and also appended to Thoms on *Factors* (pp. 601 *et seq.*).

(2) *Expenses* incurred in discussing the question whether the appointment should be made, follow, in general, the ordinary rule of success (but see *Mitchell*, 1891, 19 R. 324, where, there being no order in the Court of Session, the House of Lords allowed the law agents of an *incapax*, who unsuccessfully opposed the appointment of a *curator bonis*, their expenses in the House, and subsequently, upon a note, the Court of Session allowed them their expenses out of the estate). In the case of competition for the office, the criterion for awarding expenses out of the estate seems to be whether the estate has been benefited thereby (see, on the one hand, *Cochran*, 1849, 12 D. 147; *Brown*, 1852, 14 D. 856; and *Hill*, 1854, 16 D. 425; and on the other, *Clough*, 1837, 9 Sc. Jur. 291).

A factor, before paying a creditor, is entitled to retain out of the estate all expenses of litigation and other business properly and reasonably incurred, even though they exhaust the estate (*Drummond*, 1881, 8 R. 449). Where the factor obtains decree for expenses, he must recover from the opposite party (*Paul*, 1841, 3 D. 1145; *Rennie*, 1849, 11 D. 457).

In regard to the *opposing litigant*, the rule seems to be, though it has been questioned, that a factor is personally liable for expenses with, it may be, a right of relief (*Paterson's Factor*, 1897, 24 R. 499); but where a factor defended unsuccessfully and decree went against him as "judicial factor," it was held by a majority of seven judges that no personal liability attached (*Craig*, 1896, 24 R. 6).

The expenses of a recall of the *factory* are, in the general case, to be borne by the estate (but see *Wood*, 1862, 24 D. 563, and cf. *Gordon*, 1832, 11 S. 235); but in regard to the recall of the *appointment*, where that is due to

the misconduct of the factor, the Court has power (Pupils Act, 1849, s. 6), to mulct the factor in expenses.

[Fraser on *Parent and Child*, pp. 455 *et seq.*; Thoms on *Judicial Factors*, p. 170; Bell, *Prin.* s. 2114; Ersk. i. 7. 10; Stair, iv. 50. 28; Bell, *Dict.*, *voce* "Judicial Factor"; Mackay, *Pract.* ii. 370.]

See PUPIL; TUTOR; PETITION.

II. CURATOR BONIS TO A MINOR.

An officer appointed by the Court, in place of a common-law curator (see CURATOR), to manage the property of a minor above pupilarity. As the *curator bonis* comes under the provisions of the Pupils Protection Act, 1849, and Judicial Factors Act, 1889, and is under the supervision of the Accountant of Court, his position, and powers and duties generally, are much the same as those of a factor *loco tutoris*. It is here necessary to refer only to the leading points of difference.

I. APPOINTMENT.

(1) *WHEN APPOINTED.*—Up to a comparatively recent date, as the curator practically superseded the minor in the management of his affairs, the Court was averse to appoint a curator *bonis*, unless in exceptional circumstances. But on account of the importance of having a paid officer, the difficulty frequently encountered in procuring common-law curators, and the facility with which the appointment is made compared with the cumbrous procedure of choosing curators, the later tendency has been to relax the earlier rules. Finally, the provision of the Judicial Factors Act, 1889, s. 11, that a factor *loco tutoris* to a pupil becomes *ipso facto* curator *bonis* on the ward's attainment of minority, will, it is thought, greatly facilitate the appointment in the ordinary case, and to some extent obviate the old rule, that a case of necessity has to be made out (*Mayne*, 1853, 15 D. 554; *Barron*, 1854, 17 D. 61). Safeguarded as the minor is, a strong expediency becomes more and more the rule in practice.

The rule that the minor must consent, that he must either be a petitioner or a non-objecting respondent, and that the Court will not in the ordinary case appoint if he objects (see *Macdonald*, 1896, 4 S. L. T. No. 4), in great measure avoids the risk of injustice and hardship.

The Court, however, have frequently refused to interfere unnecessarily by appointing a curator *bonis* where the minor could choose curators for himself (*Bannatyne*, 1827, 5 S. (N. E.) 638; *Whiteside*, 1834, 12 S. 355; *Matthew*, 1851, 14 D. 312; *Macarthur*, 1854, 17 D. 61; *Barron*, 1854, 17 D. 61; *Eaton*, 1853, 2 Stu. 192). An exception to this rule always existed where a petition craved the appointment of a factor *loco tutoris*, and a curator *bonis* to members of the same family (*Watson*, 1827, 2 F. C. 189; *Irvine*, 1850, 12 D. 912; *Sutherland*, 1851, 13 D. 951; *Carter*, 1857, 19 D. 286; also *Hay*, 1749, Mor. 8973; *M'Whirter*, 1852, 14 D. 761; *Simpson*, 1860, 23 D. 35 (cases of *pro indiviso* rights); see also *Mockler*, 1867 and 1868, referred to in Thoms, 259, note (1)).

The Court have appointed curators *bonis* where the minor is unable to cite his next of kin in the process of *choosing curators* (*q.v.*), either because there are none (*Roberts*, 1839, 14 F. C. 1059), or because those on one or both sides are abroad (*Mayne*, 1853, 15 D. 554; *M'Lellan*, 1847, 10 D. 148; *Wood*, 1849, 11 D. 1494; *Carter*, 1857, 19 D. 286 (Second Div.); but see *Barron*, 1854, 17 D. 61, where the First Division refused to appoint on this ground). Similarly, where no one will act as curator, a curator *bonis* will be appointed

(*Metcalf*, 6 July 1880, unreported); and it is thought the same course would now be followed on the failure of a quorum of curators, or a *sine quo non*.

Where the minors were *illegitimate* the Court, on application, appointed officers styled curators, not curators *bonis* (*Young*, 19 Feb. 1818, F. C.; *Ogilvy*, 1849, 11 D. 1029: *M'Neill*, 1849, 11 D. 1029).

When the *father* is *bankrupt*, or insolvent, or in prison, or where there is a conflict of interest and the father's influence is feared (*M'Nab*, 1871, 10 M. 248), the Court will appoint a curator *bonis* to protect the minor's estate (*Robertson*, 1865, 3 M. 1077; *Harvey*, 1860, 22 D. 1198).

Again, where there was risk that the minor's freedom in choosing curators should be interfered with, the Court, in an early case, appointed a curator *bonis* instead of sequestrating the minor's person (*Bower*, 1750, Mor. 8910).

Where the minor is *resident abroad*, it is thought the Court would appoint a curator *bonis* to attend to his interests in this country, though a factor *loco absentis* would perhaps be the more appropriate appointment (see *Hay*, 1861, 23 D. 1291; *Burns*, 1851, 14 D. 311; but see *Johnstone*, 1843, 10 Cl. & Fin. 42, and 1856, 18 D. 343; *Stuart*, 1861, 4 Macq. 1).

Sheriff Court.—Curators *bonis* to minors may be appointed in the Sheriff Court on small estates (*Penny*, 1894, 22 R. 5; Judicial Factors Act, 1880); and the rules formerly stated (see *antea*) in regard to factors *loco tutoris* appointed by the Sheriff apply.

In a recent case (*Jack*, 1886, 14 R. 263), where minor children accepted a tender in an action of damages on account of their father's death, it was held unnecessary to appoint a curator to concur in the discharge, as the sums were to be deemed alimentary payments, and not capital sums for investment.

(2) *Parties.*—(*a*) The minor alone (*Tourton*, 1847, 10 D. 225; *Webster*, 1849, 12 D. 911), or along with relatives (*Johnstone*, 1839, 14 F. C. 1058), is the proper petitioner; or he may be made a consenter (*Whiteside*, 1834, 12 S. 355). Where the minor is alleged to be unduly influenced to his prejudice, a relative may petition alone, calling the minor as respondent (*Bower*, 1750, Mor. 8910). (*b*) The next of kin, or near relatives, who are not petitioners, should be made respondents, and, in any case, they may compear in the process (see Factor *loco tutoris*).

(3) *Who may be Appointed.*—The rules applicable to the appointment of factors *loco tutoris* (*q.v.*) apply generally here. As a rule, only one person is appointed, but in special circumstances the Court have appointed two or more (*M'Neill*, 1849, 11 D. 1029 (adverse interest); *Young*, 19 Feb. 1818, F. C.; *Ogilvy*, 1849, 11 D. 1029 (ward illegitimate, officers called curators)).

II. Powers and Duties.

(1) The *powers* and duties of a curator *bonis* to a minor are substantially the same as those of a factor *loco tutoris*, and it may therefore be enough to refer to what has already been said in regard to that office, many of the authorities there quoted dealing with curator *bonis*. He comes under the Pupils Protection Act, and the supervision of the Accountant of Court; and by the Trusts Act, 1884, he is made a trustee in the construction of the Trusts Acts, 1861 to 1884 (see also Trusts Act, 1887). It would appear also that he is entitled to make up titles under the Titles to Land Act, 1868, s. 24, as amended by the Act of 1869. An executor-*dative* who has managed

the deceased's farm for behoof of his children, and who is subsequently appointed curator *bonis* to them, must, in accounting, keep his curatorial funds separate, and cannot deduct in his accounts losses suffered by him as executor (*Matheson's Curator*, 1889, 16 R. 701).

(2) *Special Powers.*—It was doubted for a time if curators *bonis* to minors could receive the sanction of the Court for extraordinary acts of management, but, though authorities are few, it appears now to be the practice of the Court to grant special powers on proper cause shown, as in the case of factors *loco tutoris*. If the minor, however, opposes the granting of such powers, it is doubtful if they will be conferred, unless in very special circumstances. They will, in all probability, be refused where the minor proposes to choose curators for himself, and asks the recall of the curator *bonis*.

The following recent cases may be noted:—A curator *bonis* may charge the debtor in a bond granted to the ward, "his executors and assignees whomsoever," to make payment to the curator, though the charge bears to be at the instance of the ward (*Yule*, 1891, 19 R. 167). The effect of a curator's appointment, therefore, is to put him at once in the ward's place.

No special power is required to discharge an heritable bond (*Wills*, 1879, 6 R. 1096).

In *Semple* (1888, 15 R. 810) it was held that a curator *bonis* to a minor is not entitled, without special powers, to rebuild a mansion-house on the ward's estate.

An interim act and decree appointing a curator *bonis* in room of one deceased, and authorising him to complete title to certain stock of the Royal Bank of Scotland standing in name of his predecessor, is sufficient title to the bank to register him as proprietor (*Royal Bank of Scotland*, 1887, 15 R. 9).

III. Termination of Office.

Removal, Recall of Factory or Appointment, etc.—These matters are ruled by the same considerations as apply to factors *loco tutoris* (see *Termination of Office, antea*). If, however, the curator insists on acting in opposition to the ward's wishes, and the latter seeks on that ground to recall the curatory, it is thought his petition would only be granted on condition of his choosing curators for himself, or procuring another curator *bonis*, so as to provide for the former curator's proper discharge (see Thoms, 275).

[Fraser on *Parent and Child*, pp. 455 *et seq.*; Thoms on *Judicial Factors*, p. 243; Mackay, *Pract.* ii. 372; Ersk. ii. 12. 58.]

See Minor; Curator; Petition.

III. CURATOR BONIS TO AN INCAPAX.

An officer appointed by the Court (Court of Session; or Sheriff Court (Judicial Factors Act, 1880)) to manage the affairs of persons who from mental or physical infirmity are incapable of management. The Crown originally was wont to exercise its right, as *pater patriæ*, of naming protectors to subjects furious or imbecile. By the Act of 1585, c. 18, the nearest agnate of such persons was entitled to have them cognosced insane, and to be served as tutor (Fraser, *P. & C.* 524, 537). (See Tutor: Brieve: Insanity.)

Recently by the Court of Session Act, 1868, s. 101, a simpler procedure for cognition of insane persons was introduced. But the restrictions of these Statutes, both as regards procedure and the definition of insanity, prevented

many persons, who were truly incapable of managing their affairs, from being put under guardianship. This consideration, and the unavoidable delays which occurred, added to the facts that the nearest agnate was often not available, and that a tutor was not entitled to remuneration, led to applications to the Court for appointments of curators *bonis ad interim*. The satisfactory manner in which such appointments worked led to their very general adoption, not only *ad interim*, but for an indefinite period (*Bryce*, 1828, 6 S. 425; affd. 1828, 3 W. & S. 323); and these officers are now under the regulations of the Pupils Protection Act, and the supervision of the Accountant of Court.

I. Appointment.

(1) *When and to whom Appointed.*—Such curators are appointed to persons domiciled (*Murray*, 1849, 11 D. 710), or resident (*Bonar*, 1851, 14 D. 10), or possessing property, heritable or moveable (*Sawyer*, 1875, 3 R. 271), in this country, (*a*) on the failure of the legal guardian, and (*b*) when the ward is incapable of managing his own affairs.

(*a*) The *father*, if the child is cognosced, is his tutor without service, even after majority (Fraser, *P. & C.* 525, 534). On the father's death or failure, the office becomes open to the nearest agnate on cognition and service as tutor (see Cognition Act, 1585, c. 18; Court of Session Act, 1868, s. 101). On the failure of the father, and the tutor, there is room for the appointment of a curator *bonis*. A tutor-at-law may renounce his office with the approval of the Court on cause shown, *e.g.* ill-health (*Munnoch*, 1837, 15 S. 1267), or embarrassed affairs (*Mackenzie*, 1854, 16 D. 89); and the Pupils Act, 1849, s. 31, authorises the Court, on cause shown, to remove, or accept the resignation of, any tutor *datire* or curator to an insane person or idiot. Even if a curator *bonis* is appointed, the service of a tutor-at-law will supersede him (*Young*, 1839, 1 D. 1242; *Mackenzie*, 1854, 16 D. 897); and where the nearest male agnate is suing a brieve of cognition, he may meanwhile be appointed curator *bonis*, if in the best interests of the ward (*Simpson*, 1891, 18 R. 1207).

The *husband* is *ipso jure* curator and administrator to his wife, if incapable, in preference to the nearest agnate or any judicial appointee; but in some cases it has been thought advisable to have her cognosced (*Jardine*, 1825, 4 S. 159; Fraser, *P. & C.* 534). Since the Married Women's Property (Scotland) Act, 1881, though there has been no decision, it would appear to be necessary to appoint a curator *bonis* where the wife is *incapax*, as by that Statute the husband's *jus mariti*, and to a great extent his right of administration, are excluded from her estate, capital and income respectively (s. 1 (1) and (2)). (See Married Women's Property Acts.)

(*b*) The conditions justifying the appointment may be either mental or physical; and in either case the question is: Do they render the party incapable of managing his affairs?

(*a*) *Mental.*—Something short of what was necessary for cognition under the old law will justify the appointment. It is not necessary that the party be absolutely insane, if mentally unfit to manage his affairs (*Speirs*, 1851, 14 D. 11; *Allan*, 1852, 14 D. 1009; see *Irving*, 1868, 7 M. 86). A mere delusion or hallucination, however, is not enough, if it does not endanger the party's property (*Forsyth*, 1862, 24 D. 1435; *Henderson*, 1851, 14 D. 11; cf. *A. B.*, 1891, 18 R. 90, and H. L. 40), even though there is a risk of it influencing him against his relatives in the matter of his settlement (*Forsyth*, *supra*). Paralysis and great bodily weakness were held insufficient in the case of *Mackie* (1866, 5 M. 60); and in a

recent case (*Dowie*, 1894, 21 R. 1052), where it was alleged that a mother, owing to great age and impaired health, was facile and unable to resist the importunities of her youngest son, but not that she was unable to manage her affairs apart from his undue influence, the averments were held irrelevant to support an application for a judicial factor.

(β) *Physical.*—Mental incapacity, though the most frequent, is, however, not the only ground on which appointments are made; but it would rather appear that the Court are averse to appoint on any other (*Kirkpatrick*, 1853, 15 D. 735: *Mackie*, 1866, 5 M. 60). Appointments were made in the following cases: *Anderson*, 1748, Mor. 7439 (paralytic affection); cf. *Mackie*, *supra*; *Forster*, 1848, 11 D. 1031 (apoplexy); *Blackie*, 1827, 5 S. 249 (N. E.) (congenitally deaf and dumb); *Mark*, 1845, 7 D. 882 (blind and deaf); cf. *Kirkpatrick*, *supra*.

Where a party becomes insane during the course of an action, a curator *bonis*, and not a curator *ad litem*, should be appointed (*Anderson*, 1871, 8 S. L. R. 325).

The Court will not appoint, even if there is no opposition, without (1) personal service of the petition on the alleged *incapax* (*Gordon*, 1832, 11 S. 235; *Macgregor*, 1848, 11 D. 285); and (2) *primâ facie* evidence of incapacity (*Lockhart*, 1857, 19 D. 1075; *Mackie*, 1866, 5 M. 60), by the production of certificates, printed at the end of the principal petition (*Wright*, 1849, 12 D. 912), by two medical men (*Robertson*, 1853, 16 D. 317), on soul and conscience (*Campbell*, 1830, 8 S. 307), to the effect that the party is incapable of managing his affairs, and stating specifically the cause (*Laidlaw*, 1846, 8 D. 426), and its duration (*Matthew*, 1851, 14 D. 312). One certificate at least, by a medical man unconnected with the asylum where the incapax is detained, should be produced (*Knox*, 1894, 2 S. L. T. No. 400 (Ld. Low)). The date and place of interviewing the party ought also to appear (*Lord Advocate*, 1860, 22 D. 555).

Frequently the appointment is opposed by the alleged *incapax*, who denies the incapacity and lodges certificates by independent medical men (*A. B.*, 1891, 18 R. 90, and 10 R. (H. L.) 40; see *Alston*, 1895, 23 R. 16; *Macfarlane*, 1847, 10 D. 38; *Gray*, 1853, 2 Stu. 292). In these circumstances the Court either remit to the Lord Ordinary (*Beveridge*, 1776, 5 Bro. Supp. 442), or more usually to the Sheriff of the domicile, to inquire into the party's state, and examine him and other witnesses (*Macfarlane* and *Gray*, *supra*),—or to medical men to examine the alleged *incapax* and report (*Speirs*, 1851, 14 D. 11; *Forsyth*, 1862, 24 D. 1435). The alleged *incapax* is not entitled to demand a cognition and formal medical inquiry; the Court may adopt what course it considers best to obtain the necessary information, and may proceed to appoint on reports of medical men obtained by the parties (*A. B.*, 1891, 18 R. 90, and H. L. 40). Where the *incapax* lodges answers denying that he is insane, and averring that he is not subject to the Scottish Courts, but produces no medical certificates, inquiry should be allowed as to his domicile and mental state (*Alston*, 1895, 23 R. 16).

(2) *Parties.*—(*a*) *Petitioners.*—The petition for appointment of a curator may be presented by (α) the *incapax* himself (*Swan*, 1853, 2 Stu. 184; *Orr*, 1 Dec. 1866, unrep.: *Mark*, 1845, 7 D. 882); (β) *relatives* (*Allan*, 1852, 14 D. 1009 (next of kin); *Lockhart*, 1857, 19 D. 1075 (next heir of entail); *Foster*, 1859, 22 D. 15 (wife); cf. *Anderson*, 1748, Mor. 7439; *Gatherer*, 1852, 14 D. 1046 (half-brothers); *Spence*, 1834, 13 S. 199 (step-father); *Wright*, 1849, 12 D. 911 (sister-in-law); *Wood*, 1849, 11 D. 1494 (a minor)); (γ) *any parties interested*, failing relatives (*Ross*, 1851, 13 D.

950 (heritors of parish): *Mason*, 1852, 14 D. 761 (law agent): *Dick Lauder*, 1851, 14 D. 14 (debtors or creditors): *Gowans*, 1849, 11 D. 1028 (trustees); *Scott*, 1855, 17 D. 362; *Ballingall*, 1853, 15 D. 711 (a former factor, or his executors)); (*b*) the Accountant of Court, where a factor has died or ceased to act (Judicial Factors Act, 1889, s. 10): and (*c*) the Lord Advocate, where a report has been made to him under the Lunacy Act (20 & 21 Vict. c. 71, s. 81).

(*b*) *Respondents.*—All parties interested, including the alleged *incapax*, ought to be called, and they may, in any case, compear (see Factor *loco tutoris*).

(*c*) *The Party Appointed Curator.*—The same considerations apply here as in the choice of a Factor *loco tutoris* (*q.v.*). Where adverse interest is apparent, or likely, the Court will not accept the petitioner's nominee (*Armit*, 1844, 6 D. 1088: *Walker*, 1849, 12 D. 912), and may remit to the Sheriff of the county to inquire (*Thomson*, 1846, 8 D. 1073). If the person entitled to be tutor-at-law is appointed, it appears that, if required, he must act gratuitously, though the condition cannot be imposed subsequently (*Robertson*, 1830, 8 S. 435, referred to in *Accountant*, 1864, 4 M. 772).

One curator is usually appointed (*Kirk*, 1836, 14 S. 814); but where a party had in writing asked two friends to manage his affairs, if he became incapable, the Court appointed them along with a third party (*Howden*, 1833, 11 S. 561; *Kirk*, *supra* (trustees)).

II. Powers.

A curator *bonis* to an *incapax* is included under the term "judicial factor" in the Pupils Protection Act (*q.v.*), and in the construction of the Trusts Acts he is included under the term "truster." His duties and powers, ordinary and special, are, speaking generally, similar to those of a factor *loco tutoris* (*Maconochie*, 1857, 19 D. 366), necessity being the guiding principle in regard to special powers. The effect of his appointment is to put the curator in the ward's place, and to supersede the latter in dealing with the estate. Accordingly, after the curator is appointed, the *incapax* is not entitled to grant a cheque in payment of his law agent's expenses in opposing the petition on his behalf, even though a reclaiming note has been taken against the interlocutor appointing (*Mitchell*, 1891, 19 R. 324). Again, though a charge on a bond in favour of himself, and executors and assignees, bears to be at the instance of the ward, the curator may demand that the debtor should make payment to him (*Yule*, 1891, 19 R. 167). But, on the other hand, a curator *bonis* to a widow has no title under A. S., 13 Feb. 1730, to be appointed executor-*dative* on the estate of his ward's husband, other persons with a title being willing to confirm (*Martin*, 1892, 19 R. 474).

Special Powers.

(1) *Aliment and Custody of Ward.*—(*a*) Special powers are not in the ordinary case necessary in order to entitle the factor to apply the ward's income to his maintenance: but the Court will authorise him to pay a fixed sum as aliment for the ward, and, an addition, for his wife and family (*Hamilton*, 1842, 4 D. 627; see also *Myers*, 1845, 7 D. 886). As before stated the Lord Advocate may also bring the matter before the Court (20 & 21 Vict. c. 71, s. 82). The Court, if required, will grant power to sink the whole or part of the ward's funds in purchasing an annuity from a Scottish office (*Towers*, 1848, 10 D. 720; *Lindsay*, 1857, 19 D. 455: see *Finlayson*, 1836, 14 S. 219, where the relatives provided a

secured annuity (Pupils Act, s. 7)). Authority will be granted to the curator, where necessary, and where the funds are insufficient, to act along with, or through, the parochial board in alimenting the ward (*Innes*, 1846, 8 D. 1211; *Dunbar*, 1848, 10 D. 866).

Where the ward has also a foreign guardian, authority will be granted to the curator to send the income abroad, but so far only as is necessary for the ward's maintenance (*Murray*, 1849, 11 D. 710: *Laing*, 1859, 21 D. 101: *Allan*, 1855, 18 D. 97).

(*b*) The factor has no right to the *custody* of the ward, but, where necessary in the latter's interest, the Court will authorise the curator to interfere in regard to the custody and residence, as in the case of a pupil (*Gardiner*, 1869, 7 M. 1130).

(2) *Aliment of Dependents.*—Power will be granted, where necessary, to the curator *bonis* to supply aliment to those whom the ward is legally bound to support, *e.g.* wife and family (*Hamilton*, 1842, 4 D. 627), descendants, ascendants (see Factor *loco tutoris*). But an application by the curator for authority to pay, out of the ward's surplus income, aliment to the destitute only brother and heir of the ward, was refused because the discretion of the curator was not to be interfered with (*Dunbar*, 1876, 3 R. 554). The amount, and duration, of the aliment will be determined by the ordinary rules applicable to the subject (see Aliment), unless, before his incapacity, the ward had expressly, or by implication, evinced an intention of exercising his mere legal obligation.

Similarly, where there is evidence of the ward's intention as to the education and start in life of his children, the curator will be empowered, so far as is just and practicable, to carry out such intention, even to the extent of encroaching on capital, or borrowing on the security of the estate (*Howe*, 1859, 21 D. 480; *Maconochie*, 1861, 23 D. 740; *Graham*, 1865, 3 M. 695). Again, power will be given, if the circumstances justify it, to *continue* an allowance given by the ward, and which there is reason to believe it was intended to continue (*Blackwood*, 1890, 17 R. 1093; see report by Accountant in *Dunbar*, 1876, 3 R. 554; *A. B.*, 1894, 3 S. L. T. No. 304 (Ld. Low)): but the Court are averse to *increase* either an annuity or allowance paid before incapacity (*Bowers*, 1892, 19 R. 941).

Where the funds were amply sufficient, and the ward's recovery hopeless, power was granted to a curator *bonis* to pay a sum to the ward's daughter for marriage outfit, and to continue after marriage an allowance she had been receiving (*Blackwood*, 1890, 17 R. 1093; cf. *Pearson*, 1865, 3 M. 861).

(3) *To Carry out Ward's Intention.*—If clearly evinced, the Court may grant authority to the curator to carry out the ward's intention —*e.g.* to sell his heritable estate—if for the benefit of himself or his estate, though no necessity exists (see *Allan*, 1854, 16 D. 534, and *Alexander*, 1857, 19 D. 888). On the same ground, authority may be given to fulfil the ward's clearly expressed intention to aliment, or to assist in alimenting, relations (*Duguid*, 18 Mar. 1865, unrep.; cf. *Dunbar*, 1876, 3 R. 554, and *Bowers*, 1892, 19 R. 941), and, it is thought, even strangers, if the ward's means are sufficient for himself, and his nearest of kin are cited. But power will not be granted to *increase* an annuity paid by the ward though the needs of the annuitant have increased (*Bowers*, *supra*). Where the *incapax* was a parish minister, the curator was granted authority to pay an allowance to an assistant, the amount being in the curator's discretion (*Hamilton*, 1838, 1 D. 110).

(4) *Actions.*—Where the ward raises action and subsequently becomes insane, the proper course is to sist procedure until a curator *bonis* is appointed (see Curator *ad litem*). The curator, as in the case of a factor *loco tutoris*, may sue or be sued (*Curator ad litem*; Mackay, *Pract.* i. 346). The Companies Act, 1862, s. 45, makes special provision for a curator voting in place of his ward.

III. Termination of Office.

Recall of Appointment or Factory—Removal—Discharge.—The principles regulating the recall, removal, and discharge of a cuator *bonis* to an *incapax* are, in the main, identical with those applicable to a factor *loco tutoris* (*q.v.*). (1) The recall of a *particular appointment* may proceed on any of the grounds before mentioned (Factor *loco tutoris*), and does not involve recall of the office (*Forster*, 1859, 22 D. 15). The petition may be presented at the instance of anyone who is entitled to petition for the appointment, except, of course, the *incapax* himself (see *Mackenzie*, 1845, 7 D. 283).

(2) The factory itself will be recalled when the *incapax* can show (*a*) that he has recovered (*Davie*, 1849, 11 D. 1495; *Lockhart*, 1862, 24 D. 1086); or (*b*) was never incapable (*Gordon*, 1832, 10 S. 742, and 11 S. 235; *Forsyth*, 1862, 24 D. 1436; *Lawson*, 1863, 2 M. 355); (*c*) or dies; (*d*) or when the nearest agnate serves as tutor-at-law (*Young*, 1839, 1 D. 1242); (*e*) or when the curator is superseded by a foreign guardian (*Sawyer*, 1875, 3 R. 271); (*f*) or where the original appointment was incompetent or irregular (see *Gordon, supra*; *Fowlds*, 1836, 15 S. 244; *Lang*, 1847, 10 D. 148). Medical certificates are usually held sufficient proof of the ward's recovery. They must state the place of examination (*A. B.*, 1861, 33 Jur. 686), which must be other than the asylum where the *incapax* has been confined (*Simpson*, 1860, 22 D. 350).

(3) The *procedure* in obtaining the judicial discharge of the curator is fully detailed in the Notes for the Guidance of Judicial Factors already referred to (Factor *loco tutoris*; see Parliament House Book).

[Fraser on *Parent and Child*, pp. 523 *et seq.*; Thoms on *Judicial Factors*, pp. 276 *et seq.*; Bell, *Dict.*, *voce* "Insanity"; Bell, *Prin.* ss. 2103 and 2121; Mackay, *Pract.* ii. 373.]

See Insanity: Brieve; Petition.

IV. FACTOR LOCO ABSENTIS.

An officer appointed by the Court of Session (usually on summary petition) to manage the estate of a person absent from Scotland. (The term "judicial factor" in the Judicial Factors (Scotland) Act, 1880 (Sheriff Court), does not include factor *loco absentis*.) It is, in the ordinary case, necessary that the absentee should have estate, or a probable claim to estate, in Scotland (*Watson*, 1864, 2 M. 1333; see *Aikman*, 1863, 1 M. 1140; *Kennedy*, 1851, 13 D. 705). When the appointment is for the absentee's benefit, unless there is a manifest interest clearly separable from his other property (*Barstow*, 1857, 20 D. 230), a factor *loco absentis* is usually intrusted with the management of the entire estate (see *Knight*, 1833, 11 S. 366).

1. Appointment.

(1) *Circumstances Justifying Appointment.*—(*a*) It is essential that the absentee be *alive* in fact, or from presumption of law (*Kennedy, supra*; *White*, 1829, 7 S. 555).

(*b*) (*α*) The absentee must be ignorant of his rights; or (*β*) of their unprotected condition,—the usual case where a succession opens after long absence from Scotland.

(*α*) *Ignorance* is presumed from taciturnity, and the impossibility of communicating with the absentee from his address being unknown. The absence, however, need not have been of long duration, if an appointment is in the circumstances necessary; and, although the address be known, impossibility of timeous communication will justify the appointment of a factor (*Hope*, 1850, 12 D. 913; *Patrick*, 1848, 20 Sc. Jur. 566). It is thought that in the latter case the factor's powers would be limited (*Lumsdaine*, 15 May 1827, 2 F. C. 472). Since the Presumption of Life Limitation (Scotland) Acts (*q.v.*), cases where the absentee had not been heard of for twenty and nineteen years, such as *White* (1829, 7 S. 555) and *Kennedy* (1851, 13 D. 705), are unlikely.

(*β*) A man may, of course, from mere perversity, desire that his property should remain neglected, but it is thought that the presumption is against such an intention; and wherever it appears that the want of management is not intentional on the part of the owner, the Court will interfere (*Bryce*, 1828, 3 W. & S. 323; *Lumsdaine*, 1827, 2 F. C. 472; *Hay*, 1837, 15 S. 850; *Allan*, 1855, 18 D. 97; *Lamb*, 1857, 19 D. 699).

(*c*) Where necessity is shown for protecting the interests of *third parties*, *e.g.* creditors or heirs of entail, the Court will interfere on application (*Paterson*, 1851, 13 D. 951). The interest from mere relationship is not enough *per se*—it must be such as could be made effectual against the absentee. Where the absentee has left commissioners in this country, the Court will not, as a rule, interfere, unless there is serious mismanagement, or a prospect of it, presumably unanticipated by him (*Phaup*, 1831, 9 S. 584; *Bryce*, *supra*; see *Patrick*, 1848, 20 Sc. Jur. 566, and *Steel*, 1874, 11 S. L. R. 161).

Questions have arisen whether there should be an appointment of factor *loco absentis* to the absent heir, or of factor on the estate of the deceased ancestor. This appears only of moment where there is a competition as to who is heir (*Carmichael*, 1700, Mor. 7454; see *Paton*, 1785, Mor. 4071), in which case the factor is appointed on the intestate estate (see *Steel*, 1874, 11 S. L. R. 161). Sometimes the factor is appointed in both capacities (*Barstow*, 1857, 20 D. 230; *Hope*, 1850, 12 D. 913).

Similarly, it may be necessary to determine between the appointment of a factor *loco absentis*, and a factor *loco tutoris* or other guardian to the heir either of the absentee or of the common ancestor (*White*, 1829, 7 S. 555).

Again, it is often a question of difficulty in the circumstances whether a factor *loco tutoris* or curator *bonis*, or factor *loco absentis*, should be appointed to the absentee minor heir who is known to be alive (see Factor *loco tutoris*). The advisable course, apparently, would be to crave an appointment in the double capacity.

(2) *Parties.*—(*a*) The parties entitled to *petition* are much the same as in the case of the other judicial factors before referred to. *Relatives* (*Kennedy*, 1851, 13 D. 705 (sister); *Watson*, 1864, 2 M. 1333 (wife)); *creditors* (*Forbes*, 1836, 14 S. 1093; *Paterson*, 1851, 13 D. 951; *Hope*, 1850, 12 D. 913 (absentee heir of debtor)), who have also the alternative of obtaining a factor on the estate of the deceased debtor; and *joint owners* (*Young*, 21 Feb. 1876, unreported; cf. *Knight*, 1833, 11 S. 366), are the most frequent petitioners.

(*b*) *Respondents* ought to be all parties interested, who, though not called, may compear.

(*c*) *Who Appointed.*—The rules in regard to the party appointed factor on a trust estate (*q.v.*) are applicable here (see *White*, 1829, 7 S. 555).

II. Powers and Duties.

These are in great degree similar to the powers of factors on trust estates (*q.v.*). It must also be kept in view that the Pupils Protection Act, 1849, applies to factor *loco absentis* (see Factor *loco tutoris, antea*); and under the Trusts Act, 1884, s. 2, the word "trustee" includes factor *loco absentis* in the construction of the Trust Acts (see also the Judicial Factors Act, 1889, s. 19, applying the Trust Act, 1887, to judicial factors. The Sheriff Court Act of 1880 does not apply).

With regard to obtaining *special powers*, the factor *loco absentis* stands in a peculiar position, since the absentee who is *sui juris* may at any moment take up the conduct of his affairs. This circumstance, it is thought, prevents the Court interfering to grant special powers, except on the strongest expediency. While a factor *loco tutoris* may, for example, competently raise all necessary actions, it would appear that, except in the most ordinary cases, such as actions for rent, removings, etc., decrees in the case of a factor *loco absentis* would not bind the absentee (*Lumsdaine*, 1827, 2 F. C. 472; see *Watson*, 1864, 2 M. 1333), at least where the latter's address was known. The whole question, however, is very much a matter of circumstances, and urgency and necessity would go far to justify the factor's acts (*Paton*, 1785, Mor. 4071; *Kennedy*, 1851, 13 D. 705).

III. Termination of Office.

Recall of Appointment or Factory—Removal—Discharge.—(1) The rules before indicated (see Factor *loco tutoris*) in regard to the recall of a particular officer's *appointment* apply here.

(2) The *factory* will be recalled when the absentee returns (*Mackenzie*, 1845, 7 D. 361); or dies (*Wardrop*, 1846, 18 Sc. Jur. 540, where factor was heir; cf. *Reid*, 1834, 12 S. 278); or grants a mandate to someone to act for him (*Grant*, 1835, 13 S. 966); or where creditors have been found entitled to the whole estate. A recall will not be granted on the absentee's return till he has examined the factor's accounts (*Mackenzie*, 1845, 7 D. 361; cf. *Aitken*, 1893, 21 R. 62). The application for recall of the factory will usually be combined with a crave for discharge of the factor.

(3) *Discharge.*—This is regulated by the Pupils Act, 1849 (see also Notes by the Accountant of Court in Parliament House Book). Evidence of the absentee's identity, when he returns, and a discharge by him acknowledging receipt of the funds, must be produced. A judicial audit is necessary to a judicial discharge, and the Court will not grant warrant for delivery of the cautioner's bond without a remit to the Accountant of Court (*Aitken*, 1893, 21 R. 62, where it was observed (Ld. M'Laren) that it is for the Accountant to say whether a full audit may be dispensed with).

[Thoms on *Judicial Factors*, p. 159; Mackay, *Pract.* ii. 375; Bell, *Prin.* s. 2120; Ersk. 2. 12. 58.]

See Life, Presumption of; Petition.

Judicial Factor upon a Trust Estate, or upon an Intestate Estate.—In the construction of the Trusts Acts a judicial factor is "any person judicially appointed factor upon a trust estate, or upon the estate of a person incapable of managing his own affairs, factor *loco tutoris*, factor *loco absentis*, and *curator bonis* (47 & 48 Vict. c. 63, s. 2).

By the same section judicial factors, as here defined, are trustees in the sense of the Trusts Acts; and on the general question of their duties, powers, and liabilities, reference is made to the article upon TRUSTEE, and to the immediately preceding article upon JUDICIAL FACTOR. This latter article deals with the subject of judicial factors other than those appointed upon trust and intestate estates, and it is unnecessary to repeat here a statement of the law so far as it is common to all judicial factories. In this article it is proposed only to deal with the circumstances in which the Court will appoint a judicial factor upon a trust or intestate estate, and with several points in which the position of a judicial factor upon such an estate differs from that of a trustee, or of those judicial factors whose cases are dealt with in the preceding article.

Since the Judicial Factors Act of 1889 (52 & 53 Vict. c. 39, s. 6), judicial factors upon trust and intestate estates are under the supervision of the Accountant of Court, and are subject to the provisions of the Pupils Protection Act of 1849 (12 & 13 Vict. c. 51), and the relative Acts of Sederunt, which formerly applied only to factors *loco tutoris*, factors *loco absentis*, and *curators bonis*.

Circumstances in which a Judicial Factor will be appointed.—The Court, as a Court of equity, has power to take the necessary steps to render operative any trust which appears likely to become inoperative, and thus to carry out the intentions of the truster. This may be done either by the appointment of new trustees (see APPOINTMENT OF TRUSTEES) or by the appointment of a judicial factor. The appointment of a judicial factor is an exercise of the *nobile officium* of the Court, and was formerly peculiar to the Inner House; but now, by the Distribution of Business Act, 1857, a petition for the appointment of a judicial factor must be brought in the first instance before the Junior Lord Ordinary, or, in vacation, before the Lord Ordinary on the Bills (20 & 21 Vict. c. 56, s. 4). This Act, however, merely regulates procedure, and does not affect the power of the Court to appoint when necessary under its *nobile officium*, and a petition for appointment may competently be presented to the Inner House (*Paterson*, 1890, 17 R. 1059; *Dixon's Tutor*, 1867, 5 M. 1052).

The appointment of a judicial factor to administer a trust estate may be made whenever the Court is satisfied that such an appointment is necessary for the protection of the estate, or in order that the intentions of the truster may be carried out. It may be made when the trust appointment has lapsed, as where all the trustees nominate have predeceased the truster (*Cairns*, 1838, 16 S. 335), or where, surviving him, they have all declined office (*Smart*, 1854, 16 D 1004; *Russell*, 1855, 17 D. 1005), or where the trustees have all died before the purposes of the trust have been fully carried out (*Thomson*, 1857, 19 D. 964), or where trust purposes have been disclosed, but no appointment of trustees has been made (*Melville*, 1856, 18 D. 788). Where one of three trustees sued another trustee for a sum alleged to be due by him to the estate, and the third trustee declined to concur in the action, and it was held that the pursuer had not a title to sue, as not constituting a quorum of the trustees, a judicial factor was appointed to meet the emergency which had occurred (*Morison*, 1873, 1 R. 116). But where the trust purposes have been fulfilled before the failure of the trustees, an appointment will not be made, as there is no estate to administer (see *Shaw*, 1852, 14 D. 762). When the whole trust purposes have been fulfilled before the lapse of the trust, except the conveyance of property, heritable or moveable, to the person beneficially entitled to it "for his own absolute use," the beneficiary is entitled to apply for authority to

complete a title to it in his own name, and the appointment of a judicial factor is thus rendered unnecessary (30 & 31 Vict. c. 97, s. 14).

An appointment of a judicial factor may be made when there is a deadlock in the administration of the trust, and it is impossible that that administration should be carried on owing to disputes or differences of opinion among the trustees (*Forbes*, 1852, 14 D. 498; *Halcomb*, 1853, 15 D. 861; *Stewart*, 1892, 19 R. 1009). But mere general averments that the trustees cannot act harmoniously together, without evidence that there is a deadlock in the administration, are not sufficient (*Hope*, 1884, 12 R. 29). Where the trustees find that their interests as trustees and as individuals are adverse, and that it is therefore difficult or impossible for them to conduct the administration of the trust properly, they may apply to the Court for a judicial factor (*Thomson*, 1871, 8 S. L. R. 623; *A.*, 1894, 1 S. L. T. 617). Disagreements between trustees and beneficiaries as to the administration of the trust will not afford a ground for the appointment of a factor, even where the beneficiaries are trying to reduce the deed under which the trustees are acting (*Roughead*, 1833, 11 S. 516): but where the deed is challenged, and the alleged trustee has never been in possession of the estate, nor acted as trustee, an appointment may be made (*Christy*, 1834, 12 S. 916). Where the trustees and beneficiaries concur in asking for the appointment of a factor upon such a ground, the Court may grant it (*Taylor*, 1857, 19 D. 1097, 20 D. 52).

Where there is malversation of his office on the part of the trustee, the Court will remove him, and appoint a judicial factor to manage the estate (*Soutar*, 1852, 15 D. 89; *M'Whirter*, 1889, 17 R. 68; *Birnie*, 1891, 19 R. 334; *White*, 1891, 28 S. L. R. 901). But the removal of a trustee is an extreme measure, which is only adopted when there is a distinct case of malversation of office. Something more than mere irregularity or illegality is necessary (per Ld. Pres. Inglis in *Gilchrist*, 1883, 11 R. at p. 24), and the bankruptcy of the trustee is not in itself a sufficient ground for his removal (per Ld. Neaves in *Neilson*, 1865, 3 M. 561). Where the Court is not satisfied that there is ground for removing the trustee, but is satisfied that, owing to the financial circumstances of the trustee, or other reason, there is a serious risk incurred by leaving the trust estate under his management, the estate will be sequestrated, and a judicial factor appointed, leaving all questions as to the removal of the trustee for after-consideration (*Morris*, 1858, 20 D. 716; *Foggo*, 1893, 20 R. 273; but see *Dryburgh*, 1873, 1 R. 31; *Gilchrist*, 1883, 11 R. 22; *Bowman*, 1891, 19 R. 205; *Henderson*, 1893, 20 R. 536; *Harris*, 1893, 21 R. 16, for circumstances in which the Court held that there was no reason for superseding the trustees in the administration of the estate). In *Sheddan* (1867, 5 M. 955) a sole trustee, who was insolvent, refused to assume new trustees, and the Court sequestrated the estate and appointed a judicial factor. The trustee thereafter assumed two new trustees, and the Court then recalled the sequestration and factory, the deed of assumption thereupon coming into operation, and the trustee with his assumed co-trustees resuming the administration of the estate. In *Stott* (1854, 16 D 867), where the trustees were not subject to the jurisdiction of the Scottish Courts, and where they were indebted to the trust, a judicial factor was appointed (see also *Morris*, 1858, 20 D. 716). By sec. 8 of the Trusts Act of 1891 (54 & 55 Vict. c. 44), the Court, in the case of insanity or incapacity, must, and in the case of continuous absence from the United Kingdom for six months may, remove a trustee upon the application of any co-trustee or beneficiary. If a trustee so removed was the sole trustee, the Court would, on removing him, appoint a judicial factor to administer the estate. (See REMOVAL OF TRUSTEES.)

When a whole body of trustees wish to resign, it is not proper for them to do so, even though they have power to do so under the Trusts Act of 1861, without taking steps to provide for the future administration of the trust. They should, therefore, before resigning, petition the Court, praying for the appointment of new trustees or of a judicial factor (*Maxwell*, 1874, 2 R. 71). A sole trustee, or the last survivor of a body of trustees, is not entitled to resign his office until he has either assumed new trustees with the consent of the beneficiaries of full age and capable of acting at the time, or has petitioned the Court for the appointment of new trustees or of a judicial factor to administer the trust (30 & 31 Vict. c. 97, s. 10).

The Court will also in special circumstances interfere to prevent the confirmation of an executor-nominate, when there appears to be a serious risk of injury to the estate if it is suffered to come into his hands. In such a case a judicial factor will be appointed, who must find caution, and who is responsible to the Court for his administration (*Campbell*, 1895, 23 R. 90; see *Hamilton*, 1888, 16 R. 192, per Ld. M'Laren, at p. 198). In *Thomson* (1871, 8 S. L. R. 623), where one of the executors-nominate was abroad, and the other, who was one of the next of kin of the deceased, was a creditor on the estate, a judicial factor was appointed upon the application of the executor who was a creditor and another of the next of kin of the deceased. Where the executors were unable to agree as to the administration of the estate, but where they were themselves the residuary legatees, and there was practically no one else interested in the estate, the Court refused to appoint a factor on the petition of one of the executors (*Purdie*, 1897, 4 S. L. T. 358).

The Court will, where necessary, appoint a judicial factor to protect contingent interests. In *Raes* (1889, 16 R. H. L. 31) the trustees acting under a marriage contract (two of them being the spouses) had committed a breach of trust, and the Court appointed a judicial factor to protect the interests of the children of the marriage, which were only contingent during the lives of their parents. In this case the House of Lords ordered that the lost trust fund should not be replaced *simpliciter*, but should be paid to a judicial factor, to be held by him for certain definite purposes during the lives of the spouses, and afterwards for the purposes of the marriage-contract trust (see also *Dowie*, 1894, 21 R. 1052). In the *Orr-Ewing* case (1884, 11 R. 600; 1885, 12 R. H. L. 1), where an attempt was made by an English beneficiary to throw a Scots trust estate into Chancery, the Court, at the instance of other beneficiaries, pending the decision of the House of Lords upon the English action, sequestrated the trust estate, and appointed a judicial factor thereon.

Appointment upon Intestate Estates.—Where a person has died intestate, and there is uncertainty as to who is the heir, the Court may appoint a judicial factor to preserve and manage the estate until the succession is determined. Thus where a lady died intestate, leaving both heritable and moveable property, and no one applied to be confirmed as executor or to be served heir, and where she had to all appearance no relatives, the Court appointed a judicial factor upon the estate (*Dalmahoy*, 1854, not reported: see *Wood*, 1855, 17 D. 580). In another case, where the lunatic proprietor of a landed estate died, and it was very uncertain who was his heir, there being a probability of a competition between various persons, some of whom were abroad, the Court sequestrated the estate, and appointed a factor (*Macdonald*, 1849, 11 D. 1028. See *Fraser*, 1855, 18 D. 264). Even where the heir is known, but abroad, it would appear to be competent to appoint a judicial factor upon the intestate estate, though the more appropriate course would be to appoint a factor *loco absentis* (see *Hope*, 1850, 12 D. 913: see also *Steel*, 1874, 11 S. L.

R. 161; *Carmichael*, 1700, Mor. 7454). In a case where the deceased had left certain testamentary writings, but where it was doubtful if he was of a disposing mind, where the writings were themselves of doubtful validity, and where, if they were invalid, there was great uncertainty as to who was the heir, the Court appointed a judicial factor (*Hope*, 1851, 13 D. 950). Where no one having right comes forward to be confirmed as executor upon the estate of a person deceased, the Court will, on the petition of anyone interested in the executry, appoint a judicial factor to administer the estate (Bell, *Principles*, s. 1894, note). A judicial factor so appointed may, if he pleases, take out confirmation as executor-dative, but it is not necessary for him to complete his title by confirmation in order to recover the estate, as an official extract of his appointment has "the full force of an assignment or transfer executed in legal and appropriate form" of the whole estate under his charge (52 & 53 Vict. c. 39, s. 13). Whether he is confirmed or not, he must of course give up an inventory, and pay the duty.

Sec. 164 of the Bankruptcy Act of 1856 (19 & 20 Vict. c. 79) provides that "it shall be competent to one or more creditors of parties deceased to the amount of one hundred pounds, or to persons having an interest in the succession of such parties, in the event of the deceased having left no settlement appointing trustees or other parties having power to manage his estate or part thereof, or in the event of such parties not accepting or acting, to apply by summary petition to either Division of the Court (now to the Junior Lord Ordinary, 20 & 21 Vict. c. 56, s. 4) for the appointment of a judicial factor." The application of this provision is entirely independent of the question of the insolvency of the estate;—"any party interested in the estate of a person who has died without appointing trustees is entitled to make application under this section, though the deceased may have left no debts at all, or although they may be quite insignificant" (per Ld. J.-C. Inglis in *Alexander*, 1862, 24 D. 1339). The section also applies to cases where trustees have been appointed, but have declined to accept or act (but see *Norris*, 1857, 29 Jur. 129). The Court, however, will exercise its discretion in dealing with applications under this section, and will not make an appointment where there is already someone who is *in titulo* to administer the trust estate, or who is willing to make up his title (*Begg*, 1893, 1 S. L. T. 281; see *Masterton*, 1887, 14 R. 712; *Macfarlane*, 1857, 19 D. 656, per Ld. Deas, at p. 659).

Who may apply for the Appointment of a Judicial Factor.—Speaking generally, any person having an interest in the estate has a right to petition the Court for the appointment of a judicial factor. A trustee can petition, as, for example, where a deadlock in the administration is averred (*Forbes*, 1852, 14 D. 498), or where the trustees find that they have adverse interests as trustees and as individuals (*Thomson*, 1871, 8 S. L. R. 623; *A.*, 1894, 1 S. L. T. 617), or where a whole body of trustees wish to resign (*Maxwell*, 1874, 2 R. 71), or, under the Trusts Act of 1867, where a sole trustee wishes to resign (30 & 31 Vict. c. 97, s. 10). The representatives of a deceased trustee, who had made advances to the trust estate, and who would, under the trust, have been entitled to retain the trust estate in security for these, have been allowed to petition for a factor (*Burnett*, 1829, 7 S. 314). Beneficiaries under the trust can petition, either alone or in conjunction with the trustees (*Morris*, 1858, 20 D. 716; *Shedden*, 1867, 5 M. 955; *Dryburgh*, 1873 1 R. 31; *Gilchrist*, 1883, 11 R. 22). So also the tutor or curator of a pupil or minor beneficiary may petition (*Foggo*, 1893, 20 R. 273). In *Harris* (1893, 21 R. 16) a petition was entertained which was presented by the aunt of certain minor beneficiaries who lived with her. In *Bowman*

(1891, 19 R. 205) the next of kin of the deceased petitioned (see also *Campbell*, 1895, 23 R. 90). The liferenter under a trust can petition for the appointment of a judicial factor on the fee of the estate (*Henderson*, 1893, 20 R. 536; *Gowans* and *Prentice*, 1849, 11 D. 1028). The parties to a marriage contract, where the trustees have failed, may petition for the appointment either of new trustees or of a judicial factor (*Melville*, 1856, 18 D. 788; *Nicholson*, 1850, 12 D. 911); but when they have themselves, under the contract, the power to appoint new trustees, the Court will not appoint trustees, and would probably only appoint a judicial factor in cases where there was difficulty as to the administration of the trust (see *Newlands*, 1882, 9 R. 1104; *Tovey*, 1854, 16 D. 866; *Lindsay*, 1847, 9 D. 1297). Creditors can petition (*Soutar*, 1852, 15 D. 89; *Shaw*, 1852, 14 D. 762). On the death of a judicial factor, if the purposes of the appointment have not been exhausted, and if no one interested in the estate applies for the appointment of a successor, it is the duty of the Accountant of Court to make the application (52 & 53 Vict. c. 39, s. 10; see *Martin*, 1893, 1 S. L. T. 189).

By sec. 164 of the Bankruptcy Act of 1856, creditors to the amount of £100, or persons having an interest in the succession of a person who has died intestate, or whose nomination of trustees has become ineffectual through the non-acceptance of the trustees nominated, can petition for the appointment of a judicial factor on the estate. The right here given to creditors is limited to those whose debts amount to £100 (see *Masterton*, 1887, 14 R. 712); but it would appear that, in the case of the failure of trustees, any legatee, however small his legacy, is entitled to take advantage of the section. Apart from the Statute, any relative of a deceased intestate, who can show an interest in his succession, may petition (*Young*, 1850, 13 D. 950; *Macdonald*, 1849, 11 D. 1028; *Cullen*, 1831, 9 S. 382). So also, it would seem, might his creditors (*Hope*, 1850, 12 D. 913); but where the debt was not constituted, and was *ex facie* prescribed, a creditor was found not entitled to petition (*Macdowall*, 1849, 12 D. 170). In several cases, where the deceased died intestate, and the heir was doubtful or unknown, petitions have been presented by the law agents of the deceased (*Dalmahoy*, 1854, not reported; see *Wood*, 1855, 17 D. 580; *Hope*, 1851, 13 D. 950).

By the Trusts Act of 1867 (30 & 31 Vict. c. 97, s. 16) the Lord Advocate is entitled to intervene for the protection of the interests of any charitable trust, and thus has a title to petition for the appointment of a factor. The County Council (taking the place of the Commissioners of Supply), the magistrates of a city or burgh, the incorporated trades of a burgh, the parish minister and kirk session, the heritors and kirk session, have all been held entitled to intervene for the protection of charitable trusts which affect them or those under their charge (*Commissioners of Berwickshire*, 1678, Mor. 1351; *Magistrates of Montrose*, 1825, 1 W. & S. 595; *Ferguson*, 1853, 15 D. 637; *Magistrates and Trades of Dundee*, 1856, 19 D. 168; *Low*, 1865, 4 M. 45; *Forbes*, 1877, 5 R. 328). Generally, any person who has an interest, actual or contingent, in the administration of a charitable trust, has a title to intervene (see *Ross*, 1843, 5 D. 609; 1846, 5 Bell's App. 37; *Magistrates of Edinburgh*, 1851, 13 D. 1187; *Liddle*, 1854, 16 D. 1075; *Carmont*, 1883, 10 R. 829; *Rooke*, [1895] 1 Ch. 480; *Mackie*, 1896, 23 R. 668).

Who may be appointed.—The qualifications required for the appointment are in the main the same as those required for factors *loco tutoris* and *curators bonis*, and these have been fully dealt with in the immediately preceding article upon JUDICIAL FACTOR. But it may be pointed out that

the Court will not appoint, as judicial factor upon a trust estate, a person who has been nominated a trustee upon the estate, and has declined the office, otherwise there would be an inducement to exchange a gratuitous office for a remunerative one (*Pennycook*, 1851, 14 D. 311). Nor will a person who has an interest adverse to that of the beneficiaries be appointed (*Raeburn*, 1851, 14 D. 310). In the ordinary case, the Court will usually appoint any person whose name is suggested by the petitioner; but in applications under sec. 164 of the Bankruptcy Act of 1856, it will not do so, but will make an appointment of its own. The reason for this is that under the Act a person having a very small interest in the estate may make the application, and it would not be safe to allow him to choose his own factor (see *Macfarlane*, 1857, 19 D. 656, per Ld. Pres. M'Neill, at pp. 658, 659).

Powers.—For the general question of the powers of a judicial factor, both those dealing with ordinary acts of administration which he is entitled to exercise at his own hand, and those special powers, to exercise which he must obtain the authority of the Court, reference is made to the immediately preceding article JUDICIAL FACTOR, and also to the article TRUSTEE. There is one point, however, which is peculiar to the case of a judicial factor upon a trust estate, which calls for consideration here. Powers to perform acts which are beyond those of ordinary administration, or which involve the exercise of the discretion of the trustees, can be conferred by a truster upon his trustees. Thus he can confer upon them a power to sell or feu the trust estate; or he can empower them to increase, if necessary, and if in their discretion they think fit, an allowance which they are instructed to make to a beneficiary; or he can empower them to apportion the estate among the beneficiaries named, or even to select at their own discretion the persons or objects which are to be benefited by the trust estate. Where any such powers are conferred upon trustees, they do not pass to a judicial factor who takes their place in the administration of the estate. The truster is assumed in such cases to have exercised a *delectus personæ* in the nomination of his trustees. But in any such case, where the power is one which, if it had not been given by the truster, the Court could have granted to the trustees, either in virtue of its *nobile officium* or under the Trusts Act of 1867, the judicial factor may apply to the Court for authority, and the Court will exercise its discretion as to whether or not in the circumstances the authority should be granted. Thus where a power to sell is conferred by a truster upon his trustees, they could exercise it in their discretion without the authority of the Court; but a judicial factor, coming in their place, must apply to the Court for authority (*Morison*, 1855, 18 D. 132; *Auld*, 1856, 18 D. 487; *Mollison*, 1888, 15 R. 665; *Jamieson*, 1872, 10 M. 755; see *Whyte*, 1891, 18 R. 376; *Gunn*, 1892, 29 S. L. R. 903). This is an example of a case in which the Court could have granted the authority to the original trustees under the Trusts Act of 1867, had it not been already given to them by the truster.

But in such a case as one in which the truster has authorised his trustees in their discretion to increase an allowance to a named beneficiary, the Court, in considering an application by a judicial factor for authority to do so, would seem to be guided by the intentions of the truster as expressed or implied in the trust deed. If it is evident that he contemplated the possibility of the exercise of the power by persons other than those whom he actually appointed, as, for example, where the power is given to trustees named, and others who may be assumed into the trust, it is considered that the idea of *delectus personæ* is not present, and the Court will confer the

power upon a judicial factor if they are satisfied that it is expedient to do so (*Simson*, 1883, 10 R. 540; *Howden*, 1895, 23 R. 113; *Allan*, 1869, 8 M. 139; *Blair*, 1896, 4 S. L. T. 25 and 26). A case where the trustees are given power to apportion the fund among the beneficiaries, or where it is left to them to select the persons or objects which are to benefit by the trust, may perhaps fall under the same rule. "There may be cases where a testator has provided for the delegation of a power of selecting objects, and where, from supervening circumstances, the delegation cannot be carried out in the manner provided in the will. If it appears plainly that a testator did not mean to confine the selection of objects to persons nominated by himself, but only to take measures for ensuring that the selection of objects of his charity should be intrusted to competent persons, possessed of the necessary local knowledge, I do not say that it would not be within the powers of the Court to supply a vacancy in such a trust" (per Ld. M'Laren in *Robbie*, 1893, 20 R. 362). But in such a case the Court would probably appoint new trustees (see *Magistrates of Edinburgh*, 1881, 8 R. H. L. 140), who would administer the trust on their own responsibility, rather than a judicial factor, who would have to administer it under the orders and direction of the Court. In *Howden* (1895, 23 R. 113) Ld. M'Laren suggested that the distinction lay between a case in which the truster had given an unqualified power of selection of the beneficiaries to his trustees, and one in which he had clearly pointed out the objects of the trust, and had given his trustees a discretion merely as to the mode in which the benefit should be enjoyed. In several cases in which the larger discretionary power had been given, but in which there was no evidence that the truster contemplated the power being exercised by persons other than those named (*e.g.* where it was not conferred upon trustees who might be assumed), the Court has refused to grant the power to a judicial factor. Thus where a testator had ordered her trustees to pay the residue of her estate "to such charitable or religious purposes, and in such proportions, as they, or the acceptor or survivor of them, may think proper, according to their or his discretion," and had given no power to assume, the Court held that they could not authorise a judicial factor who had been appointed upon the estate to exercise this power of selection, and that the residue, so far as not already disposed of by the trustees, fell to be distributed among the testator's heirs *in mobilibus* as intestate succession (*Robbie*, 1893, 20 R. 358). Again, a trustee had been given ample discretionary powers as to the proportions in which the trust estate should be divided among a family of children, and as to the time and manner of payment. In virtue of these powers she made certain unequal payments, and afterwards became insane. Prior to her insanity she had assumed a co-trustee, who afterwards assumed another under the Trusts Act of 1867. The Court held that the discretionary powers were personal to the original trustee, and could not be exercised by the assumed trustees, and that therefore the fund fell to be distributed among the beneficiaries in such a way as to make their shares equal, taking into account the payments which had been already made (*Hill*, 1874, 2 R. 68; see also *Weir*, 1897, 5 S. L. T. 307). The fact that such powers have been granted to trustees will not entitle those who might benefit by the exercise of the powers, to object to the resignation of the trustees and the appointment of a judicial factor on the ground that the powers could not be exercised by the judicial factor (*M'Connell*, 1898, 5 S. L. T. 314).

The Court will not, as a rule, confer special powers upon a judicial factor at the time of his appointment (*Russell*, 1874, 2 R. 93; *Harper*, 1833,

11 S. 365). The application should be made by the judicial factor himself, after he has been appointed and has looked into the affairs of the trust. In making the application he should state his own opinion that the exercise of the power would be prudent and advisable (*Howden*, 1895, 23 R. 113). But special powers can be conferred upon the judicial factor, under the same petition under which he is appointed, in cases of necessity (but see *Beveridge*, 1851, 13 D. 952), or where, for example, the main purpose of the trust can only be carried out by the exercise of such powers (see *Forbes*, 1852, 14 D. 498). And where special powers have been granted to a judicial factor who has died without exercising them, similar powers will be granted to his successor at his appointment (*Stodart*, 1854, 16 D. 883; *Raeburn*, 1851, 13 D. 952). Sec. 15 of the Trusts Act of 1867 provides that an application for authority to complete the title of a judicial factor to any trust property or estate, under the 38th section of the Titles to Land (Scotland) Act, 1860, may be contained in the petition for the appointment of such factor, and such application may include moveable or personal property: but it would seem that in practice the application should be made by the judicial factor himself, after he has found caution (see Coldstream, *Procedure*, 175).

Completion of Title by Judicial Factor.—Where his predecessor in office has duly completed and recorded his title to the estate, a judicial factor can complete his title by recording in the Register of Sasines an extract of the interlocutor by which he is appointed, specifying "the trust deed and other title or titles (if any) by which the trust title had been completed," and setting forth the lands "by description or reference" (37 & 38 Vict. c. 94, s. 44). Where the title of his predecessor had not been completed and recorded, the judicial factor may make up his title, under sec. 24 of the Consolidation Act of 1868, by recording the warrant granted in his favour (31 & 32 Vict. c. 101, s. 24, as amended by 32 & 33 Vict. c. 116, s. 3; see Bell, *Conveyancing*, ii. 1007, note).

Recall of Factory, or of Appointment.—Where the trust estate has been sequestrated and a judicial factor appointed, but the trustees have not been removed from their office, the trustees may petition the Court for the recall of the factory upon showing that the reasons for which it was granted no longer exist, and upon the recall of the factory they will be enabled to resume their office as trustees (see *Morison*, 1873, 1 R. 116, per Ld. Pres. Inglis; *Shedden*, 1867, 5 M. 955; *Hunter*, 1834, 12 S. 406). A factory upon the estate of a deceased person may be recalled when the estate is sequestrated under the Bankruptcy Acts by the creditors of the deceased (see *Newall*, 1840, 2 D. 1108). The rules which govern the recall of the appointment of a factor upon a trust estate are in general the same as those which apply to the cases of other judicial factors, and have already been dealt with.

Discharge.—Where there is double distress, *i.e.* competing claims upon the estate under his charge, the judicial factor is of course entitled to raise an action of multiplepoinding in order to determine these claims. But he cannot, as trustees can, obtain a discharge in such an action. He is an officer of the Court, and after he has distributed the estate in accordance with the rankings in the multiplepoinding, he should apply to the Court by a separate petition for his discharge (see *Campbell*, 1870, 8 M. 988; *Carmichael*, 1853, 15 D. 473).

[Thoms on *Judicial Factors*, 20–156; M'Laren, *Wills and Succession*, 1270.]

See Judicial Factor: Trustee.

Judicial Notice (or Cognizance).—There are many facts of which the Court takes *judicial notice*, and it is therefore unnecessary for those alleging such facts to prove them. In theory all facts not judicially noticed must be proved. There is an increasing tendency on the part of judges to import into cases heard by them their own general knowledge of matters which occur in daily life. Thus they notice all the public statutes; their own rules of practice and course of procedure; the maritime law of nations; a war in which the country is engaged; the great and privy seals; the ordinary course of nature; the natural and artificial divisions of time; the legal standard of weights and measures; current coin; the meaning of English words; and other matters.—[Stephen, *Digest of Evidence*, s. 58, and note 26; Taylor, *Evidence*, pp. 3 *et seq.*; Best, *Evidence*, pp. 253 *et seq.*; Powell, *Evidence*, 7th ed., 279; Kirkpatrick, *Digest*, s. 91.]

Judicial Procedure.—See PROCESS.

Judicial Reference.—See ARBITRATION.

Judicial Separation.—*HISTORY.*—This is the old *separatio quoad thorum* or *divortium a mensa et thoro* of the canon law (see *Decret.* Greg. IX. lib. 4, tit. xix; *Liber Officialis S. Andree*, No. 131). Before the Reformation it was the law of Catholic Europe that marriage was indissoluble. (See, for the evolution of this theory, Freisen, *Geschichte des Canonischen Ehercchts*; Esmein, *Le Mariage en Droit Canonique.*) Divorce A VINCULO (*q.v.*) was not admitted. The Roman Catholic Church has never departed from the position that no Court of law can possibly dissolve the bond of marriage. And this doctrine is strenuously maintained by a large section of Anglican theologians (see, *e.g.*, Luckock, *Hist. of Marriage*, 2nd ed., 1895).

In some of the European States there is still no divorce *a vinculo* (see, *e.g.*, as to Italy, Code Civ. 148, as to Spain, C. C. 104). In England, until 1857, it could only be obtained by Act of Parliament (see Macqueen, *H. & W.* 154). But in Scotland divorce was introduced by the Reformers about 1560, and has been granted by the Courts since that time (Fraser, *H. & W.* ii. 1139). The Roman Church, while denying that a marriage could be dissolved, allowed that there were cases in which an injured spouse ought to have the right of living apart (see Esmein, *Le Mariage en Droit Canonique*, i. 85). The Council of Trent decreed: "Si quis dixerit ecclesiam errare quum ob multas causas separationem inter conjuges quoad thorum seu quoad cohabitationem ad certum incertumve tempus fieri posse decernit: anathema sit" (*C. Trid.* s. xxiv. 8). Upon proof of adultery, or *sævitia*, the Ecclesiastical Courts granted decree of separation or divorce *a mensa et thoro.* There are seventeen such decrees in the *Liber Officialis S. Andree*, published by the Abbotsford Club, 1845 (see, *e.g.*, Nos. 54 and 76).

This remedy has continued to exist side by side with divorce, and is commonly known as judicial separation.

GROUNDS OF JUDICIAL SEPARATION.—As before the Reformation (see *Lib. Off. S. And.* Preface xix), it is granted for two causes only—1. Adultery, and 2. *Sævitia*, or Cruelty.

As to 1. *Adultery*, the pursuer has an undoubted right to choose the remedy of separation instead of that of divorce (*Wilson*, 1866, 4 M. 732;

Symington, 1874, 1 R. 871, 2 R. H. L. 41). It is often preferred, especially by wives of the poorer classes, for the reason that a conclusion for aliment can be inserted, and the husband, if decree is granted, will be ordained to aliment the wife during their joint lives. The wife of a poor man is, if she divorces him, thrown upon her own resources. Her claim to her legal rights is worthless where the husband has no capital. See DIVORCE.

For the nature of adultery and the evidence by which it is proved, see ADULTERY; DIVORCE; CONSISTORIAL ACTIONS. The same defences are in general competent in a judicial separation as in a divorce, and adultery connived at or condoned is not a ground of decree (see *Watson*, 1874, 12 S. L. R. 78).

2. *Cruelty*, or *Sævitia*.—Cruelty has been thus defined: "Personal violence, as assault upon the woman, threats of violence which induce the fear of immediate danger to her person, maltreatment of her person so as to injure her health; these are by the law of Scotland and England a sufficient ground of divorce *a mensa et thoro*. Furthermore, any conduct towards the wife which leads to any injury, either creating danger to her life or danger to her health, that too may be taken as regarded by the law of Scotland and by the law of England sufficient ground of divorce" (per Ld. Brougham in *Paterson*, 1850, 7 Bell's App. at p. 363, cited by Ld. Pres. Inglis in *Graham*, 1878, 5 R. at p. 1095). *Paterson* is the leading case in Scotland. In England it is *Evans*, 1790, 1 Hag. Con. 35 (see per Lopes, L. J. in *Russell* [1895], P. at p. 322). Lopes and Lindley, L. JJ., defined cruelty thus: "There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it" (*Russell*, [1895] P. at p. 332). This definition was approved of by the majority in the House of Lords (*Russell* v. *R.*, [1897] A. C. 395). In a recent case Ld. Watson said the husband must stop short of injuring the wife's "health of mind or body, or of rendering her existence intolerable" (*Mackenzie*, 1895, 22 R. H. L. at p. 44).

There is an undoubted tendency to relax the strictness of the rule, and to regard as cruelty conduct which renders the existence of the other spouse intolerable, although there has been no such physical violence as to cause danger to life or limb, or, except indirectly, to health, and none such has been threatened (*Mackenzie*, 1892, 20 R. 686; 1895, 22 R. H. L. 33; *Kelly*, 1870, L. R. 2 P. & D. 59; *Bethune*, [1891] P. 205; *Beauclerk*, [1891] P. 189; *Aubourg*, 1896, 72 L. T. 295). But the judgment of the House of Lords in *Russell* clearly affirms that danger to health is still the only test of cruelty. "Mere moral torture will not be sufficient" (*M'Gaan*, 1880, 8 R. 279, per Ld. J.-C. Moncreiff). But if it be shown that a course of tyranny is breaking the health of the other spouse, this may be enough (*Kelly* and *Mackenzie*, *ut supra*). One act of violence may be sufficient (*Stewart*, 1870, 8 M. 821). But there are many cases in which the Court would decline to give decree on account of a single act, if it was not of a very gross character and there was no reason to fear its repetition (see per Herschell, Ld. Ch., in *Mackenzie*, 1895, 22 R. H. L. at p. 36; per Ld. Shand in *Strain*, 13 R. at p. 138). The issue is, Can the wife with safety continue to live with the husband? (see per Ld. Pres. Inglis in *Graham*, 1878, 5 R. at p. 1095). It is enough that violence is seriously threatened (*Evans*, 1 Hag. Con. at p. 40, per Ld. Stowell; *Mackenzie*, 1895, 22 R. H. L. 32). It is cruelty for one spouse recklessly to infect the other with venereal disease (*Strain*, 1885, 13 R. 132).

And this would probably be held of other diseases if the evidence showed a malicious intention to communicate them, or an utter recklessness

as to the health of the other spouse (see *Chesnutt*, 1854, 1 Spinks, at p. 205; *R.* v. *Clarence*, 1888, 22 Q. B. D. at p. 52).

Habitual intoxication is not cruelty (*Fulton*, 1850, 12 D. 1104). But when coupled with such conduct as puts the wife in reasonable fear of personal injury it will be a ground of decree (*M'Gaan, ut supra*).

If the husband is insane and has to be kept in restraint, the wife is not entitled to judicial separation (*Stewart*, 1870, 8 M. at pp. 828, 831; *Hall*, 1864, 33 L. J. P. & M. 65). But where the insanity was recurrent, and the husband, though released from confinement, was liable to sudden attacks of mania, during which his wife was in danger, decree was pronounced (*Hanbury*, [1892] P. 222; see *Curtis*, 1858, 1 Sw. & Tr. at p. 213). The question whether persistent false charges that the other spouse has been guilty of gross offences amounted to cruelty was raised in the case of *Russell*, [1895] P. 315; [1897] A. C. 395, and decided in the negative, there being no proof that the plaintiff's health was thereby endangered (see *Moir*, 1751, 6 Pat. Supp. 688; *s.c.* Elch. *voce* "H. & W." No. 35; Fraser, *H. & W.* ii. 896).

Cruelty by the Wife.—That which would be cruelty if committed by the husband on the wife is cruelty if committed by the wife on the husband.

Nor is it in this case necessary to prove that the husband incurred actual danger to life or limb. If the wife attacks the husband in such a way that he is driven to violence in self-defence, it may be her safety that is the more endangered, but she is guilty of cruelty (*Furlonger*, 1847, 5 N. of C. 422; *Forth*, 1867, 36 L. J. P. & M. 122; see *Russell*, [1895] P. at p. 328). And in a recent case Ld. Kincairney thought he was entitled to consider the danger to the children in being left in the charge of a violent mother (*Nisbet*, 1896, 34 S. L. R. 229). The fact that the wife was the offender does not relieve the husband of his liability to aliment her (*Nisbet, ut supra*).

Condonation of Cruelty, or *Remissio injuriæ.*—This is a phrase sometimes used, though it is not very accurate. Forgiveness of a particular act of cruelty, and continuation of or return to cohabitation, will prevent this act being in itself sufficient to entitle the wife to decree. But any subsequent acts will justify her in opening up the whole history of the married life, and she will not be barred from proving those of earlier date which were at the time forgiven (*Graham*, 1878, 5 R. 1093; *Martin*, 1896, 3 S. L. T. No. 226, Ld. Kincairney).

Mora will not, in general, be a bar where the spouses are apart, and return to cohabitation would not be safe (*Cooke*, 1863, 3 Sw. & Tr. 126).

It is no defence that the wife has been a party to a contract of voluntary separation (*Lawson*, 1797, Mor. 6157; *Martin, ut supra*; Fraser, *H. & W.* ii. 914; Bell, *Prin.* 1544).

Effects of the Decree.—The decree does not dissolve the bond of marriage or enable the parties to contract another marriage, but it entitles the innocent spouse to live apart. The position of a wife who has obtained a decree is thus defined by sec. 6 of the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86):—

"After a decree of separation *a mensa et thoro* obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her in reference to which the *jus mariti* and husband's right of administration are excluded, and such property may be disposed of by her in all respects as if she were unmarried, and on her decease the same shall, in case she

shall die intestate, pass to her heirs and representatives in like manner as if her husband had been then dead, provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, and the *jus mariti* and right of administration of her husband shall be excluded in reference thereto, subject, however, to any agreement in writing made between herself and her husband; and the wife shall, while so separate, be capable of entering into obligations and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married, and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as pursuer or defender of any action, after the date of such decree of separation and during the subsistence thereof, provided that where, upon any such separation, aliment has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use." The question whether she can acquire a domicile for herself is still open (see DOMICILE).

Subject to the above provisions of the Conjugal Rights Act, reconciliation of the spouses and return to cohabitation puts an end to the effects of the decree, and restores the spouses to their former position (Fraser, *H. & W.* ii. 908). But the Court will not recall the decree at the instance of the offender, or allow proof that cohabitation would no longer be dangerous to the other (*Strain*, 1890, 17 R. 297).

See ADHERENCE; ALIMENT; DIVORCE.

Judicio sisti Caution.—See CAUTION (JUDICIAL).

Jurat.—See AFFIDAVIT.

Juratory Caution.—See CAUTION (JUDICIAL).

Jurisdiction.—The object of this article is to state the principles or rules observed by the Courts of Scotland in determining whether they have jurisdiction to deal with cases brought before them. It is not proposed to consider the rules which prevail to regulate the distribution of business in the different Courts of the country, which will be dealt with in the articles upon these Courts (see SESSION, COURT OF; SHERIFF COURT; etc.). The law with which it is proposed to deal is that which regulates our Courts in determining whether or not they have jurisdiction in cases which, if they have, would be appropriate for their consideration. That law naturally finds its best exposition in cases regarding the jurisdiction of the Supreme Court, to which attention will accordingly be mainly confined; but it is also applicable to questions regarding the jurisdiction of local Courts, where these depend on general principles.

Jurisdiction is defined by Erskine (I. ii. 2) as "a power conferred on a judge or magistrate to take cognisance of and determine debateable questions according to law, and to carry his sentences into execution." It is derived from the sovereign power, and is granted with reference to, and limited by, the bounds of a particular territory (Ersk. I. ii. 3). It would appear to follow, that questions of jurisdiction must depend broadly upon

whether or not the Court can pronounce a judgment which will be effective within its territory. The principle has been so stated in the latest English work on the subject (Dicey, *Conflict of Laws*, 38–56), and, it is thought, will be found to underlie the rules which have been followed by the Courts of Scotland. It is not proposed to elaborate this principle; but as it appears to enter, at all events, very largely into all questions of jurisdiction, it affords a convenient means of classifying the different grounds of jurisdiction.

In actions which seek for a personal decree, the judgment, to be effective, must be enforced against the person or property of the defender. From this it follows that the ground of jurisdiction in such cases must be looked for in the presence, more or less permanent, of the defender within the jurisdiction, or in the presence of property belonging to him within the territory, either real property or property fixed there by arrestment, against which the judgment may be enforced. There are other actions in which no personal decree is sought, but which are brought to declare or regulate rights in property situated within the territory, which may be either real property, or moveable property which has come to be in the hands of the Court, or with reference to which it is necessary for the Court to exercise control or protection. In these cases the effectiveness of the judgment of the Court depends upon the position of the property within the territory. There is another class of actions, viz. actions of divorce, in which the decree sought will primarily and principally affect the *status* of the pursuer or defender, or of both. Such cases are naturally competent to the Courts of the country in which the person whose status is to be affected has his domicile, because the judgment of these Courts will effectively regulate his status within the community to which he belongs.

From these considerations there follows a division of the question into: I. Jurisdiction in personal actions. II. In real actions. III. In divorce. There must be added to these, certain classes of cases in which jurisdiction depends upon similar considerations, but which present peculiarities requiring separate treatment, viz.: IV. Jurisdiction in bankruptcy. V. In the winding up of joint-stock companies. VI. In succession and administration. VII. Jurisdiction by reconvention. VIII. By prorogation, and IX. Criminal jurisdiction.

I. Jurisdiction in Personal Actions.

The ground of jurisdiction in these actions falls under five heads: 1. Residence. 2. Personal presence in certain cases. 3. Possession of heritable property. 4. Possession of moveable property which has been arrested *jurisdictionis fundandæ causa*. 5. Arrestment of the debtor's person *in meditatione fugæ*.

1. *Residence.*—The law of Scotland does not recognise the mere presence of a defender within the territory as sufficient in itself to confer jurisdiction, except in a limited class of cases, which will be noticed later. In the ordinary case, what is required is that the defender shall be resident in Scotland. As the nature of the residence which is to be deemed sufficient requires definition, the constant practice of the Scotch Courts (in the words of Ld. Pres. Inglis in *Joel*, 1859, 21 D. 929, at 939) "has fixed that a residence of forty days is sufficient—not mere presence within the territory, travelling about and never fixed in one place, but continuous residence in one locality for forty days" (Ersk. I. ii. 16; *Paterson*, 1672, Mor. 3724; *Calder*, 1798, Mor. 2250; Ld. Fullerton in *Ringer*, 1840, 2 D. 317; *Joel*, *supra*). It is not necessary that the forty days be continuous, provided the interruptions do not take off its permanent character (*Ritchie*, 1852, 15 D.

205, per Ld. Pres. M'Neill, at 208). As this jurisdiction depends upon residence, it ceases where the defender has left the realm before proceedings have been raised (*Johnston*, 1861, 23 D. 758). In that case the defender who was ordinarily resident in America, had resided in a hired house in Scotland for the summer of 1859. He went to England in November, and within forty days of departure an action was executed against him at the house in which he had resided in Scotland. Ld. Kinloch, who was the Lord Ordinary, said, with reference to this ground of jurisdiction: "The jurisdiction in such a case does not rest on permanent settlement, or the possession by an individual of a house of his own. It rests exclusively upon residence within the country for the appointed period. It is personal presence within the realm which forms the important element. It seems to follow, from the principle on which the jurisdiction is in such a case founded, that the cessation of personal presence, by departure from the realm before judicial proceedings are raised, at once puts an end to the jurisdiction." In the Inner House the plea, so far as founded on residence, was abandoned as untenable.

The facts of this case have been noticed thus at some length because it has been stated that this jurisdiction founded upon residence continues if the defender has not been absent for forty days (Mackay, *Practice*, vol. i. p. 166, *Manual*, p. 54; Rankine, Ersk. *Prin.* i. 2. 9; Dove Wilson, *Sheriff Court Practice*, pp. 66, 67), and these authorities were followed by Ld. Stormonth Darling in the Outer House in 1891 (*International Exhibition*, 1891, 18 R. 843), while the Inner House expressly refrained from expressing any opinion on the point. These writers cite as their authority the case of *Calder*, 19 January 1798, F. C. But that case only decided that a person who had resided for the necessary period and had left his residence, but not the country, was lawfully cited at his residence. It did not decide that a person who has quitted the country can remain subject to the jurisdiction on the ground of residence, and it is thought the case of *Johnston* is conclusive against such a proposition. The misconception into which these writers have, it is thought, fallen, appears to have been induced by the terms of the Judicature Act, 6 Geo. IV. c. 120, s. 53, which provides that "where a person, not having a dwelling-house in Scotland occupied by his family or servants, shall have left his usual place of residence, and been absent therefrom during the space of forty days without having left notice where he is to be found in Scotland, he shall be held to be absent from Scotland, and be charged and cited according to the forms herein prescribed," *i.e.* by edictal citation; and the previous A. S., 14 Dec. 1805, s. 1, which provided that a person in these circumstances should be held and presumed after such absence, but not sooner, to be furth of Scotland (see Ersk. *Prin.*, 11th ed., s. 9, note, and Ersk. i. 2. 16, note 20). But these enactments merely direct the manner in which persons may be cited, and the presumption which may operate to determine which manner shall be adopted; and even as regards the proper mode of citation, their presumption may be altered by fact (*Brown*, 1849, 11 D. 474). They cannot, it is thought, in any way affect the question whether the person cited is subject to the jurisdiction of the Court on the ground of residence. That question depends upon whether the defender is resident, and has been so for the requisite period; and, as is pointed out by Ld. Pres. Inglis in *Joel*, 1859, 21 D. 939, citation has nothing to do with the founding of jurisdiction. The rule, as he there points out, that citation may be made at a residence which has not been abandoned for forty days, is a mere arbitrary regulation as to the manner in which process shall be served,

while the rule as to jurisdiction is "a rule of the municipal law in the application of a general principle of the law of nations" (see also Ld. Kinloch in *Johnston*, 1861, 23 D. 762, 763). This ground of jurisdiction applies in all personal actions, even where the cause of action arises abroad (*Frenchman*, 1550, Mor. 7323; *M'Larty*, 1881, 8 R. 435; *Graham*, 1788, Hume, p. 250). In the case of a firm or company, jurisdiction depends upon what has been called trade domicile, *i.e.* the company must have a place of business within the territory. It is not enough that there should be an agent who acts for the company in the territory (*Bishop*, 1830, 8 S. 558; *Laidlaw*, 1890, 17 R. 544).

2. *Personal Presence.*—The mere presence of the defender within the territory is sufficient to give jurisdiction where the cause of action is one which clearly arises or occurs within the territory. The typical case in which this ground of jurisdiction is sufficient, is the case of an action founded upon a contract which is made, or which is to be performed, within the territory; and this kind of jurisdiction is accordingly commonly referred to as jurisdiction *ratione contractus*. The foundation of this kind of jurisdiction in the civil law, and its nature, are fully discussed by Ld. J.-C. Inglis in *Sinclair*, 1860, 22 D. 1475, at 1481. The action in that case was for breach of promise of marriage. But the rule is not confined to actions founded on contract, but extends to every case where "the cause of action, be it contract or delict, clearly arises or occurs within the territory" (per Ld. J.-C. Inglis, *Johnston*, 1861, 23 D. 769). Jurisdiction was accordingly sustained under this head in an action of damages for slander (*Kermick*, 1871, 9 M. 984) (see also Ld. Mackenzie, *Ringer*, 1840, 2 D. 316; *Crowder*, 1831, 10 S. 29; 1832, 6 W. & S. 271; *Pirie*, 1867, 5 M. 500; *Logan*, 1859, 3 Irv. 323). On this ground the Court has sustained its jurisdiction in actions for declarator of marriage alleged to be contracted in Scotland (*Key*, 7 Mar. 1780, Arniston Collection Session Papers. Adv Lib. vol. cxxx. No. 8, cited by Fraser, *H. & W.* p. 1272, note; *Wylie*, 1834, 12 S. 927; *Kirkpatrick*, 1838, 16 S. 1200; *Longworth*, 1860, 1 M 161). Also, in an action of divorce in which the defender disputed the jurisdiction on the ground that he was a domiciled Englishman, the Court pronounced decree for interim aliment, the defender having been personally cited (*Stavert*, 15 Nov. 1881, not reported; Mackay, *Manual*, 55). The personal presence of the defender is essential (*Parnell*, 1889, 16 R. 917). It was at one time held that a person of Scotch origin remained subject to the jurisdiction of the Scotch Courts *ratione originis* although he had quitted Scotland, but this doctrine was negatived in *Grant*, 1825, 1 W. & S. 716. Opinions have, however, been expressed, that where a defender is of Scotch origin his mere personal presence within the territory will give the Courts jurisdiction over him (*Ritchie*, 1852, 15 D. 205; Ld. Fullerton, 209; Ld. Cuninghame, 209; Ld. Ivory, 210); and opinion was carefully reserved upon it in a later case (*Sinclair*, 1860, 22 D. 1475).

Jurisdiction against a foreigner will be sustained in the Sheriff Court upon the grounds which have just been treated, *i.e.* residence and personal presence in cases of contract or delict in the territory, just as in the Court of Session (*Pirie*, 1867, 5 M. 497, per Ld. Justice-Clerk, at 499, 500; *Kermick*, 1871, 9 M. 984).

The mere presence of a defender within the territory, and his personal citation, have been held to confer jurisdiction in the case of itinerant persons (Ersk. i. 2. 16; *M'Niven*, 1834, 12 S. 453; *Linn*, 1881, 8 R. 849; *Lees*, 1709, Mor. 4791).

3. *Possession of Heritable Property in Scotland.*—"The beneficial posses-

sion, whether natural or civil, of immoveable estate within the realm, whether permanently or temporarily upon a good title of possession, is sufficient to found jurisdiction," not only in actions relating to that estate, but in all personal actions (per Ld. Pres. Inglis in *Fraser*, 1870, 8 M. 400, at 404). The rule of our law was so announced after a careful consideration of the whole authorities, and, as explained by his Lordship, is in accordance with "what has been generally laid down as a proper test of jurisdiction, that the decree can be made effectual within the territory" (p. 405). The basis of this ground of jurisdiction was similarly explained in previous cases (*Ferrie*, 1851, 9 S. 854, opinion of consulted judges, at 855; Ld. Fullerton in *Macarthur*, 1842, 4 D. 354, at 362). The nature of the title on which the property is held is not important, so long as there is a beneficial interest which is capable of attachment. Thus jurisdiction has been upheld where the defender owned a defeasible mid-superiority (*Kirkpatrick*, 1838, 16 S. 1200); where he had right to an estate as apparent heir, although he had neither made up titles nor entered into possession (*Macarthur*, 1842, 4 D. 354); where he was a bondholder infeft in Scotch heritage (*Ashburton*, 1892, 20 R. 187); where he was a lessee of a house and shootings (*Fraser*, 1870, 8 M. 400); where the defender had conveyed away the estate, but the action was brought to reduce the conveyance as a fraud upon his creditors (*Shaw*, 1869, 9 M. 449); and where his property had been conveyed by the defender to marriage-contract trustees, to be held for his wife, and, if he survived, for himself in liferent and his children in fee, their right not to vest till survivance and majority, and the only part of the deed put on record was that which conveyed the estate to the trustees in trust for the purposes after specified (*Smith*, 1894, 22 R. 130). But the mere feudal title, without beneficial interest, will not be sufficient. Thus where the defender had sold his property, but the disposition had not been recorded, it was held there was no jurisdiction (*Bowman*, 1877, 4 R. 322). But where there was no completed contract of sale, owing to the missives being improbative, the execution of a disposition which had not been delivered at the date of action was held insufficient to oust the jurisdiction (*Dowie & Co.*, 1891, 18 R. 986). Where the defenders are trustees, the possession of heritage by the trust will give jurisdiction against them *quâ* trustees (*Ferrie*, 1831, 9 S. 854; *Charles*, 1868, 8 M. 772; *Kennedy*, 1884, 12 R. 275; *Robertson's Trs.*, 1888, 15 R. 914; *Ashburton*, 1892, 20 R. 187). But the possession of property by one of several trustees, though it would found jurisdiction against him as an individual, will not found jurisdiction against the trustees (*Mackenzie*, 1868, 6 M. 932; see also *Lamb*, 1624, Mor. 4812; *Hepburn*, 1627, Mor. 4814; *Haldane*, 1724, Mor. 4818). Where the defender is a foreigner, and the sole ground of jurisdiction against him depends upon his possession of property in Scotland, the action must be in the Court of Session, as the *commune forum* of foreigners (Ersk. i. 2. 18; *M'Bey*, 1879, 7 R. 255).

4. *The Possession of Moveable Property which has been arrested* Jurisdictionis fundandæ causa.—This ground of jurisdiction is based upon similar principles to the preceding. Heritable property being fixed *sua natura* within the territory, remains open to the diligence of the Courts; but in the case of moveables, these require to be arrested so as to fix them in the territory (consulted judges in *Ferrie*, 1831, 9 S. 854; Ld. Fullerton in *Macarthur*, 1842, 4 D. 354). It is said to have been borrowed from Holland, where it was introduced from views of expediency and for the encouragement of commerce (consulted judges in *Cameron*, 1838, 16 S. 918). The arrestment proceeds upon warrant of the Sheriff or upon letters passing

the Signet. It may be used to attach any moveable property (corporeal or incorporeal) belonging to the defender in Scotland. The property, to be arrestable, must be in the hands of another person than the defender, and not a mere servant of the defender. If the moveables be validly attached at the date of citation, there is jurisdiction, and the arrestment, having then effected its purpose, no longer attaches the property, which may be parted with unless attached by new diligence (*North*, 1890, 17 R. H. L. 60, Ld. Watson, at 62, 63). It applies solely to the action in which it is used, and in favour of the pursuer using it (*Goodwin*, 1871, 10 M. 214; *Anderson*, 1871, 10 M. 217). The jurisdiction conferred by arrestment must be exercised by the Court of Session, except in the case where a ship belonging to a foreigner, or of which he is part-owner or master, has been arrested within the sheriffdom, and the action is one which would be competent to the Court against a Scotsman subject to its jurisdiction (Sheriff Court Act, 1877, s. 8, subs. 4). The Sheriffs have also a power within their jurisdiction of detaining any foreign ship which has done injury to any property belonging to Her Majesty or any of Her Majesty's subjects, found in any port or river of the United Kingdom, or within three miles of the coast, until security has been given to answer for the injury (Merchant Shipping Act, 1894, s. 688). But it is thought this would not confer jurisdiction to try the cause, unless it was otherwise competent, in the Sheriff Court.

(For details as to the circumstances in which jurisdiction may be founded by arrestment, see ARRESTMENT JURISDICTIONIS FUNDANDÆ CAUSA.)

5. *Arrestment of the Debtor's Person* in Meditatione fugæ.—A foreigner who has been arrested under such a warrant (as to which, see DILIGENCE, vol. iv. 230) is subject to the jurisdiction of the Scotch Courts. The jurisdiction depends upon analogous principles to those on which jurisdiction by arrestment of moveables is founded; and, accordingly, it is in itself sufficient to found jurisdiction, although the defender would not otherwise be subject to the jurisdiction of the Courts (see Ld. Wood's judgment in *Muir*, 1861, 23 D. 1232; see also Ersk. i. 2. 19–21; *Morison*, 1867, 5 M. 136; *Burn*, 1828, 7 S. 194; *Irvine*, 1869, 7 M. 723). Imprisonment under such warrants is now incompetent, except in the few cases in which imprisonment after decree is still competent, viz.: For (1) taxes, fines, or penalties due to Her Majesty, and assessments lawfully imposed; and (2) sums decerned for aliment (Debtors Act, 1880, s. 4; *Hart*, 1890, 18 R. 169). Such warrants cannot be executed beyond the territory (*Adam*, 1887, 14 R. 800).

II. JURISDICTION IN REAL ACTIONS.

In actions which have for their subject-matter the determination of the right of possession in, or ownership of, or of other right in land in Scotland, the Court has jurisdiction *ratione rei sitæ*, although the parties who may have to be called as defenders to the action are not otherwise subject to the jurisdiction (Ersk. i. 2. 17; *Williamson*, 1635, Mor. 4815). It is the only Court competent to determine such rights; and, accordingly, not only has jurisdiction, but exclusive jurisdiction (Story, ss. 553, 554: see also *Ashburton*, 1892, 20 R. 187).

It has been laid down by the House of Lords in an English case, that the Courts of the *situs* are not only exclusive as regards all questions of title, but also in actions of damages for trespass, as the question involved in such actions, and the rights of parties, depend on the title. The mere fact that the question is raised in an action of damages does not change its essential character. Accordingly, the Court refused to entertain an action of damages for trespass to lands situated abroad (*British South Africa Co.*,

[1893] A. C. 602: see Ld. Herschell's judgment). Where, however, the question involved, although having reference to land, depends upon contract or other considerations not peculiar to the ownership of land, the question of jurisdiction will be determined according to the rules which regulate jurisdiction in personal actions (see Dicey, *Conflict of Laws*, pp. 216, 218).

On the same principle, the Court has jurisdiction to determine questions with reference to moveable property which is *in manibus curæ*. Accordingly, where moveables have been placed *in manibus curæ* by the raising of an action of multiplepoinding, the Court has jurisdiction to determine all questions regarding such moveables, both against persons resident in the territory and against foreigners. The jurisdiction arises *ratione rei sitæ*. The fund being in the hands of the Court, the Court has both the duty and the power of distributing it according to the rights of parties, whatever be their residence or domicile (*Mansfield*, 1795, Mor. 2594, 2 Bell, *Com.* 68; *Miller*, 1838, 16 S. 1204; *Crockhart*, 1852, 15 D. 202; *Black & Knox*, 1805, Mor. App. "Foreign," No. 7). But the jurisdiction thus exercised relates exclusively to the fund in question, and, accordingly, a foreigner claiming in a multiplepoinding does not subject himself to the jurisdiction of the Court in other matters by reconvention (*Bell*, 1852, 14 D. 837). Similarly, the Court has jurisdiction, where necessary, to regulate the possession of, or prevent interference with, moveable property situated within the territory (*Jones*, 1862, 24 D. 319, Ld. Pres. Inglis, at 322). So also, where a wrong is being committed within the territory, the Court has jurisdiction to prevent it, although the wrong-doer is not subject to the ordinary jurisdiction of the Court in personal actions (*Waygood*, 1885, 12 R. 651).

III. Jurisdiction in Divorce.

While there are many actions in which the status of an individual may be in question, the action of divorce differs from all others in this, that in it the Court is asked to dissolve the marriage bond and thus change the status of the individuals concerned. And as the status of an individual is determined by the law of his domicile, so the Courts which have jurisdiction to alter his status are the Courts of his domicile. The law both of England and Scotland is now definitely settled, to the effect that the domicile of the parties is the sole ground of jurisdiction in cases of divorce, by the case of *Le Mesurier*, [1895] A. C 517 (see Divorce, vol. iv. pp. 310, 311; Domicile, *Matrimonial*, vol. iv. p. 327). There are many other actions in which questions of status are involved, such as declarators of marriage, of nullity of marriage, of legitimacy or bastardy; but in these the jurisdiction of the Court is not invoked to alter the status of any person. It follows that the question of jurisdiction in such cases depends upon wholly different considerations. Thus in actions of declarator of marriage, jurisdiction has been held to arise *ratione contractus* against a defender personally present in Scotland, the place of the contract, though not domiciled there (see *supra*). So also, in declarators of nullity of marriage, the Courts of the place of celebration have been held to have jurisdiction, although none of the parties are domiciled or resident there (*Sottomayor*, 1877, 3 P. D. 1; Dicey, *Conflict of Laws*, 276). Westlake (p. 82) regards the residence of the defender as a good ground for jurisdiction in such an action (see Marriage). So also, in cases of declarator of legitimacy, the jurisdiction of the Court will not depend upon the domicile of the pursuer, but upon whether, in the circumstances of the particular case, there is jurisdiction against the defender. Thus, for example, where a

declarator of legitimacy is combined with, and ancillary to, a declarator of a right to succeed to heritable estate in Scotland, it is thought that the Scotch Courts would certainly have jurisdiction to entertain it. Where, on the other hand, the action does not affect Scotch heritage, and the defenders are not personally subject to the jurisdiction of the Scotch Courts, the Court will not have jurisdiction (*Morley*, 1888, 16 R. 78). In England jurisdiction in declarations of legitimacy is regulated by the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), but this Act does not apply to Scotland. So also residence without domicile would probably be sufficient to give jurisdiction in cases of restitution of conjugal rights, or judicial separation; and in cases of aliment the most temporary residence would be sufficient (Ld. Watson in *Le Mesurier*, [1895] A. C. 517, p. 526; see *supra*).

IV. Jurisdiction in Bankruptcy.

The Scotch Courts have jurisdiction to award sequestration of the estates of any living debtor, who is subject to the jurisdiction of the Court, upon his own petition, with the concurrence of creditors to a certain amount (Bankruptcy Act, 1856, s. 13). A person is subject to the jurisdiction of the Court within the meaning of the Act when he is resident within the territory in the sense required to found jurisdiction in personal actions as above explained, but not when he is only subject to a limited effect only, as by arrestment, *ratione contractus*, or reconvention (*Joel*, 1859, 21 D. 929; *Goetze*, 1874, 2 R. 150; *Thomson*, 1862, 24 D. 331; *Croil*, 1863, 1 M. 509). It is not certain whether the possession of heritage would be sufficient, but it is thought it would be (Ld. J.-C. Inglis, *Joel*, *supra*, p. 938).

Where the petition is at the instance of creditors, the debtor must not only be subject to the jurisdiction of the Court as above explained, but the Court can award sequestration only if the debtor be notour bankrupt, and if he has resided, or had a dwelling-house or place of business, in Scotland within a year before the date of the presentation of the petition; and in case of a company, if it be notour bankrupt, and if within such time it has carried on business in Scotland, and any partner have so resided or had a dwelling-house, or if the company have had a place of business, in Scotland. Sequestration may be awarded of the estate of a deceased debtor who at the date of his death was subject to the jurisdiction, at the instance of a mandatary or of creditors duly qualified.

Sequestration being a universal transference of the debtor's property, there cannot be two sequestrations; and, accordingly, if sequestration or its equivalent has been awarded by a foreign Court of competent jurisdiction, sequestration in this country will be refused (*Goetze*, 1874 2 R. 150).

This rule is *juris gentium*, and depends upon the principle that in universal transferences of moveable property the law which rules is the law of the domicile, and accordingly the appropriate Court to effect the transference is the Court of the domicile. The principles of international law applicable in all questions of jurisdiction in bankruptcy were summed up by Ld. Pres. Inglis in these four propositions (*Phosphate Sewage Co.*, 1878, 5 R. 1138): (1) When the Court of the domicile has vested the moveable estate for distribution, no part of it can be touched or affected except through these proceedings, and by the order of that Court. Its jurisdiction is exclusive. (2) Where the bankrupt is a trading company with more than one domicile, the process may be instituted in the Court of either domicile, but that Court in which proceedings are first instituted has

exclusive jurisdiction. (3) These principles do not apply to real estate situated beyond the country of the domicile. But in questions between different parts of her Majesty's dominions, this is regulated by Statute (19 & 20 Vict. c. 79, s. 102). (4) The trustee or assignee in the proceedings is, in his character as such, subject only to the jurisdiction of the Court to which he owes his title, and creditors claiming to participate in the distribution must resort to that Court to make good their claims. (See also *Strother*, 1803, Mor. *voce* "*Forum Competens*," App. No. 4; *Selking*, 1805, cited Bell, *Com.* ii. 571, note; 2 Dow, 230; *Maitland*, 1808 Mor. "Bankrupt," App. No. 26; *Royal Bank*, 20 Jan. 1813, F. C.; *Roy*, 12 D. 1028.)

The word "domicile," in this connection, is used in the same sense as in questions of succession, for the rule in both cases is founded on the same principle, viz. that moveables follow the person—*mobilia sequuntur personam*. But it is to be observed that the matters to which the Courts in this country must have regard, in determining whether they have jurisdiction, have been defined by Statute. And, accordingly, in applying the rules of international law above noticed to Scotch sequestrations, the Court, it is conceived, will regard the question of domicile as determined if the requirements of the Statute are satisfied. In other words, the Legislature has specified the matters which must be looked to in determining the question of domicile. If these matters are present, the Court has jurisdiction, and will vest and distribute the estate, wherever situated, according to the law of Scotland. So also, where the process has been instituted in a foreign Court which recognises the same principles of international law, and purports to exercise jurisdiction *ratione domicilii*, the Court would, it is thought, treat the exercise of jurisdiction by the foreign Court as concluding the question of domicile, and recognise the process accordingly (*Goetze, supra*; *Waygood*, 1885, 12 R. 651; *Wilkie*, 1870, 9 M. 168).

But while the Court will decline to award sequestration where the existence of a proper process in a foreign country is brought under their notice, it does not follow that an award of sequestration in terms of the Statute is null because of the existence of a prior process before a competent foreign tribunal (*Gibson*, 1894, 21 R. 840, Ld. Young, 847).

V. Jurisdiction in the Winding up of Companies.

The Court of Session has jurisdiction in the winding up of all companies registered in Scotland (Companies Act, 1862, s. 81).

In the case of an unregistered company, which means any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under the Companies Acts, the Court of Session has jurisdiction if the company have its principal place of business in Scotland, or one of its principal places of business (Companies Act, 1862, s. 199). It has also jurisdiction in the case of a company incorporated in a foreign country and having its principal place of business there, but which has an office and assets in Scotland; and the fact that there is a foreign liquidation pending does not affect the jurisdiction of the Court to make the order, though this will generally be made ancillary to the liquidation in the country of the domicile (*Marshall*, 1895, 22 R. 697; Buckley, p. 466, 7th ed., and case there cited). But there is no jurisdiction where the company has no office or branch, but carries on business by means of agents (*Lloyd, Générale Italiano*, 29 Ch. D. 219).

(See on the whole subject of winding up such companies, Buckley, note to sec. 199, 7th ed., pp. 464 *et seq.*)

See Joint Stock Companies.

VI. Jurisdiction in Succession and Administration.

The jurisdiction of the Court in actions brought against executors or trustees with reference to the succession of deceased persons, while it may be sustained upon the same grounds as in ordinary petitory actions, depends in certain circumstances upon a wider foundation. Further, the Court, although possessing jurisdiction, exercises a discretion in determining whether it will entertain the case upon considerations of convenience.

The Court has jurisdiction to appoint and confirm executors wherever a person dies possessed of estate situated in Scotland, and in the case of such executors the Court has jurisdiction to entertain actions against them having reference to the deceased's succession (*Ferguson*, 3 Pat. 503, 510; *M'Morine*, 1845, 7 D. 270; *Mags. of Wick*, 1849, 12 D. 299; *M'Gennis*, 1891, 18 R. 817; *Brown*, 1883, 10 R. 1235). Similarly, where the estates of the deceased have been transferred by him to trustees, to be administered and distributed by them, the Courts have jurisdiction to entertain actions against such trustees in regard to the estate, independently of other grounds, where the trust is one constituted in Scotland and to be executed there (*Kennedy*, 1884, 12 R. 275, Ld. M'Laren, 282; *Orr-Ewing's Trs.*, 1885, 13 R. H. L. 1, Ld. Watson, p. 23; *Robertson's Tr.*, 1888, 15 R. 920; *Ashburton*, 1892, 20 R. 196). The ground of this jurisdiction is thus stated by Ld. M'Laren in *Kennedy*: "The obligation of trustees to account for their administration is one and indivisible, and is in general to be enforced by an appeal to the Courts of the country in which that obligation is to be fulfilled, and in which the trust is to be executed." And Ld. Watson (*Orr-Ewing's Trs.*, 1885, 13 R. H. L. 23) said: "In my opinion the trust created by the *mortis causa* disposition and settlement is a Scotch trust, and *primâ facie* his trustees are amenable, in all questions touching the administration of the trust estate, to the jurisdiction of the Courts of Scotland." (See also *Thomson*, 1895, 22 R. 866.) This general ground of jurisdiction over Scotch executors and trustees does not displace the ordinary methods of determining jurisdiction. Accordingly, trustees or executors, if subject to the jurisdiction of the Scotch Courts on any ordinary ground, may be sued in Scotland in matters relating to the trust or executry estate. Thus if the subject of the trust be heritable estate in Scotland, the Courts will have jurisdiction (*Charles*, 1868, 6 M. 772, per Ld. Pres. Inglis; *Martin*, 1879, 7 R. 329). So if a trustee is subject to the jurisdiction of the Courts in personal actions, the Courts have jurisdiction over him in actions with reference to the trust estate (*Ferguson*, 3 P. 510, per Ld. Loughborough: *Robertson*, 1843, 6 D. 170: *Cruikshank*, 1843, 5 D. 733: *Ferguson*, 1853, 15 D. 637; *Thomson's Trs.*, 1851, 14 D. 217: *Macalister's Exrs.*, 1834, 13 S. 171; *Boe*, 1857, 20 D. 11: *Ferrie*, 1831, 9 S. 854: *Robertson*, 18 Feb. 1817, F. C., note; *Preston*, 1841, 2 Rob. 88; and see review of cases by Lds. Selborne and Watson in *Orr-Ewing's Trs.*, 1885, 13 R. H. L. 1). Jurisdiction founded by arrestment would appear to be in this respect the same as other grounds of jurisdiction *in personam* (*Young*, 1838, 16 S. 572: *M'Morine*, 1845, 7 D. 270: *Campbell*, 1809, Hume, 258: *Rigby*, 1833, 11 S. 256: *Ranken*, 1840, 2 D. 717: *Innerarity*, 1840, 2 D. 813).

But the exercise by the Scotch Courts of jurisdiction over foreign trustees and executors is regulated by considerations of *forum conveniens*. The Court, in dealing with such cases, exercises a discretion conditioned by the true and legitimate interest of the executry estate (*Clements*, 1866, 4 M. 592, per Ld. Pres. Inglis). The general rules which are followed in determining the action of the Court in such cases are these: (1) The action will be sustained where the trustee cannot or will not account in

the proper forum (*Peters*, 1825, 4 S. 107). (2) If the trustee can be called to account, and is willing to account in the proper forum, the action will be dismissed (*Brown's Trs.*, 1830, 9 S. 224). (3) If it be doubtful whether the Courts of the *forum conveniens* can give the pursuer a full remedy, the Court will sist procedure with the view, if necessary, of aiding the action of the foreign Court (*Macmaster*, 1833, 11 S. 685). (*Orr-Ewing's Trs.*, 1885, 13 R. 1, Ld. Watson, pp. 27 *et seq.*: *Sim*, 1892, 19 R. 665; see also *Sydney*, 1897, 34 S. L. R. 532.)

See FORUM NON CONVENIENS.

VII. JURISDICTION ON THE GROUND OF RECONVENTION.

Where a foreigner brings an action in the Scotch Courts, he is, upon considerations of equity, barred from pleading want of jurisdiction in an action brought against him by the defender which is necessary for the complete determination of the rights of parties which are in dispute. In these circumstances the foreigner is said to be subject to the jurisdiction *ex reconventione*. The doctrine of reconvention as it existed in the law of Rome, and has been received and applied in Scotland, is elaborately discussed by Ld. J.-C. Inglis in *Thompson*, 1862, 24 D. 331. The result is thus stated: "Reconvention . . . is a rule devised entirely for the protection of a defender and for the speedy determination of counter claims —that the claims must either arise *in eodem negotio* or be *ejusdem generis*, and that the rule will only apply where the two claims, the *conventio* and the *reconcentio*, may be tried simultaneously, and terminated either by a single sentence or by two sentences, either contemporaneous or nearly contemporaneous" (p. 344). Lds. Neaves, Mackenzie, and Jerviswood give, as examples of the circumstances in which it will apply, the case where a foreigner sues upon a deed which is impeached by the defender on grounds which require a process of reduction, the foreigner being then bound to submit to the jurisdiction in the action of reduction; the case of a counter claim giving rise to a plea of compensation or retention, but which requires to be constituted by action; and the case of a defender who has claims against the foreigner *in pari materiâ*, which might otherwise be left in abeyance. Reconvention has accordingly been held to apply in a reduction by a trustee in a sequestration of a preference claimed by a foreign creditor who had claimed in the sequestration (*Ord*, 1847, 9 D. 541): in an action for redelivery of goods by a trustee in a sequestration against a foreign creditor who had claimed (*Barr*, 1879, 7 R. 247); in a counter action of damages for collision at sea (*Morrison & Milne*, 1866, 5 M. 130); in an action to restrain a foreign company, which had claimed in a Scotch liquidation, from proceeding in a foreign Court (*California Redwood Co.*, 1886, 13 R. 1202): in a suspension and interdict against foreigners, who had raised action in Scotland, proceeding to have the same question determined in a foreign Court (*Dawson*, 1860, 22 D. 685); in an action of damages for the oppressive use of diligence on the dependence of an action by a foreigner (*Baillie*, 1852, 15 D. 267). It has been held not to apply to an action of damages for assault and slander against a foreigner who has brought an action for a judgment debt (*Thompson*, *supra*); to an action against a foreigner claiming in a multiplepoinding by a creditor who had no connection with the multiplepoinding (*Bell*, 1852, 14 D. 839); or to an action upon a bill against an Englishwoman who had brought a suspension and interdict against the holder from noting, protesting, or charging upon it, which had been dismissed upon the holder undertaking not to do summary diligence upon it. It was held that the process of suspension,

which was forced upon the defender in order to prevent an illegal use of summary diligence, involved no submission to the jurisdiction upon the question of liability upon the bill (*Davis*, 1897, 24 R. 297). An incidental petition for recall of arrestments by a foreigner is not a ground for the plea (*Goodwin*, 1871, 10 M. 214). To give rise to the plea in any circumstances, there must be a depending action between the same parties in Scotland when the action is brought, or when the objection to the jurisdiction is pleaded (*M'Ewan's Trs.*, 1852, 15 D. 265; *Longworth*, 1868, 7 M. 70; *Morrison & Milne*, 1865, 5 M. 130; *Whyte*, 1846, 8 D. 952).

VIII. Jurisdiction by Prorogation.

A defender may by consent waive objection to the jurisdiction of the Court. The jurisdiction is then said to be prorogated. The consent may be either express (Mackay, *Manual*, p. 63; *Longmuir*, 1850, 12 D. 926; *Irvine*, 1869, 7 M. 723) or tacit, by pleading without protest against the jurisdiction (Mackay, *Manual*, pp. 63, 65; *Service*, 1627, Mor. 7305; Ersk. i. 2. 29; *A.* v. *B.*, 1628, Mor. 7306; *White*, 1846, 8 D. 952; *Forrest*, 1845, 4 Bell's App. 197). Opinions were expressed in one case that a foreigner could not prorogate the jurisdiction of the Court of Session; but the opinions were not necessary to the decision of the case, as it was held that there had been no prorogation (*Reoch*, 1831, 9 S. 588). A defender who states the plea of no jurisdiction unsuccessfully is not held to waive his objection by stating other defences (*Shaw*, 1696, Mor. 7314). A defender can only prorogate the jurisdiction to the effect of waiving objections personal to himself. He cannot confer jurisdiction in an action not competent to the Court. Thus he cannot by prorogation give jurisdiction to a judge who has retired from the bench (*Innes*, 1827, 6 S. 279), nor to a judge outside his territory (Ersk. i. 2. 29), nor in a case in which another Court has exclusive jurisdiction, (Ersk. i. 2. 72; *Kennedy*, 1611, Mor. 7307; *A.* v. *B.*, 1618, Mor. 7407; *M'Duff*, 1586, Mor. 7304; *Clark*, 1783, Mor. 7532; *Laurie*, 31 Jan. 1812, F. C.). So jurisdiction cannot be prorogated in an action of divorce where the parties are not domiciled in Scotland (*Ringer*, 1840, 2 D. 307). When the Court has no jurisdiction to entertain the cause, it is *pars judicis* to take the objection, notwithstanding that the defender does not plead it, or agrees to waive it (*Redding*, 1888, 15 R. 1102, a case of divorce; *Reid*, 11 Jan. 1814, F. C.).

IX. Criminal Jurisdiction.

The principal circumstance which determines jurisdiction in criminal cases is the *locus delicti*. If a crime be committed in Scotland, no matter by whom, the Scottish Courts have jurisdiction to try and punish the offender. It is of course also necessary, before the offender can be tried and punished, that he be apprehended and brought before the Court. In this respect criminal jurisdiction resembles civil jurisdiction *ratione contractus*, and in order to its completion it is necessary not only that the crime be committed within Scotland, but that the criminal be apprehended there (Hume, ii. 57). It is generally true that unless the crime be committed in Scotland, and unless the criminal be apprehended and brought before the Court, there is no jurisdiction. But to this rule there are exceptions: (1) The jurisdiction of the Courts in the case of treason is founded, not upon the *locus delicti*, but upon nationality, and accordingly the Courts have jurisdiction to try and punish the crime of treason by a British subject, wherever it may have been committed (Hume, ii. 50, and cases of *Kirkpatrick*, 1665, and *Macdonald*, 1747, there reported). (2) If crime be committed by a

Scotsman in Scotland, even if there upon a visit only, the Court has jurisdiction, if the criminal be not apprehended, to pronounce sentence of outlawry, and single and liferent escheat (Hume, ii. 50, and case of *Cresswell*, 10 Feb. 1776, there reported). But it is not so in the case of a foreigner who is under no obligation to remain and answer in the Scotch Court, and whose absence cannot therefore be regarded as contemptuous (Hume, ii. 57). (3) The Court has jurisdiction to try and punish the crime of piracy irrespective of the nationality of the offender or ship (Hume, i. 480), to try offences committed by a British subject on board a British ship on the high seas, or in any foreign port or harbour, or on board any foreign ship to which he does not belong, and offences committed by a foreigner on board a British ship on the high seas (Merchant Shipping Act, 1894, s. 686). Under the Coining Act the Court has jurisdiction to try coining offences committed at sea on ships registered at a Scottish port (24 & 25 Vict. c. 99, s. 36). (4) Offences against the Foreign Enlistment Act (33 & 34 Vict. c. 90) are triable by any Court before which the accused is brought, wherever the offence may have been committed. Under statute the English Courts have jurisdiction over any person who conspires or incites to murder any person, whether a British subject or not, and whether within the Queen's dominions or not, and to try any murder or manslaughter committed on land out of the United Kingdom by a British subject (24 & 25 Vict. c. 100, ss. 4 and 9); but this Act does not apply to Scotland.

The jurisdiction of the Courts extends over the whole territory of Scotland, including ports, harbours, navigable rivers, and anchoring grounds (*Lewis*, 1858, 3 Irv. 16; *M'Allister*, 1837, 1 Swin. 587). The question of the jurisdiction of the Courts over the territorial waters, *i.e.* over waters within cannon-shot of the coast, has never been raised in Scotland. It was raised and decided in the negative in England in the case of *The Franconia* (*R.* v. *Keyn*, 1876, L. R. 2 Ex. Div. 63). Thereafter the Territorial Waters Act, 1878 (40 & 41 Vict. c. 73), was passed. This Act declares the jurisdiction of Her Majesty to extend over the open seas adjacent to the coasts of the United Kingdom, and all other parts of her dominions, to such a distance as is necessary for their defence and security. It declares any offence committed in waters within a marine league of the coast to be within the jurisdiction of the Admiral, *i.e.* the Admiralty of England and Ireland, but provides that proceedings shall not be taken against a foreigner without the consent of the Secretary of State. This Act includes offences committed within the territorial waters of Scotland, but it confers jurisdiction for the trial of such offences upon the Courts of England and Ireland only.

As a crime may be made up of acts and occurrences happening in different places, it may, in certain cases, be difficult to determine whether the crime was committed within the jurisdiction or not, and crimes are so diverse in their nature and incidents that no general rule can well be laid down. (See discussion of this question in Stephen, *Hist. of Criminal Law*, ii. 9 *et seq.*; *Keyn*, 1876, L. R. 2 Ex. Div. 63, Denman, J., 103; Coleridge, C. J., 158; Cockburn, C. J., 232–235.) It is decided that there is jurisdiction where a forgery, fabricated in England, is uttered in Scotland (Hume, ii. 53, 54, and cases there; *Humphreys*, 1839, Bell, *Notes*, 148); where it is uttered in Scotland by being posted in a letter addressed to England (*Jeffreys*, 1842, 1 Broun, 327, Bell, *Notes*, 149); where goods are obtained in England by a fraudulent letter despatched from Scotland (*Witherington*, 1881, 4 Coup. 475, 8 R. J. C. 41, in which the previous cases are reviewed), and *vice versâ* (*Bradbury*, 1872, 2 Coup. 311); where money is obtained in Scotland by a fraudulent advertisement in England (*Allan*, 1873, 2 Coup.

402); where a Scotch bankrupt uplifts money in England to defraud his creditors (*M'Kay*, 1866, 5 Irv. 329). Thieves and resetters found in possession of stolen property may be tried where they are apprehended, the crime being continuous. This is both at common law and by statute (Hume, ii. 54, and cases cited Macdonald, *Crim. Law*, 249, note 1; Acts 13 Geo. III. c. 31, ss. 4 and 5; 44 Geo. III. c. 92, ss. 7, 8; 24 & 25 Vict. c. 96, s. 114). This applies only to the theft or reset which is continued by the possession, not to any peculiarity in the manner of taking, as by housebreaking or the like (Hume, ii. 55; Alison, ii. 78, 79). Under the Post Office Act (7 Will. IV. and 1 Vict. c. 36, s. 37) the Courts of every place through which the letter or article which is the subject of the offence passes have jurisdiction; and in second offences of coining, the Court which tried the first offence has jurisdiction as well as the Court of the *locus* (24 & 25 Vict. c. 99, s. 28). Supreme criminal jurisdiction in Scotland is exercised by the High Court of Justiciary (see JUSTICIARY, HIGH COURT OF; SHERIFF COURT; MAGISTRATE).

Jurisprudence (*jurisprudentia*, or, separately, *prudentia juris*) meant originally skill in JUS (*q.v.*); and ultimately came to mean the science and art of law in the widest sense, as in Ulpian's definition: "Jurisprudence is the knowledge (*notitia*) of things human and divine, and the science (*scientia*) of the just and the unjust" (*Dig.* i. 1. 10. 2).

In French usage *jurisprudence* signifies the large body of principles, historical and theoretical, lying outside of codes and statutes, and elaborated by theoretical writers and the law courts, but absolutely essential to the administration of law (Austin, *Jur.* 670; Merlin, *Rép. de Jur., s.v.*).

In both English and French the meaning approaches law, or a body of law, but with the implication that it is arranged or administered on some scientific principle (*e.g.* Story's *Equity Jurisprudence*). This is the explanation of such phrases as *jurisprudence vétérinaire*: *medical jurisprudence* (now discarded in Scottish usage) as applied to a body of rules of evidence on medical subjects (cf. Dalloz, *Jurisprudence*; Sirey, *Recueil Général*, where *Jurisprudence de la Cour de Cassation* is merely a collection of decisions of this Court; von Ihering, *Die Jurisprudenz des täglichen Lebens* (The *Law* of everyday life)).

In ordinary usage jurisprudence now signifies: (1) the science of rights or of duties, and (2) the science of laws. Rights (with their correlative duties) and laws are distinguishable but inseparable. No discussion of one without the others would be intelligible, and so the title jurisprudence is applied to either the discussion of topics lying on the border-land of law and some other science, or philosophy or political history, but with no immediate practical application, or to a more strict and abstract view of the ordinary rules of law (cf. Pollock, *Essays in Jurisprudence and Ethics*, i.).

The practising lawyer finds the science necessary for his purposes in the style books and books of procedure, and more recently in the works of the institutional writers, and finally in such general works as the first chapter of Bell's *Principles*, Broom's *Legal Maxims*, and Lindley's *Jurisprudence* (of which see preface). But the criticism, amendment, improvement, and simplification of the law and its forms can only be attained by a wider survey of the subject, and this divides itself into three branches: (1) the historical and archæological; (2) the ethical, political, and economical; and (3) the logical or formal. The bent of philosophical jurisprudence in any country is generally determined by its political and legal institutions and the

problems of law reform presented. In Germany the ethical side has been much cultivated, and in England the logical. "Our English lawyers have no philosophy of law" (Pollock and Maitland, *Hist.* i. 153). On the other hand, Scotland, owing to the position held by the civil law in this country, the deference paid to the authority of Continental civilians, and the system of legal education in this respect, goes with the Continent. Recently legal history has attracted much attention in England (see Miller, *The Law of Nature and Nations in Scotland* i.).

A fairly complete bibliography of the subject will be found in Miller's *Philosophy of Law* (London, 1884), p. 408, and Hastie's *Kant*, p. xxvii.

In addition, the following may be referred to:—(1) Historical: Hearn, *Aryan Household*; Maine's *Works*; Pollock and Maitland, *History of English Law*; Muirhead, *Roman Law*; and articles in the *Juridical Review* and *Law Quarterly*. (2) Political and Ethical: Dicey, *Law of the Constitution*; Seeley, *Political Science*; Fitzjames Stephen, *Liberty, Equality, and Fraternity*, and other works; Leslie Stephen, *Social Rights and Duties*; Spencer, *Ethics*; *Justice*; *and Sociology*; T. H. Green, *Principles of Political Obligation*; D. G. Ritchie, *National Rights*; Hastie, *Kant's Philosophy of Law*; and *Puchta's Jurisprudence*; Hegel's *Philosophy of Right*, by Dyde; Miller, *Philosophy of Law*. (3) Logical: Pollock, *First Book of Jurisprudence*; Holland, *Jurisprudence*.

See Law; International Law.

Jury.—[See Challenge of Jurors; Citation of Jury; Oath of Jurors; Jury Trial; Criminal Prosecution (Solemn); Verdict.]

In a criminal trial five special and ten common jurors are balloted. If the accused be a landed man (*i.e.* a landed proprietor), he is entitled to have a majority of landed men on the jury (Alison, ii. 386; Hume, ii. 311; Macdonald, 446). Although at one time it was the practice to allow to a foreigner the indulgence of having foreigners on the jury, this is no longer so. The jury are no longer supplied with copies of the indictment or lists of cases (Criminal Procedure (Scotland) Act, 1887, s. 67), unless there is some special reason for this—such as the complexity or extreme length of the charges.

When the jurors have been sworn, there must be no private communication between them and any person. They must not leave the Court except under the charge of an officer of Court, until their verdict has been returned, or until they have been discharged (Hume, i. 417). Any corrupt communication with the jury or a juror by the prosecutor, or any other person, to the prejudice of the panel, entitles the panel to absolvitor (Hume, ii. 404). If at an early stage a juror become ill, it is competent, with consent of accused, to ballot another, and to re-swear the whole, the witnesses deponing again to the notes of their evidence (*M'Namara*, 1848, Ark. 521; *Lundie*, 1863, 1 Coup. 86).

If both prosecutor and accused consent, a jury which has been balloted for a previous case may be taken to try another case (6 Geo. IV. c. 22, s. 18); and this is frequently done in practice.

Jury Trial.—I. *Origin of Jury Trial and Constitution of Jury.*—Trial by jury in civil causes was made part of the judicial procedure of Scotland in the year 1815. By the Statute 55 Geo. III. c. 42, on the preamble that trial by jury in civil causes would be attended with

beneficial results to the administration of justice in that part of the United Kingdom of Great Britain and Ireland called Scotland, provisions were enacted for the trial of certain causes by jury. By 59 Geo. III. c. 35, the scope of the above Statute was extended, and the institution of jury trial, which by the original Statute was limited in point of time, was made permanent. By the Judicature Act, 1825, 6 Geo. IV. c. 120, the powers of the Jury Court were still further extended. Under all these Statutes trials by jury were conducted by a Court separate and distinct from the Court of Session, called the Jury Court. This Court consisted of three judges (afterwards increased to five), called the "Lords Commissioners of the Jury Court in civil causes," and possessed a separate and suitable establishment of clerks and other officers. As originally established, however, it had no independent jurisdiction, but was regarded as a judicial commission for the ascertainment "of certain facts deemed pertinent to a cause by the judges of the Court by whom the issues were remitted to the Jury Court to be tried." The semi-independence of the Jury Court was found to be inconvenient, and in 1830 the Court was abolished, and it was enacted that all trials by jury in civil cases should take place in the Court of Session.

The number of a jury in a civil cause is twelve. The qualification of common jurors is regulated by 6 Geo. IV. c. 22, s. 1. Everyone is qualified who, at the time of the trial on which he may be required to serve, has and is seized "in his own right, or in the right of his wife, of lands or tenements, of an estate of inheritance, or for his or her life, within the county or shire, city or place, from whence the jury is to come, of the yearly value of five pounds at the least, or shall be then worth in goods, chattels, and personal estate the sum of two hundred pounds sterling at least." Certain persons are exempted from serving: All peers, judges of the Supreme Courts, sheriffs of counties, magistrates of royal burghs, ministers of the Established Church, and other ministers of religion who shall have duly taken and subscribed the oaths and declaration required by law, and whose place of meeting shall be duly registered, and parochial schoolmasters, advocates practising of members of the Faculty of Advocates, Writers to the Signet practising as such, Solicitors practising before the Supreme Courts, procurators practising before any inferior Court, having severally taken out their annual certificates, clerks or other officers of any Court of justice actually exercising the duties of their offices, jailers or keepers of houses of correction, professors of any university, physicians and surgeons duly qualified as such and actually practising, officers in the navy or army on full pay, officers of customs and excise, messengers-at-arms and other officers of the law; also lighthouse-keepers and income tax commissioners (6 Geo. IV. c. 22, s. 2; 32 & 33 Vict. c. 36; 34 & 35 Vict. c. 103; Mackay, *Manual*, p. 347). Not less than thirty-six and not more than fifty jurors are cited. A list of these has to be returned by the Sheriff of Edinburgh or of any other county or counties; "but so that one-third of the number of jurors required, or if the number required cannot be divided equally into thirds, a number as near as may be, at the discretion of the Sheriff, shall be persons qualified as special jurors and distinguished in the return accordingly; in the event of the list to be taken from the general jury book, as provided in the said Act, not being found to contain the said proportion of special jurors, the deficiency shall be supported by names to be taken from the special jury book" (31 & 32 Vict. c. 100, s. 45). As to the citation of jurors, it is provided that the sheriff clerk of the county in which any juror is to be cited shall "fill up and sign a proper citation addressed to each such juror, and shall cause the same to

be transmitted to him in a registered post letter directed to him at his place of residence." The remuneration to jurors is at the rate of ten shillings a day. The jurors are chosen in open Court by ballot from the list of persons summoned. The name of each person summoned is written on a piece of paper; these papers are put in a box and lots drawn in the usual way. If any of the persons thus drawn do not appear, or are challenged with or without cause, another is drawn in his place. The jury consists of eight common and four special jurors. It may be added that if any of the persons summoned fail to appear, they may be fined unless their excuses are admitted by the presiding judge (s. 44). Each party has a right to challenge four jurors without cause. In addition to these, any juror may be challenged as a party interested.

Special Jury.—If either party intends to apply for a special jury, notice of motion must be given to the other party within four days after giving or receiving notice of the trial; this notice must be lodged and served thirty-six hours before the motion is moved in Court. If a special jury is ordered, the record and assistant clerk in the office in the Register House shall transmit the order to the Sheriffs, Sheriff-Substitutes, or clerks in the district from which the special jury is to come, requiring them forthwith to return the names of thirty-six persons qualified to be special jurymen. As soon as the thirty-six names are received, the clerk gives forty-eight hours' notice to the parties' agents to attend at the Register House for the purpose of reducing the jury to twenty: after the jury is reduced, precepts are issued to summon the jury (A. S., 16 Feb. 1841, ss. 14, 15). The qualifications for a special juryman are regulated by 7 Geo. IV. c. 8, s. 1. The granting of a special jury is in the discretion of the Court.

II. *What Cases are tried by Jury.*—By the Judicature Act, 6 Geo. IV. c. 120, s. 28, the following list of cases to be tried by jury was enumerated: "All actions on account of injury to the person, whether real or verbal, as assault and battery, libel or defamation; all actions on account of any injury to moveables or to land, when in this last case the title is not in question; all actions for damages on account of breach of promise of marriage, or on account of seduction or adultery; all actions founded on delinquency or quasi-delinquency of any kind, where the conclusion shall be for damages only and expenses: all actions on the responsibility of shipmasters and owners, carriers by land or water, innkeepers or stablers, for the safe custody and care of goods and commodities, horses, money, clothes, jewels, and other articles; and, in general, all actions grounded on the principle of the edict *Nautæ, Caupones, Stabularii*; all actions brought for nuisance; all acts of reduction on the head of furiosity and idiocy, or on facility and lesion, or on force and fear: all actions on policies of insurance for maritime or fire or life insurance; all actions on charter parties and bills of lading: all actions for freight; all actions on contracts for the carriage of goods by land and water; and actions for the wages of masters and mariners of ships and vessels." By the Court of Session Act, 1850, 13 & 14 Vict. c. 36, proof on commission was allowed in place of trial by jury in all cases above enumerated, except in actions for libel or for nuisance, or such as are properly and in substance actions of damages. Then by the Evidence Act, 1866, 29 & 30 Vict. c. 112, s. 2, it was enacted that the Lord Ordinary, with consent of parties or on special cause shown, might dispense with a jury in any cause in dependence before him. These latter Acts give considerable latitude to the discretion of the judge before whom the case is called, and the Inner House will not readily interfere with this discretion. As to what cases will in practice be sent to a jury, it is not easy to be specific, but it

may be taken that, generally speaking, all actions of damages, whether for accident (*M'Avoy*, 1881, 9 R. 100), defamation, or nuisance, all actions as to public rights-of-way (*Paterson*, 1893, 20 R. 370), and actions of reduction of deeds on the ground of the incapacity of the maker, or of facility and circumvention (*Clark*, 1885, 13 R. 313), will be sent to a jury, unless special cause be shown, or unless parties consent to a proof in the ordinary way. Actions of declarator of rights-of-way are not mentioned in the list of cases enumerated in the Judicature Act, and there is a divergence of opinion as to whether such actions ought to be sent to a jury, Ld. M'Laren being strongly of opinion that they ought not (*Fraser Tytler's Trs.*, 1890, 17 R. 670), and the late Ld. Benholme sharing the same view (*Macfie*, 1872, 10 M. 408). But whether right or wrong, the practice appears to be, in general, to try such actions by a jury; in *Blair*, 1884, 11 R. 515, the Lord Ordinary (Ld. Fraser) observed: "I have examined the cases on this subject for the last thirty years to ascertain the practice of the Court; and—setting aside the special case of *Macfie* v. *Stewart*, reported in 10 M. 408—I can only find two classes of cases involving claims to a right-of-way which were not tried by a jury"; and Sheriff Mackay states in his *Manual of Practice*, p. 325, that such actions are generally tried by jury. There are, however, exceptions to the rule. Thus where, in the opinion of the Court, the questions at issue were of too complicated a nature to be tried by jury (*Macfie*, 1872, *supra*), or where the right-of-way formed the subject of a correspondence in the public press (*Macpherson*, 1886, 14 R. 7; *Blair*, 1884, 11 R. 515; cf. *Hope*, 1898, 5 S. L. T. No. 433), or where there was a strong popular feeling on the question (*Fraser Tytler's Trs.*, 1890, 17 R. 670), or where there was a mixture of law and fact (*Laidlaw*, 1874, 2 R. 148), the Court ordered the case to be tried without a jury. In actions of damages, also, the Court will dispense with a jury in exceptional cases, though the mere fact that the probability that only a trifling award of damages will be recovered is no reason for withdrawing an action from the general rule (*Rhind*, 1893, 21 R. 275; *Crabb*, 1892, 19 R. 580: *Donnachie*, 1892, 20 R. 210; see also APPEAL FOR JURY TRIAL (vol. i. 262)).

III. *TIME AND PLACE OF TRIAL.*—After issues have been adjusted and approved, the Lord Ordinary, on the motion of either party, may "appoint a time and place for the trial of such issue or issues, such time being as soon after the date of such approval as with reference to the proper trial of such issue or issues conveniently may be, and, except upon special cause shown, not later than three weeks from the date of such motion; and such trial shall proceed at the time and place so appointed unless at the time of such appointment one or other of the parties shall intimate to the Lord Ordinary that he objects thereto, in which case the Lord Ordinary shall report the matter to the Court, by whom it shall be fixed when and where the trial shall proceed" (13 & 14 Vict. c. 36, s. 40. This section does not supersede sec. 46 of A. S., 16 Feb. 1841; *Hampton*, 1885, 12 R. 969). If the trial takes place during session, the Lord Ordinary before whom the cause depends, presides; if at the sittings in vacation, one of the judges of the Division usually presides. If the trial is to be held by the Lord Ordinary during session, notice of trial to the opposite party is not required, a motion before a Lord Ordinary to fix the date of trial being equivalent to notice for the sittings (*M'Neill*, 1853, 15 D. 582). Where the pursuer gave notice of motion for the sittings, and the defender thereupon moved the Lord Ordinary to appoint the place and time of trial, the Court held that the defender's motion was not incompetent, and that the duty of the Lord Ordinary was to report (*Bell*, 1862, 24 D. 603).

IV. *Notice of Trial.*—If either party desires the trial to be held at the sittings, notice of trial must be made to the opposite party. Notice of trial is regulated by A. S., 24 Feb. 1846. It is therein enacted that as soon as the issues are finally lodged, the pursuer may give notice of trial. If he fails to do so within ten days, or if he countermands the notice duly given, the defender may then give notice to the pursuer, or countermand it. If defender countermands, the right of the pursuer revives for ten days after the date of such countermand; in case either party countermands his notice, it is competent for the Court or judge to fix the time of trial on cause shown by the opposite party (*Evans*, 1886, 13 R. 1103). Except for failure to conform to the regulations here laid down, the pursuer does not easily lose his right to lead in the matter of notice. If he exercises his right discreetly and reasonably, it ought not to be interfered with, unless some special cause, in the way of expediency or as matter of justice between the parties, be shown for controlling him (*Bell*, 1862, 24 D. 603, per Ld. J.-C. Inglis: see also *M'Neill*, 1853, 15 D. 582; *North British Rwy. Co.*, 1865, 3 M. 340: *Mushet*, 1856, 18 D. 486; *Lauder*, 1857, 20 D. 71). Notice of trial must be given fifteen days previous to the trial, if the cause is to be tried in Edinburgh; if the trial is to be on Circuit, notice must be given on or before the second last day of session immediately preceding the Circuit at which the cause is to be tried (A. S., 16 Feb. 1841, s. 12). After notice has been given to the opposite party, if he desires to have the place of trial changed, he must, within four days from the receipt of such notice, make a motion for that purpose in the Division to which the cause belongs (*ib.* s. 13). All regulations as to notices of trial are the same in the case of a new trial as in the case of the original trial (*ib.* s. 41). In all cases where notices of trial or countermands of such notices "are directed to be given under this Act of Sederunt, the principal notice, signed by the agent, shall be lodged in the Jury Office in the Register House, and a copy served at the same time upon the agent for the opposite party: and where the motion is to be made before the Division, a copy of the notice must also be lodged with the Keeper of the Inner House Rolls: and in all cases in which any number of days' notice is required to be given for business to be done, the days are to be computed by excluding the day on which the notice is given, and including the day on which the business is to be done" (*ib.* s. 44). By A. S., 22 June 1859, it is enacted that "when a notice of trial has been given by either party in a cause for the sittings after the winter session of the Court, or for the sittings after the summer session of the Court, or for the sittings in the Christmas recess, it shall not be competent to countermand such notice after the expiry of the time within which notices of trial require to be given for such sittings: provided always that it shall be competent for either party, after the expiry of such time, to apply to the Court to postpone the trial, for any cause which could not have been foreseen previous to the expiry of such time; and it shall also be competent to make such application, after the termination of the session, to the judge who is to preside at the trial, or in his absence to the Lord Ordinary on the Bills, it being shown to the satisfaction of such judge or Lord Ordinary that the application could not have been made to the Court during session." Taking this section of A. S., 22 June 1859, along with sec. 44 of A. S., 16 Feb. 1841, and A. S., 24 Feb. 1846, the Court were of opinion that the 44th section of A. S., 1841, could not be held to be in force to the effect that any failure to comply with any part of its directions must necessarily be followed by a nullity, and consequently the Court held that, where the countermand was given to the opposite party within the time prescribed by

the Act of 1859, the failure to lodge the duplicate countermand on the proper date inferred no nullity as regarded the countermand (*Gordon*, 1865, 3 M. 595).

V. *Postponement of Trial.*—At any time before the jury is empannelled and sworn to try a cause, it is competent "to apply to put off the trial on account of the unavoidable absence or sickness of a material witness, or for other sufficient cause, to the satisfaction of the Court, and supported by oath or affidavit, if the Court shall so require; or in vacation, by the judge before whom motions are to be heard as before directed; and upon payment of such expenses as shall have been incurred by the opposite party in consequence of the delay of the trial"; if the reason for postponement be known during session, the motion must be made in session, upon notice to the opposite party (A. S., 16 Feb. 1841, s. 25).

VI. *Abandonment.*—If it shall appear to the Court that a party has abandoned his suit, or if the pursuer, or the party appointed to stand as pursuer, shall not proceed to trial within twelve months after issues have been finally engrossed and signed, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause be shown for delay to the satisfaction of the Court. And in case either party shall not appear at the trial, after due notice has been given, the party appearing, if pursuer, is entitled to lead evidence and obtain a verdict; if defender, he is entitled to a verdict without evidence. If the party appearing declines to proceed in this manner, the judge shall certify to the Division the fact of non-appearance, and the Division shall proceed as in cases in which parties are held as confessed (*Ross*, 1889, 16 R. 871), unless it shall be shown to the satisfaction of the Court that the failure to appear was caused by some sufficient cause (A. S., 16 Feb. 1841, s. 46). This section does not apply where a trial has taken place, a verdict been returned for the pursuer, and that verdict set aside, and the pursuer has thereafter for twelve months failed to take any further step (*Macfarlane*, 1892, 19 R. 953). By the 10th section of the Judicature Act, 6 Geo. IV. c. 120, the pursuer may, after closing of the record, abandon his action on payment of full expenses, and bring a new action, if otherwise competent. But where, after the minute of abandonment was lodged, the pursuer failed to pay the expenses, the pursuer was held to have lost the privilege of abandonment, and the defender was assoilzied (*Ross*, 1889, 16 R. 871). The 46th section of A. S., 16 Feb. 1841, above mentioned, is not superseded by sec. 40 of the Court of Session Act, 1850, 13 & 14 Vict. c. 36 (*Hampton*, 1885, 12 R. 969).

VII. *Procedure prior to Trial.*—Up to the date of closing the record the procedure is the same as in ordinary Court of Session actions. After closing the record it is customary, where a jury trial is asked for, for the pursuer to ask an order for issues. If this course be followed, and issues ordered, parties may discuss the relevancy of the action on the adjustment of issues. It is, however, not uncommon for the case to be sent to the procedure roll for discussion on the relevancy. This may be done if it is obvious that a long and difficult discussion will ensue, or where the parties agree to ask for this course to be followed. The advantage of the discussion taking place on the issues is that all the averments and contentions of the pursuer are focused in the issue, and the judge is enabled, by consideration of it, to discover at a glance the position of the pursuer, which, in the absence of an issue, might cause both trouble and delay. If issues are ordered within eight days, parties should lodge them two days before the day so fixed. By 31 & 32 Vict. c. 100, s. 27 (3), it is provided that if

the parties consent, or if the Lord Ordinary considers it expedient, the Lord Ordinary may order the case to be tried without the adjustment of issues. This was done in the case of *Brannan*, 1884, 12 R. 61, and the Lord Justice-Clerk (Moncreiff) observed that where such a course is followed, it is quite improper for the jury to have the record itself in their hands; the proper course is for the judge to put before the jury the points that arise on the record. If issues, when ordered, are not lodged within the time appointed, it is competent for the opposite party to enrol the case, and to take decree by default (A. S., 15 July 1865, s. 12). After issues have been finally adjusted, a cause never falls asleep. If, however, the pursuer, or the "party appointed to stand as pursuer in the issue," fails to proceed to trial in twelve months, the Court shall proceed as in cases in which parties are held as confessed (A. S., 16 Feb. 1841, ss. 46, 47). The Court will refuse decree if they are of opinion that sufficient cause has been shown for the delay. See Issues.

VIII. *Proceedings at the Trial.*—A. *Procedure.*—As soon as the jury is empannelled and sworn, it is the duty of the Clerk to read the issues to the jury; after which the junior counsel for the pursuer opens the case. The evidence for the pursuer is then led. When the pursuer's evidence is closed, the junior counsel for the defender opens his case; then follows the defender's evidence: when it is closed, senior counsel for the pursuer replies, and is followed by senior counsel for the defender. If the defender leads no proof, however, pursuer's counsel has no right of reply (A. S., 16 Feb. 1841, s. 27).

B. *Exceptions.*—When an exception is taken in the course of a jury trial, a note thereof shall be taken by the judge, or, if he shall so direct or the party excepting shall think proper, a note thereof shall be written out and signed by such party or his counsel, and also by the judge, at the time (31 & 32 Vict. c. 100, s. 34). The instrument containing an exception is called the bill of exceptions: it contains a distinct statement of the exception so noted, with such a statement of the circumstances in which the exception was taken (including, if necessary, a statement of the purport of the evidence) as, along with the record in the cause, may enable the Court to judge of such exception; unless the party, or the presiding judge, or the Court considers it desirable, it is not necessary to submit to the Court the notes of evidence or the documentary evidence adduced at the trial: if these are submitted to the Court, they form no part of the bill of exceptions. See Bill of Exceptions.

C. *Production of Documents, etc.*—All writings which are meant to be put in evidence at the trial of a cause must be lodged within eight days before the trial with the clerks in the Register House, and notice must be given to the opposite party that they are lodged. If, however, either party has failed to lodge within the required time, and if it can be shown to the satisfaction of the judge that they could not be lodged in time, they may be admitted (A. S., 16 Feb. 1841, s. 19). All plans, maps, models, or other such productions to be used at the trial, must also be lodged with the clerks at the Register House eight days before the trial (s. 18). The eight days include either the day when the productions are made or the day of trial (Mackay's *Manual*, p. 343). By sec. 20 of the above Act of Sederunt it is provided that "when it is deemed necessary by either of the parties that the original of any registered instrument, or any recorded process, or any process depending, or that may have depended, in any other Court shall be lodged in process, it shall be competent for the party to apply to the Lord Ordinary in the cause before the issues are signed, and thereafter

to the Court, or in vacation as after directed, for a warrant to authorise and direct the Lord Clerk Register and his deputies, or the keeper of any other register, in whose custody the instrument or process is preserved, or the Clerk of any Court before which such process is depending, or may have depended, to deliver up the same to the clerks aforesaid, at the office in the Register House, in order to be produced at the trial, upon delivery of the warrant, and a proper receipt and obligation for redelivery after the trial: and provided such application has been intimated to the agent of the opposite party, and also to the Lord Clerk Register or his deputies, two days before such application is made, it shall be competent to the Lord Ordinary, or the Court, if they shall see cause, to grant such warrant in such terms and under such conditions and qualifications as may be deemed necessary." Along with the documents produced there ought to be an inventory. No document will be rejected by reason of the omission to fix a stamp, or by reason of the insufficiency of the stamp, provided the party tendering the same shall, before the conclusion of the trial, pay into Court a sum of money certified by the judge to be the amount of stamp duty chargeable, along with the penalty. The judge's decision on the matter is not subject to review (31 & 32 Vict. c. 100, s. 41). See EVIDENCE.

D. *Notes of Evidence.*—Prior to the Court of Session Act, 1868, the only competent record of the trial was the judge's notes. These notes are still used by him in charging the jury. Where the parties agree, however, the evidence taken in shorthand and extended by the shorthand writer may, with the judge's consent, be subsituted for the judge's notes for all purposes; and if this be done, it shall not be competent to ask for the judge's notes (31 & 32 Vict. c. 100, s. 27).

E. *Judge's Charge.*—The duty of the judge, after the evidence has been led, is to charge the jury on the whole case. It is customary for him to give a brief résumé of the evidence on both sides, suggesting, if necessary, what he considers the proper and reasonable view of the facts; it is not, however, indispensable for him to mention the facts at all, if he is of opinion that the jury require no guidance, or if the facts are still fresh in the minds of the jury. His main duty is to state the law applicable to the case in such a manner that the jury can have no doubt as to what the law is.

F. *Verdict.*—The jury, if unanimous, may return a verdict immediately after the charge; if not unanimous, a verdict cannot be returned within three hours. After three hours, a verdict by a majority may be returned. In cases of equality the juror first sworn has a casting vote. The verdict ought to deal separately with each of the issues. In England special verdicts are common. A special verdict is one where the jury return certain findings in fact, leaving it for the judge to apply the law; though not unknown in practice in the Scotch Courts, such verdicts are now almost obsolete (*Murray*, 1870, 9 M. 198; A. S., 16 Feb. 1841, s. 31). The verdict, to be final, must be applied by the Court. This is done by motion by the party for whom the verdict has been found. If the cause has been tried in session, such motion may be made at any time after the expiration of ten days after the trial; if in vacation, the motion may be made at any time after the expiration of six days after the commencement of the next session (A. S., 16 Feb. 1841, s. 34). On the motion to apply the verdict it is competent for the Court to amend the verdict if it does not express properly the intention of the jury (*Marianski*, 1854, 1 Macq. 766). By the Court of Session Act, 1868, s. 36, it is provided that "the judge at the trial may direct the jury upon any matter of law (subject to the opinion

of the Court upon such direction), and with liberty to either party to move the Court to enter the verdict for such party, although returned against him, if the Court shall be of opinion that such direction was erroneous, and that such party was truly entitled to a verdict. The opinion of the Court upon any direction so given may be obtained upon motion to enter the verdict for the party moving; and if the Court shall be of opinion that the direction was erroneous, and that the party moving is truly entitled to the verdict in whole or in part, they shall direct the verdict to be entered by him, in whole or in part, either absolutely or on such terms as they may think fit, otherwise they shall refuse the motion; or they may, if necessary, set aside the verdict and order a new trial; provided also that in such applications, as well as in motions for a new trial, it shall not be necessary to print the notes of the evidence for the use of the Court; but the judge's notes may be produced at any time if required." After the jury has been discharged it is incompetent to show by the evidence of jurymen that the verdict does not correctly express the intention of the jury (*Pirie*, 1890, 17 R. 1157).

IX. *Jury Trial at Circuit Courts.*—Instead of a trial being held at the sittings or by the Lord Ordinary, it may be appointed to be tried at Circuit. If a trial is to be held at Circuit, it must be held at the Circuit which has jurisdiction over the place to which the subject-matter of the action belongs (*Macintosh*, 1871, 9 M. 698). Notice of the trial must be made in the ordinary way. By the Court of Session Act, 1868, s. 46, it is provided that "where a cause is appointed to be tried at any Circuit town in any period of vacation or recess, and no special diet is fixed for such trial, it shall be lawful for either of the judges presiding at the sittings of the Circuit Court of Justiciary in such Circuit town to try the same, and such trial may proceed either at the same time with the sittings of the said Circuit Court of Justiciary or at the termination thereof." It is provided by the Court of Session Act, 1868, s. 50, that agents entitled to practise in the inferior Courts may attend a jury trial on Circuit as sole agent in the cause. The permission to hold jury trials on Circuit has not been taken advantage of to any great extent, and the practice may now be regarded as having fallen into desuetude.

X. *Appeals for Jury Trial.*—By the Court of Session Act, 1868, it is provided that it shall be lawful, by note of appeal under this Act, to remove to the Court of Session all causes originating in the inferior Courts in which the claim is in amount above £40 at the time (31 & 32 Vict. c. 100, s. 73). This power is subject to the conditions specified in the Judicature Act, 6 Geo. IV. c. 120, s. 40 (*Willison*, 1893, 20 R. 976). The Court may either remit to one of the Lords Ordinary or appoint one of its own number to preside at the trial. The appeal is taken against an interlocutor in the Sheriff Court allowing a proof, and must be presented within fifteen days after the date of such interlocutor. When once the appeal is lodged, it supersedes the proof. In the case of *Cochrane*, 1883, 10 R. 1279, the Court stated it to be its opinion that by an appeal "the case is removed from the Sheriff Court, and that it may be dealt with in the same manner as if it had originated in the Court of Session"; and in a subsequent case this statement was founded on by one of the parties, who claimed that, as a result, it followed that the Court were not empowered to send the case back to the Sheriff Court for proof. This view, however, was not accepted (*Bethune*, 1886, 13 R. 882). The Court has a discretion in the matter (*Cunningham*, 1893, 21 R. 19). Where the action, though nominal, was in reality an action involving the question of resting-owing, the Court remitted

to the Sheriff for proof (*Cunningham*, 1893, 21 R. 19); again, where the action was for damages by a tenant for illegal removal, and the case was a trifling one, the Court remitted to the Sheriff (*Nicol*, 1893, 20 R. 288). On the other hand, the Court refused to remit where the ground for doing so was that the Sheriff knew the circumstances of the case, he having already settled an action dealing with a claim connected with the same subject-matter (*Johnstone*, 1894, 21 R. 777); but in a subsequent case it was observed that the case of *Johnstone* laid down no general rule (*Crawford*, 1895, 22 R. 367). It is competent for the Court, on an appeal for jury trial, to remit the question, not to the Sheriff, but to a Lord Ordinary, for proof without a jury (*Willing & Co.*, 1892, 20 R. 34; *Laidlaw*, 1874, 2 R. 148).

[See Mackay, *Practice*, vol. ii. pp. 30 *et seq.*; Mackay, *Manual*, pp. 325 *et seq.*; Macfarlane, *Practice in Jury Causes.*]

Jus, in Roman law, has two main significations: (1) law, *norma agendi*, the system of rules regulating the actions and relations of men, *e.g. jus civile, jus publicum*, etc.; (2) right, *facultas agendi*, the power or authority to do a thing, *e.g. jus commercii, jus in re alienâ*. In this second sense the term was used to denote the whole sum of a man's rights, *e.g.* an heir was said to enter *in omne jus* of the deceased. The term *jus* has other special meanings in Roman law. Thus it denotes law with a human sanction as opposed to *fas*, law with a religious sanction, and, in the later empire, it was used to describe the law contained in the writings of the jurists, as distinct from *leges*, the enactments of the emperors. *Jus* also denotes the place in which justice is administered, or the presence of the magistrate, as in the phrases *in jus vocatio* and *in jure cessio*. So, in an action, the proceedings before the magistrate were said to be *in jure*, as opposed to those before the *judex*, which were *in judicio*.

There were three factors in the development of *jus* in Rome, *jus civile, jus gentium*, and *jus naturale*. *Jus civile* was the old rigid and technical law, applicable only to Roman citizens. *Jus gentium* was an equitable system, free from formalism, built up mainly by the peregrine prætors, and applicable to all free persons, whether Romans or foreigners. *Jus naturale* was an application to legal relations of the central principle of the Stoic philosophy—a type of perfect law, inherent in the nature of men and things, to which it was the duty of law-givers to make enacted laws conform.

The law of Rome was divided into *jus publicum* and *jus privatum*. *Jus publicum* is that which relates to the State, and comprehends the law of religion and constitutional law. *Jus privatum* is that which has to do with the relations of private individuals. Another division was that into *jus scriptum*, or written law, and *jus non scriptum*, or law based on immemorial usage.

The subject-matter of *jus privatum* is distributed by Gaius and Justinian in their *Institutes* under the heads of persons, things, and actions.

The sources of the *jus scriptum* are enumerated by Justinian as follows:—*Leges*, enacted by the people in the *comitia centuriata*; *plebiscita*, enacted by the *concilium plebis*; *senatus-consulta*, ordinances of the senate; *principum placita*, consisting of *epistolæ, rescripta*, or *mandata*, addressed to individuals, and determining doubtful points, *decreta* or judicial sentences, and *edicta* or laws generally binding; *magistratuum edicta* or *jus honorarium*; and the *responsa prudentium*, opinions by the *juris consulti* who were officially authorised to interpret the law.

Jus accrescendi.—See Accretion.

Jus crediti.—In a wide sense, this term may be applied to the right which is stated in the creditor in any personal obligation, and which may be enforced by personal action. It has been used to describe such widely differing rights as those of partners in private or public companies, and of heirs under marriage contracts, entails, and trust deeds. In this sense it is equivalent to *jus ad rem*, and covers the whole range of obligation; being distinguished, on the one hand, from a mere *spes*, which confers no *jus* whatever, and, on the other hand, from a real right or *jus in re*, which founds a preferential right. (For a suggested, but, it is thought, an unfounded distinction between *jus ad rem* and *jus crediti*, see *Edmond*, 1858, 3 Macq. pp. 122, 129.)

The term *jus crediti*, however, is now generally understood in a more restricted sense as descriptive of the rights conferred under contracts of marriage, or deeds of a like nature for settling provisions upon wives and children of a marriage. It is in this restricted sense that the subject is here more particularly treated.

1. *Essentials of a proper* Jus crediti.—To the creation of a *jus crediti* in the proper sense of the term there are two essential factors, which must be carefully distinguished. (1) A present right must be stated in the creditor, which (2) must avail in competition with onerous creditors. For a *jus crediti* is "a right which entitles the parties vested with it to compete with onerous creditors on a deficient fund" (Ld. Benholme, *Wilson's Trs.*, 1856, 18 D. 1096, p. 1104). Any right which falls short of this is not a true *jus crediti*; any right which has a higher effect, and which confers a preference upon the holder, is no longer a *jus crediti* but a real right.

(1) A present right must be stated in the creditor. It need not necessarily, however, be presently exigible, for an obligation to pay or deliver at a future date will create a present right in the creditor, vesting in him from the date of the obligation. As the determination of this first point depends primarily upon the intention of parties, and the ascertainment of the import of the deed granting the right, it becomes a question of construction in each case whether or not a present right effectual against the granter and his representatives has been conferred.

(2) The right conferred must also be effectual against creditors of the granter. It is solely in this connection that considerations of onerosity in the grant or of solvency in the granter become relevant, as defending the right against challenge by creditors either at common law or under the statutes relating to insolvency and bankruptcy.

2. *Provisions to Wife.*—Under the ordinary forms of antenuptial contracts the wife has a *jus crediti* for her provisions. She receives the character and rights of a creditor of her husband, and ranks *pari passu* with other creditors, either absolutely, or contingently, upon her survivance of her husband (Ersk. iii. 9. 22, iii. 8. 36, note; Menzies, *Convey.* 445; *Wilson's Trs., sup.*, s. 1). But she has, *qua* wife, no preference beyond what she may establish by diligence (*Keith*, 1688, Mor. 11833; *Allan*, 1713, Mor. 11835; Bell, *Com.* i. 683). Where provisions in favour of a wife are of a testamentary nature, it will not confer a *jus crediti* upon her that they are contained in an antenuptial contract (see *Grant*, 1872, 10 M. 804).

In a question with creditors, however, provisions to a wife, even if contained in an antenuptial contract, may not avail; for, although the husband's insolvency is not here a relevant plea (Ersk. iv. 1. 33; see *Thoirs*, 1729,

Mor. 984), in the absence of anything of the nature of fraud (see *Wood*, 1680, Mor. 977; *Watson*, 1874, 1 R. 882), the onerous consideration of the marriage fails in so far as the provisions exceed what is fair and reasonable (*Duncan*, 1785, Mor. 987; *M'Lachlan*, 1824, 3 S. 192; *Watson*, *v.s.*). But "the excess must be gross, and rationality will not be measured in nice scales" (Ld. Neaves, *Carphin*, 1867, 5 M. 797, p. 804).

In the case of marriage contracts or other deeds which are executed *after* marriage, the highly onerous cause which supports antenuptial provisions in a question with creditors is awanting, the parties being no longer independent contractors. For such provisions, therefore, a wife has no *jus crediti* unless the husband was solvent at the date of granting them, and then only to a reasonable amount (*Jeffrey*, 1825, 4 S. 32; *Sharp*, 1839, 1 D. 396; *Craig*, 1861, 4 Macq. 267; *Walkinshaw's Trs.*, 1872, 10 M. 763; see *Guthrie*, 1846, 9 D. 124). Erskine (iv. 1. 33) states that postnuptial provisions to a wife, so far as rational and without fraud, may be sustained, albeit the husband were at the date of granting them conscious of insolvency (see *Walker*, 1635, Mor. 953), but this is not now law. The insolvency of the husband is a relevant answer against her claim to rank to any extent. But a conveyance to a wife *stante matrimonio*, granted in fulfilment of an unobjectionable obligation in an antenuptial contract, is, of course, effectual to her as being granted for an onerous cause (*Campbell*, 1778, Mor. 1000). Postnuptial provisions, however, which remove restrictions upon, or vary in her favour the wife's antenuptial provisions, confer upon her no *jus crediti* so as to compete with onerous creditors (*Maclachlan*, 1839, 1 D. 1177: see DONATIONS INTER VIRUM ET UXOREM; see generally, Fraser, *H. & W.* ii. 1347 *seq.*; Bell, *Com.* i. 683, 687; Brodie's Stair, 98, note; Menzies, *Convey.* 454).

3. *Provisions to Children: No proper* Jus crediti *conferred.*—In the case of provisions to children and heirs of the marriage, there is a presumption against an intention by the father to confer upon them a present right of credit, so as to clothe them during his life with the character and rights of true creditors (*Gordon*, 1748, Mor. 12915: affd. 1 Pat. 493; for the origin of this presumption, see *Herries, Farquhar, & Co.*, 1838, 16 S. 948, p. 964), and under the ordinary styles of contracts the right of the issue of the marriage will be held to be a mere *spes successionis*—a *spes*, however, which, as explained below, is defeasible only by the father's onerous deeds.

Where no actual benefit or interest can be claimed or taken in the father's lifetime, there is no *jus crediti* vested in the children as against onerous creditors of the father (Ld. Moncreiff, *Goddard*, 1844, 6 D. 1018, p. 1024). Accordingly, where heritage is provided, or a sum of money made payable to the heirs or children of the marriage at or after the father's death, whether by antenuptial contract (*Brown*, 1 Feb. 1820, F. C.: *Browning*, 1837, 15 S. 999; *Goddard*, *sup.*; *Arthur*, 1870, 8 M. 928: see also Ld. Rutherfurd Clark, *Gillon's Trs.*, 17 R. 435, p. 441), by postnuptial contract (*Strachan*, 1754, Mor. 996), or bond of provision (*Geddes*, 1836, 14 S. 1084), no *jus crediti* is thereby conferred upon them to the effect of enabling them to compete with onerous creditors, even as to debts contracted after the marriage (*Grahame*, 1677, Mor. 12887). And where the deed does not confer a *jus crediti*, the adjection of a clause giving a right of action, or authorising diligence at the instance of the children or persons named for the purpose, will not change the character of the right (see Ld. Medwyn, *Goddard*, *sup.*, p. 1023; Ld. Ardmillan, *Wilson's Trs.*, *sup.*, s. 1, pp. 1115, 1117, 1128). Nor will an obligation to grant infeftment in terms of the contract (*Cunynghame*, 1804, Mor. 13029), or to secure the children's

provisions (*Arthur, sup.*; Ld. Medwyn, *Herries, sup.*, p. 972), or an express clause of warrandice (*Fulton*, 1811, Hume, 533; *Cunninghame*, 20 Dec. 1810, F. C. p. 107), have any such effect. Even where infeftment has been taken in security of the children's provisions, the security, being merely accessory, has been held not to alter the character of the principal obligation (*Brown, sup.*; Ld. Moncreiff, *Goddard, sup.*, p. 1025; M. Bell, *Convey.* 895; but cf. cases of *Bushby, inf.*, s. 4, and *Herries, sup.*). This, however, may become important in a question *inter heredes*, for such a conveyance in security will there confer a preference to the extent of the subject secured (see Ld. Medwyn, *Herries, sup.*, p. 972; Ld. Benholme, *Wilson's Trs., sup.*, s. 1, p. 1105; *Walkinshaw*, 1872, 10 M. 763).

4. *Provisions to Children:* Jus crediti *conferred.*—Where, on the other hand, a provision to children is so conceived that there may be a direct interest accruing during the father's lifetime, this will be in general construed as conferring a *jus crediti* (Ld. Moncreiff, *Goddard, sup.*, s. 3, p. 1023). As, for example, where there is an obligation to infeft the heir at a determinate day or age (*Douglas*, 1724, Mor. 12910), or where a provision is made payable at the majority or marriage of the child (*Ballingall*, 1759, Mor. 12919; *Lyon*, 1724, Mor. 8150, 12909; *Cruikshank's Trs.*, 1853, 16 D. 7; see *Jolly*, 1824, 2 S. 730), or at the dissolution of the marriage (M. Bell, 894). If the provision is to bear interest from a term which may arrive during the father's life, this will confer a *jus crediti*, not only to the extent of the interest, but also for the principal sum, though the latter may not be payable till the father's death (*Mackenzie*, 1792, Mor. 12924; affd. 3 Pat. 409, 417; see *Herries, supra*, s. 3, p. 967). But the payment must not be subject to any condition or contingency (Menzies, *Convey.* 447). So, where provisions to younger children, although declared payable at majority or marriage, were contingent as to amount upon the father's estate devolving at his death upon children of a first or a subsequent marriage, the younger children's right to a *jus crediti* was negatived (*Mactavish*, 1787, Mor. 12922; but cf. *Ballingall, sup.*). If no date for payment be expressed, *e.g.* in a bond of provision, the obligation will *in dubio* be held to confer no present right (Menzies, *Convey.* 459).

Upon the same principle, if there be a clear intention to restrict the father's control over the property during his life in favour of the issue of the marriage, *e.g.* where there is a clause restricting his right to a bare liferent, or an obligation to denude in favour of trustees, or to entail the lands (Ld. Neaves, *Wilson's Trs., sup.*, s. 1, p. 1109; *Herries, sup.*, s. 3), a *jus crediti* will be held to have been thereby constituted in the children, entitling them to compete with onerous creditors (Ersk. iii. 8. 40; Bell, *Com.* i. 686; Menzies, *Convey.* 679). Even where the terms of the deed might not *per se* confer a *jus crediti*, security for the provisions by the infeftment of trustees for the children may overcome the presumption against a *jus crediti* having been constituted (*Herries, sup.*, s. 3). And the intervention of trustees may in such cases operate so as to secure a preference if the trustees be infeft in lands (*Bushby*, 1825, 4 S. 110), or, in the case of moveables, the money be invested in the names of trustees for behoof of the issue (see *Wilson's Trs., sup.*). And where the intention is clear to state the fee in the children, but their right has not been perfected by infeftment taken, diligence done, or assignation intimated, the children, although losing their preference, are still entitled, in virtue of their personal right to the fee, and of the *jus crediti* thereby created, to rank along with onerous creditors (*Seton*, 1793, Mor. 4219; *Falconer*, 1824, 2 S. 633; 1825, 3 S. 455; see *Guthrie*, 1846, 9 D. 124).

In questions with creditors, provisions in postnuptial contracts, or bonds of provision to existing children are accounted gratuitous, and can be cut down in competition if the granter were not solvent (*Murray-Kynnynmound*, 1746, Mor. 990; *Cult*, 1783, Mor. 974). And provisions to children of a first marriage contained in an antenuptial contract with a second wife are in no better position (*Harvie*, 1847, 9 D. 1420). Where postnuptial provisions are made in implement of antenuptial obligations, the latter must, in order to found a true, just, and necessary cause for the later deed, have vested something more than a mere *spes* in the child (Bell, *Com.* i. 688); and, even where a *jus crediti* is conferred by the older deed, a postnuptial provision in implement will be exposed to challenge under the Bankruptcy Statutes if it vary the obligation in favour of the child (see *Wilson's Trs.*, *sup.*, s. 1, pp. 1124, 1128).

5. *Reserved Powers of Husband or Father: Rights of Wife and Children of Marriage.*—The husband's obligation in favour of the wife or children of the marriage, although it may prove ineffectual in competition with his creditors, is, in a question with him or his representatives, fully onerous and binding. He is, accordingly, under an implied obligation not to defeat the rights created in their favour by any subsequent gratuitous deed, and is barred from disputing their right to claim as creditors. This holds good whether the effect of the father's obligation be to confer a full *jus crediti* or a mere *spes successionis*. In either case his power to grant onerous deeds remains untouched; in either case the wife or children of the marriage can *qua* creditors challenge and reduce gratuitous deeds granted by him subsequent to and in prejudice of his obligation to them. Thus, he may sell the estate destined to the heirs of the marriage (*Cunynghame*, 1804, Mor. 13029; *Cunninghame*, 20 Dec. 1810, F. C.). Again, he can settle provisions, by marriage contract or otherwise, on the wife or children of a second marriage (*Duncan*, 1785, Mor. 987; *Bruce*, 1761, Mor. 13036; *Haldane*, 1885, 13 R. 179), or upon the younger children on their marriage (*Dykes*, 9 Feb. 1811, F. C.; cf. *Ewing*, 1799, Mor. 12997), even though these may entail encroachment upon provisions settled under a former marriage contract. Such later provisions, however, must be reasonable in amount, for to this extent only will they be adjudged onerous.

Gratuitous deeds, on the other hand, may be reduced at the instance of the wife or children (*Farquhar-Gordon*, 1790, Mor. 13028; *Browning*, 1837, 15 S. 999; *Haig*, 1857, 19 D. 449; *Arthur*, 1870, 8 M. 928; *E. of Glasgow*, 1872, 11 M. 218; *Maude*, 1878, 5 R. 570). So, a deed restricting the heir's interest to a liferent (*Speirs*, 1778, Mor. 13026), or converting the estate into an entail (*Gordon*, 1731, Mor. 12984; *Watson*, 1801, Mor. App. "Prov. to Heirs," No. 4; *Munro*, 13 Feb. 1810, F. C.; *Graham*, 1743, Mor. 13010), may be challenged and reduced as gratuitous. See also *Davie*, 1827, 5 S. 903; *Dykes*, 9 Feb. 1811, F. C., and case of *Hyslop* there noted.

It was formerly held that the father's reserved power would sustain reasonable deeds granted by him for other than onerous causes, but the better opinion is to regard the father as precluded from dealing with the settled estate except upon onerous cause (*Speirs*, 1778, Mor. 13026, Hailes, 806, overruling *Thomson*, 1762, Mor. 13018; Menzies, *Conveyancing*, 456). This, however, does not exclude a father's power of reasonable distribution of a sum settled upon the children of the marriage. But if the power be exercised so as to exclude a child from sharing, this is equivalent to a gratuitous alienation (*Campbell*, 1738, Mor. 13004; 1739, Mor. 6849; *Watson*, *sup.*; see *Gillon's Trs.*, 17 R. 435). This strict limitation of the

father's powers was, under the former law, held not to apply to provisions of conquest, and on a similar principle is now held not to apply to cases in which there has been a settlement of the *universitas* of an estate by marriage contract (Ld. Curriehill, *Champion*, 1867, 6 M. p. 22; *Lowden's Trs.*, 1881, 8 R. 741; see *Cowan*, 1669, Mor. 12942; *Oliphant*, 1629, Mor. 3066).

6. *Protection not extended beyond Issue of Marriage:* Jus crediti *in Substitutes.*—The husband's contract with the wife does not, in general, extend beyond the issue of the marriage, instituted or substituted; as regard substitutes to them, he lies under no restraint, their rights being merely *in destinatione* and alterable at pleasure (*Craik*, 1728, Mor. 12984; 1735, Mor. 4313; *Trail*, 1737, Mor. 12985: *Macdonald*, 1877, 4 R. 271; see *Wilson*, 1827, 6 S. 198: Ld. Watson, *Mackie*, 1884, 11 R. H. L. p. 15). But "issue of the marriage" may include grandchildren (*Macdonald*, 1893, 20 R. H. L. 88; cf. *M'Murdo's Trs.*, 1897, 24 R. 458).

Again, the protection against gratuitous acts of the father is in general only pleadable against the father. Upon the heir's succession the contract is fulfilled, and the latter may alter the order of succession as he chooses (Menzies, *Conveyancing*, 677). But where the father or person *in loco parentis* substitutes children to each other, with a prohibition against gratuitous alienation, express or implied, this states a *jus crediti* in the substitutes which will prevent their disappointing each other by assigning their shares gratuitously (*Macreadie*, 1752, Mor. 4402: but cf. *Smith*, 1710, Mor. 4332). Similarly, a prohibition against alteration of the order of succession by the heir during expectancy confers a *jus crediti* upon substitutes, which prevents the heir, by arrangement with the father, from disappointing their rights (*Haig*, 1857, 19 D. 449).

7. *Diligence against Father: When competent to Wife or Children.*—Where a full *jus crediti* has been vested in the wife or issue of the marriage, they, or trustees for them, may avail themselves of the remedies of creditors, and use diligence to complete their right, or in security of their provisions. Thus, they may use inhibition against him (*Douglas*, 1724, Mor. 12910), adjudge in implement (*Lyon, Mackenzie, sup.*, s. 4), or in security (*Ballingall, sup.*, s. 4). These remedies are not available to children whose right is only a *spes successionis* (*Gordon*, 1748, Mor. 4398; Ld. Bannatyne, *Cunninghame, sup.*, s. 5, p. 106; cf. *Grahame*, 1677, Mor. 12887). The almost invariable practice which now prevails of constituting a trust for the protection of the wife and issue has largely deprived this class of case of practical value, except as illustrative of the distinction between a proper *jus crediti* and a *spes*.

8. *Free Funds primarily chargeable with Father's onerous Deeds: Rights of Children as Creditors* inter heredes.—In a question with the father, his representatives, or the cautioner of the father for implement of the marriage contract obligations (*Dickson*, 1707, Mor. 12938; *Fotheringham*, 1734, Mor. 12941; Ld. Medwyn, *Herries, sup.*, s. 3, p. 972) the wife and children, as already stated, are regarded as creditors. Accordingly, while the father's power to encroach on the settled funds by onerous deeds cannot be quarrelled by them, such debts are chargeable primarily against the father's free funds, and it is only when these are exhausted that the settled funds can be attacked (*Arthur, sup.*, s. 3; *Cunninghame, sup.*, s. 5; *E. of Wemyss*, 28 Feb. 1815, F. C.; affd. 20 May 1818, F. C.; *Bethune*, 1747, Kilk. 460). The wife and children have therefore a right of relief against the free funds to the extent of the encroachment upon their settled provisions; even against subjects subsequently acquired by the father (*Henderson*, 1730, Mor. 12928).

Where the father, in the exercise of his powers as fiar, sells the estate settled upon the heirs of the marriage, he is not bound to invest the price in other lands (*Cunninghame, sup.*, s. 5); and if he does, the heir cannot, on his father's death, claim these as a *surrogatum* (*Cunninghame, sup.*, s. 5). But in virtue of the father's personal obligation the heir remains a creditor for the value of the estates, the measure of his claim being the amount for which they were sold, not their value as at the opening to the succession (*Cunninghame, sup.*; *E. of Wemyss, sup.*; *Bethune, sup.*; see *Hyslop*, 1821, 1 S. 137). As already noted (*supra*, s. 3), diligence or security, which may be ineffectual to secure children against onerous creditors, may yet avail to confer a preference in a question *inter heredes*.

9. Jus crediti *vests without Service: Transmissibility: Discharge.*—A *jus crediti* vests without service or confirmation (see *Gordon*, 1821, 1 S. 185), and the heirs of the marriage, as being creditors, may without service reduce gratuitous deeds (*Moncreiff*, 1759, Mor. 12871), or sue the father's representatives to secure their provisions (*Campbell*, 1763, Mor. 12885: *Wallace*, 1665, Mor. 12857). And as it vests without service, so it will transmit to heirs or singular successors though they should not be served (Ersk. iii. 8. 38, 73; Menzies, *Convey.* 676). There is no distinction in this respect between an obligation to provide and secure heritage, and an obligation to provide money; for it is not the subject of the obligation, but the nature of the right, which determines the necessity for service (*Ogilvy*, 16 Dec. 1817; see *Douglas*, 1870, 8 M. 374). But if the father has actually fulfilled his obligation by securing the provision in terms of the contract, the *jus crediti* is converted into a right of succession to the specific provisions thus secured, which must be taken up by service (*Finlayson*, 1760, Mor. 12874, p. 12876; Ersk. *sup.*; cf. *Buchanan*, 1862, 4 Macq. 374).

A *jus crediti* may be conveyed not only by *mortis causa* or *inter vivos* deed, but also by simple assignation, intimation being made to complete the right (Bell, *Com.* i. 36; Menzies, *Convey.* 711; Bell, *Convey.* 771; see *Gordon, supra*; *Macdowall*, 1824, 2 S. 682; *Tod*, 1869, 7 M. 1100). As to whether intimation is in all cases necessary to complete the right of an assignee of a *jus crediti*, see *Edmond*, 1858, 3 Macq. 116; but cf. Ld. Curriehill, 18 D. p. 55.

A *jus crediti*, although it be not presently exigible, may be effectually discharged by anticipation, and the discharge will be valid though the child discharging should predecease the father (*Routledge*, 19 May 1812, F. C.; 16 Dec. 1819, F. C.; affd. 2 Bli. 692, 4 Dow, 392; *Ewen*, 2 S. 612; rev. 1 W. & S. 595; Menzies, *Convey.* 687, 688). Upon this principle, a gratuitous alteration of the destination by the father, to which the heir has been made a party, is unchallengeable by substitutes, even although the heir should predecease (*Macdonald*, 1877, 4 R. 271; Bell, *Com.* i. 686; Bell, *Pr.* 1972; cf. *Haig*, 1857, 19 D. 449, in which, however, there was a prohibition against the expectant heir altering the order of succession).

10. *Quality of* Jus crediti *as regards Succession.*—In the person of the creditor a *jus crediti* may be heritable or moveable as regards succession to him. The general rule laid down by Ld. Westbury is that "a *jus crediti* partakes of the nature and quality of the subject itself, and is governed by the same rules as to transmissibility by descent as are applicable to the subject to which it applies" (*Buchanan, sup.*, s. 9, p. 378). But this rule neglects the ordinary case where the *jus crediti* is general in its nature and where it is uncertain to what subject it may eventually attach. In such cases it retains its character as a personal right, and descends to executors (*Wardlaw's Trs.*, 1880, 7 R. 1070). In general, the criterion is the nature

of the demand which the holder of the *jus* is entitled to make upon the subject charged with payment of his claim (Bell, *Com.* i. 36, ii. 4; Bell, *Pr.* 1482; Menzies, *Convey.* 709 *seq.*). See HERITABLE AND MOVEABLE. As to the appropriate diligence for creditors attaching the right, see *Watson*, 1868, 6 M. 258; *Wilson*, 31 May 1809, F. C.; Menzies, 711; Bell, *Convey.* 999, 1000).

See generally, Bell, *Com.* i. 681 *seq.*; Menzies, *Convey.* 446, 447, 455–9, 676 *seq.*: Esk. iii. 8. 38 *seq.*; Bell, *Convey.* ii. 860, 874, 878 *seq.*, 893 *seq.*; Fraser, *H. & W.* ii. 1347 *seq.*, 1356, 1407 *seq.*, 1475, 1498; Goudy, 27, 31.

See also JUS QUÆSITUM TERTIO; MARRIAGE CONTRACT; TRUST.

Jus deliberandi.—In Roman law it was open to the creditors of a deceased person, as well as legatees and *fidei commissarii* of the deceased, to petition the prætor to fix a time within which the heir must enter on the inheritance. The time so fixed was the *spatium deliberandi*, and, as a general rule, it consisted of one hundred days. The heir, on his side, similarly had a right to be allowed during this period to deliberate whether he would undertake the responsibility of entering as heir (*jus deliberandi*). Under Justinian a period of nine months was allowed for this purpose, if granted by the magistrates, and it might be extended to a year upon personal petition to the emperor (*Cod.* 6. 30. 9). Originally, if the heir did not proclaim his intention within the time prescribed, he was taken to have declined the inheritance. Justinian, however, altered this by enacting that the heir, by doing nothing in the way of either refusing or accepting within the time allowed, should lose the right of refusing to enter (*Cod.* 6. 30. 22. 14).

In Scots law the term is used to denote the right of an apparent heir of heritage to be allowed an interval of one year and a day (1695, c. 24), known as the *annus deliberandi*, within which to consider the expediency of accepting the succession, with responsibility for the ancestor's debts. The period of deliberation was restricted to six months by 31 & 32 Vict. c. 101, s. 61 (re-enacting 21 & 22 Vict. c. 76, s. 27, and 23 & 24 Vict. c. 143, s. 16). It is there provided that actions of constitution and adjudication against apparent heirs, whether on account of the ancestor's debt or on account of the heir's debt, for the purpose of attaching the heritable estate, may be insisted in at any time after the lapse of six months from the date of his becoming apparent heir. The Scots law on this subject is fully treated, and the authorities collated, *sub voce* APPARENT HEIR; ANNUS DELIBERANDI; ADJUDICATION FOR DEBT.

Jus devolutum.—Prior to 1874, patronage, or the right to make appointments to vacant ecclesiastical benefices, was vested in persons holding the privilege in relation to respective parishes as a patrimonial right (see PATRONAGE). The patron, however, was bound not to leave the parish for any lengthened period without a minister through his failure to appoint, and in order to secure this, the law provided that if the patron did not exercise his right within six months of the occurrence of a vacancy, the right to make an appointment devolved upon the Presbytery. This right was termed *jus devolutum*. On the abolition of patronage by the Patronage Abolition Act of 1874, the right of election and appointment of ministers was vested in the congregation; but it was provided that if the congregation failed to make an election within six months of the occurrence of the vacancy, the

right to make the appointment should devolve upon the Presbytery, just in the same way as, under the old patronage system, where the patron failed to make a timeous appointment. The provision is as follows :—

"7 (1). If on occasion of a vacancy in any parish no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for that time to the Presbytery of the bounds where such parish is, who may proceed to appoint a minister to the said parish *tanquam jure devoluto*."

Several judicial cases have occurred under this section. It has been found that notwithstanding the provision of sec. 3, under which the Church Courts have power to decide finally and conclusively upon the appointment, admission, and settlement of any minister, the question whether in any particular case the *jus devolutum* has accrued is one for the civil tribunals to determine (*Stewart*, 1878, 6 R. 178; see also *Cassie*, 1878, 6 R. 221). The opinion has been expressed that the General Assembly has no power to extend the period by granting to the congregation another six months, or otherwise, when some miscarriage has occurred (per Lords Gifford and Young in *Cassie, supra*). Where, however, there has been a miscarriage owing to action of the moderator or of the Church Courts, for which the congregation are not responsible, the congregation are not thereby deprived of the right to elect, notwithstanding the expiry of the six months from the occurrence of the original vacancy (*M'Farlan*, 1879, 16 S. L. R. 480; *Dunbar*, 1889, 26 S. L. R. 517).

The question, however, which has given rise to most difficulty, both before and subsequent to the abolition of patronage, is the effect in relation to the *jus devolutum* of a presentation or election which, for some reason or another, comes to nothing, and does not lead to the induction of a minister. The following are the rules which obtained during the period of patronage, as stated by Bankton and Erskine :—

"If the patron acquiesces to the rejection of the presentee by the Presbytery, the residue of the six months that remained at the time the presentation was made commences to run from the time of such refusal, or from the time the appeal is finally discussed, within which he may present another, provided the presentee was an actual minister or licentiate, and declared his acceptance or willingness to accept; as likewise he has the residue of the six months in case of the presentee's death happening after the presentation is offered to the Presbytery . . . but if the patron presents one who does not accept within six months, or who is not legally qualified, as not having taken the oaths required by law, or the like, he can only, on the presentee's being rejected, present another within the six months of the vacancy happening" (Bankt. I. ii. 64).

"If the presentee be qualified in terms of the statute, the currency of the six months is suspended by the presentation during the whole time the Church Courts are employed in deliberating whether to receive him or not; and if they should at last reject him for heterodoxy, or whatever other cause, the patron has as much time left him to present, after their sentence, as was to run of the six months when the presentation was offered to the Presbytery" (Ersk. I. v. 17).

It is thought that these rules still obtain under the new system of appointment. It has been suggested (Mair, *Digest*, 254) that where an appointment has not been sustained by the Church Courts, the six months run on without interruption. The case, however, which is supposed to support this view (*Craig*, 1893, 20 R. 941) was very special, and does not

seem to go further than that if the election is irregular, and therefore void, it is no election, and does not interrupt the running of the six months. There does not seem to be any reason why the old rule should be departed from, that when a qualified person is appointed and accepts, and the Church Courts reject him, the running of the six months pauses whilst the case is in dependence (Mair, *Digest*, 245–55).

Jus fetiale, in Roman law, was the system of rules which regulated the declaration and conduct of war and the making of treaties. The name was derived from the fact that the forms observed in international intercourse were under the supervision of a class of priests known as *fetiales* (Livy, i. 24 *et seq.*).

Jus in re; Jus ad rem. Jus in rem; Jus in personam.—These expressions denote a distinction, which is of great importance in practical jurisprudence, between rights available against all persons indefinitely, and rights available only against a definite individual or individuals. He who has a *jus in re*, *e.g.* the owner of a subject, has a right to its exclusive enjoyment, which he can make good against everybody. He who has a *jus ad rem*, *e.g.* a servant having a right to wages, has a claim only against a definite individual, his master. The same distinction is denoted by the terms *jus in rem* and *jus in personam*. These latter terms are undoubtedly more descriptive, and are also analogous to the description of judgments as being *in rem* or *in personam*, and to the mediæval distinction between "statuta realia" and "personalia," which played so great a part in the development of international private law. In Scotland, however, the terms *jus in re* and *jus ad rem* are used more frequently. Although the expression *jus in re* is classical (*e.g. Dig.* 39. 2. 19), the terms *jus in re* and *jus ad rem* were first used to express this distinction by the canon law. A *jus in re* is properly a "real" right; a *jus ad rem*, a "personal" right.

Jus mariti.—Before the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21) (*q.v.*), a woman's whole moveable estate passed to her husband on her marriage, unless his right had been renounced or excluded by an antenuptial marriage contract. And moveable estate which she acquired during the marriage vested in her husband, subject in certain cases to a claim introduced by the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86), s. 16, that he should make therefrom a reasonable provision for her maintenance. The husband was said to take the wife's estate in virtue of his *jus mariti*. The Act of 1881 abolished the *jus mariti* in marriages after its date, subject to certain limitations referred to below. The ways in which the *jus mariti* might be renounced or excluded, the extent to which it has been excluded by statute, the effect of exclusion, and the question whether a foreign husband who acquires a Scottish domicile after the Act of 1881 is entitled to *jus mariti*, are discussed under Administration, Husband's Right of, as that right is now of greater practical importance, and the same rules apply to both. The husband's rights may be held to be excluded by implication where the terms of the deed are not very apt, but its general effect is inconsistent with the view that the *jus mariti* was to subsist. (See, in addition to the cases cited under Administration, Husband's Right of, *Marshall's*

Factor, 1897, 4 S. L. T. No. 394). The cases in which the *jus mariti* still subsist are :—

1. Where the marriage was contracted and the wife acquired right to moveable estate prior to 18th July 1881.

2. Where the marriage was prior to 18th July 1881, and the wife acquires moveable estate thereafter, if the Act is excluded by reason of the husband having, before its passing, made by irrevocable deed a reasonable provision for his wife in the event of her surviving him (s. 3 (1)).

3. Where heritage was vested in the wife prior to the Act, the husband takes the rents accruing thereafter (*Horsburgh*, 1889, 16 R. 507).

4. It is not settled if a foreign husband who acquires a Scottish domicile after the Act is entitled to *jus mariti* (see ADMINISTRATION, HUSBAND'S RIGHT OF, and cases in Walton, *H. & W.* 408 *seq.*; Dicey, *Conflict of Laws*, p. 650). The new German Code adopts the principle that there is a tacit contract at marriage that the patrimonial rights of the spouses shall be governed by the law of the domicile at that time, and shall not be altered by a subsequent change of domicile.

Where the husband's right exists, he is the absolute owner, and may deal with estate which comes to him in this way exactly as with any other part of his moveable estate, subject to the claim to a reasonable provision introduced by sec. 16 of 24 & 25 Vict. c. 86 (see *Mudie*, 1896, 23 R. 1074; Fraser, *H. & W.* i. 679; *Ferguson*, 1877, 4 R. 393; *Fraser*, 1872, 10 M. 837).

[Fraser, *H. & W.* i. 679; Walton, *H. & W.* 144, 408.]

See ADMINISTRATION, HUSBAND'S RIGHT OF: COMMUNIO BONORUM; CONJUGAL RIGHTS ACT; DIVORCE; MARRIED WOMEN'S PROPERTY ACT: HERITABLE AND MOVEABLE; MARRIED WOMAN; WIFE.

Jus præventionis.—See JURISDICTION.

Jus quæsitum tertio.—When a contract containing a stipulation in favour of a third party, who is named or clearly indicated, becomes irrevocable, the right so stated in the third party vests in him, and on it he can found and sue. Such a contract may amount to a direct creation of a trust in favour of the third party; or it may become irrevocable (1) by intimation, or delivery, or registration; (2) by the death of one of the parties to it; (3) by third parties, on the faith of the contract and for value, acquiring rights under it.

In all the reported cases where a *jus quæsitum* was said to arise the contracts had been reduced to writing, but there seems to be no sound reason why a *jus quæsitum tertio* should not spring out of an oral agreement; subject, perhaps, to the condition that, as in the case of trusts, the constitution of the obligation in favour of the third party be proved by writ or oath. See, however, *Downie*, 1879, 6 R. 457.

This doctrine, which is known to the law of Scotland as that of *jus quæsitum tertio*, forms a deviation from the rule of contract law, that no third party can sue upon a contract. It resembles, indeed, more closely in its main features the conception of a trust, where the relation of trust arises out of a contract between the truster and trustee, the beneficiary being the *tertius* on whose behalf *jus est quæsitum*. A comparison of the English and Scottish cases emphasises this view. In *Gandy* (1885, 30 Ch. D. 57), Cotton, L. J., after stating the rule of law that third parties cannot sue on

a contract, continues: "that rule, however, is subject to this exception. If a contract, although in form with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as a cestui que trust under the contract, then B. would, in a Court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated." So Jessel, M. R.: "A mere agreement between A. and B., that B. shall pay C. (an agreement to which C. is not a party, directly or indirectly), will not prevent A. and B. from coming to a new agreement next day, releasing the old one. If C. was a cestui que trust it would have that effect" (*in re Empress Engineering Co.*, 1883, 16 Ch. D. 125). Again, in the following parallel cases, English and Scottish, our *tertius* with his *jus quæsitum* and the English cestui que trust show strong affinity. Take the Scottish case first. A husband inserted in an antenuptial contract a stipulation in favour of his stepmother. He died leaving a settlement by which he revoked this provision, yet the Court held the stepmother entitled to succeed in an action for its enforcement (*Wannoch*, 1759, Mor. 7730). In the English case of *Gall* (1877, 6 Ch. D. 144) the facts were the same, with this difference, that the beneficiary there was a child of the wife's by a former marriage.

Compare, again, the two decisions in *Rose, Murison, & Thomson*, 1889, 16 R. 1132, and *Lloyd's* v. *Harper*, 1880, 16 Ch. D. 290. The rubric of the former runs that "an association of underwriters, before admitting a new member, were in the practice of inquiring into his financial position, and, in certain cases, of requiring a guarantee for underwriting obligations to be contracted by him. Held by Ld. Kyllachy that a guarantee so granted conferred a *jus quæsitum* on any person subsequently assured by such underwriter." In *Lloyd's* case the Court of Appeal held, in similar circumstances, that the body in whose favour the guarantee was granted were in the position of trustees for the benefit of persons whose ships might be underwritten by members of their association. A last example will suffice. A creditor took over from his debtor a farm which belonged to him, part of the consideration being an undertaking by the creditor to pay a debt due by the common debtor to a third party. Creditor number two was found in equity entitled to enforce this stipulation in his favour, this *jus quæsitum* as we should call it (*Gregory*, 1817, 3 Mer. 582).

These cases establish the relationship of our doctrine of *jus quæsitum* to the English idea, called equitable, and classified under the head of trusts.

The American Courts hold conflicting views upon the subject, but a great body of authority supports the view that a third party can sue upon a right duly constituted in his favour in a contract which has become irrevocable. For example, "it is the settled law in Wisconsin that when one person, for a valuable consideration, engages with another . . . . to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the agreement. After knowledge of and assent to such agreement by the person for whose benefit it is made, his right of action on it cannot be affected by a rescission of the agreement by the immediate parties thereto" (*Bassett*, 43 Wis. 319, quoted in *American Law Review*, 1881, p. 238, where the American law is fully discussed).

The law of Scotland, however, is well settled, and goes much farther than English common law has ventured. The English rule, as enunciated by Pollock (*Contracts*, 5th ed., 201), stands (subject to the above exception) thus: "It is now settled that a third person cannot sue on a contract made

by others for his benefit, even if the contracting parties have agreed that he may. The final decision was in *Tweddle* (1861, 1 B. & S. 393)." This rule is founded largely on failure of consideration passing between the third party and the obligor, consideration being a sacred requirement of the English system of contract law. For in principle there seems to be no more reason why a man should not undertake to execute a contract in favour of a nominee of the other contractor, than that a person should come forward and adopt a contract made on his behalf by an unauthorised agent. And this is the principle upon which our law has taken its stand. "The general rule of the law of Scotland is that every stipulation in a mutual agreement is binding upon the person obliged, whether it is conceded in favour of the other contractor or of a third party" (Ld. Watson in *Macdonald*, 1893, 20 R. H. L. 88). That is of course in questions between the parties to the agreement; and with respect to the third party in the event of the agreement as between the contractors having become irrevocable. This brings us to an analysis of our definition of a *jus quæsitum tertio*.

1. The stipulation in favour of the third party must be clearly expressed in terms which leave no doubt that a benefit for him is intended, and contracted for. The circumstance that advantage will result to him out of the performance of a contract between A. and B. confers on C. no right whatever (*Lindores*, 1714, Mor. 7735; *Heron*, 1893, 20 R. 1001). "The *jus* must be not merely a *jus* in which the *tertius* is interested; it must be a *jus* which was intended to be in some way beneficial to the third party" (per. Ld. Cranworth in *Finnie*, 1857, H. L. 3 Macq. 75). Ld. Wensleydale said in the same case: "By an agreement in favour of third parties I understand an agreement that something is to be done or permitted for the benefit of the third party, who may afterwards come in and insist upon its performance, and in the meantime the actual parties cannot revoke it." And again, in *Peddie's* case (1857, 3 Macq. 65), Ld. Cranworth said: "It must be not only a *jus tertio*, but a *jus quæsitum tertio*; it must be something that was intended to enure to the benefit of the third party. These words are appropriate, and all necessary to enunciate accurately the principle." The parties, furthermore, must not only intend to benefit the third party, but must make his benefit the subject of express agreement, or the result of a necessary inference. A town hall was built by subscriptions obtained by a town council on representations to the public, in plans and writing, of the nature of the buildings to be erected. The plans showed rooms dedicated to the use of the town clerk. Here it was held that there was no contract between subscribers and the town council out of which could spring a *jus quæsitum* to the town clerk to demand the offices shown on the plan (*Downie*, 1879, 6 R. 457). In the case of *Costine's Trs.*, 1878, 5 R. 782; affd. 6 R. H. L. 13, a father and son, contracting together concerning the disentail of an estate, agreed that part of the price, a sum of £3000, should be handed to trustees for the son's behoof, reserving to the father power to limit and control the son's interest in this fund to an alimentary liferent. The father subsequently restricted his son's interest to a liferent, and declared that, in the event of the son's dying without issue, the fee of the £3000 should pass to C. and D. The son having acquiesced in this deed of appointment, it was notwithstanding held that C. and D. had acquired no *jus quæsitum*, the deed so far as they were concerned being testamentary in character because their interest had not been made matter of contract between the father and son. *Tait*, 1738, Mor. 7728, and *Mitchell's Trs.*, 1877, 4 R. 800, furnish also authority against gratuitous testamentary beneficiaries acquiring any vested irrevocable interest under a marriage contract

or a mutual settlement between a husband and wife, even although the contract in the latter of these cases contained a declaration that the deed should be irrevocable on the death of one of the spouses. But *Macdonald* v. *Hall*, 1893, 20 R. H. L. 88, supports the leading proposition that if the right of the beneficiary be the subject of express agreement it will be enforced. Here the question arose out of an antenuptial contract of marriage under which a husband had conveyed to his wife his whole property then belonging to him, or which he might have at his death, in liferent, "and to the children of the intended marriage and the issue of the body of such children," whom failing to his own heirs, etc., in fee; in consideration of an absolute conveyance by the wife to her husband of her whole property. The House of Lords held that a grandchild had, as a conditional institute under this contract, a *jus crediti* which the grandfather could not gratuitously defeat. In the Court below, and on the construction of the words "issue of the body," it had been thought that the deed was contractual only for the benefit of the children of the marriage, exclusive of grandchildren; but the rule of law to be applied was clearly stated by Ld. Kinnear: "It is no doubt perfectly competent for the spouses, contracting with each other before marriage, to stipulate for benefits to other persons or classes of persons beside themselves and their children, and if a destination to heirs or to one of the relatives of one of the spouses is the counterpart of an obligation in favour of the other [or clearly contracted for?], it will be just as onerous and irrevocable as the mutual provisions in favour of the spouses themselves. That is perfectly clear. But I am unable to find any indication of onerosity *or mutuality* in this deed, except in so far as it provides for the wife and the immediate children of the marriage." His Lordship then proceeds to give his reasons for considering this provision to be testamentary and not contractual, whereby he held no *jus crediti* had been acquired for the grandchildren.

The stipulation in favour of the third party may be the result of a necessary inference from the terms of the contract in certain circumstances, and notably in the cases of feu-contracts where building restrictions, inserted by the superior in the titles of the feuars, are enforceable at the instance of the fellow-vassals, for each of whom a *jus quæsitum* is said to have been acquired by the superior. In such cases the question is "whether there is sufficient evidence displayed in the titles of parties that the restrictions were imposed and accepted as for the benefit of the body of feuars on the ground of the judgment in *MacRitchie's Trs.*, 1881, 8 R. H. L. 95" (Ld. Kyllachy in *Walker's Trs.*, 1897, 4 S. L. T. 322, 34 S. L. R. 791). So Ld. Kinnear in *Stevenson*, 1896, 23 R. 1079: "To give a feuar a right to enforce such conditions there must be (1) an express stipulation in their respective contracts with the superior, or (2) a reference to a common plan or scheme of building, or (3) an agreement between the feuars themselves."

Under this head there fall to be dealt with those cases, of which *Robertson* v. *Fleming*, 1861, H. L. 4 Macq. 167, may be cited as the leading authority, where the benefit intended for the third party does not spring directly from the contract, and all that the third party can say is that he has sustained a loss through the failure of the obligor to perform his duty. "I have never had any doubt," says Campbell, L. C., "of the unsoundness of the doctrine contended for that A., employing B., a professional lawyer, to do any act for the benefit of C., A. having to pay B., and there being no intercourse of any sort between B. and C., and if, through the gross ignorance and negligence of B. in transacting the business, C. loses the

benefit intended for him by A., C. may maintain an action against B. and recover damages for the loss sustained. Scottish authorities under the head *jus quæsitum tertio* have no application, for these contemplate a vested right absolutely acquired by the consummated transaction." So where A. contracts with B. to supply a gangway to a ship, and C., a firm of engineers, contracts with B. to fit engines in the vessel, there is no implied contract between A. and C. which will entitle C. to sue A. for damages resulting to C. from A.'s failure to supply a gangway conform to contract, notwithstanding knowledge on A.'s part, when he made the gangway, that it was to be used by C. (*Campbell*, 1891, 19 R. 282; *Blumer*, 1874, 1 R. 379; but compare *Heaven* v. *Pender*, 1883, 11 Q. B. D. 503, which was, however, a case founded on tort, and not on any implied rights under the contract between A. and B.). The third party, in order to sue the agent or contractor in such circumstances, would have to show that the latter had been employed on his behalf; or was joint-agent for his nominal employer, and the third party (*Lang*, 1827, 2 W. & S. 563; *Grant*, Mor. 2081; *Raes*, 1889, 16 R. H. L. 31).

2. The *tertius* must be named or clearly indicated, either as an individual or as a member of a class (*Finnie*, 1857, 3 Macq. 75). He need not be in existence at the date of the contract, if clearly contemplated; as for example children who acquire a *jus crediti* at birth in terms of an antenuptial settlement (*Hall* v. *Macdonald*, 1893, 20 R. H. L. 88); or persons who after the date of the contract bring themselves within the class on whom its benefits are conferred: as in the cases already noted where associations of underwriters held guarantees for the credit of their members, and the advantage of the customers of those members; or the cases arising under feuing contracts referred to above. Here we see another point of divergence between the doctrine of *jus quæsitum* and the rules of contract law which forbid a person, not in existence at its date, to step in and adopt a contract made by an agent expressly on his behalf and in his name (*in re The Northumberland Avenue Hotel Co.*, 1886, L. R. 33 Ch. D. 16; *Tinnevelly Sugar Refining Co. Ld.*, 1894, 21 R. 1009).

3. The contract must be irrevocable as between the contractors when the *tertius* founds upon it. Some confusion on this point is to be observed among the authorities, it being sometimes said that the contract is irrevocable because there is a *jus quæsitum tertio* (*e.g.* per Ld. Ormidale in *Mitchell's Trs.*, 1877, 4 R. 800), and again that there is a *jus quæsitum* because the contract is irrevocable. The former of these views seems to have the countenance of Stair in the familiar passage wherein he enunciates the law. The text runs: "It is likewise the opinion of Molina, and it quadrates with our customs, that, when parties contract, if there be any article in favour of a third party at any time, *est jus quæsitum tertio, which cannot be recalled by either or both of the contractors*, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform." Now it is clear that if the clause in italics—"which cannot, etc"—were read before the words "*est jus quæsitum*," the authority of Stair could not be claimed for this argument. And such appears to have been the reading adopted by Ld. Ardmillan, who says: "According to Ld. Stair it is only when there is in a contract 'some article in favour of a third party' *which cannot be recalled by one or both of the contractors*, that there is a *jus quæsitum*. . . . It must be clear that the contracting parties intended to benefit him (the third party), and that they could not, separately or together, revoke the stipulation" (*Blumer*, 1874, 1 R. p. 387). An examination of the authorities cited by Stair bears out Ld.

Ardmillan's construction of the language. Stair refers to four cases: *Nimmo*, 1627, Mor. 7740; *Renton*, 1634, Mor. 7721; *Ogilvie*, 1664, Mor. 7740; and *Irving*, 1676, Mor. 7722. In two of these decisions the question of intimation or delivery was expressly pointed to as necessary to fix the position of parties; in one of the others the contract as between the contracting parties was completed and *de facto* irrevocable; and in the fourth it was never suggested that the original obligee proposed to resile from his agreement. On principle, it is plain enough that if A. and B. make a contract in C.'s favour behind his back, and nothing follows, they may immediately agree to rescind that agreement. Indeed the stipulation in his favour may be looked on as no more than an uncommunicated offer binding in his favour only when intimated and accepted, or at least when delivered on his behalf in the form of a written deed. Until that moment there is *locus pœnitentiæ* for the contractors. "I don't doubt the principle that when a person who is indebted makes provision for payment of his debts by vesting property in trustees for the purposes of discharging them, but does this behind the backs of his creditors and without communication with them, the trustees do not become trustees for creditors. The arrangement is one supposed to be made by the debtor for his own convenience. It is as if he had put the sum of money into the hands of an agent with directions to apply it in paying specific debts. In such a case there is no privity between the agent and the creditor. The debtor may at any time revoke the authority and recall the money placed in his hands. [So money consigned on this footing was held to confer no preference as against an arresting creditor, *Stonehever*, 1706 Mor. 7724.] The case, however, is obviously different where the creditor is a party to the arrangement; the presumption then being that the deed was intended to create a trust in his favour, and he is therefore entitled to call on the trustee to execute. So even if he be not a party, if the debtor has given him notice of the existence of the deed, and has expressly or impliedly told him that he may look to the trust property for payment of his debt, the creditor may thereby become a cestui que trust, and may acquire a right as such just as if he had been a party, and had executed the deed" (Ld. Cranworth in *Synnit*, 1854, 5 Cl. H. L. 121). Further Scots authorities in support of this proposition are noted below in the next paragraph; a reference may, however, be given here to the English decision *in re The Empress Engineering Co.*, 1883, 16 C. D. 125, where the test of revocability was held to decide whether a right was conferred upon a third party; and to *Gandy*, 1885, 30 Ch. D. 57, where this test was adopted with approval.

4. The contract is irrevocable (1) when it amounts to the constitution of an irrevocable trust. Enough has perhaps been said on this aspect of the subject, and the reader is referred to the article on Trusts (see *Shedden*, 1895, 23 R. 228; *Byre's Trs.*, 1895, 23 R. 332; *M'Gowan*, 1862, 1 M. 141; *Kidd*, 1863, 2 M. 227).

(2) By intimation, delivery, or registration. At a meeting of the Burgh Commissioners of Bo'ness it was resolved to increase the salary of their sanitary inspector. The resolution was duly minuted, but not intimated to the inspector. The commissioners shortly after proposing to annul their resolution, the Court decided that they were entitled to do so, want of intimation being fatal to the inspector's claim that he had a *jus quæsitum* under the minuted resolution which made it irrevocable. Ld. Trayner said: "I think a sufficient ground of judgment is that the resolution was never intimated to the pursuer. He has therefore no *jus*

quæsitum." Ld. Moncreiff was of the same opinion (*Burr*, 1896, 2 148). In *Cruickshanks* (1893, 21 R. 257) the trustee under a trust d containing a clause directing him to pay debts, advertised for clai Creditors who thereafter intimated claims were held to have acquired a *jus quæsitum* under the intimated deed. Want of intimation also may be the ground of the striking decision in the case of *Stubbs* (1894, 22 R. 51), where the Court was of opinion that third parties had acquired no right under a contract between A. and B., although A., who took over the business of B., obliged himself to pay all present and future liabilities of B., howsoever arising. The third party here was suing A. for a slander uttered by B. (prior to the transfer) in the course of his business of publishing "Black Lists." Ld. Adam, in delivering the judgment of the Court, denied the vesting of any *jus quæsitum*, on the ground that the contract was revocable as between A. and B.

If the transaction be looked on as one of delegation (*Ogilvie*, 1664, Mor. 7743), the ordinary rule of law requiring intimation and the creditor's consent applies.

Delivery or registration forms a more perfect form of intimation with its consequent results when delivery of the deed is to the *tertius* himself (*Borthwick*, 1816, 5 Dec. F. C.; *Irving*, 1676, Mor. 7722), or to an outsider on his behalf (*Borthwick*, 1686, Mor. 7735; *Rose, Murison, & Thomson*, 1889, 16 R. 1132); but registration by way of delivery will suffice (*Renton*, 1634, Mor. 7721; *Obers*, 1897, 24 R. 719).

(3) By the death of one of the parties. Two brothers executed a joint deed of entail in terms of which both of them made settlements in favour of a series of heirs. It was held that the heirs of entail obtained a *jus quæsitum* under the deed, in respect that on the death of one of the brothers the deed had become irrevocable, it being assumed that during their joint lives it was open to them to revoke the provision (*Hogg*, 1863, 1 M. 647).

(4) Where innocent third parties for value acquire rights on the faith of a contract, the contract is not revocable (*Tennant*, 1879, 6 R. 554, H. L. 69; *Mount Morgan Gold Mine Co.*, 1891, 18 R. at p. 783; Pollock on *Contracts*, 5th ed., 566). Much more so is this the case where the third party contracting on the faith of an agreement is the *tertius* in whose favour that very agreement stipulates. So contracts between superiors and feuars with properly constituted (*supra*) terms in favour of co-feuars become irrevocable, and the right of the third party becomes vested when he too contracts with the superior on the faith of the superior's contract with an earlier vassal (*Hislop*, 1881, 8 R. H. L. p. 95; *Stevenson*, 1896, 23 R. 1079; *Johnston*, 1897, 24 R. 1061; cf. *Rose, Murison, & Thomson, supra*).

Jus relictæ and **Jus relicti.**—At common law the wife is entitled on her husband's death, or divorce for his fault (see DIVORCE), to one-third of his free moveable estate if he leave lawful children by her or a former wife, or to one-half if he leave no children. By sec. 6 of the MARRIED WOMEN'S PROPERTY (SCOTLAND) ACT, 1881 (44 & 45 Vict. c. 21) (*q.v.*), a corresponding share or interest in his wife's moveable estate is given to the husband of any woman who may die domiciled in Scotland, "subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be." It is immaterial that the marriage was constituted or the property acquired prior to the Act (*Paterson's* case, 1882, 10 R. 356, 10 R. (H. L.) 73),

or that the *jus mariti* was excluded by antenuptial marriage contract, if she died the absolute owner (*Fotheringham*, 1889, 16 R. 873; *Simons' Trs.*, 1890, 18 R. 135). The effect of divorce is not mentioned, and it has been held that a husband who divorces his wife is not entitled to *jus relicti* (*Eddington*, 1895, 22 R. 430). With this distinction, which it is humbly thought the Legislature did not intend to create, the two rights correspond, and what is said in the sequel of *jus relictæ* must be read as applying also to *jus relicti*, as the statutory right of the husband may conveniently be designated (see *Buntine*, 1894, 21 R. 714).

Jus relictæ, whether a right of succession or division (see *Tait's Trs.*, 1886, 13 R. 1104), cannot be defeated by any testamentary deed. It vests *ipso jure* on the husband's death, and the widow is entitled to the interest accrued on it from the date of death (*M'Intyre*, 1865, 3 M. 1074).

The question as to whether any subject is heritable or moveable depends on the general law, except that heritable securities and bonds with a clause of interest which have been made moveable *quoad* succession, remain heritable *inter conjuges*, and do not form part of the estate out of which *jus relictæ* is payable (31 & 32 Vict. c. 101, s. 47, and 1661, c. 32; see *Dawson's Trs.*, 1896, 23 R. 1006). Debentures of public trusts and companies are heritable unless otherwise provided in the private Act (*Downie*, 1866, 4 M. 1067). Mortgages and debentures of companies incorporated by Act of Parliament are moveable, unless otherwise provided in the special Act, under the Companies Clauses Consolidation Acts (8 & 9 Vict. c. 17, s. 46, and 26 & 27 Vict. c. 118, s. 23). See HERITABLE AND MOVEABLE.

Deeds in Fraud of Jus relictæ.—A husband is perfectly free to dispose of his estate *inter vivos* in any way which he pleases, though he may do so expressly for the purpose of diminishing the fund available for *jus relictæ* (Bell, *Prin.* ii. 1584; Fraser, *H. & W.* ii. 1010). But a simulate deed which merely purports to divest the granter, and really leaves him in enjoyment of the property, may be reduced as in fraud of *jus relictæ* (Bell, *l.c.*; Fraser, *l.c.*; *Lashley*, 1804, 4 Pat. 581; *Millie*, 1803, Mor. 8215; affd. 1807, 5 Pat. 160; *Buchanan*, 1876, 3 R. 556; and see an instructive American case, *Walker*, 1890, 49 Amer. Rep. 617).

How Jus relictæ may be Discharged or Renounced.—The wife may renounce her rights by an antenuptial marriage contract. And although she is a minor, it seems that renunciation for a small provision would not be evidence of enorm lesion though the husband died possessed of large moveable estate (*Cooper*, 1888, 12 R. 473, 15 R. (H. L.) 21). It may be discharged *stante matrimonio*, but in that case the discharge may be revoked as a donation if it was granted gratuitously or for a consideration grossly insufficient (see DONATIONS INTER VIRUM ET UXOREM). Renunciation or exclusion will not be readily implied, but effect will be given to words which, without expressly naming the right, clearly indicate the intention to renounce or exclude it (*Durrant Stewart's Trs.*, 1891, 18 R. 1114; *Keith's Trs.*, 1857, 19 D. 1040; *Dunlop*, 1865, 3 M. (H. L.) 46; *Edward*, 1888, 15 R. (H. L.) 33; *Wright's Trs.*, 1897, 4 S. L. T. No. 494 (Ld. Pearson); Ersk. iii. 9. 16; Fraser, *H. & W.* ii. 1060).

Where it does not appear that a provision in a marriage contract, or in the husband's testamentary writings, was intended to be in full of *jus relictæ*, the widow may take both (Fraser, *H. & W.* ii. 1067). But where there are provisions in several deeds, some of which are said to be in full of *jus relictæ*, and others not, the deeds will be read together, and the widow must elect between her legal rights and the conventional provisions (*Stewart*, 1832, 11 S. 139). A settlement disposing of the husband's whole estate of all his

moveables, is held to imply an intention that the widow shall not take *jus relictæ*, as there would be no estate out of which it could be paid (*Keith's Trs.*, 1857, 19 D. 1040; *Caithness Trs.*, 1877, 4 R. 936; *Edward, ut supra*). Where the wife has assented to a scheme of division of the husband's estate which is inconsistent with her taking *jus relictæ*, she cannot both approbate and reprobate the deed by claiming both legal and conventional rights (*Edward, ut supra*). So a provision of the liferent of the whole estate accepted by the wife will bar her from taking *jus relictæ* (*Buntine*, 1894, 21 R. 714, and cases there cited). And a husband cannot claim *jus relicti* in addition to a liferent of the wife's whole estate accepted by him prior to the Act of 1881, for this would be to make the Act affect a marriage contract contrary to sec. 8 (*Buntine, ut supra*). But where the deed does not dispose of the whole estate, or the failure of objects brings about intestacy *quoad* some part of the estate, a widow who has not expressly renounced *jus relictæ* may claim her half or third of the estate undisposed of, in addition to a liferent (*Buntine, ut supra*, per Ld. M'Laren; see M'Laren on *Wills*, i. s. 478, and cases cited).

Where the wife has not renounced her *jus relictæ*, and it is clear the husband did not intend her to take both it and the conventional or testamentary provisions, she must make an election between the two. Her acceptance of one set of rights or the other may be proved by facts and circumstances (*Pringle's Executrices*, 1870, 8 M. 622). And where she can show that she was misled in making her election, or was not fairly informed as to the value of the respective rights, she may reprobate her acceptance, and claim to be restored to her former position (*Donaldson*, 1886, 13 R. 967; *M'Fadyen*, 1882, 10 R. 285). And where matters are entire she may be restored, though her ignorance was not due to any fault or negligence of others (Fraser, *H. & W.* ii. 1062; see *Dawson's Trs.*, 1896, 23 R. 1006).

A discharge by her after the husband's death has the effect of carrying to the executor the sum which would have fallen to her as *jus relictæ*, as in a sense being purchased by him with the special provision. The legitim fund will be one-third of the whole moveables, as if the wife had been going to take her *jus relictæ* (Fraser, *H. & W.* ii. 1070; *Fisher*, 1840, 2 D. 1139; 1843, 2 Bell's App. 63; *Campbell's Trs.*, 1862, 24 D. 1321). But this does not apply to estate such as a bond with a clause of interest, which, though moveable *quoad* succession, is heritable *quoad* the widow. The division of of this will be bipartite (*Dawson's Trs, ut supra*).

Effect of Change of Domicile.—It is hardly doubtful that a husband can defeat his wife's claim to *jus relictæ* by acquiring a domicile in a country where this right is not recognised, and, conversely, that by acquiring a Scottish domicile after the marriage he gives her this right if she has not renounced it (see *Hoy*, 1792, 3 Pat. 247; *Lushley*, 1804, 4 Pat. at p. 614; *Trevelyan*, 1873, 11 M. 516; Bell, *Prin.* s. 1591; Walton, *H. & W.* 405 *seq.*). As to *jus relicti*, the Act clearly extends to a wife dying domiciled in Scotland, though not domiciled there at marriage (44 & 45 Vict. c. 21, s. 6).

[Stair, iii. 8. 43; Ersk. iii. 9. 15; Bell, *Prin.* 1591; Fraser, *H. & W.* ii. 1058; Walton, *H. & W.* 220, 405.]

See LEGITIM; TERCE; ELECTION.

Jus repræsentationis.—See SUCCESSION.

Jus tertii.—This is a phrase used in pleadings, and means that the

party stating a plea—in pursuit or in defence—has no right to do so; another may have, or has, the right, but he has not.

The phrase is not of civil-law origin, but is found in use in our system of law as early as the sixteenth century. Although belonging to the domain of practice or procedure, it is not so determinate in its significance as to be dealt with specifically either in Shand's *Practice* or in Mackay's *Practice* or *Manual of Practice*. Reference to the phrase in the indices of our law books and in our digests are rare; and yet the phrase has long been and is in current use. The plea of *jus tertii* is in fact substantially a question of legal title and interest, and discussion of it is to be looked for, if anywhere, in discussions of these departments of the law of procedure.

Mr. Mackay, in treating of title and interest as "both necessary to maintain an action," says: "There is neither title nor interest where the right to be enforced by the action is vested in another than the pursuer, and the pursuer would derive no benefit from enforcing it" (*Manual of Practice*, p. 125); and this is practically a statement of the doctrine and plea of *jus tertii*. Of the plea of no title he says (p. 126), "There may be . . . an interest but no title"; and, after citing examples of this, he writes: "In these instances there was no title, although there was an interest recognised by law which might by other means have been made effectual" (p. 127),—pointing to cases where the party ought to have sued (or defended), not personally, but through someone linked with or representing him, as, *e.g.*, an executor, for a legatee, or a trustee, for a bankrupt. In cases of *jus tertii*, on the other hand, the claimant (or defender) has no right, and he and the parties who have are entirely third parties to one another. Similarly, the author of Bell's *Dictionary* says: "When a party in an action maintains a plea which he has neither title nor interest to maintain, he may be met by the reply that it is *jus tertii* in him to maintain such a plea" (*sub vocibus*); and Ld. Trayner, in his *Maxims*, defines *jus tertii* thus: "The right of a third party. Where anyone in an action at law propones pleas, or advances arguments, which he has no title or interest to maintain, he may be met by the reply that such pleas are *jus tertii* to him" (*sub vocibus*). As is pointed out in Bell's *Dictionary*, the absence of interest, in the legal sense, does not mean that no benefit would accrue to the person pleading another's right if he were allowed to appear, but that it is not his right to do so, because *quoad* him the opponent had a good case.

Modern instances of judicial discussion of the plea of *jus tertii* are not frequent. They have arisen perhaps most often in questions of the validity of titles to land. Thus in *Monteith* (1869, 7 M. 523), a superior was found to have no legal title and interest, and it was held to be *jus tertii* to him, to attempt to reduce a disposition granted by one of his predecessors on the ground that a decree of adjudication, which constituted the defender's title, and on which infeftment was taken, had been obtained in respect of documents that were invalid and ineffectual. The heir of the defender in the adjudication might, possibly, it was thought, have reduced on the grounds stated, but the superior could not (see *Lord Advocate* v. *M'Culloch*, 1874, 2 R. 27, where, similarly, it was held *jus tertii* to the Crown, in the face of a sufficient title and prescriptive possession, to object to the defender's claim of the right of salmon-fishing, in respect of possible defects in the transmission of the title from the Crown vassal to the subvassal; see also *Duke of Roxburyh*, 1732; affd. 1734, 1 Pat. 126). Where the title of two parties is derived from one author, it is *jus tertii* to either party to object to the right of the common author (see *Livingston*, 14 July 1768, F. C.; affd. 29 April 1773, 6 Pat. 790). In *Blackburn* (1868, 3 M.

318), in a question of objection taken to a name standing on the Voters' Roll as a "joint-tenant and occupant," the Sheriff and the Court decided that no one could raise the objection of no joint-tenancy save the alleged joint-tenant. In questions under the law of location, the plea of *jus tertii* also arises—where assignations or subleases have been made by a principal tenant, in spite of prohibitions in the lease. It is there held to be *jus tertii* to others than the landlord to plead the prohibition, in respect it is a provision personal to him (*Hay & Wood, Petrs.*, 1801, Mor. 15297; Rankine, *Leases*, 2nd ed., p. 169; see also Rankine, p. 173, and *Dobie*, 1864, 2 M. 788). Again, in a question of bankruptcy law, it was found to be *jus tertii* to a bankrupt to object to the accounts of the trustee's agent on the ground that he had acted also as a commissioner (*Learmonth*, 1858, 20 D. 564). In certain recent cases of claims for bursaries raised by candidates not appointed, it has been held that in the circumstances the claimants had no right to pursue. In one of these (*M'Donald*, 1890, 17 R. 951) the late Ld. Pres. Inglis says: "The conclusion for declarator that he [the pursuer] was elected to the bursary is inconsistent with fact, for he certainly was not elected. He asks that all writings conferring the bursary on the other candidate should be set aside. But what is that to him? What has he to do with that?" These last words, and similar words used by Lord Ordinary Trayner, are in effect the expression, in language at once popular and juristic, of the plea of *jus tertii* (see also *Martins'*, 1885, 13 R. 274; *Ramsay*, 1860, 22 D. 1328; affd. 23 D. (H. L.) 8. See series of cases under heading "*Jus tertii*" in Morrison's *Dictionary*. See TITLE TO SUE AND DEFEND; PROCESS; JUS QUÆSITUM TERTIO; and leading case of *Hislop* v. *M'Ritchie's Trs.*, 1881, 8 R. (H. L.) p. 98, where the phrase *jus tertii* is used incidentally in a more general sense).

Justice Clerk.—The Lord Justice Clerk derives his designation from his former relation to the Court of Justiciary, in which Court he now occupies the position of Vice-President, taking the chair at its deliberations in the absence of the Justice-General. He is also President of the Second Division of the Court of Session. Far from the high position which he now occupies, the Justice Clerk was originally not even a judge, but was, as his name denotes, merely the Clerk to the Justice Court. He seems to have still occupied this inferior position in the reign of Charles I., for we find the Justice Clerk again and again named assessor to the Justice—a post which his constant attendance in Court and familiarity with criminal procedure would render him peculiarly fitted to fill. This happened in the case of *Crombie*, 22 June 1625, and in the case of *Meldrum*, 2 August 1633 (Hume, ii. p. 16). The office gradually rose in credit, until, from being named an assessor, others came to be named assessors to him. This happened in the trial of George Graham, when the Council, on 24 November 1663, appointed certain Lords "to be joined as assessors to the Lord Justice Clerk and Justice-Depute." In the sederunt following upon this act, the name of the Justice Clerk is for the first time inserted as one of the judges of the Court. As this innovation was probably looked upon with disfavour, an act of Council, passed on the 8th of December of the same year, declares "That the Lord Justice Clerk is one of the judges of the Justice Court, and has power to sitt and voat therein"; and the seat thus acquired, which in practice was that of President of the Court, was confirmed to him in 1671, when the Court was reconstituted. Power was given to the Justice Clerk in his original commission

to appoint deputes, who after his practical elevation to the Bench discharged his duties at the table, and for long, in consequence, the appointment of Principal Clerk of the Justiciary Court lay with the Lord Justice Clerk. It now lies with the Crown.

As a judge in the Court of Session, the Justice Clerk was on equal footing with the others, until he was made President of the Second Division of the Court in 1808 (48 Geo. III. c. 151, s. 2). His office is now the second highest judicial post in Scotland. His salary is £4800 per annum. In addition to his judicial position he is *ex officio* one of the officers of State for Scotland, and one of the commissioners for keeping the Scottish *regalia*.

[Hume, ii. 16, 17.] See SESSION, COURT OF.

Justice, College of.—See COLLEGE OF JUSTICE.

Justice-General.—The Lord Justice-General, as head of the criminal jurisdiction and as Lord President of the Court of Session, holds the chief legal appointment in Scotland. The two offices were united in pursuance of 11 Geo. IV. and 1 Will. IV. c. 69, ss. 18 and 19, by which it was enacted that from and after the termination of the then existing interest in the office of Lord Justice-General, that office should devolve upon and remain united with the office of Lord President of the Court of Session, who should perform the duties thereof as presiding judge of the Court of Justiciary, and that the salary attached to the office of Lord Justice-General should cease. It was further enacted that when the office should have so devolved, "and when he shall deem it expedient to be present at any Circuit Court, it shall be lawful for him to despatch business in such Court, whether any other judge or judges of the Court of Justiciary be or be not present." The office of Justice-General is in direct lineal descent from the oldest judicial office in the country, that of the Scottish Justiciar, the duties of which office seem to have been originally carried out by the King himself. We find a positive appointment to that effect for David II. in a Parliament held at Scone in 1357: "Ordinatum est et consensum per tres communitates quod dominus noster Rex teneat Iter Justiciarii, per totum regnum, in sua propria persona: precipue ista vice, propter pleniorem justiciam auctoritate regia faciendam, et ad incutiendum terrorem delinquentibus, ut abstineant a maleficiis suis." The King gradually, however, performed these circuit duties by deputy, though for a long time he seems also to have been present. Thus in the Act 1526 (Thomson's ed., v. ii. s. 315) it is ordained "that na Justice Airis be haldin na part, without our Sovrane Lord and his Justice be present." The first mention of his Justice accompanying the King is in 1488 (Thomson's ed., v. ii. 208). Before the foundation of the Court of Session by James V. in 1532, the Justiciar was in the habit of trying civil as well as criminal cases, and we have various instances of appeal from his judgments in civil cases to the Court of Parliament, as the paramount feudal Court of the King and his freeholders. It is uncertain whether such a power of review was ever exercised over him in criminal matters, and a law of Alexander II., the statute "de capiendis indictamentis et malefactoribus puniendis," seems to exclude such review entirely (Stat. Alex. II. c. 2).

The office of Justiciar was at one time divided between two persons. There were, in fact, two Justiciars, appointed for separate regions and exercising each within his bounds the same absolute and supreme powers.

When this partition of the office came to be made it is impossible to say, but the division seems to have existed in the reign of Alexander II., when one Justiciar (called Justiciar for Scotland), controlled the country north of the Forth, while the other, called Justiciar for Laudone, had jurisdiction over the southern portion of the country. The two were again united under one commission by the time of Queen Mary, as appears from the Discours particulier d'Ecosse—a memorial drawn up in French for her use in 1559: "Et aussi y a en ce Royaume Justice Generalle, laquelle a puissance de cognostre en tous crimes. Et combien que pour ce jourd 'huy n'y en ait *qu 'un*, toutes fois le temps passé y'en avait deux."

Finally, from being a practical office the post of Justiciar came to be a sinecure. It fell into the hands of a certain family instead of being bestowed for life on some qualified individual. The family which thus enjoyed it was the family of Argyle, though at what date it fell into their hands is unknown. The Earl of Argyle is mentioned as Justice-General in the sederunt of a Court held by his deputy, Patrick Baron of Spittalfield, on the 25th of August 1526. Though such a tenure was felt to be a wrong, and was cancelled by contract in April 1628 between Charles I. and Lord Lorn, the office never reacquired its original condition. It was bestowed for life or for shorter periods upon various members of the nobility, who seem invariably to have appointed deputies, or to have had deputies appointed by the King to sit with them. And so gradually the presidency of the Court of Justiciary came to be assumed by the Justice Clerk.

[Hume, ii. 1–15.]

See JUSTICE CLERK; JUSTICIARY, HIGH COURT OF; SESSION, COURT OF.

Justice of the Peace.—*History.*—The office of justice of the peace was instituted in Scotland in the reign of James VI. by the Act 1587, c. 82, in supplement of the justice aires appointed by that Statute and re-enacted by 1609, c. 7, to assist in "extirpating the ungodlie, barbarous, and brutall custome of deadlie feads, whilk by the inveterate abuse of many bypast ages was become sa frequent in this Realme." The Acts of Parliament 1617, c. 8, and 1633, c. 26, ratified the original Statutes and defined the powers and duties of justices. The Act 1661, c. 38, adopting the instructions by Cromwell's Council in Scotland to justices (1655), fully defines these powers and duties, and still constitutes the general code regulating the execution of the office. By the 18th Article of the Treaty of Union it is provided "that the laws concerning regulations of trade, customs, and excises in Scotland be the same as in England." A new commission was thereupon issued for Scotland in 1707, declaring the justices therein appointed to have the same powers in matters relating to customs and excise as were competent to justices of the peace in England. The Act 6 Anne, c. 6, vests justices of the peace in Scotland with "whatever doth appertain to the office and trust of a justice of the peace in England *in relation to, and for the preservation of, the public peace*: Provided, nevertheless, that in the sessions of the peace the methods of trial and judgments shall be according to the laws and customs of Scotland."

The Commission is in the following terms:—

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to our most dear and faithful counsellors (*the princes of the blood*), the most reverend father in God, and our faithful counsellor, Archbishop of Canterbury, Primate and Metropolitan of all England, our beloved and faithful counsellor, our Chancellor of that part of our United Kingdom of Great

Britain and Ireland called Great Britain (*then are named the Archbishop of York, the Archbishop of Armagh, certain of the members of the Privy Council, the Lord Justice-General, Lord Justice-Clerk, and Commissioners of Justiciary for Scotland for the time being, the Lord President and Judges of the Court of Session for the time being, the Lord Advocate and Solicitor-General for Scotland. These are followed by the names of the gentlemen of the county*): Greeting—Know ye, that we have assigned you, jointly and severally, and every one of you, our Justices, to keep our Peace, in our county of , and to keep, and cause to be kept, all the ordinances and statutes for the good of our peace, and for the preservation of the same, and for the quiet rule and government of our people, made in all and singular their articles in our said county (as well within liberties as without), according to the force, form, and effect of the same; and to chastise and punish all persons that offend against the form of those ordinances or statutes, or any one of them, in the aforesaid county, as it ought to be done, according to the form of those ordinances and statutes; and to cause to come before you, or any one of you, all those who, to any one or more of our people concerning their bodies, or the firing of their houses, have used threats, to find sufficient security for the peace, or their good behaviour towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they find such security, to cause to be safely kept. We have also assigned you, and every two or more of you, of whom any one of you, the aforesaid (here the justices before named are again mentioned) we will shall be one, our justices, to inquire the truth more fully, according to the law and custom of the land, of all and all manner of felonies or capital crimes, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, ingrossings, and extortions whatsoever, and of all and singular other crimes and offences, of which the Justices of our Peace may or ought lawfully to inquire, by whomsoever and after what manner soever, in the said county, done or perpetrated, or which shall happen to be there done or attempted: And also of all those who, in the aforesaid county, in companies, against our peace, in disturbance of our people, with armed force, have gone or rode, or hereafter shall presume to go or ride; and also of all those who have there lain in wait, or hereafter shall presume to lie in wait, to maim, or cut or kill our people; and also of all victuallers, and all and singular other persons who, in the abuse of weights or measures, or in selling victuals, against the form of the ordinances and statutes, or any one of them, therefor made, for the common benefit of our people, have offended, or attempted, or hereafter shall presume to offend or attempt; and also of all sheriffs, bailiffs, stewards, constables, keepers of gaols, and other officers, who, in the execution of their offices about the premises, or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been, or shall happen hereafter to be, careless, remiss, or negligent in our aforesaid county; and of all and singular articles and circumstances, and all other things whatsoever that concern the premises, or any of them, by whomsoever, and after what manner soever, in our aforesaid county, done or perpetrated, or which hereafter shall there happen to be done or attempted in what manner soever; and to inspect all indictments or libels whatsoever so before you, or any of you, taken or to be taken, or before others, late our Justices of the Peace in the aforesaid county, made or taken, and not yet determined; and to make and continue processes thereupon against all and singular the persons so indicted or accused, or who before you hereafter shall happen to be indicted or accused, until they can be taken, surrender themselves, or be outlawed, or declared rebels; and to hear and determine all and singular the felonies, capital crimes, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premises, according to the laws and statutes of the kingdom, as in the like cases it has been accustomed or ought to be done; and the same offenders, and every one of them, for their offences, by fines, ransoms, amerciaments, forfeitures, and other means, as according to the law and custom of the land, or form of the ordinances or statutes aforesaid, it has been accustomed, or ought to be done, to chastise and punish. Provided always, that if a case of difficulty upon the determination of any of the premises before you, or any two or more of you, shall happen to arise, then let judgment in nowise be given thereon before you, or any two or more of you, unless in the presence of one of our Justices, or of one of our Justices appointed to hold courts of circuit, in the aforesaid county. And, therefore, we command you, and every one of you, that to keeping the peace, ordinances, statutes, and all and singular other the premises, you diligently apply yourselves; and that at certain days and places, which you, or any such two or more of you (as is aforesaid), shall appoint for these purposes, into the premises you make inquiries, and all and singular the premises hear, and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of the land, saving to us the amerciaments, and other things to us therefrom belonging. And we command, by the

tenor of these presents, our Sheriff of the said county of , that at certain days and places which you, or any such two or more of you (as is aforesaid), shall make known to him, he cause to come before you, or such two or more of you as aforesaid, so many, and such good and lawful men of his bailiwick (as well within liberties as without), by whom the truth of the matter in the premises shall be the better known and determined. We also command the keepers of the rolls of our peace in our county aforesaid to bring before you, at the days and places aforesaid, the writs, precepts, processes, and indictments aforesaid, that they may be inspected, and by a due course determined, as is aforesaid. In witness whereof, we have caused these our letters to be made patent.—WITNESS ourself, at Westminster, the day of , in the year of our reign.

(*Signed by the Secretary of State for the time.*)

To the commission is annexed the following oath:—

Ye shall swear, that as justice of the peace in the county of , in all articles in the Queen's Commission to you directed, you shall do equal right to the poor and to the rich, after your cunning, wit, and power, and after the laws and customs of this realm and statutes thereof made: And ye shall not be of counsel with any person in any quarrel hanging before you: And that ye hold your sessions after the form of the statutes thereof made: And the issues, fines, and amerciaments which shall happen to be made, and all forfeitures which shall fall before you, you shall truly cause to be entered without any concealment or embezzling, and truly send them to the Queen's Exchequer: Ye shall not let for gift or other cause, but well and truly ye shall do your office of Justice of the Peace in that behalf: And that you take nothing for your office of Justice of the Peace to be done, but of the Queen, and fees accustomed, and costs, limited by statute: And ye shall not direct, nor cause to be directed, any warrant by you to be made to the parties, but you shall direct them to the bailiffs of the said county, or other the Queen's officers or ministers, or other indifferent persons, to do execution thereof. So help you God.

Appointment of Justices and Endurance of Commission.—The commission by which justices are appointed is direct from the Sovereign. Certain persons are included in every commission of the peace. Such are certain members of the Privy Council, the judges of the Court of Session, the Lord Advocate, the Solicitor-General. The following are *ex officio* justices: (1) Sheriffs; (2) the senior magistrate of any populous place, who by 33 & 34 Vict. c. 37 may *ex officio* act as a justice for the county in which such place is situated; (3) by sec. 10 (1) of the Local Government (Scotland) Act, 1889, the convener of the county; (4) by sec. 40 of the Local Government (Scotland) Act, 1894, the chairman of a district committee, and (5) the chairman of a parish council, unless a woman, or personally disqualified by any Act, are justices for the county in which the district or parish is situate. There is no limit to the number of justices who may be named.

Qualification.—No property or other qualification is required in Scotland. The only general disqualification is contained in 6 Geo. IV. c. 48, s. 27 (Small Debt Act), by which it is declared that "no solicitor or procurator in any inferior Court in Scotland, or the partner of any such person, shall be capable to continue to be a justice of the peace, or act as such, in any county in Scotland during such time as such solicitor, etc., shall continue in the business or practice of solicitor or procurator in any inferior Court." By 19 & 20 Vict. c. 48, s. 4, *ex officio* justices who happen to be solicitors may act as justices, on making a declaration not to practise in the Court of Justices. In a number of particular instances, justices are prohibited by Statute from acting as such in regard to the matters therein dealt with. The following are the most important: Under the Factory Acts the occupier of a factory or workshop, and the father, son, or brother of such occupier, are not qualified to act as a member of a Court before which a proceeding is taken with respect to an offence under the Acts. Proprietors

of salmon-fishings and trout-fishings are prohibited from acting as justices where they are pursuers, or directly interested in prosecutions, but not otherwise merely as proprietors (9 Geo. IV. c. 39, s. 12; 8 & 9 Vict. c. 26, s. 5). Under the Licensing Act, 9 Geo. IV. c. 58, every brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other excisable liquors, or who shall be in partnership with any such person, is prohibited from acting in revenue questions cognisable by the justices. The proprietor or tenant of the house or premises for which a certificate is sought is also disqualified.

Acceptance.—A person named in a commission who does not wish to act may refrain from qualifying by abstaining from taking the requisite oaths. But once having qualified, he must perform the duties of the office. The requisite oaths are: (1) the particular oath annexed to the commission of the peace; and the oaths appointed by the Promissory Oaths Act, 1868; (2) sec. 2, the oath of allegiance, and (3) sec. 4, the judicial oath. By sec. 11 every person for the time being by law permitted to make a solemn affirmation instead of taking an oath, may make an affirmation as justice.

Endurance.—A commission of the peace endures for six months after the demise of the sovereign who issued it, unless a new commission be sooner granted by his successor (1 Anne, c. 8, s. 2). A justice *ex officio* remains a justice so long as he retains the office conferring the qualification (Hutcheson, 1. 50). The office may be recalled expressly by writ under the Great Seal, or tacitly, by omitting the name of the justice from a new commission. A justice may resign his office as freely as any other officer of the Crown (Blair, p. 2).

The appointment of clerk is in the hands of the Secretary of State (1686, c. 20). In the absence of the clerk the justices may appoint a clerk *ad interim.*

Powers and Duties of Justices.—The administrative powers and duties of the justices are exercised by them either in a body when sitting in sessions, or as individual justices. The former have been affected by the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), sec. 11 of which enacts: "there shall be transferred to and vested in the council of each county (subs. 5) the administrative powers and duties of the justices of the peace of the county in general, or special or quarter sessions assembled, in respect of the several matters following, namely: (i.) The execution as local authority of the Act relating to gas meters, to explosive substances, to weights and measures, to habitual drunkards, and to wild birds. (ii.) The appointment of visitors of public, private, or district lunatic asylums; and (iii.) The registration of rules of scientific societies under the Act of the session of the sixth and seventh years of the reign of Her present Majesty, chapter 36. All powers and duties of the justices of the peace not transferred by this Act to the county council shall be reserved to and transacted by such justices in the same manner, so far as circumstances admit, as if this Act had not been passed." The judicial functions under the Statutes referred to are not interfered with by the above transference, nor are the administrative powers, except as justices collectively.

The principal administrative powers and duties of justices now are:—

(*a*) Taking affidavits.

(*b*) Execution of deeds by persons unable to write.

(*c*) Duties under the Army Act—enlistment, billeting, and impressment of carriages.

(*d*) Duties under the Pawnbrokers Act.

(*e*) Licensing of public-houses.

(*f*) Licensing of play-houses.
(*g*) Granting of licences to deal in game.
(*h*) Duties under the Riot Act.
(*i*) Duties under Reformatory and Industrial Schools Acts. Swearing in of constables.

Judicial Duties.—The civil jurisdiction of the justices is mainly confined to their Small Debt Court, where debts to the amount of five pounds may be sued for. No legal practitioner may appear for parties (6 Geo. IV. c. 48, amended by 12 & 13 Vict. c. 34). At common law justices have jurisdiction for recovery of wages without limit as to amount, and can enforce contracts of service by warrants of summary imprisonment (*M'Lellan*, 9 July 1825, F. C., 4 S. 165). Aliment may be awarded for bastard children, but paternity cannot be decided in Small Debt Court (*Lindsay*, 1826, 4 S. 748).

In these cases the procedure is by written pleadings, in as nearly as possible the forms in use in the Sheriff Court (*Hebenter*, 1868, 6 M. 132). Interlocutors require the signature of two justices. Procurators of the Sheriff Court practise before the justices. One justice may issue a warrant to commit a debtor *in meditatione fugæ* until caution *judicio sisti* be found. The debt must exceed £8, 6s. 8d., except in case of aliment, or fines and rates (5 & 6 Will. IV. c. 70). The debt need not be one subject to the justice's jurisdiction. Decrees in ordinary civil cases cannot be enforced by diligence against the person (*Blaw*, 1754, Mor. 7610; *Macallister*, 1826, 4 S. 453).

Criminal Jurisdiction.—Under the common law the criminal jurisdiction of justices is chiefly confined to the preservation of the public peace. They try cases of breach of the peace, assaults, and petty thefts or pickery, which may all be regarded in the light of offences against the public peace (*Wilkie*, 10 July 1798). Their jurisdiction does not extend beyond cases that may be disposed of summarily. There have been attempts on the part of justices in the past to deal with heinous crimes, but the practice never obtained the concurrence of the Court of Justiciary, and it is long since any person has been tried before the justices for a crime for which the verdict of a jury ought to be taken (Hutcheson, vol. i. p. 174).

As part of the duty of preventing breach of the peace, the process of LAWBURROWS (*q.v.*) may be brought before the justices.

Justices have a considerable jurisdiction under a variety of penal Statutes, chiefly in reference to Revenue, Highways, Fishings, and Public-houses, which will be found under these titles.

Where power of punishment is committed to justices by special Statute, the amount is generally restricted in the Statute. All other cases are ruled by sec. 29 of the Summary Procedure Act, 1864, under which the punishment which justices may inflict is limited to a fine of £5, or imprisonment for sixty days, and to finding of caution to keep the peace for six months under a further penalty of £10, and in default of such caution not being found, to imprisonment for a further period not exceeding thirty days. Though there are several reported instances of scourging and whipping, it never was a general practice for justices to sentence to corporal punishment (Hutcheson, vol. i. p. 220).

By the Prisons (Scotland) Administration Act, 1860, s. 84, wherever a judge or magistrate may award a sentence of fine or imprisonment, he may adjudge any male juvenile offender, not exceeding fourteen years of age, to be whipped. The number of strokes must be specified, and must not exceed twelve with a birch rod (25 Vict. c. 18). See WHIPPING.

Justices share in the power which all Courts have to enforce order and to punish acts of contempt of their authority (Hume, ii. 138). Part of the justice's criminal jurisdiction consists in the apprehension of accused persons, committing them for further examination, or for trial until liberated in the due course of law, and, under the Prevention of Crime Act, 34 & 35 Vict. c. 112, in dealing with convicts liberated on ticket of leave.

Territorial Jurisdiction.—Justices can act judicially only in the county for which they are commissioned, but a justice named for two adjoining counties may act for either county if resident in one of them at the time—his warrant being issued to a constable of the county within which it is to be executed (28 Geo. III. c. 49). An affidavit sworn before a justice out of his county, or even in England, is as effectual as if sworn before him within his own county (*Kerr*, 1852, 14 D. 864).

Procedure.—The sittings of the justices as a Court must be held on the days appointed by Statute (1661, c. 38), viz., the first Tuesday of March, May and August, and the last Tuesday of October, with power to continue and adjourn. These sittings are termed the "Quarter Sessions," or "General Quarter Sessions." Adjournment, if made, must be to a specified day. To such adjourned sittings the name "General" or "General Quarter Sessions" is more properly applied. The Courts held by the justices apart from the statutory meetings are called "Common," "Special," or "Petty" Sessions, which are held at regular intervals for the disposal of small debt business, and criminal cases. Large counties may be divided into districts by the Quarter Sessions for the purposes of the Licensing and Small Debt Acts, but no justice's jurisdiction is thereby limited.

The quorum for a Court is two justices (*Reid*, 1730, Mor. 7636), but a larger number usually are present in Quarter Sessions, especially when hearing cases on appeal. One justice cannot act judicially unless specially authorised by Statute (*M'Kay*, 1760, Mor. 7637). Particular Statutes require that the justice who grants warrant to apprehend should try the case, but generally there is no such necessity.

The General Quarter Sessions are held at the county town, but Special Sessions for the purpose of appointing and swearing in constables are often held by special adjournment to any convenient place in the county.

Meetings of justices are called by their clerk. Each meeting elects its own chairman.

A judgment in Quarter Sessions cannot be reviewed by a later Quarter Sessions. An appeal taken to Quarter Sessions during proceedings in Special Sessions "does not stop the justices from proceeding and finishing the cause by sentence; but if against such a sentence an appeal be entered, they should admit the appeal, and not proceed to execution until the same be discussed" (*Meldrum*, 1746, Mor. 7637).

Appeal may be taken to the Circuit Court either from the Special or Quarter Sessions in the exercise of their ordinary jurisdiction. If there is an equality of opinion either in Quarter or Special Sessions, the chairman has no casting vote, but he may decline to vote, or withdraw, or an additional justice may be brought in, in order that a decision may be arrived at. There appears to be no legal exclusion of a justice sitting in Quarter Sessions and voting in review of his own judgment; but there is an obvious impropriety, unless it be to rectify an erroneous judgment he may have given.

In all judicial proceedings the justices must hear and act together, and not separately (*Rex* v. *Forrest*, 3 T. R. 38).

Review.—In common with other inferior Courts, the decisions of the Justice of Peace Court are subject to review by the Court of Session, except where excluded by Statute. But as almost all the jurisdiction is statutory, review is either specially provided for or altogether excluded (Mackay, *Manual of Practice*, p. 98). Review on Justice of Peace Small Debt cases is excluded in all cases except on the ground of malice and oppression, and then only within one year from the date of decree (6 Geo. IV. c. 48, s. 14). "How far this provision would exclude reduction on the ground of departure from the statutory procedure, or excess of jurisdiction, is not clear" (Mackay, *Manual of Practice*, p. 630; *Thomson*, 1852, 14 D. 479). Though review is specially excluded, reduction may be competent in civil cases. See REDUCTION.

Remuneration.—The services of justices are given gratuitously, but they are entitled to be reimbursed for proper expenditure in official business. The County Council provides for all expenses lawfully incurred by the Quarter Sessions or the justices out of Sessions (52 & 53 Vict. c. 89, s. 89).

Responsibility.—Justices are liable to prosecution civilly before the Court of Session, and criminally before the Court of Justiciary (Hutcheson, 1. 63; *Hay*, 1731). When there has been excess of jurisdiction and gross neglect of prescribed forms, especially where the liberty of the subject and the provisions of the Act 1701, c. 6 (for the prevention of wrongous imprisonment and against the undue delay of trials), are concerned, *bona fides* will not in general save a justice from being subjected in damages. Protection is given to justices in the execution of their duty by the Twopenny Act, 43 Geo. IV. c. 141, which enacts that in all actions brought against a justice on account of any conviction by him, in case such conviction shall be quashed, the plaintiff shall not be able to recover, besides any penalty levied, greater damages than twopence, nor costs, unless malice and want of probable cause are alleged. And if the justice prove at the trial that the plaintiff was guilty of the offence whereof he had been convicted, no damages shall be recoverable. The Act 9 Geo. IV. c. 29, s. 26, extends these provisions to all inferior judges and magistrates in Scotland in regard to any sentence pronounced, or proceeding tried, in any criminal trial. By 11 Geo. IV. and 1 Will. IV. c. 37, s. 13, "all acts done by any judge or magistrate in apprehending any party, or in regard to any criminal cause or proceeding, or to any prosecution for a criminal penalty," are also so privileged. Justices were anciently answerable for any miscarriage in their office to the Privy Council of Scotland, and are now to the Privy Council of the United Kingdom (Forbes, ii. c. 1, s. 30). [Twopenny Acts.]

[See (1) *Duty and Powers of Justices of Peace in Scotland*, by William Forbes, Advocate, in two parts, 1707 and 1708; (2) *Office, Powers, and Jurisdiction of His Majesty's Justices of the Peace and Commissioners of Supply*, by Robert Boyd, LL.D. (2 vols.), 1787; (3) *Treatise on the Offices of Justice of the Peace, etc., in Scotland*, by Gilbert Hutcheson, Advocate (4 vols.), 1st ed. 1806, 3rd ed. 1815; (4) *Summary of the Powers and Duties of a Justice of the Peace in Scotland*, by George Tait, Advocate, 1st ed. 1815, 4th ed. 1828; (5) *Scottish Justice's Manual*, by William Blair, Advocate, 1834; (6) *Digest of the Law of Scotland, with Special Reference to Office and Duties of a Justice of the Peace*, by Hugh Barclay, LL.D., Sheriff-Substitute at Perth, 1st ed. 1851, 5th ed. by John Chisholm, Advocate, 1894; (7) *Practical Manual for Justices of the Peace and other Magistrates in Scotland*, by Alexander Macdonald, Writer, Glasgow, 1872.]

Justiciary, High Court of.—The High Court of Justiciary is the Supreme Court for criminal causes in Scotland, as the Court of Session is the Supreme Court for civil causes. Unlike the Court of Session, however, decisions in which are subject to the review of the House of Lords, the decisions of the High Court of Justiciary are final and are not subject to review by any tribunal.

Judges.—The Court consists of thirteen members. These are the Senators of the College of Justice, *i.e.* the Lord Justice-General, the Lord Justice-Clerk, and eleven Lords Commissioners of Justiciary (50 & 51 Vict. c. 35, s. 44). Previous to the Criminal Procedure (Scotland) Act, 1887, there were only seven judges of the High Court of Justiciary, viz. the Lord Justice-General, the Lord Justice-Clerk, and only five of the senators, specially appointed to be also Lords Commissioners of Justiciary. But now every person "appointed to the office of one of the Senators of the College of Justice in Scotland" is, "in virtue of such appointment," a Lord Commissioner of Justiciary (*ib.*). The salaries paid to the judges are fixed by sec. 45 of the same act as follows:—The Lord Justice-General, £5000 a year; the Lord Justice-Clerk, £4800 a year; each of the Senators of the College of Justice, £3600 a year. The judges are no longer entitled to any allowance in addition to these salaries in respect of any Court held by them as Lords Commissioners of Justiciary, whether on Circuit or otherwise. (See also Justice Clerk; Justice-General.)

Sittings.—All sittings of the Court of Justiciary are now sittings of the High Court of Justiciary (Crim. Proc. Act, 1887, s. 44). The Court holds such sittings as are necessary, on the requisition of the Lord Advocate (*ib.* s. 46). As to Circuit Courts, see Circuit Courts.

Quorum, etc.—Usually only one judge sits at a trial. In cases of special difficulty or importance, two, or more usually three, sit (31 & 32 Vict. c. 95, s. 1). (See also Circuit Courts.) In appellate proceedings, three judges are a quorum; but a bill of advocation or suspension may be passed, and *interim* liberation may be ordered, by a single judge (Hume, ii. 512; Alison, ii. 27; Macdonald, 534, 539; 38 & 39 Vict. c. 62, s 3 (6)). A quorum of three is necessary to *refuse* a bill of advocation or suspension (Alison, ii. 27; *Steedman*, 1810, Hume, ii. 512). An appeal in regard to bail may be disposed of by a single judge. See Bail.

Jurisdiction.—"The charter of the Court of Justiciary with regard both to the quality of the crimes of which they may take cognisance, and of the persons whom they may try, is as ample and extensive as the general principles of law respecting jurisdiction in criminal matters will allow" (Hume, ii. 49). Generally stated, every person, whether British subject or foreigner, charged with a crime (against public law) committed in Scotland, is subject to the jurisdiction of the Scottish Criminal Courts (Hume, ii. 41; Alison, ii. 81; Macdonald, 247). A Scottish peer is amenable only to his own order when charged with treason, petty treason, murder, or other felony (6 Anne, c. 23; 6 Geo. iv. c. 66; Hume, ii. 46); but for minor crimes he is answerable in the ordinary Courts (cases of *Earl of Rosebery* and *Earl of Morton*, in Hume, ii. 47; *Earl of Mar*, 1831, Bell, *Notes*, 148). Members of the House of Commons are exempt from arrest during the sitting of Parliament, except for treason, felony, or breach of the peace (see Hume, ii. 48, 49; Alison, ii. 20).

To give jurisdiction, the crime must be an offence against public law, and not against the regulations of a particular order (Alison, ii. 12). Thus, *e.g.*, a soldier or a clergyman is amenable only to a military or an ecclesiastical Court on account of offences against professional discipline and

regulations. But for all acts which are offences against the general law of the land, a soldier or a clergyman is subject to the jurisdiction of the criminal Courts.

The jurisdiction of the Scottish Criminal Courts, then, reaches any crime committed within Scotland. But even in the case of crimes which are committed partly in Scotland and partly abroad, the Courts may have jurisdiction. Thus if one forge a deed abroad and utter it in Scotland, the proper Courts for the trial are those of this country, since it is here that the main act is done which completes the crime (Hume, ii. 53). A person was tried in Scotland for the forgery of bank notes, on a libel which related that the plate had been fabricated, and the notes thrown off, in London (case of *Herries* and case of *M'Caffer*, Hume, ii. 54). Conversely, a person was tried in Scotland for forgery, the forgery being uttered in Scotland by being posted in a letter addressed to England (*Jeffrey*, 1842, 1 Br. 337, Bell's *Notes*, 149). So also it was held, by a full bench, that a domiciled Englishman, resident in England, who had been lawfully apprehended in England and brought to Scotland for trial on a charge of falsehood, fraud, and wilful imposition, by sending letters from England to traders in Scotland, containing false statements and representations, whereby he had fraudulently induced them to forward goods to him in England without paying and without intending to pay for them, was subject to the jurisdiction of the Criminal Courts in Scotland as the *forum delicti* (*Witherington*, 1881, 4 Coup. 475, 8 R. (J. C.) 41, 18 S. L. R. 576. See also *Bradbury*, 1872, 2 Coup. 311; *Allan*, 1873, 2 Coup. 402; *Michael*, 1842, 1 Br. 472; *M'Gregor*, 1846, Arkley, 49). The decision in *Witherington's* case disposed of the doubt expressed in *Hall* (1881, 4 Coup. 438, 8 R. (J. C.) 28, 18 S. L. R. 574). A similar rule holds in the case of sending threatening letters from England to a person in Scotland (case of *Taylor*, 1818, Hume ii. 54; Alison, ii. 74, 75). A Scottish bankrupt who uplifted money in England to defraud his creditors was held liable to the jurisdiction of the Scottish Courts (*M'Kay*, 1866, 5 Irv. 329, 3 S. L. R. 54).

Theft and reset are regarded as continuous crimes, as "of a continued and successive nature, so as to be renewed" (in a different jurisdiction) "by the act of the thief in holding possession of the stolen goods, and travelling onwards, with the felonious purpose of securing and disposing of his spoil" (Hume, ii. 54). Accordingly, where a thief or a resetter passes out of one jurisdiction into another, in possession of the property, and is there apprehended, there is jurisdiction in the *forum deprehensionis* (see case of *Joseph Taylor* for horse-stealing, Hume, ii. 55; *Dougherty* and *Prunty*, 1824, Shaw, 123; *Nicol*, 1834, Bell, *Notes*, 149; *Stevenson*, 1853, 1 Irv. 341; *Gracie*, 1884, 5 Coup. 379). This rule has been confirmed by statute (13 Geo. III. c. 31, ss. 4, 5, and 44 Geo. III. c. 92, ss. 7, 8; 24 and 25 Vict. c. 96, s. 114; cf. Crim. Proc. Act, 1887, 50 & 51 Vict. c. 35, s. 22). Before the *forum deprehensionis* the accused cannot be convicted, at common law, of the aggravations characterising the original theft (such as housebreaking, etc.), as the jurisdiction is grounded alone on his holding possession of the stolen goods (Hume, ii. 55; Alison, ii. 78, 79. See also 24 & 25 Vict. c. 99, s. 28 (coining); 7 Will. IV. and 1 Vict. c. 36, s. 37 (Post Office); 5 Geo. IV. c. 84, s. 22 (being at large before expiry of sentence); etc.).

Offences Committed at Sea.—In the case of a crime committed at sea, there is jurisdiction if the ship, at the time of the crime, be within three miles of the Scottish coast (*M'Alister*, 1837, 1 Swin. 587, and Bell, *Notes*, 147; *Dalziel*, 1842, 1 Br. 425, and Bell, *Notes*, 146), or within a Scottish port, harbour, or navigable river, or anchoring ground, whatever be the

nationality of the ship or of the accused (*Lewis*, 1858, 3 Irv. 16, 30 Sc. Jur. 508). In the case of offences on the high seas, the Scottish Courts have jurisdiction only if the ship be British. Where the alleged crime is committed in a foreign port or harbour, the Scottish Courts have jurisdiction only if both ship *and accused* be British (Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 686). In cases of piracy, the Scottish Courts have jurisdiction irrespective of the nationality of the ship or the accused (Hume, i. 480).

Within Scotland the jurisdiction of the High Court of Justiciary is almost universal. It may be said to have jurisdiction to try all crimes committed within Scotland and in the other circumstances above enumerated. It has an inherent power to try any new crime created by statute where no Court is fixed for the trial (Hume, ii. 40, and cases there). The jurisdiction of the High Court is excluded only where a particular Court is fixed by statute for trial of offences under it; and not even then, unless the jurisdiction is excluded expressly or by necessary implication (*Rowet*, 1843, 1 Br. 540; *Robertson*, 1844, 2 Br. 176; *Bell*, 1850, J. Shaw, 348; *Duncan*, 1864, 4 Irv. 474).

Exclusive Jurisdiction.—The High Court of Justiciary has exclusive jurisdiction to try cases of (1) treason; (2) murder; (3) rape; (4) deforcement of messengers; (5) breach of duty by magistrates (Hume, ii. 58); (6) corrupt disclosure of official secrets (52 & 53 Vict. c. 52, s. 6 (3)), and (7) where a higher degree of punishment than imprisonment is directed by statute. By sec. 56 of the Criminal Procedure (Scotland) Act, 1887, it is now competent to indict in the Sheriff Court persons accused of the crime of *uttering a forged document*, or of the crime of *robbery*, or of the crime of *wilful fire-raising*, or of any of the crimes under the Acts of Parliament for the prevention of persons *going armed by night for the destruction of game*, which under these Acts could formerly be indicted in the Court of Justiciary only.

Lastly, the High Court of Justiciary has an inherent power, as such, competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature, "though it be such which in time past has never been the subject of prosecution" (Hume i. 12; *Greenhuff and Others*, 1838, 2 Swin. 236, and Bell, *Notes*, 172, 174; *Taylor and Others*, 1808, Burnett, *Appendix*, 10; *Fraser*, 1847, Arkley, 280, 329; *Sweenie*, 1858, 3 Irv. 109; *Dick* and *Lawrie*, 1832, 4 Sc. Jur. 594, 5 Deas & And. 513). See Sheriff Court; Justice of Peace; Magistrate.

Procedure.—See Act of Adjournal; Books of Adjournal; Criminal Prosecution; Clerk of Justiciary; Circuit Courts; Indictment; Bail; Citation of Jury; Jury; Oath of Juror; Sentence; Verdict.

Appellate Jurisdiction.—See Advocation to High Court of Justiciary; Appeal to High Court of Justiciary; Appeal to Circuit Court; Bail; Suspension; Review. Also compare Respite; Pardon.

[For early history and antecedents of the High Court of Justiciary, see Hume, ii. pp. 1–31.]

Justifiable Homicide.—There are certain circumstances in which the wilful killing of a person is held in law to be justifiable. The most obvious illustration of this is the case of a properly-qualified judge, with the requisite jurisdiction, who sentences to death a panel found guilty of a capital crime; as also the case of the magistrates and officials who,

under proper warrant, regularly execute the sentence. Another familiar instance of justifiable homicide is the case of soldiers or sailors on duty who, in obedience to an officer or magistrate, kill anyone—but the act must not be one of flagrant illegality. So also where magistrates are obliged to kill in order to suppress a riot (see RIOT). If an officer, acting under a warrant *ex facie* legal, kill a person violently resisting the execution of the warrant, or seriously threatening the officer's life should he proceed to its execution, the homicide is justifiable (Hume, 197, 198, 200, 201). So, also, to kill a person in self-defence, where he murderously attacks, is justifiable. But the alarm must be reasonable (Hume, i. 223, 224). A woman attacked by a ravisher may kill him; and a third person may do so if this is necessary in order to prevent rape (Hume, i. 218). In cases of imminent danger it is justifiable to kill a robber (Hume, i. 217; Act 1661, c. 22). In cases of housebreaking *by night* the danger is presumed to be imminent.

See MURDER; CULPABLE HOMICIDE.

Juvenile Offenders.—See AGE; EDUCATION (*Industrial and Reformatory Schools*, vol. iv. 379); WHIPPING.

Kain.—The word "kain" or "canum" was used in ancient charters to signify the tribute or duty payable to the superior by his vassal. It consisted of poultry, eggs, cattle, "custom-wedders," or any produce of the land other than grain. The term is still, though rarely, employed to signify part of the reddendo in feu-charters (*Hope*, 1872, 10 M. 347). In modern times, however, it is more frequently found in leases, and even in this century it was usual to stipulate that a certain number of kain-fowls ("flying customs"),—or so many fish in a tack of salmon-fishings,—should form part of the rent. This custom still exists in certain districts of Scotland, its chief justification being that it helps to neutralise fluctuations in prices (Rankine, *Leases*, 290; Ross, *Lect.* ii. 236, 495; Hunter, *Landlord and Tenant*, ii. 297).

Such prestations are usually convertible into money at a rate agreed on, but sometimes they are not so; and this distinction is important in practice in the valuation of property according to rental. In a sale of lands the established rule is that, where by the terms of the lease kain are convertible into money, they are computed in the rental; where they are not so convertible, they are not computed (Hunter, i. 478; Bell, *Leases*, i. 226; *Chalmers*, 1735, Mor. 14159; *A.* v. *B.*, 1749, Mor. 13317; *Mitchell*, 1773, Mor. 14159; *E. Morton*, 1793, Mor. 13872). In a modification or sale of teinds the rule is different, for it has been decided that, where in such cases kain are *bonâ fide* put into the lease, they are not to be included in valuing the rental,—even if convertible into money (Ersk. *Inst.* ii. 10. 32, and note; Connell, *Tithes*, i. 201; *Maxwell*, 1747, Mor. 15748; *Adam* v. *Heritors of Cushney*, 1752, Mor. 15743). In questions between the lessee and a singular successor no distinction is made between convertible kain and kain which are not convertible (Hunter, i. 478).

Kenning to the Terce.—This is a judicial method of apportioning between a widow and the heir those lands out of which terce is

claimable. The right to terce arises to a widow by the fact of survivance of her husband; but, in order to make it effectual, more is required. The first step, viz. serving to the terce, although seldom resorted to in practice (it was last used in 1891), cannot be said to be obsolete. It proceeds upon a brieve from Chancery directed to the Sheriff of the county in which the lands are situated. Thereupon a jury is empanelled to return a verdict on these two questions: Was the person craving to be served, the lawful wife of the deceased? and, Was the deceased at his death seised in the lands specified to the claim? Upon the Sheriff interponing authority to the verdict, the widow acquires a *pro indiviso* right of possession to the extent of one-third along with the heir (see Brieve). To obtain a division of the property a further step is necessary. Kenning, the method formerly in use, although still competent, is obsolete in practice. In place thereof it is usual, in the absence of other arrangement, for the parties to enter into arbitration, under which the widow may be found entitled either to a certain part of the property, or to a fixed sum out of the rents. Kenning was performed thus: The Sheriff began at the sun or the shade, *i.e.* east or west, as the cavel or lot decided, and set off the first two acres for the heir, the next acre for the widow, and so on. One-third of the annual rent of indivisible subjects was included in the widow's share. But this was not an exclusive mode of procedure. The Sheriff might give one portion to the widow and another to the heir, dividing the estate according to the report of valuators to whom he had made a remit, and who had appeared before him and deponed to the justness of their valuation. In either case possession was thereafter given by delivery of earth and stone upon the land, and an instrument of possession (*Jurid. Styles*, i. 347) was taken by the widow in the hands of a notary public. This instrument requires no registration.

After kenning, or its equivalent, the right of the widow ceases to be held jointly with the heir. Each has, so far as the other is concerned, an absolute and uncontrolled right in the allotted share, the one as proprietor, the other as liferentrix. The latter's powers are those of a liferenter by constitution. The widow is then entitled to the whole fruits of the portion she possesses. If these are more than one-third of the fruits of the whole estate, she is not bound to account to the heir for the surplus; nor, on the other hand, if they fall below that proportion, can they, as in the case of a jointure secured on the estate, be augmented out of the part retained by the heir.—[Stair, ii. 6. 14; Ersk. ii. 9. 50; Fraser, *H. & W.* 1103; M'Laren, *Wills*, 112; Walton, *H. & W.* 218.] See Terce.

Kin; Kindred.—See Degrees of Kinship.

King.—See Sovereign.

King's Advocate.—See Lord Advocate.

King's Counsel.—See Queen's Counsel.

King's Evidence.—See Queen's Evidence.

King's Remembrancer. — See QUEEN'S AND LORD TREASURER'S REMEMBRANCER.

Kirk (the Scots form of Church) is commonly used to describe the Church of Scotland as by law established, and also its places of worship. The present article deals with it in the latter sense, *i.e.* as the parish church.

1. The obligation to provide and maintain the parish kirk lies on the heritors of the parish, in whom it is vested in trust for the use of the parishioners in public worship (see opinion of Ld. Pres. Inglis in *Duke of Roxburghe*, 1876, 3 R. 728, at p. 734; and *Steel*, 1891, 18 R. 917). This obligation has its source in various Statutes following on the Reformation, as interpreted by practice and decision (Rankine, *Landownership*, 3rd ed., p. 657). In the case of parliamentary churches the burden laid on heritors is limited and defined by statute (5 Geo. IV. c. 90, s. 18). The question of *providing* a parish church (apart from repairing or rebuilding) might arise "when a new parish *quoad omnia* has been erected for which no building has been provided from other sources" (Rankine, *op cit.* p. 659), but in present practice the question is of little importance, since the providing of parish churches is invariably connected with the erection of *quoad sacra* parishes (see DISJUNCTION AND ERECTION). In any case, the obligation to provide a church is of the same character and is ruled by the same principles as the obligation to maintain it. It includes the providing of a bell (*Inverkeithing*, 1642, Mor. 7914), as well as seats and other necessary furnishings (*Earl of Home*, 1777, 5 B. S. 558), the pew being twenty-nine inches wide, and eighteen inches laterally being allowed for each person (*Harlaw*, 1802, 4 Pat. 356). There is no obligation to provide a steeple "except so far as was necessary for hanging the bell," *i.e.* there need not be a steeple, but there must be a belfry (*Earl of Home, supra*; *Magistrates of Peebles*, 1875, 2 R. (H. L.) 117).

There is no doubt that the heritors must execute all necessary repairs. The difficult question always is whether the disrepair is such that the heritors must rebuild. This is a question of circumstances in each individual case. If the church can be made "safe and serviceable" (*Murray*, 1833, 12 S. 191) by repairs which are not really equivalent to rebuilding (*M'Leod*, 1830, 8 S. 475), then the obligation is merely to repair. The practical test which has usually been taken is that of the probable cost. Where the repairs can be done for half the cost of a new church, it has been held sufficient to repair (*Murray, supra*); if they would amount to three-quarters of the cost of a new church, rebuilding is required (*M'Leod, supra*). Cases between these two depend on their special circumstances (cf. *Bertram*, 1864, 2 M. 1406; Rankine, *op. cit.* 660).

The heritors cannot be called on to rebuild, on the sole ground that the church has become inadequate to accommodate an increased population. If the church is substantial or repairable, there is no legal obligation on the heritors to rebuild (*Cunningham*, 12 Dec. 1811, F. C.; *Lynedoch*, 1828, 6 S. 791; *Miller*, 1834, 7 W. & S. 185). But if the church is in such disrepair as to require rebuilding, then the new church must be made sufficient to accommodate two-thirds of the examinable parishioners (*i.e.* above twelve years old) according to the population of the parish at the time of rebuilding (*Tingwall*, 1787, Mor. 7928; *Lerwick*, 1820, Connell, *Par. Law*, Supp. p. 44; *M'Leod, supra*). It must be built on the same site or as near it as possible (*Wilson*, 1809, Connell, *op. cit.* Supp. p. 63).

The heritors are entitled to act on their own initiative and without consulting the Presbytery (*Boswell*, 1831, 13 S. 148; *Lyncdoch*, *supra*). They may determine the plan and style of the building or repairs, and so long as they are performing their duty, the only function of the Presbytery is to see that the proposed accommodation is adequate (*Tingwall*, *supra*; *M'Neill*, 1828, 6 S. 422). The heritors' decision may be reviewed by suspension in the Court of Session (*Boswell*, *supra*).

But if the heritors neglect their duty to rebuild or repair, the Presbytery has jurisdiction (*Dunning*, 1807, Mor. App. "Kirk," No. 4; *Cunningham*, *supra*), and may decern for the erection of a new church or for the necessary repairs (*M'Neill*, *supra*), subject to appeal to the Sheriff and the Ld. Ordinary on Teind Causes (31 & 32 Vict. c. 96). See opinions in *Porterfield*, 1829, 8 S. 277. As to the heritors and their assessments, see HERITORS.

2. *Transportation of Kirks, i.e.* the removal of a church from one part of the parish to another, can be effected under 1707, c. 9, and 7 & 8 Vict. c. 44, s. 1. The Court requires a strong case to be made out before it will sanction the removal of the parish church from its immemorial site (see *Gordon*, 1846, 18 Sc. Jur. 595).

3. *Allocation of Seats in a Parish Church.*—In a purely burghal parish the magistrates, as representing the community, are the heritors, and the allocation of seats rests with them. They have power to charge seat-rents, which must, however, be applied solely in defraying ecclesiastical charges, including the upkeep of the churches of the parish (*Clapperton*, 1840, 2 D. 1385). It is not legal to apply the proceeds of seat-rents to the general purposes of the burgh (*ib.*).

In the case of mixed parishes (landward-burghal) two alternatives are open: (*a*) The area of the church may be divided into two portions, one for the landward part and the other for the burghal. The portion thus assigned to the burgh is then allocated among the inhabitants according to the real rents, and not as in purely burghal parishes, because in a mixed parish the burgh does not contribute to the upkeep of the church in its corporate capacity, but the assessment falls on the individual inhabitants according to their properties (*Sinclair*, 1761, Mor. 7918; *Duke of Argyle*, 1775, Mor. 7921; *Fenars of Crieff*, 1781, Mor. 7924). (*b*) The sittings may be allocated to the whole parish on the basis of the real rent without distinguishing between the landward and the burghal portions, *i.e.* as if there was no burgh in the parish (*Stephen*, 1887, 15 R. 72).

Subject to these special provisions applying to burghs, the general law as to allocation of sittings is as follows.

The disposal of the area of the church lies with the heritors, not with the minister or the kirk-session (*Falkland*, 1739, Mor. 7916). The heritors may carry out the allocation by agreement, or by ordinary process before the Sheriff, subject to review by the Court of Session (Duncan, *Par. Law*, ch. iii.; Black, *Par. Ecc. Law*, 2nd ed., p. 66). Seats are set apart for the minister's family, the elders, and the poor (Dunlop, *Par. Law*, p. 41). Thereafter the heritors are entitled to select family seats (with full and ample accommodation for the family, excluding servants, and for guests), the order of choice being according to valuation. Then, by a second choice in the same order, they divide the rest of the area for the use of their tenants and dependants, but in such a manner that the total allotted to each heritor under the double choice shall be in proportion to his valuation (*E. of Marchmont*, 1776, Mor. App. "Kirk," No. 2; *Walker*, 1848, 10 D. 1378). When a church has never been regularly divided, any heritor may require it to be done; and if there has been no division and no agreement

among the parties, mere possession of a seat by a heritor, even for the prescriptive period, will not establish such a right as to bar a judicial division (*Wemyss*, 1838, 16 S. 332). But where there has been long possession following on an agreement, this is presumptive proof of a regular and proper division (*Cathcart*, 1785, Mor. 7928; *Smith*, 1826, 4 S. 738). The question of possession in such cases is discussed by Ld. Neaves in *D. of Abercorn*, 1870, 8 M. 733. Such allocation falls to be made in the church of a new parish erected *quoad omnia* (*Reid*, 1850, 12 D. 1211), but certain provisions are made for charging seat-rents in parliamentary and *quoad sacra* churches (5 Geo. IV. c. 90, ss. 18–22; 7 & 8 Vict. c. 44, s. 9).

The allocation is made according to the rights of the heritors at the time of making, and there seems to be power to give accommodation in the new church to parties who had it by agreement in the old church, though they have not the qualification of heritor or parishioner (*Gavin*, 2 June 1825, F. C.). The heritor must allot his sittings among his tenants—a proceeding which is subject to revision by the Sheriff; and where a property is divided, it may be necessary to divide the sittings effeiring to it (Rankine, *op. cit.* p. 168).

The allocation, once made, is final so long as the building remains. It is only if the church is rebuilt that a new allocation can be made. When the church is merely repaired (no matter how extensive the repairs are), no reallocation of seats is competent (per Ld. Neaves in *D. of Abercorn*, *supra*; *Stiven*, 1878, 6 R. 174; *D. of Roxburghe*, 1877, 4 R. (H. L.) 76). Accordingly, if there is excambion of a church already built (and repairable) for a new church, the area of the new church must be divided on the same footing as that of the old church was (*D. of Roxburghe*, *supra*).

As the heritors are proprietors of the area of the church only in trust, there can be no exclusive right of property in a kirk-sitting (*St. Clair*, 1776, Mor. App. "Kirk," No. 1). "Proprietors, both large and small, hold sittings, not absolutely in property, but in trust for themselves and the persons on their estates, and therefore it is that sittings cannot be disjoined from the properties, because, if they were, it would be a breach of trust on the part of the proprietors" (per Ld. Pres. Inglis in *Stephen*, 1887, 15 R. 72; *D. of Roxburghe*, 1876, 3 R. 734; *Steel*, 1891, 18 R. 911). The church-seat is carried by a disposition of the lands as part and pertinent (*Duff*, 1769, Mor. 9644). From this conception of the area of the church as held in trust, it follows that the lease of land in the parish implies right to accommodation for the tenant in the part of the area allocated to the landlord (*Skirving*, 1796, Mor. 7930). On the same principle, traffic in seats, even for a laudable object, is illegal, as involving breach of trust (*Mackay*, 1889, 17 R. 38).

4. *Use of the Church.*—The church and its appurtenances can be used only for purposes consistent with the trust under which the heritors hold it. "Parish churches are exclusively appropriated for divine worship, or for the religious education of the poor, or for parochial meetings of the heritors or parishioners, relative to the interests of religion, or of charity, or of education in the parish" (per Ld. Cunninghame, Ord., in *Esson*, 1843, 5 D. 1430), unless "in the case of extraordinary necessity" (per Ld. Mackenzie, *ib.*). Accordingly, interdict was granted in that case even against a public meeting "to explain the present position of the church and enforce her missionary and other schemes." In *St. Andrews*, 1835, 13 S. 391, interdict was given against holding a meeting of municipal electors in a church (cf. also *D. of Richmond*, 1844, 6 D. 701).

Burial in churches was forbidden by the General Assembly. See Burying-Place, at vol. ii. p. 268.

The bells of the parish church cannot be rung to assemble other congregations than its own, though by consent or usage they may be rung for other public purposes (*M'Naughtan*, 1835, 13 S. 432; *Mags. of Peebles*, 1875, 2 R. (H. L.) 117).

[See Duncan, *Par. Law*; Black, *Par. Ecc. Law*; Rankine, *Landownership*.]

See Church; Disjunction and Erection; Heritors.

Kirk or Market.—See Deathbed.

Kirk Session.—See Church Courts.

Knaveship.—Under the obligation of Thirlage (*q.v.*), knaveship was the payment in kind due to the under-miller (knaveship = servant's perquisite). It was a sequel (*i.e.* an accessory of the payment of multures), and the obligation to pay it was implied in the general obligation to pay multures (*Malcolm*, 1697, Mor. 15990). Where grain was wrongfully ground elsewhere than at the mill of the thirle, an action lay for knaveship as well as for abstracted multures, because knaveship is the fee of a servant who has to be kept for the service of the thirle (*Forbes*, 1744, Mor. 16022; *Adamson*, 1628, Mor. 15965). And where the amount of multure is stipulated, it is due without deduction of knaveship, the latter being due over and above the stipulated multure (*Campbell*, 1672, Mor. 15978). The amount due as knaveship was fixed by the usage of the thirle (*Ramsay*, 1738, Mor. 16017); and on proof of usage, payment of a muty ($\frac{1}{3}$ of a peck) was sustained, though this was not a standard measure (*Forbes*, 1672, Mor. 10858; cf. *Muirhead*, 1697, Mor. 10873). Infeftment *cum molendinis et multuris* implied a complete liberation from thirlage to the grantor's mill, and therefore freed from liability for knaveship, "which is only the fee of a service" (*Cuskiben*, 1612, Mor. 15963). But of course it might be expressly stipulated that the grantee should remain liable for knaveship, etc. (*E. of Cassilis*, 1667, Mor. 15977).

Labes realis.—See Vitium reale.

Lading, Bill of.—See Bill of Lading.

Læsio ultra dimidium, or **Læsio enormis.**—In Roman law the seller had the right of rescinding a sale if the price agreed upon is less than half the true value of the thing sold, unless the buyer consented to pay so much more as to make the price a fair one. The first trace of this principle is found in two rescripts of Diocletian and Maximian in 285 A.D. and 295 A.D. These enactments were adopted, as laying down a general rule of law, by Justinian in his Code (*Cod.* 4. 44. 2). The seller

who has suffered a *læsio ultra dimidium* could, if he had not delivered the property, assert his right by an *exceptio* to an action for delivery; or, if he had delivered the property, he could bring an action for rescission of the contract. If the seller succeeds in this action, the property and the purchase-money have to be respectively restored, and the parties are thus replaced *in statum quo ante*.

This rule of Roman law has been followed in most of the countries in which the Civil law obtains. By the French Code Civil the purchaser, in order to escape rescission, must pay a price equivalent to nine-tenths of the true value, with interest on the balance from the date of the contract (Arts. 1681, 1682). In Scotland this doctrine has not been adopted, and mere inadequacy of price without fraud does not avoid a sale (Ersk. iii. 3. 4; *Latta*, 1865, 3 M. 508). In *Dawson* (1851, 13 D. 843), vats were sold by auction for £2, and were afterwards discovered to contain white lead valued at £300; yet the Court sustained the sale. In *Fairie* (1669, Mor. 14231) the Roman law rule as to *læsio ultra dimidium* was pleaded, but the plea was not sustained.

Lakes.—See LOCHS.

Landed Men.—See JURY.

Landlord and Tenant.—See LEASES.

Land Tax, or **Cess,** is now a permanent tax of fixed amount, levied annually on the land rent of counties in Scotland, but subject to redemption (38 Geo. III. c. 5 and c. 60; 42 Geo. III. c. 116). Burghs used to contribute as well as counties, but they have now been relieved of the burden (59 & 60 Vict. c. 37, s. 4 (1)).

Land tax is the oldest method of taxation, though it must not be supposed that, when first instituted, it was an annual or regular payment. In the earliest times of which we have any historical record "the ordinary source of the royal revenue may be described generally as consisting of the rents of Crown lands, with the payments due from the thanages, the casualties of ward, marriage, relief and non-entry exigible from time to time from the Crown vassals, the fines imposed by the Justiciary and Sheriffs, the estates of attainted persons, the fermes or maills of royal burghs, and the customs on merchandise, with occasional compositions for letters of gift, remissions and legitimations, and the castle wards—that is, certain dues payable by lands in the vicinity of some of the royal castles for the expense of upholding them. Taxes were an extraordinary source of income, to which the king was not expected to have recourse except on the occurrence of great national emergencies" (Preface to vol. i., by Dr. Stuart and Mr. G. Burnett, of *The Exchequer Rolls of Scotland*, 1878, p. xxxiv). But these taxes, as they happened to be required, were levied on the land in varying proportions, and were the origin of the cess, which has been annually levied on land for more than two hundred years. For a considerable time before 1587, when the Church lands were annexed by the Crown, the taxes had been imposed in the proportion of one-half on the Church, one-third on the freeholders, and one-sixth on the burghs. Subsequent to

the annexation of the Church lands, the counties continued to pay their former share, the balance falling on the rest of the kingdom. The incidence of the tax on individual lands was settled by the ancient valuations contained in the Old and New Extent (see EXTENT) and Bagimont's Roll. The latter was the rent-roll of Scottish ecclesiastical benefices, made up in 1275 by Baiamundus de Vicci, who came from Rome to collect one-tenth of the benefices for the relief of the Holy Land (Innes, *Scotch Legal Antiquities*, p. 190). It seems to have been used, for some eighty years after the Reformation, as the basis of valuation of Church lands, which had now become temporal lordships. These lands had never been extended, nor had the lands held feu of the Crown, which were valued at the feu-duty reserved. The whole system was full of anomaly and confusion, but no attempt was made to obtain a new valuation until the time of Charles I. A system of valued rent was then instituted in 1643 (*Thomson's Acts*, vi. part i. p. 26), which though actually abandoned in 1666, in favour of the Old Extent, was finally adopted in 1667 (*Thomson's Acts*, vii. 539). Under this system taxes were levied not "as the taxations have been or by the divisions of temporalities and spiritualities," but "promiscuously," and "a particular roll" was ordered "to be made up by commissioners, of the just and true worth of every person or persons, their present year's rent of this crop and year 1643 to landward as well of land and teinds as of any other thing whereby yearly profit and commodity ariseth" (*Thomson's Acts*, vi. part i. p. 30, col. 2). Each burgh and sheriffdom was made liable for a certain sum, apportionable in the former by the magistrates, in the latter by commissioners. The rolls then made up are not now in existence, but the results of them were carried to the cess books, and became the sole rule for taxation.

From this time until the Union the land tax gradually came to be regarded as a regular institution, until in the Act of Union it was practically recognised as an annual tax. The proportion payable by Scotland was fixed at £48,000 (about a fortieth of the English contribution). The tax was levied on this principle, under Annual Supply Acts, during nearly the whole of last century.

In 1798 Pitt introduced a scheme, which took final shape in 1802 (42 Geo. III. c. 116), giving landowners the power of redeeming their land tax. Scotland's contribution was then finally fixed at £47,954, 1s. 2d., and remained at that figure until the abolition of the land tax in burghs (59 & 60 Vict. *sup.*). The collection was formerly in the hands of the commissioners of supply in counties, and magistrates in burghs, but is now intrusted to officials appointed by the Treasury, who take the risk of defalcations on the part of their collectors (Taxes Management Act, 1880, s. 81). The tax is recovered by poinding and sale (*ib.* s. 97). Although it attaches to the land, it is not a *debitum fundi* (*Graham*, 1664, Mor. 10164). But though it is only a personal debt, the owner of the land for the time being is liable for the tax as it falls due. But arrears do not affect singular successors (1 B. C. 739, 7th ed.).

As may be readily supposed, in the case of a tax which is levied in accordance with valuations made two centuries ago, the alterations in the value of property during that time have given rise to many inequalities. But the total sum payable by Scotland is now so comparatively insignificant that they would appear to be regarded rather as an interesting relic of a bygone time than as a serious hardship.

In Counties.—The land tax is now paid entirely by the counties. It is allocated by the commissioners of supply on the proprietors of land, and

subjects connected therewith which yield annual revenue (38 Geo. III. c. 5, s. 131; 52 & 53 Vict. c. 50, ss. 12 (2), 102). The actual collection, as mentioned above, is now in the hands of officials appointed by the Treasury. The commissioners cannot be compelled to supply to the collector an assessment roll of the land tax, setting forth the names of the different proprietors liable to assessment and their owners, and the amount payable in each case, as there is no such duty imposed on them by statute, and they have no power to tamper with the cess books (*Lord Advocate* v. *Commissioners of Supply for the County of Edinburgh*, 23 D. 933). In the case of lands which have been divided, they have still power to assent to an agreement between the parties as to the allocation among the several parcels of land of the *cumulo* amount of tax due in respect of the whole, but any dispute is now finally determined by the Sheriff, whose determination is recorded in the Sheriff Court Books, and forms the rule of payment subsequent to its date (52 & 53 Vict. c. 50, s. 102).

See COMMISSIONERS OF SUPPLY.

In Burghs.—As has been stated above, land tax in burghs was done away with by the Act of 1896 (59 & 60 Vict. c. 37). The amount payable by each burgh was fixed, as in the case of counties, by the Act of 1798 (38 Geo. III. c. 5, s. 128), which continued any usage then existing as to the incidence of the tax, until altered by the burghs themselves. The cess was imposed, by usage dating back to the 16th century, not only on the rents of heritable subjects, but also, under the name of trade-stent, on trade profits and personal estate. This latter part of the tax was properly a part of the land tax, payable to the Crown, and as such leviable directly by the Crown on the inhabitants—not the magistrates—of burghs, and payment was enforceable by diligence under the Act 52 Geo. III. c. 95 (*Renfrew* v. *Magistrates of Glasgow*, 1861, 23 D. 505). The incidence of the whole tax on individuals was settled by the magistrates, assisted by stent-masters. Latterly the proportion allocated to heritage was fixed according to the value appearing in the annual valuation roll, there being no valued rent as in counties (17 & 18 Vict. c. 91, s. 33).

Redemption.—The Act of 1802 (42 Geo. III. c. 116) made it possible for any owner of land to redeem his tax. The power has been taken advantage of to the extent that about one-third of the whole amount fixed by the Act as Scotland's quota has been redeemed. Application has to be made to the commissioners of supply to adjust the amount of tax payable in respect of the lands, for which it is proposed to purchase exemption. The commissioners of redemption (now the commissioners of the Treasury, 1 & 2 Vict. c. 58, s. 1) then bargain with the landowner for the sale. Powers were given to heirs of entail to sell or burden part of the estate for the purpose of redeeming the tax (42 Geo. III. c. 116, ss. 61–66, 101, 102). And under the Lands Clauses Act (8 Vict. c. 19, s. 67) heirs of entail, or other persons with only a qualified interest in lands, were permitted to use the proceeds of a compulsory sale for redemption of land tax.

Opinions were expressed in the case of *Renfrew* (*supra*) that the then existing Redemption Acts did not apply to burghs. But an Act passed shortly afterwards (24 & 25 Vict. c. 91, s. 40) provided that in the case of any burghs, whose assessment produced a surplus over and above their proper quota of land tax, such surplus was to be used for the gradual extinction of their tax. When it was proposed in 1896 to entirely free the burghs from the tax, it was found that in several instances—notably Dumfries—some proportion of the tax had by this means been redeemed. To meet such cases the Act 59 & 60 Vict. c. 37, s. 4 (1), provided for

repayment annually to any burgh of a sum "equal to the annual amount of the land tax redeemed by such burgh."

[Rankine, *Law of Landownership*, 3rd ed., pp. 203, 724 *et seq.*]

See EXTENT; COMMISSIONERS OF SUPPLY.

Lands Clauses Acts.—The acquisition of land for purposes of a public nature, by public bodies, companies incorporated by Act of Parliament, and others authorised by Parliament to purchase or take land, is governed by and carried out under the provisions of the Lands Clauses Consolidation Acts. The leading Scottish Statute is 8 Vict. c. 19 (the Lands Clauses Consolidation (Scotland) Act, 1845), the corresponding English Act being 8 Vict. c. 18, and the amending Statute applicable to both countries is 23 & 24 Vict. c. 106 (the Lands Clauses Consolidation Acts Amendment Act, 1860). The Lands Clauses Consolidation Act, 1869, 32 & 33 Vict. c. 18, is confined to the amendment of statutory provisions which only affected England, and although, under sec. 4 of that Act, both the Acts of 1845, the Act of 1860, and the Act of 1869 may be cited together as "The Lands Clauses Consolidation Acts, 1845, 1860, and 1869," the Statute of 1869 has really no application to Scotland. The amending Act of 1883 (46 & 47 Vict. c. 15) is also a purely English Statute.

The scheme and objects of the Lands Clauses Acts are to prescribe the general conditions under which land may be acquired for public or quasi-public purposes, and the mode in which the acquisition is to be carried out, and the purchase-money or compensation ascertained and disposed of. The authority to take or purchase the particular lands in question is given by the joint operation of the general Statute and of the special Act, which defines the lands liable to be taken (generally by reference to deposited plans and books of reference), and incorporates the whole or portions of the Lands Clauses Act. While the Lands Clauses Act provides the machinery and regulates the general rights of parties in all cases in which land is acquired under Parliamentary powers, additional provisions are found applicable to undertakings of various kinds in the general Acts applicable to each class of undertakings. The provisions of the Lands Clauses Acts thus fall to be read along with those of the Railways Clauses Act (8 & 9 Vict. c. 33) in the case of railways, with those of the Markets Clauses Act (10 & 11 Vict. c. 14) in the case of market buildings, with those of the Gasworks Clauses Act (10 & 11 Vict c. 15) in the case of gas companies or municipalities dealing in gas, of the Waterworks Clauses Act (10 & 11 Vict. c. 17) in the case of water supply to towns, of the Harbours Clauses Act (10 & 11 Vict. c. 27) in the case of dock and harbour undertakings, of the Cemeteries Clauses Act (10 & 11 Vict. c. 65) in the case of public cemeteries, and also with those of the Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38) in reference to water supply generally.

The special Act generally specifically incorporates the Lands Clauses Act or some portion thereof, but as that Act declares (s. 1) that it shall apply to every undertaking authorised by subsequent Act, and shall be incorporated with such Act, it would seem that in the absence of any indication in the special Act as to incorporation or the extent of incorporation, the Lands Clauses would apply in its entirety (see per Ld. Westbury in *re Cherry*, 1862, 31 L. J. Ch. 351; and other cases cited in *Law of Railways in Scotland* (Deas, Ferguson's edition), p. 144). Where the special Act incorporates the provisions "relating to the purchase and taking of lands

otherwise than by agreement," or the Act, with the exception of these provisions, the descriptive words being the *descriptive heading* of a portion of the Act, all the sections forming part of that portion of the Act fall to be included or excluded, as the case may be, without a critical examination of whether their provisions, strictly speaking, fall within the descriptive heading or not (*Ferrar*, 1869, 4 L. R. Ex. 227). Where the special Act incorporates the Lands Clauses Act, even although the special Act makes special provision for compensation in certain cases, compensation may be recovered in other cases, unprovided for in the special Act, under the general provisions of the Lands Clauses Act (*Reg.* v. *Vestry of St. Luke's, Chelsea*, 1871, 6 L. R. Q. B. 572, 7 L. R. Q. B. 148). The Lands Clauses Act by descriptive headings divides its subject-matter thus—

(1) Purchase of lands by agreement (ss. 6–16).
(2) Purchase of lands otherwise than by agreement (ss. 17–66).
(3) Application of purchase-money or compensation (ss. 67–79).
(4) Conveyances of lands (ss. 80–82).
(5) Entry upon lands (and provision as to part of a house) (ss. 83–90).
(6) Intersected lands (ss. 91 and 92).
(7) Common lands (ss. 93–98).
(8) Lands subject to heritable burdens (ss. 99–106).
(9) Lands subject to feu-duty, etc. (ss. 107–111).
(10) Lands subject to lease (ss. 112–116).
(11) Interests omitted to be purchased (ss. 117–119).
(12) Superfluous lands (ss. 120–127).
(Effect of word *dispone*, superiorities, and provision as to land-tax and poor-rate).
(13) Notices (ss. 128 and 129).
(14) Recovery of penalties and expenses (ss. 130–141).
(15) Access to special Act, etc. (ss. 142–144).

These headings "are not logical or precise" (per Ld. Pres. Inglis in *Alexander*, 1868, 6 M. 320), and do not apply with absolute accuracy to all the sections which intervene between one heading and the next, but they sufficiently classify the main divisions of the Act.

I. Purchase by Agreement.

The Statute authorises the promoters of the undertaking to contract with the owners of lands authorised to be taken by the special Act, and required for the purposes of the undertaking, and with all persons having any right and interest in such lands, for the purchase of such lands and of all rights and interests therein (s. 6), empowers all persons otherwise limited in their rights or under legal disability to sell and convey the same (s. 7), or to exercise any other incidental power required to be exercised (s. 8), and provides that in the case of persons under disability the amount of purchase-money or compensation shall be ascertained by statutory process, and deposited in bank for the benefit of the persons interested. The statutory processes provided include arbitration, verdict of a jury, and valuation under an appointment by the Sheriff, as in cases of compulsory taking subsequently provided for, while in every other case of taking from a person under disability the compensation must not be less than the amount determined by two able practical valuators, one appointed by each party, or, in case of their failing to agree, by a third valuator appointed by the Sheriff (s. 9). An owner absolutely entitled, formerly (s. 10), and heirs of entail later (16 & 17 Vict. c. 94, s. 14), could, and now all persons under disability (23 & 24 Vict. c. 106, s. 3) can, sell in consideration of an annual feu-duty

or ground-annual (8 Vict. c. 19, s. 10) charged on the tolls and rates of the undertaking, and recoverable by poinding and sale of the goods of the promoters (s. 11). The promoters are also authorised, where entitled to purchase lands for extraordinary purposes (to which the compulsory powers are inapplicable), to purchase such lands from all persons enabled by the Act to sell and transact, and to sell those lands again and purchase others, subject to the restriction in the special Act as to the quantity held, and to the further restriction that in the case of a party under legal disability there can be only one sale of the prescribed quantity (ss. 12–14).

The important question at once arises: Does the Lands Clauses Act authorise compensation to be given, not only for land taken, but for land damaged by the taking and by the construction of the works authorised, and if so, does compensation fall to be paid under it to owners no part of whose property is actually taken, though their property is injured by the construction of the works?

The Railways Clauses Act, and other Acts dealing with particular classes of undertakings, expressly provide that full compensation is to be paid to the owners of lands taken or used or injuriously affected by the construction of the works, for the value of the lands taken, and for all damage sustained by reason of the exercise of the statutory powers. But the Lands Clauses Act has no such express enactment. It does contemplate purchase-money or compensation for lands taken, or rights or interests therein, and compensation for any permanent damage or injury to such lands (s. 9). It provides, in compulsory purchase, for an offer to treat for the purchase of the lands required, 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" (s. 17), but this notice only falls to be given to owners, etc., of lands to be taken. It provides for arbitration, in the absence of agreement, between the promoters and the owners or persons entitled to sell and convey "any lands taken or required for or injuriously affected by the execution of the undertaking" (s. 20). It also, in dealing with assessment by verdict of a jury, refers to the sum to be paid for the purchase of the lands required for the works, and the sum to be paid "by way of compensation for 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" (s. 48). In dealing with assessment by valuation it again alludes to "the purchase-money or compensation to be paid for any lands to be purchased or taken," and "the compensation to be paid for any permanent injury to such lands" (s. 56).

It provides, further, that in assessing compensation by the various modes, "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" (s. 61). The corresponding section (68) of the English Act is not closely analogous, and is couched in terms more favourable to the contention that it confers a distinct right to compensation for injurious affecting, apart from any land of the claimant being taken. There is, however, the highest judicial authority for the view that no particular difference in effect exists between the Scottish and English Acts (per Ld. Blackburn in *Walker's Trs.*, 1882, 9 R. H. L. 19, at p. 32; and per Ld. St. Leonards in *Caledonian Ry. Co.*, 1865, 2 M. 229, at pp. 245, 246).

It is quite clear that if a part of a man's land is taken—or something equivalent to land, such as a servitude or water-right—he is entitled to compensation for the depreciated value, or injurious affecting of the remainder of his land which has not been taken (*Duke of Buccleuch*, 1871, L. R. 5 E. & I. App. 418).

But on the question whether, under the Lands Clauses Act standing by itself, a person whose land is not taken but only injuriously affected can claim compensation, there have been two conflicting currents of judicial opinion. On the one hand the view has been maintained, that to let in a claim for injurious affecting under the Lands Clauses Act *per se*, land must have been taken from the claimant (per Ld. Colonsay in *Hammersmith Rwy. Co.*, 1869, 4 E. & I. App. 171, at pp. 207-209; per Ld. Blackburn in *Duke of Buccleuch*, 1870, L. R. 5 Ex. 221, at p. 235; and per Bovill, C. J., in *Beckett*, 1867, 3 L. R. C. P. 82, at p. 90); while on the other it was asserted that, without recourse to the Railways Clauses Act or any other, compensation could be recovered under the Lands Clauses Act merely for injuriously affecting (*Macey*, 1864, 33 L. J. Ch. 377, per Wood, V. C., at p. 381; *Broadbent*, 1856, 7 De G. M. & G., per Ld. Chan. Cranworth, at p. 447; *Farrand*, 1856, 21 Beav., per Romilly, M. R., at p. 419; *Bush*, 1875, 19 Eq. Ca., per Jessel, M. R., at p. 294; *M'Carthy*, 1872, L. R. 7 C. P., per Wills, J., at p. 516, and also per Keating, J.). Although at one time the former view was thought to be justified by a judgment of the House of Lords (*Brand's* case, *supra*), the latter has now been sustained, and the true statement of the law appears to be that no absolute distinction can be drawn between the application and the effect of the Lands Clauses and Railways Clauses Acts, and that, without recourse to the latter, compensation can be obtained where property is depreciated in value, even though no part of it, and no private servitude or easement connected with it, is taken, provided it can be proved to be injuriously affected so that the person owning, or interested in it, suffers special damage of a nature not experienced by the general public (*M'Carthy*, 1874, 7 L. R. H. L. 243: and see the opinions in *Walker's Trs.*, 1882, 9 R. H. L. 19; *Cowper Essex*, 1889, L. R. 14 App. Ca. 153).

It would seem, further, that the distinction suggested in *Macey's* case between sec. 68 and the other sections of the English Act has been obliterated, and any difficulty in applying judgments based on that section to claims in Scotland for injuriously affecting removed, by the judgment in a later case, in which it was held that sec. 9 of the English Act applied to permanent injury as well as to actual taking, and the expression "such lands" there occurring was to be construed as meaning lands held by limited owners (*Stone*, 1876, L. R. 1 C. P. D. 691, 2 C. P. D. 99). Indeed, it would seem that in one respect the rights of claimants are larger under the Lands Clauses Act than under the Railways Clauses Act, and that under the former they may be able to assert a right to compensation in respect of depreciated value owing to the subsequent use of the works by the constructing body (*Cowper Essex*, 1889, L. R. 14 App. Ca. 153: and *Duke of Buccleuch's* case contrasted with *Brand's* case, and *Glasgow City & District Rwy. Co.*, 1870, L. R. 2 Sc. App. 78).

The footing on which compensation falls to be calculated is that of the value of the lands to the owner at the date of the acquisition, and not that of their value to the promoters of the undertaking (Cripps on *Compensation*, p. 112; *Penny*, 1868, L. R. 5 Eq. 235); and the promoters are not entitled to set off any benefit accruing to the claimant or the neighbourhood from the construction of the works (*Eagle*, 1867, L. R. 2 C. P. 638. As to the

items of claim and the principles regulating the assessment of compensation, see *Law of Railways*, pp. 268–301).

The general principles which govern the right to obtain compensation may be stated thus—

1. The injury for which compensation is recoverable must be one arising from the legitimate exercise of the statutory powers, and for any improper exercise the remedy is by action of damages (*Cal. Rwy. Co.*, 1860, 3 Macq. 833, at p. 838; *Lawrence*, 1851, 16 Ad. & El. Q. B. 643).

2. The injury must be one which, but for the statutory authority, would have constituted an actionable wrong (*in re Penny*, 1857, 7 El. & Bl. 660, per Ld. Campbell, and per Ld. Watson in *Walker's* case, 9 R. H. L. at p. 38). But if land or its equivalent be taken from any man, a claim is let in for all damage suffered by him in respect of land connected with the land taken and injuriously affected (cases of *Duke of Buccleuch* and *Cowper Essex*).

3. The right of action may be taken away without any right to compensation being conferred. But this rather applies to questions which arise under the cognate Acts than under the Lands Clauses Act standing *per se* (*Cal. Rwy. Co.* (*Ogilvy's* case), 1865, 2 Macq. 229).

4. Where the Lands Clauses Act cannot be founded on, the injury must be from the construction and not from the subsequent use (*Brand's* case and *Hunter's* case, *supra*).

5. If right to compensation is conferred, the remedy by action is excluded (*Cal. Rwy. Co.*, 1890, 3 Macq. 808, per Lord Chancellor; *Watkins*, 1851, 20 L. J. Q. B. 391).

6. The injury must be to the land, and not merely to a personal interest (*Ricket*, 1867, 2 L. R. E. & I. App. 175, contrasted with *Beckett*, 1867, 3 L. R. C. P. 82).

7. The injury must be to the land (or its equivalent), but not necessarily upon the land, provided the premises suffer special damage (cases of *M'Carthy* and *Walker's Trs.*, *supra*).

II. Purchase otherwise than by Agreement.

Compulsory Taking—Before the compulsory powers of taking land are exercised, the whole of the capital prescribed for the undertaking must be subscribed (s. 15), of which subscription a certificate under the hand of the Sheriff is the statutory (s. 15) and conclusive (*Ystalyfera Iron Co.*, 1873, L. R. 17 Eq. Ca. 142) evidence. It would seem, however, that this condition does not apply to an extension for which the funds are to be furnished by an existing company (*Reg.* v. *G. W. Rwy.*, 1852, 1 El. & Bl. 253; *Weld*, 1863, 32 Beav. 340); and it is applicable only to the taking of land, and not to the acquisition of a servitude or easement provided by a special Act (*G. W. Rwy.*, 1884, L. R. 9 App. Ca. 787).

The compulsory powers are strictly construed (*Monerieff*, 1843, 5 D. 879, 5 Bell's App. 333), but more strictly in the case of a trading company than of an existing public corporation (*Galloway*, 1866, 1 L. R. H. L. 34). Express authority is required to entitle a railway company to take land already vested in another railway company (*Dublin and Drogheda Rwy. Co.*, 1871, 5 Ir. R. Eq. 393). A contract not to exercise the compulsory powers is void (*Ayr Harbour Trs.*, 1883, 10 R. H. L. 85), but they must be exercised solely for the proper purposes of the undertaking authorised by the special Act (*Buchanan*, 1850, 12 D. 778; *Wrigley*, 1863, 9 Jur., N. S. 710; *Carrington*, 1868, L. R. 3 Ch. App. 377; *Lamb*, 1869, 4 L. R. Ch. 522). They must be put in force within the prescribed time, and where no time is specified by

the special Act within three years of its passage (s. 116), but it appears to be sufficient that notice is given within the limited period (*Reg.* v. *Birmingham, etc., Rwy. Co.*, 1850, 19 L. J. Q. B. 453, 20 L. J. Q. B. 304; *Ed. & Gl. Rwy. Co.*, 1850, 12 D. 1304, 13 D. 145; *Tiverton & North Devon Rwy. Co.*, 1884, L. R. 9 App. Ca. 480), provided there be no unreasonable delay in following up the inchoate transaction.

How Compulsory Powers set in Motion.—When the promoters make up their mind to acquire any lands they are authorised to "take" (*Spencer*, 1882, 22 Ch. D. 142), they must give a notice—popularly known as the notice to treat—to all the "persons interested" (*Lawson*, 1881, 8 R. 442) in, or enabled to dispose of, the lands, whom they can discover after diligent inquiry. This notice must demand particulars of the interests possessed (*Cameron*, 1864, 16 C. B., N. S. 430), and of the claims made in respect thereof, and state the particulars of the lands required, and that the promoters are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for damage sustained by the execution of the works (s. 17).

The service of the notice puts the company in the same position as if a binding and completed contract for the purchase of the lands had been conducted. "The special Act is substantially an offer of the land by the landowners to the company, and notice by the company of their intention to take the land is an acceptance of the offer" (per Ld. J.-C. Inglis in *Forth and Clyde J. Rwy. Co.*, 1864, 2 M. 693; *Campbell*, 1855, 17 D. 619; *Mackenzie*, 1866, 4 M. 810; *Heron*, 1856, 18 D. 922; *Sc. N.-E. Rwy. Co.*, 1859, 3 Macq. 382). The company cannot resile after giving the notice (*R.* v. *Hungerford Market Co.*, 1832, 4 B. & Ad. 327; *Morgan*, 1868, 4 L. R. C. P. 97, per Kelly, C. B.), either in whole or in part (*Laing*, 1846, 9 D. 70). And, on the other hand, the owner cannot create in any other party a new interest for which compensation can be claimed (*City of Glasgow Union Rwy. Co.*, 1870, 8 M. 747). Delay in following up the notice, if unreasonable, may, however, be held equivalent to an abandonment of the transaction by the company (*Hedges*, 1860, 28 Beav. 109: *Stetton*, 1870, L. R. 6 Ch. 751; *Richmond*, 5 L. R. Eq. 352, 3 L. R. Ch. 679); and the promoters may abandon a notice to take part of a house or manufactory on being served with a counter notice to take the whole (*Grierson*, 1874, L. R. 19 Eq. Ca. 83).

If the parties are agreed as to the sale, a notice is not requisite, and this would appear to be so even in the case of an heir of entail (*Mackenzie*, 1866, 4 M. 810), and in special circumstances the place of a formal notice may be held to be supplied by equivalent proceedings (*Glasgow, Airdrie, etc., Rwy. Co.*, 1849, 11 D. 1153). The mere service of a notice does not appear to be sufficient to operate conversion of the property *quoad* succession (*Law of Railways in Scotland*, pp. 169 and 170, and cases there cited).

The notice may be in writing or print, or partly in both, and must be subscribed by an authorised officer of the company. It must be in strict conformity with the company's statutory powers, and if it includes any land not being included under the compulsory powers, may be held a nullity (*M'Callum*, 3 S. L. T. 194, per Ld. Kyllachy); while, on the other hand, it limits the amount the company are entitled to take in the proceedings it initiates, and any attempt to obtain more land than it includes, without a fresh notice, may be stopped by interdict (*Renton*, 1845, 8 D. 247).

The notice must be served personally, or left at the person's last place of abode, and if any person is absent from the United Kingdom, or cannot be found after diligent inquiry, it must be served upon his factor or agent, and also left with the occupier, or, if there is no occupier, fixed on a conspicuous

part of the lands (s. 18). It must be served within the time prescribed for the exercise of the compulsory powers, and should be in prudence, and generally is in practice, served long before.

How Price ascertained and Compensation assessed.—If for twenty-one days after service of the notice a person interested fails to state the particulars of his claim, or to treat with the promoters, or if he and the promoters cannot agree, the compensation falls to be settled by the methods provided by the Act for settling cases of disputed compensation (s. 19).

These are:—

(1) Determination by the Sheriff, if the claim does not exceed £50.
(2) Arbitration in the option of the claimant, if the claim exceeds £50.
(3) Jury trial, if the claimant does not elect for arbitration, if he fails to state his claim, or if the arbitration lapses through delay, the claim exceeding £50.

To these may be added the form of procedure where there is neither dispute nor agreement, owing to the absence of the parties—

(4) Valuation by a valuator appointed by the Sheriff, subject to submission to arbitration as to whether the sum fixed is sufficient, if the party entitled is dissatisfied.

In all cases the parties may agree to refer the amount of compensation to arbitration (s. 20). If they do not, and the claim does not exceed £50, then, on application by the claimant (which apparently need not be made within six months of the notice, *Reg.* v. *Edwards*, 1884, 13 Q. B. D. 586), the Sheriff may summon the parties to appear before him, conduct an inquiry without written pleadings, settle the expenses, and pronounce a determination, which is final and conclusive and not liable to review (ss. 21 and 22), unless it can be shown that he has exceeded his jurisdiction, by giving compensation for something specially excluded as an element for consideration (*Glasgow District Subway Co.*, 1895, 22 R. 658).

Arbitration.—If the person entitled to compensation desires to have the amount settled by arbitration, and signifies his desire to the promoters in writing before they have presented a petition to the Sheriff to summon a jury, unless the promoters are willing to pay the sum claimed and enter into a written agreement for that purpose, then within twenty-one days of the receipt of such notice the compensation falls to be settled by arbitration (s. 23). Unless both parties concur in appointing a single arbiter, each nominates his own, and after delivery of the nominations to the arbiters, neither party is entitled to revoke without the consent of the other (*Yates*, 1860, 29 L. J. Ex. 447), nor does death of the party operate as a revocation. If for fourteen days after request served by the other, a party fail to appoint, the party requesting, and having himself made an express appointment (*Bradley*, 1850, 20 L. J. Ex. 3) of an arbiter, may appoint such arbiter to act for both parties, and his award will be binding and final (s. 24). If an arbiter die, the person who appointed him may appoint another to act in his place; and if for seven days after notice in writing from the other party, he fail to do so, the remaining arbiter may proceed *ex parte* (s. 25). Similarly, if either arbiter refuse or for seven days neglect to act (*Willoughby*, 1847, 9 Q. B. 923), the other may proceed *ex parte* (s. 29); and it is not a condition precedent that an oversman should have been appointed (*Shepherd*, 1885, 30 Ch. D. 553). If, however, a single arbiter dies, the matter must be begun *de novo* (s. 28). When two arbiters have been appointed, they (and not the parties, *Glasgow Ry. Co.*, 1850, 7 Bell's App. 325) must, before entering on the matters referred to them, nominate an oversman by writing, and on the death or incapacity of the oversman, another in his place (s. 26).

If "in either of the cases aforesaid" they refuse, or for seven days after request of either party neglect, to appoint, the Lord Ordinary may, on the application of either party, make an appointment of oversman (s. 27). In one case where the arbiters, having originally failed to agree, refused to appoint an oversman, one was appointed by the Lord Ordinary (*Mackenzie*, 1861, 24 D. 251); but in another case, where the arbiters had neglected for more than seven days to appoint, the Lord Ordinary (Ld. Pearson) declined to appoint, on the ground that there had been no previous nomination which had failed (*Petr., Union Bank*, 1897, referred to in *Law of Railways*, p. 958).

If the arbiters fail to make their award within twenty-one days, or within the time prorogated by them, the submission devolves on the oversman (s. 30). They may call for books and take evidence (s. 31). The expenses of the arbiters and oversman, and of recording the decreet-arbital (ss. 32 and 33), fall to be borne by the promoters of the undertaking, as do all the expenses of or incident to the arbitration, except in the case where the same, or a less sum, is awarded than was offered by the promoters, in which case each party defrays his own expenses (s. 32). The offer which is to be founded on as affecting the question of expenses ought to be made before the reference becomes irrevocable by delivery of the nominations (*Yates*, 1860, 29 L. J. Ex. 447; *Gray*, 1876, L. R. 1 Q. B. D. 696; *Lord Fitzhardinge*, 1872, L. R. 7 Q. B. 776). The promoters are liable in expenses where they have made no tender if compensation, however small, is awarded (*Martin*, 1858, 27 L. J. Ex. 432), and the offer must be in respect of the same subject-matter as the award (*Miles*, [1896] 2 Q. B. 432). But if no compensation is found due, the section does not apply (*R.* v. *Byron*, 1852, 16 Jur. 640). It applies only to arbitrations entered into under the provisions of the Statute, and not to cases of compensation referred by voluntary agreement (cf. *Reynal*, 1847, 5 Rail. C. 60). The finding as to expenses need not be contained in the award itself (*Gould*, 1850, 6 Rail. C. 568, 573), and expenses may be awarded after the expiration of the three months within which the award itself must be pronounced (cases of *Martin* and *Gould*). The determination of the arbiters as to the expenses is final (*Carmichael*, 1868, 6 M. 671, 2 L. R. Sc. App. 36).

The arbiters or oversman must make their award within three months, and if they fail to do so the compensation falls to be settled by a jury (s. 35). As regards the oversman, the period of three months dates from the time when he is called upon to exercise his functions (*Skerratt*, 1848, 5 Rail. C. 166; *Pullen*, 1882, 51 L. J. Q. B. 285). The arbiters may appoint the oversman at any time within their three months, even though their own capacity to make an award has failed by the lapse of the twenty-one days (*East and West India Docks, etc., Co.*, 1848, 5 Rail. C. 527) and the statutory period of three months may be prorogated by consent of parties (*Cal. Rwy. Co.*, 1849, 12 D. 338, 3 Macq. 808).

Jury Trial.—If the claimant does not demand a reference, or if the reference is not concluded within the prescribed time, the compensation falls to be settled by a jury (s. 35). Any person entitled to compensation exceeding £50 may give written notice to the promoters stating his desire to have the compensation fixed by a jury, and unless the promoters agree to pay the amount claimed, they must, within twenty-one days of the notice being received, present a petition to the Sheriff to summon a jury, and in default are liable for the whole sum claimed (s. 36). The promoters must give not less than ten days' notice to the other party of the petition for a jury (s. 37), and this notice is essential to the validity of the proceedings

(*Ed., Perth, & Dundee Rwy. Co.*, 1852, 1 Macq. 284). It is equally so whether the jury is summoned on the initiative of the promoters or the claimant, and whether there has or has not been previous arbitration procedure (*Falconer*, 1853, 15 D. 352). The ten days' notice must contain the tender by the promoters (s. 37).

Ten days' notice of the time and place of the inquiry must also be given in writing to the claimant or his agent (s. 40), but this notice may be dispensed with by him (*Lang*, 1871, 9 M. 768).

The Sheriff summons a jury of twenty-five indifferent persons qualified as civil common jurymen (s. 39), out of whom, if necessary supplemented by bystanders, a jury of thirteen is impannelled (s. 41). The Sheriff presides, and the jury, or seven of them, may view the lands (s. 42). Penalties are imposed on defaulting jurymen and witnesses (ss. 43, 44, and 45), and the jury must be sworn (s. 47). If the claimant does not appear, the inquiry cannot proceed, and the compensation falls to be determined by a valuator appointed by the Sheriff (s. 46). The jury must return their verdict separately for the sum to be paid for the land, and for the sum to be paid as compensation for damage by severance of the lands taken from the claimant's other lands held therewith, or by otherwise injuriously affecting such lands, unless the parties agree to dispense with such severance (s. 48; *City of Glasgow Union Rwy. Co.*, 1870, 8 M. H. L. 156; *Holt*, 1872, 7 L. R. Q. B. 728; *Cowper Essex*, 1889, 14 App. Ca. 153).

The verdict, which may be given by a majority, and judgment must be recorded (s. 49), and the expenses must be borne by the promoters, unless the jury give the same or a less sum than that previously offered, or unless the claimant fail to appear after due notice, in either of which cases one-half of the promoters' expenses falls to be defrayed by the claimant (s. 50). This provision has no application to a case where the promoters have made no offer, and are not liable at all for the claim made (*Todd*, 1871, 24 L. T. 435). The "sum previously offered" is that required to be specified in the statutory ten days' notice of the petition for the jury (*Reg.* v. *Manley Smith*, 1883, L. R. 12 Q. B. D. 481; *Pearson*, 1870, L. R. 2 Q. B. 785). The details of the expenses in case of difference fall to be settled by the Sheriff (s. 51), and they may be recovered by poinding and sale (s. 52).

Either party may insist on a special jury, but the claimant, if he so desires, must give notice to the promoters before presentation of their petition to the Sheriff. If so required, the Sheriff takes steps to nominate and reduce a special jury in presence of the parties, upon five days' for the first and four days' notice for the second operation (s. 53). Any deficiency of special jurymen may be made up from persons qualified as special or common jurymen, not previously struck off, and who can readily be procured, subject to the lawful challenges, and the inquiry then proceeds as if before a common jury (s. 54). Any other inquiry may be taken of consent before the same jury (s. 55).

Valuation in Case of Absent Parties.—In the case of persons absent from the kingdom, persons who cannot, after diligent inquiry, be found, and persons who do not appear at the time appointed for jury trial, the compensation falls to be determined by a valuator appointed by the Sheriff (ss. 56 and 57), who must annex to his valuation a signed declaration (s. 58) of its correctness. The nomination, valuation, and declaration must be produced to the owner on demand (s. 59), all the expenses are borne by the promoters (s. 60), and the valuator must have regard not only to the value of the land taken, but to the damage otherwise sustained by the exercise of the powers (s. 61). In this and the other cases of determination by the Sheriff, arbiters, valuator,

or jury, the compensation may be apportioned among persons jointly interested, provided no person having a separate interest be prevented from having it separately tried (s. 62). If a person whose compensation has been determined in absence is dissatisfied with the amount awarded, he may require the question to be submitted to arbitration whether the same was sufficient (ss. 63 and 64); and if on the one hand a further sum is awarded, the promoters must deposit the same within fourteen days, and bear all the expenses, but on the other, if the arbiters hold the sum to have been sufficient, the expenses are in their discretion.

III. Application of Compensation.

Compensation payable to parties having limited ("partial or qualified" (*Weir*, 1882, 19 S. L. R. 604)) interests (including corporations but not other railway companies (*Cal. Rwy. Co.*, 1869, 7 M. 1072)), or prevented from treating or failing to make title, must, if it amounts to £200, be paid into bank (*i.e.* an incorporated or chartered bank (s. 3; *Methven*, 1851, 13 D. 1262)), to be applied under the authority of the Court of Session to one or more of certain specified purposes (s. 67).

These purposes are—

(1) Redemption of land tax, discharge of encumbrances affecting the land in respect of which the money is paid or other lands settled therewith, or affecting succeeding heirs of entail (see cases cited in *Law of Railways*, p. 391).

(2) In the purchase of other lands to be settled in the same manner as the lands in respect of which the money is paid (*Buchanan*, 1864, 2 M. 1197; *Duff*, 1863, 2 M. 117; *Duke of Hamilton*, 1858, 20 D. 1134; *Gordon-Oswald*, 1875, 2 R. 931).

(3) If the compensation is paid in respect of buildings taken or injured, in removing or replacing such buildings or substituting others in their stead in such manner as the Court shall direct.

(4) Payment to any person becoming "absolutely entitled" to such money (see English cases cited in *Law of Railways*, p. 391).

The Lands Clauses Acts give no authority to apply consigned money in repayment of improvement expenditure (*Mags. of Dumbarton*, 1852, 14 D. 673), which is governed by the provisions of the Entail Acts. The provisions of the former Acts have, however, received liberal construction in England where the purposes proposed were, if not strictly within the terms of the Statute, yet of a closely kindred nature (see cases referred to in *Law of Railways*, pp. 392, 393).

The compensation falls to be so applied on an order of the Court made on the petition of the party who would have been entitled to the rents of the lands; and until it can be so applied, it may be kept in bank or invested in the public funds or heritable securities, the interest or proceeds being paid to the party who would have been entitled to the rents (s. 68; *Innes*, 1848, 10 D. 870; *Earl of Rosebery*, 1888, 15 R. 824).

If the compensation is less than £200 and more than £20, it (and it would seem that if after investment of a larger sum there remains a balance unapplied of less than £200 and more than £20, this balance (*re Kinsey*, 1863, 1 N. R. 303)) falls to be paid, with the approval of the company, to two trustees nominated by the parties entitled to the rents of the lands, and to be applied (without recourse to the Court) by the trustees to the purposes specified in the case of the larger consigned sums (s. 69).

Sums which do not exceed £20 (either a total sum or a balance, *re Bateman*, 1852, 21 L. J. Ch. 691; *re Lord Eyremont*, 1848, 12 Jur. 618) are

paid directly to the parties entitled to the rents for their own use and benefit, or, in case of incapacity, to those who represent them (s. 70).

Compensation payable under contract, in cases of purchase by agreement to persons not absolutely entitled, also falls to be paid into bank to an account for behoof of all the parties interested in the lands, or similarly applied by trustees, if under £200, but the Court or trustees may allot to any liferenter a portion of the sum corresponding to any special injury or annoyance he may be considered to sustain (s. 71; *Earl of Mansfield*, 1850, 13 D. 235; *Sc. N.-E. Rwy. Co.*, 1859, 3 Macq. 382, at p. 416).

In the case of compensation in respect of long leases or reversions, the Court may direct the application of the money as they think just (s. 72).

It is not necessary, upon the purchase of the lands to be entailed, to insert the provisions of the entail verbatim, provided that on the first occasion of completing titles to the entailed estate the new lands are introduced into the titles (s. 73).

On deposit of the compensation the owner of the lands must execute a conveyance to the promoters or as they shall direct, or in default thereof, or if he fail to adduce a good title, they may make up their title by notarial instrument (s. 74). If the owner refuse to accept the compensation, or neglect or fail to make out a title, or if he refuses or is unable validly to convey, or if he be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear at the trial where the assessment is by a jury, the company must deposit the compensation, and may make up their title by notarial instrument (ss. 75 and 76). But the owner is not in such default as to justify this procedure if he is able and willing to make up his title, and only the requisite forms of law require to be carried through (*Graham*, 1848, 10 D. 495). Money so deposited may be invested, or distributed and paid over on summary application to the Court on the petition of any party preferring a claim to the same (s. 77), and in all questions relating to the title to lands the party in possession is to be deemed the owner until the contrary is shown to the satisfaction of the Court (s. 78).

In all cases of deposited compensation, except where the procedure has been necessitated by wilful refusal to receive the compensation or convey the lands, or by refusal or inability to discharge a burden, or by failure or neglect to make out a good title, the Court of Session may order the expenses to be paid by the company (s. 79). "Wilful refusal" means a refusal "without reasonable grounds" (*in re East India Docks, etc., Rwy, Act*, 1848, 16 Sim. 174; *In re Windsor, Staines, and G. W. Rwy. Act*, 1850, 12 Beav. 522). To disentitle the landowner to expenses the consignation must have been "by reason of" the failure or neglect to make out a title (*Moncrieff*, 1857, 19 D. 283), and the company are liable for all additional expenses caused by unsuccessful objections to the title offered (*Miles*, 1867, 5 M. 402; *Thomson*, 1867, 5 M. 410).

The Statute specifies the following charges:—

(*a*) The expenses of the taking or purchase of the lands, or those incurred in consequence thereof, except in so far as otherwise provided for (*Primrose*, 1848, 11 D. 236; *Charlton*, 1885, 28 Ch. D. 237).

(*b*) The expenses of investment in Government or real securities, and of reinvesting in the purchase of other lands, and of re-entailing such lands and incident thereto (*Grant*, 1851, 13 D. 1015). But this section does not subject the company to liability for the expenses incident to applying the fund to each or all of the purposes contemplated by sec. 67 (*Stirling Stewart*, 1893, 20 R. 932; *Steven*, 1893, 30 S. L. R. 658). Where several companies have taken portions of the claimant's lands, which are reinvested on one

application, the general rule is that the expenses are divided equally and not rateably between the companies, but the rule is one subject to equitable modification (see *Law of Railways*, p. 401). The expenses of re-entailing include those of entry with the superior (*M. of Titchfield*, 1853, 15 D. 908).

(*c*) The expenses of obtaining the proper orders for any of these purposes, and for payment of dividends or interest and of the principal, and of all proceedings relating thereto, except those occasioned by litigation between adverse claimants (*Law of Railways*, p. 406). The company are, however, liable only for expense in so far as caused by their actings, and not for expense occasioned by other matter introduced into the petition (*Lord Torphichen*, 1851, 13 D. 1400: *Erskine*, 1851, 14 D. 119; *Drummond Hay*, 1873, 1 R. 180; *Countess of Stair*, 1882, 19 S. L. R. 618; *Lady Willoughby d'Eresby*, 1885, 13 R. 70; *Moncreiffe*, 1859, 21 D. 1359), or irregularity in the procedure (*D. of Hamilton*, 1858, 21 D. 124—as to reclaiming note, *M. of Huntly*, 1868, 6 M. 959).

The Act only allows the expenses of one application for reinvestment, unless it appears to the Court that it is for the benefit of the parties interested in the compensation that it should be invested in the purchase of lands in different sums and at different times, in which case the Court may in its discretion order the expenses to be paid by the promoters (*Grant*, 1851, 13 D. 1015; *Lord Elibank*, 1857, Duncan's *Entail Pro.* p. 141; *Logan*, 1889, 26 S. L. R. 521). It is a question of circumstances whether the expenses of an abortive application fall on the claimant or the promoters (cf. *Rector of Holywell*, 1865, 11 Jur., N. S. 579), and expenses must be prayed for (*Lord Elibank's Petition*).

IV. Conveyances.—Feus and conveyances may be in the forms provided in the Schedules to the Act (s. 80); the expenses must be borne by the promoters, and include all incidental expenses, including those of establishing the title (s. 81; *Graham*, 1848, 10 D. 495); and in case of disagreement are ascertained and decerned for by the Lord Ordinary on summary petition (s. 82). If, on taxation, one-sixth part is disallowed, the expenses of the taxation and application must be borne by the party whose expenses are so taxed. Where lands are taken under compulsory powers, no feudal relation is constituted between the promoters and the superior (*Mags. of Elgin*, 1884, 11 R. 950; *Mags. of Inverness*, 1893, 20 R. 551). But it is otherwise where lands are acquired by agreement for extraordinary purposes (*M'Corkindale*, 1893, 31 S. L. R. 561).

V. Entry on Lands.—The promoters cannot, except for the purpose of survey, enter upon the lands acquired until they have paid the price, except with consent of the owners (s. 83). Tacit consent will, however, be sufficient to justify them (*Renton*, 1845, 8 D. 247), and consent once given cannot be recalled (*Knapp*, 1863, 32 L. J. Ex. 236, at p. 239). They must, before entering, settle with all parties interested, including not only the occupiers, but also liferenters and bondholders. The prohibition against entry does not apply to the execution of operations on adjoining land which injuriously affect the owner (*Hutton*, 1849, 18 L. J. Ch. 345); and the mere deposit of materials and plant on the land treated for, with consent of the tenant, is not sufficient to entitle the owner to object under this section (*Fleming*, 1847, 9 D. 792).

The promoters may, however, after giving not less than three or more than fourteen days' notice, enter on the lands for the purpose merely of surveying and taking levels, and proving or boring to ascertain the nature of the soil, and of setting out the line of the works, subject to the condition of making full compensation for all damage (s. 83). But before this right

comes into operation there must have either been a contract for purchase or statutory procedure equivalent to a contract (*Dalgleish*, 1847, 9 D. 505). If, however, it is necessary for the promoters to enter before the purchase price is agreed to, or compensation assessed, they may do so by the method of procedure known as "entry on deposit and giving bond." Sec. 84 of the Act provides that on depositing in bank the sum claimed, or such sum as shall be fixed by a valuator appointed by the Board of Trade (s. 84, as amended by 30 & 31 Vict. c. 126, s. 36) as the value of the lands, and also, if required, giving to the claimant a bond, with two sufficient sureties, for a sum equal to the sum to be deposited for payment to such party, or for making a deposit in bank for the benefit of the parties interested in the lands, as the case may require, for the payment of the compensation to be found due, with interest at 5 per cent. from the date of entry till payment or deposit, the promoters may enter upon and use the land. The sum so deposited must be paid into bank to an account in name of the parties interested in the lands, under control of the Court of Session, and a receipt is given by the bank to the promoters (s. 85). It remains in bank as a security to the landowner, and may be invested in Government and heritable securities on the petition of the promoters; and on the conditions of the bond being performed, the Court may order it to be repaid or tranferred to the promoters, or if they are not performed, may order it to be applied as thought fit for the benefit of the parties for whose security it was deposited (s. 86).

If the landlord dispenses with the granting of the bond, he is still entitled to interest at 5 per cent. on the sum found due (*West Highland Rwy. Co.*, 1894, 21 R. 576). The valuation on which the deposit is made must comprise the whole lands included in the notice to treat (*Barker*, 1848, 5 Rail. C. 401), and generally, it would seem, must fully cover the possible claims (*Law of Railways*, p. 211). The bond must be under the hand of the secretary or other properly authorised officer in the case of an incorporated company, and in other cases under the hand of two or more of the promoters. The promoters are not entitled to resist a petition to uplift the consigned sum in payment of compensation awarded, on the ground that they are raising a reduction of the decree-arbitral, but if the reduction be first raised, the petition will not be granted till it is decided (*Fortune*, 1849, 11 D. 531; *Main*, 1895, 22 R. 487).

If the promoters or their contractors wilfully enter on the lands without having made payment or deposit, the promoters are liable to the pursuers in a penalty of £10 over and above the payment of all damage suffered (s. 87). The penalty and damage may be recovered before the Sheriff, and by tenants for a year or shorter time, as well as by owners or tenants on long leases (*Glasgow Dist. Subway Co.*, 1892, 20 R. J. C. 28). If after conviction the company or their contractors remain in possession, the company incur a further liability of £25 per day, which may be recovered before a competent Court; but no penalty attaches where the company have without collusion *bonâ fide* paid compensation to the wrong party (s. 87); and the Sheriff's decision as to penalty is not conclusive as to the right of entry (s. 88).

If, where the promoters are duly authorised to enter, the party in possession refuses to give up possession or hinders the promoters from entering, they may apply by petition to the Sheriff for possession, and the expenses of the procedure fall to be paid by the party wrongfully refusing to cede possession, and may be deducted from the compensation, or if no compensation is payable, recovered by poinding and sale (s. 89).

Part of a House under Sec. 90.—The promoters cannot insist on any

party selling or conveying a part only of a house or other building or manufactory if he be willing to sell or convey the whole thereof (s. 90), the word "required" being equivalent to "compelled" (*Gardner*, 1868, 2 John & H. 248, at p. 256). But if the owner refuses to sell a part and calls on the company to take the whole, they are entitled to abandon their notice and take none (*R.* v. *L. & S.-W. Rwy.*, 1848, 17 L. J. Q. B. 326), and he cannot ask them to take more than they propose unless he offer the whole (*Pulling*, 1864, 33 L. J. Ch. 505). The promoters need not, if willing to take the whole, serve a second notice (*Schwinge*, 1853, 24 L. J. Ch. 405); and they cannot, after a counter notice, enter without consigning the value of the whole (*Giles*, 1861, 30 L. J. Ch. 603). The term "house" includes everything *a cælo usque ad centrum*, and a tunnel cannot be made under a house without liability to take the whole of it (*Glasgow City and Dist. Rwy. Co.*, 1883, 10 R. 894). As to whether a garden, stable, paddock, water duct, or other pertinent forms part of a house or manufactory, reference must be made to the reported cases which will be found collected in the *Law of Railways in Scotland*, pp. 199–204 (Ferguson's edition).

VI. Intersected Lands.

Special provisions are made with reference to small portions of land, the value of which to the owners is greatly reduced by their being cut off from the rest of their property. If lands, not being situate in a town or built upon (*Carington*, 1866, L. R. 2 Eq. 825, 3 Ch. App. 377; *L. & S.-W. Rwy.*, L. R. 4 H. L. 610; *Elliott*, 1848, 2 Ex. 725), are so cut through by the works as to leave, either on both sides or one side, a less quantity than half a statute acre, and if the owner require the promoters to purchase such small portions, they must do so unless the owner have other land adjoining into which the same can be thrown; and if so, the promoters must throw the piece of land so left into the adjoining land by removing the fences and levelling and soiling the ground in a sufficient and workmanlike manner (s. 91). If the owner has no adjoining land, and if the value of the severed piece is less than the cost of making bridges or other communications, the promoters may, if required by the owner to make such communications, require the owner to sell the severed land; and any dispute as to the value or the cost of making communication may be settled as in cases of disputed compensation (s. 92). The right of the promoters under this section is not restricted to lands not situate in a town or built upon, but applies to all severed land (*Eastern Counties Rwy. Co.*, 1860, 9 H. L. C. 32); but where the small portion of land is valuable as enabling the owner to enjoy rights of fishing, bathing, etc., the provisions are not applicable, and he may be entitled to accommodation works under other Statutes (*Falls*, 12 Ir. L. R. 233).

VII. Common Lands.

In the case of lands of the nature of commonty, the promoters must call a meeting of all those interested either in respect of property or servitude after prescribed notices (s. 93). The meeting may appoint a committee, not exceeding five in number, who, for the purpose of ascertaining the compensation, are to be deemed the proprietors, and have full power to agree as to the compensation, or have the question of compensation settled as in other cases (ss. 94, 95, 96). The notice of claim apparently requires to be signed by all the members of this committee (*Fife and Kinross Rwy. Co.*, 1859, 21 D. 187). If no committee is appointed, the compensation is determined by a valuator nominated by the Sheriff (s. 97);

and upon payment or tender to the committee or any three of them, or if there is no committee, on deposit in bank, the promoters may execute a disposition, and the lands vest, while the Court may order payment of the deposited money on petition (s. 98).

VIII. Lands subject to Heritable Burdens.

If the lands are encumbered, the promoters may, upon six months' notice, redeem the security, and, on tendering the full amount of principal, interest, and expenses, with six months' additional interest, are entitled to a conveyance or discharge (s. 99). If the holder of the security refuses to accept payment, or fails to adduce a good title, they may deposit a corresponding sum in bank and expede a notarial instrument (s. 100). If the lands are of less value than the debt, the promoters, on payment to the creditor of the agreed on or awarded value as between them and the owner, are entitled to a conveyance of the security and debt so far as paid, and the interest of both owner and creditor in the lands ceases (s. 101). Where part only of the lands is taken, and that part is of less value than the debt, the company, on payment of the value of the lands, are entitled, on payment of the compensation, to a conveyance of the land taken, in which both landowner and creditor cease to have interest, and a memorandum of the amount paid must be endorsed on the bond by the holder (s. 103). In both these latter cases also the sum may be deposited, if refused on tender, and a title expeded by notarial instrument (ss. 102 and 104). If the sums secured are paid off before the stipulated time, the promoters must pay all expenses incident to their reinvestment (s. 105); and if the rate of interest is higher than can reasonably be expected on reinvestment, compensation must be paid for the loss so incurred (s. 106). Mortgagees are entitled to notice, as parties interested (*Martin*, 1863, L. R. 1 Eq. 145; rev. 1 L. R. Ch. 501).

IX. Lands subject to Feu-duty, etc.

In the case of lands subject to feu-duties or similar charges, the promoters may agree to hold the lands without redeeming, making payment of the charge as it falls due, provided they are not called upon by the party entitled to redeem the same (s. 107); or if they are called upon to redeem, any difference as to the consideration is determined as in other cases of disputed compensation (s. 108). If part only of the lands is taken, then unless the remainder provide sufficient security, and the owner consent to it becoming liable for the whole charge, the charge must be apportioned between the portions taken and not taken, either by agreement or by determination of the Sheriff (s. 109). If difficulty arises, the procedure by deposit and notarial instrument may be adopted (s. 110). The remaining lands continue liable for the whole or part of the charge, and the promoters may be required to grant a probative deed, declaring what part of the lands has been taken, and what continues liable, and to what extent (s. 111).

X. Lands under Lease.

If part of lands held under lease is taken, the rent payable under the lease is apportioned between the lands taken and the lands not taken, either by agreement between the owner and occupier and the promoters, or by the Sheriff, the lessee is subsequently only liable for the rent apportioned to the part not required, and all the conditions of the lease become applicable to the part not required (s. 112). It is the duty

of the promoters, not of the tenant, to obtain the apportionment (*Slipper*, 1867, 4 L. R. Eq. 112). The tenant is entitled to compensation for damage done by severance or otherwise by the execution of the works (s. 113). The effect of the notice is to elide any prohibition in the lease against alienation (*Slipper's* case); and on the other hand, the promoters cannot, it would seem, found on a clause of resumption in favour of the landlord as against the tenant's claim for compensation (*Solway Junction Rwy. Co.*, 1874, 1 R. 831).

In the case of tenants for a year or from year to year the compensation falls to be settled by the Sheriff (s. 114), and under this description are included persons who hold under longer leases, of which less than a year remains to run (*R.* v. *G. N. R.*, 1876, L. R. 2 Q. B. D. 151). The nature of the tenant's interest falls to be determined as at the date of the promoters' notice (*City of Glasgow Union Rwy. Co.*, 1870, 8 M. 747), and procedure under sec. 114 is (in Scotland at all events) applicable alike when land is actually taken and when it is only injuriously affected (*Glasgow District Subway Co.*, 1895, 23 R. 81; *Cal. Rwy. Co.*, 1855, 17 D. 312).

If the claim is for compensation on the footing that the interest is greater than as a yearly tenant, the promoters may require production of the lease or missive, and if it is not produced within twenty-one days the claimant is considered and dealt with as a yearly tenant (s. 115). But the promoters are not entitled to demand such production until a claim for compensation is made by the tenant (*Forfar and Brechin Rwy. Co.*, 1892, 19 R. 786). The tenant's right in any case is a demand for apportionment of the rent or compensation from the promoters, and he is not entitled to retain a portion of the rent as an abatement (*Ferguson*, 1881, 9 R. 168), while the landlord has no lien for his rent over the compensation money paid to the tenant (*Peddie*, 1857, 20 D. H. L. 1, 3 Macq. 65). Sec. 116 of the Act provides that the compulsory powers shall not be exercised after the expiry of the prescribed period, and if no period is prescribed in the special Act, after the expiration of three years from its passing.

XI. Interests omitted to be Purchased.

If, after the promoters have entered on the lands, it appears that there is any right or interest which there has been an omission to purchase or compensate, through mistake or inadvertency, then, irrespective of whether the period for purchase has expired or not, the promoters shall remain in possession, provided within six months after notice of the right, or within six months after determination by law if the right is disputed, they purchase or compensate for the same, and for the intervening profits or interest, such compensation being agreed on or awarded as if the promoters had purchased before entry (s. 117). The value is to be assessed as at the date of entry (s. 118); and if the promoters unsuccessfully dispute the right, they must pay the whole expenses of the litigation necessary to establish it (s. 119). The omission must have been by mistake or inadvertency (*Martin*, 1866, 1 L. R. Ch. 501: *Stretton*, 1870, 5 L. R. Ch. 751), and the promoters cannot avail themselves of these sections where they did not, prior to the expiry of the period allowed for compulsory purchase, intend to acquire the omitted estate or interest (*Davidson's Trs.*, 1894, 21 R. 1060).

XII. Superfluous Lands.

The promoters are not entitled to hold lands except for the proper purposes of their undertaking, and the following provisions are made for

the disposal of lands which have been acquired (either in the belief that it would be required permanently or temporarily, or at the owner's instance demanding that the whole of a property should be taken, or as intersected land (*G. W. Rwy. Co.*, 1874, 7 L. R. E. & I. App. 283)), but which are ultimately found not to be required.

Within a period prescribed by the special Act, or if none be prescribed, within ten years after the time limited for the completion of the works, the promoters must absolutely sell and dispose of all superfluous lands in the manner they deem most advantageous, and in default of such sale all such lands remaining unsold at the expiration of such period thereupon vest in and become the property of the adjoining owners in proportion to the extent of their lands respectively adjoining the same (s. 120). It is sufficient to prevent such vesting that the sale should have been contracted for within the time limited (*Caledonian Rwy. Co.*, 1869, 7 M. 959, at p. 964). Until the ten years or other time limited have run, the promoters are apparently the sole judges of what land is or is not required (*Glover's Trs.*, 1869, 7 M. 338); and unless they have clearly treated it as superfluous, as by attempting to transfer it to a third party, the former owner has no title to demand a reconveyance (*Astley*, 1858, 27 L. J. Ch. 478; *L. & S.-W. Rwy. Co.*, 1870, 4 E. & I. App. 610). The fact that the ten years or other limited time have run is not in itself decisive (*Hooper*, 1877, L. R. 3 Q. B. D. 258, at p. 275, and *N. B. Rwy. Co.*, 1879, 6 R. 640, at p. 652); and lands do not become superfluous if in reasonable probability they are likely to be required for the purposes of the undertaking within a reasonable time (*Betts*, 1878, L. R. 3 Ex. D. 182; affd. by H. L. 49 L. J. Ex. 197). The point of time as at which the inquiry falls to be made is the expiration of the prescribed time, but the probable development of the undertaking and the locality is a relevant element in the inquiry. Land does become superfluous when the promoters deal with it as such, either by attempt to sell or by physical treatment (*Norton*, 1879, L. R. 13 Ch. D. 268). For the case of abandonment of the works, special provision is made in the case of railways by 13 & 14 Vict. c. 83, s. 27. Lands acquired for extraordinary purposes do not fall within the sections relating to superfluous lands (*Caledonian Rwy. Co.*, 1869, 7 M. 1072, 9 M. H. L. 116); but they may apply to lands in which the company have a right of reversion, and which are in the occupation of tenants (*Moody*, 1865, 34 L. J. Q. B. 172; affd. 1866, 1 L. R. Q. B. 510). Land which may become superfluous must be land separated by a vertical or lateral, and not by a horizontal, boundary from land required for the purposes of the promoters, and in this respect sec. 120 is in contrast to sec. 90 (*re Metr. Dist. Rwy. Co.*, 1880, L. R. 13 Ch. D. 607; *Mulliner*, 1879, L. R. 11 Ch. D. 611). The time for the sale of superfluous lands may, in the case of railways, be extended by a certificate of the Board of Trade under the Railway Companies Act, 1864 (27 & 28 Vict. c. 120, ss. 3 and 9).

Before the promoters dispose of superfluous lands, they must, unless they be situate within a town (*Elliott*, 1848, 2 Ex. 725; *L. & S.-W. Ry.*, 4 E. & I. App. 610), or be lands built upon (*Carington*, 1866, 2 L. R. Eq. 825), or used for building purposes (*L. & S.-W. Ry.* v. *Blackmore*; *Coventry* v. *L. B. & S. C. Ry. Co.*, 1867, 5 L. R. Eq. 104), first offer to sell the same to the person owning the lands from which the superfluous lands were originally severed, or if he refuse or cannot be found, to the several persons whose lands immediately adjoin the lands to be sold, and where more than one person is entitled to such right of pre-emption, to such persons in succession in such order as the promoters think fit (s. 121; *L. & S.-W. Ry.*). "Adjoining land" includes any land which comes substantially in contact with the superfluous land

(cases cited in *Law of Railways*, p. 241). The right of pre-emption is lost if not exercised within six weeks, and a declaration in writing to that effect made by a party not interested before the Sheriff is sufficient evidence of the fact (s. 122). Differences as to price are settled by arbitration, the expenses of the reference are in the discretion of the arbiter (s. 123), and upon tender of the price agreed or awarded, the promoters are bound to convey (s. 124). (As to the method of division where the company fail to sell, and the lands vest in the adjoining owners, and the sale of superfluous land under conditions, see *Law of Railways*, pp. 244–246; and as to the rights of creditors and debenture-holders of an incorporated company in reference to such land, *Law of Railways*, pp. 246 and 816, 817.)

Word "Dispone."—In all conveyances by the promoters the word "dispone" operates as a clause of absolute warrandice (s. 125), except where otherwise provided by express words. Superiorities remain unaffected, but the promoters are not liable for feudal prestations or bound to enter, they making full compensation to the superior for any loss in respect of casualties or otherwise (s. 126; *Law of Railways*, pp. 178, 179).

Land Tax—Poor-rate.—If the promoters become possessed of any lands subject to land tax, or poor-rate, or prison assessment, they must, from time to time, until the works are completed and assessed, make good the deficiency caused in such tax and rates by reason of the lands having been taken, but may redeem the land tax (s. 127). In determining whether such deficiency exists, the promoters' whole property acquired and taken within the parish is to be considered (*Hall*, 1861, 8 R. 687). But where an existing company acquires land under a new Act, upon which land a deficiency arises, it is no answer to a claim under sec. 127 that the whole value of the company's undertaking in the parish during the period of assessment is greater than the aggregate value of their undertaking before the passage of the new Act, and of the property then existing upon the land taken by the new Act (*Hall*, 1883, 10 R. 857).

XIII. Service of Notices, etc.

The Lands Clauses Act also contains careful provisions for the service of notices (s. 128), for the tender of amends in respect of any irregularity or unlawful proceeding (s. 129), and for securing access to the special Act by all persons interested (ss. 142 and 143).

XIV. Recovery of Damages and Penalties.

Every penalty or forfeiture imposed by the Lands Clauses Act or special Act, or any Act incorporated therewith, or bye-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 (s. 130). Penalties and expenses may be recovered by poinding and sale (s. 131), and failing goods of the promoters, by poinding and sale of the goods of their treasurer, who is entitled to recover from the promoters (s. 132). Unless the application of penalties is otherwise provided for, not more than one-half thereof may be awarded to the informer, and the remainder goes to the kirk-session or poor-rate collector, for the benefit of the poor of the parish where the offence was committed (s. 135). In the case of a prosecution for breach of bye-law of an incorporated company, the instance is good if the prosecution is by "The —— Company and A. B., their secretary, with concurrence of the procurator-fiscal" (*G. N. S. Ry.*, 1897, 35 S. L. R. 40).

Proceedings cannot be quashed for mere want of form (s. 138), and

where written pleadings have been made up and the evidence recorded in writing, an appeal lies from the Sheriff-Substitute to the Sheriff, whose judgment is not subject to review (s. 139; *Glasgow Subway Co.*, 1893, 1 S. L. T. 60).

[For commentary on the Act generally, reference may be made to Deas, *The Law of Railways in Scotland*, Ferguson's edition, 1897; *The Law of Compensation*, by C. A. Cripps; and to the annotations on the various sections of the Scottish Act in Rankine's *Law of Landownership* and Ferguson's *Scottish Railway Statutes*, and of the English Act in the *Law of Compensation*, by Balfour Browne and Allan.]

Lands Valuation Appeal Court.—This Court is constituted under and in terms of the Lands Valuation Act, 1879 (42 & 43 Vict. c. 42), s. 7, and consists of any two judges of the Court of Session who from time to time shall be named for that purpose by Act of Sederunt. The Court sits from time to time during session or in vacation as may be necessary to dispose of appeals from County and Burgh Valuation Courts. This Appeal Court takes the place of the Senior Lord Ordinary and Lord Ordinary officiating in Exchequer causes named as the judges in the appeals allowed by the Valuation Act, 1857 (20 & 21 Vict. c. 58), s. 2, which first gave an appeal from the decision of the local Court and that only in those cases where the Valuation Roll in question was made up by an officer of Inland Revenue. The Act of 1879 not only changed the constitution of the Court, but also makes the right of appeal available whether the assessor is or is not an officer of Inland Revenue. The Lands Valuation Appeal Court is a supreme Court of exclusive jurisdiction, with full power to regulate its own procedure, and its decisions in any appeal are final and not subject to review by any other Court in any manner of way (*Stirling & Sons*, 1873, 11 M. 480).

Appellants. — A case stated on appeal to the Lands Valuation Appeal Court against the decision of the local Court may be demanded by anyone who may competently bring an appeal to the latter Court. Appeal to the superior Court is expressly excluded in those complaints to the lower Court allowed to any person interested by sec. 6 of the Valuation Act, 1879, against any particular set forth in the Valuation Roll, on any other ground than the amount of the annual value. The terms of that section have been held to imply that the right to appeal to the superior Court exists in the case of complaints as well as appeals to the lower Court, provided the complaint is against the annual value; that, in fact, the statutes use the word "appeal" to mean either complaints or appeals to the lower Court (*Ferrier*, 1892, 19 R. 882, Inl. Rev. Case, No. 138; *M'Gregor*, 1874, 4 R. 1144, Inl. Rev. Case, No. 105; *Blantyre Parochial Board*, 1883, 10 R. 773, Inl. Rev. Case, No. 32; *Burgh of Linlithgow*, 1878, 9 R. 1236, Inl. Rev. Case, No. 130).

Form of Case Stated on Appeal.—The statutory provisions as to the form of the case stated on appeal are contained in sec. 2 of the Act of 1857 (20 & 21 Vict. c. 58), and secs. 7 and 9 of the Act of 1879 (42 & 43 Vict. c. 42). The 1857 Act requires the lower Court to "state specially and to sign the case upon which the question arose, together with the determination thereupon"; and this has been interpreted by a variety of decisions to mean, that the case must contain a full and plain statement of (1) the findings of the lower Court on the facts involved in the case (not a mere report of the evidence led, or a reference to the printed notes of the evidence

appended in terms of the 1879 Act); (2) the principle contended for by the appellant, and the principle adopted by the lower Court; (3) the conclusion arrived at which is the subject of appeal; and (4) a certified copy of the notes of evidence, as an appendix (*Rule*, 1883, 10 R. 502, Inl. Rev. Case, No. 33). The local Court is final on the facts, and in the Appeal Court the only question that can competently be raised is whether the lower Court, in the conclusion appealed against, has applied the right principle to the facts stated to have been proved. The Appeal Court has no power to review the verdict of the lower Court as to the facts; it can only deal with the principle of valuation which should be applied to those facts in order to arrive at the value of the subjects in terms of the Valuation Acts. Even where it appears from documents produced that the findings in fact are erroneous, the Appeal Court will proceed upon those findings, at least where the rights of persons not parties to the case are involved (*Marr Typefounding Co. Limited*, 1884, 11 R. 563, Inl. Rev. Case, No. 43). An appeal to obtain a review of the judgment of the inferior Court on the facts is incompetent (*M'Jannet*, 1882, 10 R. 32, Inl. Rev. Case, No. 22; Valuation Act, 1854 (17 & 18 Vict. c. 91), ss. 3, 8, 10, 13; Valuation Acts, 1857, 1879, secs. *ut supra*).

Amendment of Case.—The parties to a case are responsible, along with the Court below, that that Court gives distinct findings in the case on all the facts founded on by either side (*Lord Middleton*, 1882, 10 R. 28, Inl. Rev. Case, No. 21; *Union Tube Co.*, 1895, 22 R. 583, Inl. Rev. Case, No. 113; *Glasgow & South-Western Rwy.*, 1898, 5 S. L. T. 209). Sec. 9 of the 1879 Act gives the Appeal Court power to remit the case back to the lower Court, with such instructions as may seem necessary for having the case more fully stated. This power, however, has been held to be limited to the rectification of a mistake in the statement of the case; the obtaining a more definite finding on matters of fact set forth in general terms in a case; or to correct a judgment of the lower Court refusing to admit competent, or allowing incompetent, evidence; and the like. But the Appeal Court will not, in the ordinary case, make a remit for the taking of evidence, where neither party has offered to lead proof in the lower Court; or to allow a party to lead evidence which he had it in his power, but failed to bring when the question was tried in the Court below (*Assessor for Argyll*, 1889, 16 R. 793, Inl. Rev. Case, No. 96). Where, moreover, the case has been stated in an incompetent form, it is in the discretion of the Court to refuse a remit, and to dismiss the appeal *simpliciter* (*Steel Company of Scotland*, 1892, 19 R. 847, Inl. Rev. Case, No. 137; *Glasgow and South-Western Rwy. Co., ut supra*).

Expenses.—The Valuation Acts contain no express provision on the subject of the award of expenses by the Lands Valuation Appeal Court, and the uniform practice has been not to award expenses to either party. There is no direct authority on the point, but Ld. Fraser, in a memorandum left by him on the subject (*Journal of Jurisprudence*, vol. 35, p. 173), argues that such an award is quite competent; and it has been observed in one case, that if appeals were caused by the neglect of the repeatedly expressed opinion of the Court, the question of awarding expenses might become a matter for consideration (*Forbes Irvine*, 1893, 20 R. 627, Inl. Rev. Case, No. 144).

Appeals against the decision of the Assessor of Railways and Canals are regulated by the Valuation Act, 1854 (17 & 18 Vict. c. 91), s. 24, and fall to be presented, not to the Lands Valuation Appeal Court, but to the Lord Ordinary on the Bills, or, where the lands and heritages lie within one county, to the Sheriff of the county in terms of that statute.

Last Heir.—When a person dies intestate without heirs lawfully begotten of his body, and there being no person who can prove propinquity to him in the remotest degree so as to succeed to his property, such property, both heritable and moveable, falls to the Crown as *ultimus hæres*, but always under burden, so far as the value of the property avails, of the debts of the deceased. There are two possible cases: (1) where an heir or heirs exist but cannot be found, and (2) where an heir or heirs do not exist, as in the case of a bastard, who has no descendants, he having, in the eye of the law, no father. In the latter case it must be noticed that the widow of a bastard is entitled to teree and *jus relictæ*, even though the Crown should succeed as *ultimus hæres*. In the case of heritable property held of the Crown falling to the Crown, there is *ipso jure* consolidation; but where the property is held of a subject-superior, it is necessary to interpose a donatory, as the Crown cannot hold of a subject. Where it is necessary to interpose a donatory, or where the Crown makes a gift of estate falling to it as *ultimus hæres*, power is given in the deed of gift to institute an action of declarator of gift of *ultimus hæres*, or of declarator of bastardy, and it is necessary for the donatory to do so to complete his title. The action is raised by the donatory as such, the deed of gift being set forth in the instance; and the lieges and all others having or pretending to have an interest, and, in the case of bastardy, the person or persons who would by law have succeeded to the estates, heritable and moveable, of the bastard had he been begotten in lawful wedlock, together with the widow of the bastard, if he left one, are called as defenders. The declarator is to the effect that the estates, which are described, pertained to the deceased, fell into the hands of the Crown, and were at the gift and disposal of the Crown by reason of the deceased's death without heirs, or by reason of bastardy, have been gifted to the donatory, and are in consequence his in all time coming. After decree of declarator is obtained, the donatory, in the case of heritable property, obtains a letter under the quarter seal charging the superior to give him an entry.—[Stair, iii. 3. 44, 47; M'Laren on *Wills and Succession*, i. pp. 79, 80; *Jurid. Styles*, iii. p. 170.] See Gift of Bastardy.

Law, as it is used on the title-page of this volume, means the sum total of the principles and rules which ought to be observed by parties in the determination of their rights and duties, if these are to come into effect in Scotland, and which the Scottish Courts, if called upon, are presumed to apply and enforce. While the citizen who wishes the law reformed, the legislator, or the philosopher must regard the law differently, the judge, the legal practitioner, or the party to an action or legal transaction must hold the law as contained in a Statute, decision of the Supreme Court, or undoubted custom established by text writers as absolutely final and conclusive (cf. Pollock and Maitland, *Hist.* i. 1; Bentham, *Morals*, 324, 330. "[The legislature] has even the power to do what is wrong, and we are bound to obey it" (Ld. Neaves in *M'Laren*, 3 R. 1151, at p. 1159).

In the above sense Equity (*q.v.*) is really a part of the law.

The law may be divided into written or statutory, and unwritten, common, or customary. The written law includes, besides Statutes of the Imperial Parliament, Acts of Sederunt, Orders in Council (see *Index to the London Gazette* and preface to *Statutory Rules and Orders*, 1891, published by authority), By-Laws (*q.v.*) of Corporations, etc. The unwritten law is transmitted by tradition and usage, and the principal articles thereof are so notorious that they require no evidence to prove them, *e.g.* primogeniture,

legitim, terce, etc. In law reports and text books the principles on which the Courts proceed and the main doctrines of the common law are set forth, but these are not written law, for it is the written decree of the Court which is law, and that as between the parties only. Any expression of opinion by a judge, if the facts of the case are known, and the nature and amount of the argument submitted, may be valuable as explaining the actual judgment; but it should not be interpreted verbally like a Statute. In a Statute, on the other hand, the very words used are of the essence of the law.

As to the written law, see ACT OF ADJOURNAL; ACT OF SEDERUNT; DESUETUDE; STATUTE.

Decisions of the Courts were formerly regarded in a somewhat different light in Scotland from that which prevailed in England. Erskine (i. 1. 47) speaks of a uniform series of decisions of the Court of Session, and says "that great weight is to be laid on their later decisions, where they continue for a reasonable time uniform, upon points that appear doubtful; but they have no proper authority in similar cases." He applies the same doctrine to the House of Lords, and concludes: "where a similar judgment is repeated in this Court of the last resort, it ought to have the strongest influence on the determinations of inferior Courts." Blackstone's doctrine (i. 68) is: "These judicial decisions [*i.e.* of the judges in the several Courts of justice] are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law." "It is an established rule to abide by former precedents, where the same points come again in litigation." With Erskine decisions prove a custom *of the Court*, if they are clear and uniform; with Blackstone one decision may prove the custom of the country. The English rule now prevails in Scotland.

Decisions of the Supreme Courts, if in point, are treated as absolutely binding on inferior judges. In *Houldsworth's* case quoted below, Ld. Blackburn said: "When it appears that a case clearly falls within the *ratio decidendi* of the House of Lords, the highest Court of Appeal, I do not think it competent, for even this house, to say that the *ratio decidendi* was wrong." As to judgments of Lords Ordinary, see *Clarke*, [1891] A. C. 419.

If two decisions are directly contradictory, the one which is pronounced by the higher Court prevails. If the Court which has pronounced them is the same, or if the second decision is given by a Court of equal authority, the later prevails (cf. Ld. Blackburn in *Houldsworth*, 1880, 5 App. Ca. 335; Ld. Selborne, L. C., in *Campbell*, 1880, 5 App. Ca. p. 798; *Virtue*, 1 R. 285). But conflicts between contradictory decisions of the Court of Session may be resolved by referring points of difficulty to seven judges, or the whole Court (C. of S. Act, 1868, ss. 59 and 60; *Watson*, 1890, 17 R. 736; *Robertson & Baxter*, 1897, 24 R. 758; and other cases; *Caldwell*, 1883, 10 R. 1263, is an instructive example in all its stages). Mere *obiter dicta* are not binding (Ld. Chelmsford, L. C., in *Nicol's* case, 3 De G. & J. 426).

Decisions of the Sheriff and inferior Courts are not binding as authorities even on the judge who pronounced them; but where uniformity of procedure within a county is more desirable than accuracy, such precedents should be followed. An example of the *absence* of cases in the inferior Courts tending to prove the law may be found in *Clarke* v. *Carfin Coal Co.*, H. L. [1891] App. Ca. 427.

Decisions of the English and Irish Courts, and particularly of the House of Lords in English and Irish appeals, are treated with great respect in the Scots Courts, but their authority varies according as (1) there is or is not a Scots decision on the same point, and (2) the law on the subject is

or is not the same in the two countries (cf. *Virtue*, 1873, 1 R. 285; remarks of Ld. Young in *Avon S.S. Co.*, 1890, 18 R. 286; remarks of Ld. Adam in *Wallace*, 1892, 19 R. 919, and in *Morrison*, 1894, 21 R. 1071).

The *dicta* of Ld. Macnaghten in *Perth General Station Committee* v. *Ross*, [1897] App. Ca. p. 492, evidently assume that Scots lawyers are *bound* to search for English precedents. In subjects such as domicile, mercantile law, construction of statutes and deeds, vesting, etc., and in points arising under Imperial Statutes, such as the Companies Acts, the Merchant Shipping Act, etc., English decisions, even of single judges, perhaps because they are reported, are in practice held binding (*Wallace's Trs.*, 18 R. 921).

American decisions and text books are of less authority, but are useful by way of illustration in cases where the law is identical with Scots law. In *In re Missouri Steam Ship Co.*, 1889, 42 Ch. D. at p. 330, the Court (consisting of Ld. Halsbury, L. C., Fry and Cotton, L. JJ.) disapproved of the practice of quoting American cases. (A complete list of American reports will be found in Bouvier's *Law Dict., sub voce* "Reports.")

The great institutional writers have great authority in proving custom, but are not binding on the Courts (*e.g.* Bell, *Prin.* s. 26: *Clarke*, *cit.*, etc.).

The writings of foreign jurists are useful by way of illustration, particularly in questions in Roman law, the conflict of laws, and international law. Cf. Fraser on *Husband & Wife*, vol. ii., authorities cited; cf. *Ld. Adv.* v. *The Clyde Trustees*, 19 R. 174 (Ld. Kyllachy's judgment); *Ewing* v. *Orr-Ewing*, 10 App. Ca. 513 (Ld. Selborne commenting on Ld. Fraser's opinion); *The Queen* v. *Keyn* (*The Franconia*), L. R. 2 Ex. Div. 63.

The ancient Roman Law (*q.v.*) and the Canon Law (*q.v.*) are only authorities in so far as their doctrines have been adopted by our Courts (Stair, i. 1. 12 and 14; Ersk. i. 1. 41, 42; per Ld. Watson in *Clarke*, [1891] App. Ca. p. 427; *Collins* v. *Collins*, 9 App. Ca. 205).

Besides legislating directly in Acts of Sederunt,—generally on matters of form, for the Court never exercised the power, given by the Mercantile Law Amendment Act, of making regulations for carrying into effect the purposes of this Act,—and besides laying down solemn precedents, by hearing in presence or before seven judges, the Court has sometimes deliberately laid down a rule in a single decision, *e.g.* *The Minister of the Parish of Tingwall* v. *The Heritors*, 1787, Mor. 7928, where it was laid down "as a general rule to be observed in all time coming" that a church must be built so as to be capable of containing two-thirds of the parishioners who were upwards of twelve years old; *Gentles*, 18 S. L. R. 1, where a rule was laid down as to expenses when an appeal was withdrawn in Single Bills. And now under the Judicial Factors (Scotland) Act, 1880, s. 4 (7), it is the duty of the Accountant of Court, when it appears to him that there is a diversity of practice or of judgment in the Sheriff Courts which he thinks should be put an end to, to report the same to the First Division of the Court and ask a rule to be laid down, and the Court may do so, "which rule the several Sheriffs and their substitutes shall be *bound* to observe."

Erskine (i. 1. 28) observes "that when mention is made of the common law in Scots Statutes, the Roman law is understood, either by itself or in conjunction with the Canon law. When the expression is fuller, the common laws of the realm, our ancient usages, are meant, whether derived from the Roman law, the feudal customs, or whatever other source." The phrase may now be said to be used in the English sense of customary law, as opposed to statute.

But beyond what are ordinarily called legal principles and rules, there is a large amount of knowledge besides practical skill required for the

application and administration of law. Even if it consisted exclusively of Statutes, interpretation would be required; but there is a distinct tendency on the part of legal rules to increase in number at the expense of rules of mere common-sense construction. This arises from our system of following precedents in the English fashion and not in the old Scottish one.

Thus ordinary common-sense knowledge of men and things is assumed along with the English language and all that that implies. Grammar is called in for the construction of statutes or deeds (*The Queen* v. *Monck*, 2 Q. B. D. pp. 551 and 558), but when once a meaning has been given to a phrase, it is apt to be treated as *law* (Stroud's *Judicial Dictionary*; *Digests*, *s.v.* "Words"): *e.g.* "I am fully sensible of the absurdity of the legal reasoning on which this last proposition is founded . . . The only answer is that the law is so settled" . . . (per Ld. Westbury in *Ralston*, 4 Macq. 397, at p. 405).

Ordinary public and historical events do not require to be proved, and may be assumed (*Egerton*, 4 H. L. C. pp. 160, 162, etc.). So also the mode of computing time and the ordinary succession of the seasons; and so also an elementary knowledge of pure science; but the line must be drawn by the Court, where an ordinary judge should distrust his own knowledge, and rely on scientific evidence. "A Court of law would be a very inefficient institution if its members were to profess ignorance of the ordinary processes of agriculture, commerce, and industry which are known to the rest of the world. We must take such knowledge of the arts as we have along with us" (per Ld. M'Laren in *Jamieson*, 19 R. p. 901). The necessity and the use of such general knowledge is shown in commercial cases (cf. *Peek*, L. R. 6 E. & I. p. 404). Remarks of Lds. Fitzgerald, Bramwell, and Herschell in *The Ceto* (a collision case), 1889, 14 App. Ca. at pp. 688, 693, 694). The ordinary principles of morality and public policy are assumed.

Many rules of experience have taken a proverbial form in *maxims* (Dickson on *Evidence* (Legal Presumptions); Trayner, *Maxims*).

Logic has been dealt with in much the same way as grammar. All laws, written or unwritten, must be dealt with according to the natural principles of reason: but several logical rules have become legal, *e.g.* approbate and reprobate: the greater contains the less (Bankt. iv. 45. 36, Rule 9). *Accessorium sequitur principale* (*q.v.*), etc., and some rules really logical, have been incorporated in the Bills Act, Partnership Act, and others (Broom, *Maxims*, chap. iv.). It may be that, though logical in form, these rules are ethical in substance and origin.

Law is divided into public and private, but the distinction is hard to maintain, and does not affect practice (Ersk. i. 1. 28). A better division is according to the classes of rights and duties involved in the relation, and so we have

(1) *Constitutional Law* (*q.v.*), dealing with the relations of the Government, the Crown, Parliament, and the Executive to the subjects of the State, and including the law of Parliament.

(2) *Administrative Law* is a term used by the Scottish Universities Commissioners, and borrowed from Continental usage. It may be held to include the great body of statutory law, dealing with police, burgh, county, and local government, poor, public health, education, and similar subjects. Perhaps the details of taxation, stamps, excise, and customs fall under this head (Holland's *Jurisprudence*, 330, etc.).

(3) *Criminal Law* deals with the powers of persons (official or private) to prosecute for crimes, and the powers of judges as to punishment. It aims at (*a*) respecting the freedom of the person before trial, consistently

with securing his appearance thereat (see BAIL). (*b*) Ensuring a fair trial, any excessive punishment being restrained by the prerogative of pardon as to sentences in the High Court, or the sentence being quashed in the case of the inferior Courts (see CRIMINAL PROSECUTION). (*c*) Adequate prison regulations for the execution of the sentence (Revised Rules for Prisons in Scotland, printed 10 July 1888, No. 264). A *penal law* is one imposing punishment for an offence against the State; but it is not penal merely because it imposes an extraordinary liability on the delinquent in favour of the person wronged (*Huntington*, [1893] App. Ca. 150; Dicey, *Conf. of Laws*, 220).

(4) *Municipal Law* deals with the rights and obligations as to person and property of individuals. It includes in modern practice the laws as to marriage, husband and wife, parent and child, guardian and ward, trusts, succession, etc. And since the passing of the Act 20 & 21 Vict. c. 44, the Crown regularly appears in the Courts as a private litigant (see LORD ADVOCATE).

Mercantile Law, including the law merchant, or customary law of merchants, belongs to this division (Bell, *Com.* Pref. xi.; cf. Ersk. iii. 2. 24, who treats the customs of trading nations as part of the *jus gentium*).

As to land laws and feudal law, see FEUDAL SYSTEM.

(5) *Ecclesiastical Law* is either the quasi-statutory (Acts of Assembly) or common law of the Church itself within the limits of its constitution (Cook's *Procedure*; Mair's *Church Law*), or that branch of the municipal law which deals with ecclesiastical persons and property (Black's *Parochial Ecclesiastical Law*, Duncan's *Parochial Law*. See BURYING-PLACE; CHURCH; KIRK; CHURCH COURTS; ECCLESIASTICAL BUILDINGS; GLEBE; MANSE; TEINDS).

(6) *Military Law* is a special code dealing with the duties and rights of soldiers as such in peace and in war, at home and abroad (*Manual of Military Law*, issued by the Government, 1894. See ARMY; COURT-MARTIAL; MILITARY LAW; etc.).

"*Martial Law*, as distinguished from military law and the customs of war, is unknown to English jurisprudence" (*Manual of Military Law*, p. 5). See MARTIAL LAW.

(7) *International Law* (*q.v.*) may be regarded as an extension of all the preceding branches of law to cases where foreign States, or their subjects as representing such States, become involved.

Legal rules have been divided into three branches: (*a*) Substantive law, (*b*) Evidence, and (*c*) Procedure. History shows that this distinction is a slow product of evolution; and such well-known works as Dickson on *Evidence* and Mackay's *Court of Session Practice* prove that it is both impossible and inexpedient to draw a hard and fast line of distinction. The special treatises on Scots Conveyancing of Menzies and Montgomerie Bell show this subject to be an indefinite combination of all three branches. Conveyancing is properly a theory of forms, including extrajudicial as well as judicial transfers of property; but these writers, after the fashion of the compilers of Justinian's *Digest*, interpolate a considerable amount of matter which, according to modern ideas, belongs to the substantive law.

As to the position of foreigners with regard to Scots law, see ALIEN; FOREIGN; INTERNATIONAL LAW; INTERNATIONAL PRIVATE LAW; MANDATARY.

Positive Law is the law actually in force as above defined, as opposed to *Natural Law*.

Natural Law means sometimes (*a*) positive law discovered by intuition, sometimes (*b*) an ideal at which men aim, and generally (*c*) the actual physical

order of the universe, which cannot be violated (Miller, *Philosophy of Law*, App. A, where authorities are collected. See JURISPRUDENCE).

Law Agent.—This is the generic name applied in Scotland to every person entitled to practise in a Court of law, exclusive of members of the Faculty of Advocates. It is thus practically synonymous with the English term solicitor.

I. HISTORY.

The rise of professional lawyers in Scotland seems to have been due to the introduction and development of the civil and canon laws. As the clergy were the only body of men capable of reading and explaining the Latin compilations of those laws, their advice and assistance were naturally sought by litigants; and they accordingly appear to have gradually assumed the character of advocates in the Ecclesiastical Courts. It is impossible to ascertain with any accuracy the date at which professional pleaders first appeared in our temporal Courts; but they certainly did so long before the year 1532, the date of the institution of the present Court of Session, our Supreme Civil Court, when it was expressly provided that a certain number of advocates and procurators should be appointed to plead in that Court (see ADVOCATE). For more than a century and a half advocates practised in the Court of Session without the aid of law agents. But the inconveniences arising from the employment of the same person as advocate and law agent led gradually to the formation of three classes of law agents, namely, advocates' first clerks, writers to the signet, and solicitors. The advocates' first clerks, among whom were frequently to be found young men studying for the Bar, were the head assistants of the advocates. Intrusted with the practical details of their masters' causes, they naturally took advantage of their position in order to act as law agents on their own account, a practice which the Court at first tacitly permitted and eventually recognised. This body has, however, ceased to exist as a separate class of practitioners, its members having been united since 1850 with the Society of Solicitors in the Supreme Courts (see ADVOCATES and ADVOCATES' CLERKS). The writers to the signet appear to have been originally clerks in the office of the Secretary of State, who had charge of the King's seal, and to have thus been officially engaged at the initial stage of litigation. They were, however, for a long time prohibited from acting as law agents in the Court of Session. But the prohibitions became obsolete about the beginning of the eighteenth century, and the Court expressly recognised in 1754 the right of writers to the signet to practise as law agents. In the meantime, notwithstanding numerous prohibitions, a third class of law agents, generally called solicitors, had gradually established themselves in the Court of Session, and their right to practise was recognised in 1754. These formed a society which is now incorporated under the name of the Society of Solicitors in the Supreme Courts of Scotland. While the position of practitioners in the Supreme Courts was being thus gradually modified, there was no corresponding change among the practitioners in the Inferior Courts, who were generally called writers or procurators. These practitioners had the entire management of their clients' causes, but were entitled to practise only in the particular Inferior Court to which they had been admitted, and they were excluded from the Supreme Courts. In several of the more important Sheriff Courts, namely, those of Aberdeen, Glasgow, Edinburgh, and Paisley, the practitioners soon formed themselves

into local societies, the members of which had the exclusive privilege of practising in those Courts, and the societies prescribed separate regulations as to the qualifications, examinations, and admission of candidates, apprenticeship to a member being generally indispensable. To secure a uniform system of legal training for others than members of the societies above mentioned, the Court of Session passed an Act of Sederunt in 1825 rendering it necessary for candidates to serve an apprenticeship of three years with a writer to the signet, solicitor, or procurator. A very material improvement in the position of practitioners in the Inferior Courts was effected by the Procurators Act of 1865, especially as regarded the qualifications of candidates, and the formation of a large number of provincial societies of law agents under the powers of incorporation conferred by that Act. In 1870 the Royal Commissioners appointed to inquire into the Courts of Law in Scotland unanimously recommended that there should be one general examination applicable to law agents throughout Scotland, that all exclusive privileges should be abolished, and that arrangements between town agents and country agents for the division of the profits of litigations should be legalised; and to these recommendations effect has been given by the Law Agents Act of 1873 (36 & 37 Vict. c. 63), which contains further provisions to be afterwards mentioned. For a long time previously notaries public had been very generally employed, not merely in doing properly notarial work, but also in conveyancing and every kind of legal business except Court practice. Under sec. 24 of the Law Agents Act a considerable number of such notaries, of seven years' standing, were admitted as law agents. On 24 December 1883 a Crown Charter was granted constituting "The Incorporated Society of Law Agents in Scotland," the membership of which is open to all law agents, and also (since 14 August 1896) to notaries public, under 59 & 60 Vict. c. 47, s. 4 (see *post*, under the heading *Societies of Law Agents*). The same Statute (s. 3) gave great facilities to notaries public to be admitted as law agents, and of these facilities advantage has been taken by a large number of notaries. No person can now be admitted as a notary public in Scotland until he has been admitted and enrolled as a law agent (s. 2 of the same Statute), so that the anomalous position of notaries public in Scotland will soon be a thing of the past. See NOTARY PUBLIC.

II. QUALIFICATION AND ADMISSION.

The qualifications and mode of admission of law agents are now regulated by the Law Agents Act of 1873 above mentioned (36 & 37 Vict. c. 63), as amended by the Law Agents and Notaries Public (Scotland) Act, 1891 (54 & 55 Vict. c. 30), and the Law Agents (Scotland) Act Amendment Act, 1896, and by several Acts of Sederunt passed by the Court of Session under the powers conferred by those Acts. The regulations fall under three heads, viz.: (1) Apprenticeship; (2) Examination in general knowledge and in law; and (3) Admission by the Court of Session.

1. *Apprenticeship.*—The apprenticeship required by the Law Agents Act (s. 5) consists of service under a valid indenture or contract of service with a practising law agent, or with a sheriff clerk in office at the date of the Act (5 August 1873). When (as generally happens) the apprentice is a minor, his father, or, in the event of his father being dead, his curators, if he has any, should be consenting parties to the indenture. (See APPRENTICE.) In every case the apprenticeship must be under a written indenture, to be recorded in the register of probative writs of the county in which it is made, and intimated to the Registrar of Law Agents (Mr. John Moir, D.C.S.,

9 New Register House, Edinburgh) within six months from the date fixed for the commencement of the apprenticeship. The proper mode of intimating an indenture to the registrar is by sending him an extract after the indenture has been duly recorded, together with a fee of 2s. 6d. This should be attended to by the master of the apprentice. In the indenture the apprentice must bind himself to serve his master in his professional business for a period not less than that prescribed by the Act, viz. in the ordinary case, five years, or in the following exceptional cases, three years, viz.: (*a*) A person who has for five years been a clerk to and engaged under the superintendence of a practising law agent in such business as is usually transacted by law agents; (*b*) a person holding a degree in Law or in Arts of a University in Great Britain or Ireland, granted after examination (the Examiners do not require that the degree be taken before the apprentice is bound, but regard a degree taken at any time during the apprenticeship as justifying an apprenticeship of only three years); (*c*) a member of the Faculty of Advocates; (*d*) a person who has been called to the degree of Utter Barrister in England; (*e*) a person who has been admitted and enrolled as an attorney or solicitor in England. Indentures must be stamped in accordance with the provisions of the Stamp Act, 1891, ss. 26, 27, and 28, and the clause "Articles of Clerkship" in the schedule appended to the Act, the stamp duty being £60 when the apprentice becomes bound to serve in order to his admission as a law agent to practise before the Court of Session, or as writer to the signet in Scotland, but only two shillings and sixpence when he becomes bound to serve in order to his admission as a law agent to practise before a Sheriff Court in Scotland. But it is expressly provided that a person paying only 2s. 6d. may at any subsequent time pay the difference between 2s. 6d. and £60, and so become entitled to practise in the Court of Session (s. 26 (2)). The result is that no apprentice need pay more than 2s. 6d. on his indenture, unless he is qualifying himself for admission to the Society of Writers to the Signet. When, from necessary or reasonable cause, the whole period of apprenticeship under an indenture cannot be completed with the master therein named, the Law Agents Act provides (s. 5, subs. 4) that the remainder of the period may be completed with another qualified master. The assignation of the indenture requires to be stamped, the duty being 10s., or (where only 2s. 6d. has been paid on the previous indenture) 2s. 6d., and to be intimated to the Registrar of Law Agents within six months of its date. It is further provided by the Law Agents Act (s. 5, subs. 5) that a master may permit his apprentice to serve any part of his term not exceeding two years with another qualified master: the Examiners recommend that the permission be given in the form of a short writ, an assignation of the indenture not being necessary.

2. *Examinations in General Knowledge and in Law.*—Under the powers conferred by sec. 8 of the Law Agents, amended by the Act of 1891, the judges of the Court of Session have passed several Acts of Sederunt appointing a Board of Examiners, instituting examinations, and prescribing the subjects thereof, both in general knowledge and in law. The power now possessed by the judges of the Court of Session to render compulsory the attendance of candidates at university or other classes has not been exercised. The existing regulations are contained in an Act of Sederunt dated 18 March 1893, coming into effect on 1 January 1895 (under A. S., 19 December 1893), supplemented by Acts of Sederunt dated 12 July 1893, 29 January 1895, and 3 December 1896. Special provisions have been made for candidates in course of qualifying under the old

regulations, but it seems unnecessary to state these provisions here. The regulations may be varied in the future, as they have been in the past, so that intending candidates will do well not to rely implicitly on the summary here given. The Clerk to the Examiners (Mr. G. S. Donaldson, S.S.C., 15 Hanover Street, Edinburgh) will supply for one shilling a print containing the regulations in force, and specimen questions of the examinations.

A candidate is exempt from examination in general knowledge (1) if he hold a degree of any university in the United Kingdom granted after examination, (2) if he be a member of the Faculty of Advocates, (3) if he have been called to the degree of Utter Barrister in England or Ireland, or (4) if he have been admitted and enrolled as an attorney or solicitor in England or Ireland, or (5), under A. S., 18 March 1893, s. 4, if he have obtained the higher-standard certificate granted to students who have passed the preliminary examination in the specified subjects of the curriculum for the degree of M.A. under the Ordinance No. 11 of the Universities' Commissioners: but, in this last case, the candidate must pass an examination in book-keeping, which, however, may be taken at the same time as the examination in law. Similarly, a candidate is exempt from examination in law, other than forms of process, civil and criminal, if he holds the degree of LL.B. or B.L. of any Scottish University. Further, the Court accept the examinations held by the Society of Writers to the Signet for admission into that society as equivalent to those held under the Law Agents Act, so that there are practically two systems of examination applicable to law agents in Scotland. See WRITERS TO THE SIGNET. When under special circumstances they see fit to do so, the Lord President and the Lord Justice-Clerk have statutory power to exempt any person from compliance with the rules for the time being in force with reference to a curriculum of general and legal study (s. 5 of the Act of 1891).

There are two examinations in general knowledge, the first of which must be taken before, or within one year after, the commencement of apprenticeship, while the second may be taken either immediately after the first examination or at any time within three years thereafter, or within three years of presenting to the Clerk to the Examiners the equivalent certificates, as after mentioned. As regards the first examination, the aim of the Examiners is to make it equivalent to the examination for the lower-grade leaving certificates of the Scottish Education Department, and a candidate is exempt from this examination in any subject on which he holds a leaving certificate of either the higher or lower grade, or a certificate (higher or lower) of the Oxford and Cambridge Schools Examination Board. Under A. S., 3 December 1896, the same privilege is conferred on the lower-standard certificate granted to students who have passed the preliminary examination in the specified subjects of the curriculum for the degree of M.A. under the Ordinance No. 11 of the Universities' Commission. The subjects are: (1) English composition and writing to dictation; (2) arithmetic, simple and compound, and vulgar and decimal fractions; (3) elements of Latin; (4) history of England and Scotland; and (5) geography. A candidate who fails to pass the first examination may in ordinary course attend any subsequent examination which shall be held before or within the first year of his apprenticeship, but after that time he requires to make a special application to the Examiners, and give them proof of diligence. The application should be sent to the Clerk to the Examiners at least six weeks before the date of the examination for which the candidate intends to enter. Candidates who fail to pass the first examination are re-examined in all the subjects. Under A. S., 3 December 1896, a candidate who holds certi-

ficates exempting him from *all* the subjects of the first examination requires to produce them to the Clerk to the Examiners before, or within one year after, the commencement of his apprenticeship. The fee payable is one shilling on each certificate presented.

The *second* examination in general knowledge includes three of the following subjects, to be selected by the candidate, viz. mathematics, logic, Latin, Greek, French, German, Spanish, and Italian. Candidates must also pass an examination in bookkeeping, but this may be taken at the same time as the examination in law. Candidates holding higher-grade leaving certificates of the Scottish Education Department, or higher certificates of the Oxford and Cambridge Schools Examination Board, or certificates (higher standard) of the preliminary examination of the Scottish Universities for graduation in Arts, are exempted from examination in any of the subjects to which the certificates apply. The aim of the Board of Examiners is to make their examination in each subject as nearly as possible equivalent to the above; and as to what is comprised in mathematics, Latin, Greek, French, German, and Italian, reference is made to the provisions of the Universities Commissioners' Ordinance No. 11, and the rules of the Joint Board of Examiners of the Scottish Universities, a summary of which will be found in the print of regulations above mentioned issued by the Clerk to the Examiners of law agents. In Spanish the standard is similar to that prescribed for the other modern languages above mentioned. In logic a knowledge of deductive logic and of the elementary portions of inductive logic is required. In bookkeeping candidates must know both double and single entry, the examination being similar to that for the leaving certificate in that subject, but not including commercial arithmetic. Candidates who fail to pass this second examination for law agents may offer themselves for re-examination at any time within three years after passing the first examination, or presenting the equivalent certificates as above mentioned, and they are only required to qualify in those subjects in which they have previously failed, or in equivalent subjects.

Both first and second examinations are held twice in the year in Edinburgh, commencing on the third Tuesday of January and the second Tuesday of July. Examinations are also held in Glasgow, Aberdeen, and Dundee, commencing on these respective dates, if not less than ten candidates intimate their intention of presenting themselves for examination in any of these cities.

Candidates intending to present themselves for examination, either for the first examination or the second examination, are required to give written notice to the Clerk to the Examiners at least twenty-one days before the date of each examination. The notice should specify the examination the candidate desires to undergo, the town at which he wishes to be examined, and bear his postal address or residence, and full Christian name or names and surname. Candidates entering for the first examination should, if an indenture has already been entered into, give the date of the commencement of their apprenticeship; and in the case of those giving notice for the second examination, they must state the subjects in which they desire to be examined, and the date on which they passed the first examination, or obtained its equivalent. Forms of application may be had from the Clerk.

The fees for the examination are to be paid to the Clerk when the candidate gives notice. These are, in the case of the first examination, for a first enrolment, £3, 3s.; and for subsequent examinations, £2, 2s. each; and in the case of the second examination, for a first enrolment, £3, 13s. 6d.; for

subsequent examinations where more than one subject is taken, £2, 2s.; and where only one subject is taken, £1, 1s.

The *examinations in law* are held quarterly in Edinburgh, commencing on the fourth Tuesday in January, the last Tuesday in April (in 1898, on the preceding Monday), the third Tuesday in July, and the third Tuesday in October in each year. The fees (including the expenses of the petition to the Court after mentioned) payable on a first examination are £5, 15s.; and for subsequent examinations, £2, 2s. each. The subjects of the examination are as follows: The law of Scotland, civil and criminal (Erskine's *Institutes*, Bell's *Principles*, Hume's *Commentaries*, 1st volume); conveyancing; and forms of process, civil and criminal. Candidates are requested to keep in view that a knowledge of the forms of process, both in the Supreme and Sheriff Courts, is essential.

No candidate can be examined in law till he has presented to the Court of Session a petition for admission as a law agent as after mentioned. Where the petition has not been previously prepared, the candidate must give written notice to the Clerk to the Examiners at least twenty-eight days before the date of the examination. Candidates whose petitions have been previously prepared are required to give written notice to the Clerk fourteen days before the date of each examination. To enable the Clerk to prepare the petition, candidates must lodge with him at the time of giving notice for the examination the following documents: (1) Extract of indenture, duly discharged; (2) assignation thereof, or second indenture or agreement, duly discharged, if such was entered into; and (3) certificate of birth. They must at the same time lodge such certificates and diplomas as they found on as their educational qualifications.

3. *Admission by the Court of Session.*—The only mode of admission as a law agent is that prescribed by sec. 7 of the Law Agents Act, viz. by petition to the Court of Session, praying their Lordships to admit the applicant. As it is the duty of the Clerk to the Examiners, when required by the applicant, to present and carry through the petitions free of expense, other than the fee already mentioned, it is not necessary to state here the proper procedure. To entitle the candidate to present the petition, he must be twenty-one years of age, and have completed his apprenticeship, and passed the two examinations in general knowledge, or have obtained their equivalents as above mentioned. Before being admitted, he must make affidavit that he has actually served an apprenticeship to a qualified master or masters during the whole time required by the Law Agents Act, and this affidavit may be made either before a magistrate or justice of the peace, or before the judge to whom the petition is presented. Beyond this, the candidate does not require to take any oath, or to make any declaration, on admission. Before being actually admitted, the candidate must pay the stamp duty required by the Stamp Act, 1891, viz. £55 for admission to practise in the Sheriff Courts, or £85 for admission to practise before the Court of Session, or as a Writer to the Signet, under deduction in each case of the sum already paid on his indenture, and subject to the provisions of sec. 17 of the Law Agents Act, under which any law agent in the Sheriff Court may at any time practise in the Court of Session on payment of the £30 of difference between the two stamp duties. A Sheriff Court agent may, without payment of such difference, act as sole agent in any civil cause appointed to be tried by jury in any circuit town, under sec. 46 of the Court of Session Act, 1868.

Under the Law Agents Act, the name of every law agent admitted by the Court must be enrolled by the Registrar of Law Agents, who is entitled,

under A. S., 3 December 1896, to a fee of 2s. 6d. for entering the name in his alphabetical register, and granting a certificate of the enrolment. Every law agent so enrolled is deemed to be admitted to all Courts of law in Scotland, subject to the provisions of the Stamp Act above mentioned; but in order to practise in any Court he must sign the roll of agents practising in such Court, paying 5s. for each subscription, and delivering a note specifying his place of business, and also a similar note as often as he changes his place of business (see secs. 2, 12, 13, 14, and 16 of the Law Agents Act).

III. Certificate or Licence to Practise.

For more than a century past, every practising law agent has been obliged to take out annually a stamped certificate or licence to practise. The matter is now regulated by the Stamp Act, 1891, ss. 43 to 48, and the clause "Certificate" in the schedule appended thereto. The stamp duty, in the case of a person practising or carrying on his business within the city or shire of Edinburgh, is £9 if he has been admitted for three years or upwards, or £4, 10s. if he has not been so long admitted. In the case of a person practising or carrying on his business beyond those limits, the duty is £6 if he has been admitted for three years or upwards, or £3 if he has not been so long admitted. The certificate ought to be renewed in November of each year. The failure of a law agent to take out his certificate does not render his admission void; but if he practises as a law agent in any Court, or acts as a notary public, he incurs the statutory penalties, viz. a fine of £50, and incapacity to sue for any fee, reward, or disbursement. The similar provisions of former Statutes have been held to prevent a law agent from taking decree in his own name for expenses found due to his client (*Ewing*, 1832, 6 W. & S. App. 222). Sec. 44 of the Stamp Act, 1891 (re-enacting the provisions of sec. 60 of the Stamp Act, 1870), imposes a penalty of £50 on "every person who (not being a barrister, or a duly certificated solicitor, law agent, writer to the signet, notary public, conveyancer, special pleader, or draftsman in equity) either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceeding in law or equity." But it further provides that the expression "instrument" does not include a will or other testamentary instrument, "an agreement under hand only," a letter or power of attorney, or a transfer of stock containing no trust or limitation thereof. The exception of agreements under hand only, *i.e.* not under seal, appears sufficiently wide to include every kind of contract, as Scotch deeds never are executed under seal. The consequences of the neglect of a law agent or a notary public to take out a certificate are personal to himself: his acts are quite valid as far as third persons are concerned.

IV. Unqualified Practitioners.

At common law no one is allowed to practise as a law agent in any Court without having been duly admitted, and persons attempting to do so are subject to severe penalties and punishment (*Lord Advocate* v. *Hunter*, 1833, 11 S. 514; *A. B.*, 1834, 12 S. 504). Two exceptions have, however, been made by Statute: in the Small Debt Court a party may appear by a member of his family, or by such other person as the Sheriff shall allow, such person not being an officer of Court (1 Vict. c. 41, s. 14); and in all actions in the Sheriff Court under the Debts Recovery Act of 1868 the parties may be represented by any person *bonâ fide* employed by them in their usual

business (30 & 31 Vict. c. 96, s. 4). Under the Law Agents and Notaries Public (Scotland) Act, 1891, ss. 2 and 4, any person who is neither a law agent nor a notary public may be prosecuted summarily before the Sheriff if he, either by himself or in conjunction with others, wilfully and falsely pretends to be, or takes or uses any name, title, addition, or description implying that he is, duly qualified to act either as a law agent or as a notary public, or that he is recognised by law as so qualified, the maximum penalty being £10 and costs for the first offence, and £20 and costs, or, failing payment thereof, one month's imprisonment, for any subsequent offence. Sec. 3 of the same Act provides that "no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as a law agent, or as a notary public, without being duly qualified so to act, or who, not being so qualified, gives legal advice, or frames or draws any deed, shall be recoverable in any action, suit, or matter by any person or persons whomsoever."

V. Privileges.

Subject to the statutory provisions already mentioned with reference to stamp duty and subscription of Court rolls, every law agent enrolled by the Registrar of Law Agents is entitled to practise in any Court of law in Scotland (Law Agents Act, s. 2). Only advocates, that is to say, members of the Faculty of Advocates, are entitled to practise as counsel or barristers in the Supreme Courts of Scotland, viz. the Court of Session, the Commission of Teinds, the High Court, and the Circuit Courts of Justiciary (Mackay, *Practice*, vol. i. p. 106). But an enrolled law agent may practise in the double capacity of counsel and agent in the Bill Chamber of the Court of Session, and in all the Inferior Courts in Scotland, viz. Sheriff Courts, Burgh Courts, Admiralty Courts, Dean of Guild Courts, Justice of Peace Courts, Police Courts, and all other Courts of law having only local jurisdiction (Law Agents Act, s. 2). The restriction of a law agent's right to appear in causes brought under the Small Debt Act (1 Vict. c. 41, ss. 14 and 17) has been removed by the Small Debt Amendment Act, 1889 (52 & 53 Vict. c. 26, s. 8).

A law agent is not entitled to borrow a process depending before any Supreme Court sitting in Edinburgh unless he has a place of business in Edinburgh or Leith, nor a process depending before any Inferior Court unless he has a place of business within the jurisdiction of such Court (Law Agents Act, s. 15). In this matter counties united under the Sheriff Court Act of 1870 are regarded as one sheriffdom and jurisdiction (33 & 34 Vict. c. 86, s. 12).

Law agents as well as counsel are entitled to act in the conduct of complaints and appeals in the Presbyteries, Synods, and General Assembly of the Established Church of Scotland (Hill, *Practice*, 6th ed., p. 18).

The largest and most lucrative part of the business of law agents consists, in most instances, of extrajudicial work; but in this they have no monopoly or exclusive privilege beyond such as arises from the statutory provisions already mentioned in regard to certificates or licences to practise and unqualified practitioners.

Law agents are eligible for various offices besides those that may be held by any other fit and competent persons, such as all clerkships in the Court of Session and Bill Chamber (52 & 53 Vict. c. 55, s. 8), and (along with advocates) salaried Sheriff-Substituteships, provided they are of not less than five years' standing in their profession (40 & 41 Vict. c. 50, s. 4). They are exempted from serving upon juries, provided they have taken out

their annual certificates and are in actual practice (6 Geo. IV. c. 22, s. 2). Under sec. 18 of the Law Agents Act an enrolled law agent is entitled to be admitted a notary public as a matter of right; and under sec. 2 of the Amendment Act of 1896 no other person can now be admitted as a notary public in Scotland.

In the discharge of the duties which they owe to their clients, law agents, as well as advocates, necessarily enjoy very considerable immunities and privileges. These are dealt with in other articles in this Encyclopædia. See ADVOCATE; CONFIDENTIAL COMMUNICATIONS: and DEFAMATION.

VI. APPOINTMENT OR RETAINER.

Except in a few matters regulated by the forms of procedure in Court, the appointment of a law agent is governed by the general law applicable to the appointment of ordinary agents or factors. See AGENCY. The mere acceptance of employment creates the relation of agent and client, with all its implied consequences. Writing is not essential, and in practice a formal authority is seldom asked or given, except where the powers to be conferred are beyond the scope of a law agent's usual employment. A written mandate, however, is required by the rules of judicial procedure when the client is out of Scotland, and also when a law agent subscribes a petition for service or sequestration of a client. In the Inferior Courts a law agent appearing for a defender is required to produce, along with his defences, either a written mandate or the copy of citation given to the defender; but this rule is rarely enforced, unless the law agent's authority is disputed by the pursuer.

The contract implied in the employment of a law agent may be proved *prout de jure*, that is to say, by every legal means of probation—parole, documentary, oath of party on reference, and circumstantial evidence. The legal presumptions and the legal sufficiency of the proof vary according as the question is raised between party and party, or between agent and client. It must, however, be borne in mind that innominate contracts of unusual or anomalous nature can be proved only by writ or oath on reference. See Begg on *Law Agents*, 2nd ed., pp. 75 *et seq.*; *Downie*, 1885, 13 R. 271; and *Reid*, 1887, 14 R. 789.

VII. AUTHORITY.

When a law agent has been duly appointed, he has an implied authority, the extent of which depends in each case on the character of the work which he has been employed to perform. In a question between agent and client a reasonable latitude will be allowed in construing the client's mandate or instructions (*Stewart*, 1852, 14 D. 527; *Smith*, 16 D. 727; *Barclay*, 1868, 9 M. 9; and *Clarke*, 1888, 15 R. 569); but a mandate to carry on proceedings in an inferior Court does not warrant an appeal to the Court of Session (*Stephen*, 1863, 2 M. 287); and, similarly, authority to conduct a litigation in that Court does not cover an appeal to the House of Lords (*Robertson*, 1860, 22 D. 714). In the general conduct of judicial proceedings a law agent is entitled to exercise his own discretion, subject to the directions of counsel when counsel are employed (*Batchelor*, 1876, 3 R. 918); but he is not entitled to abandon an action without communicating with his client (*Urquhart*, 1857, 19 D. 853), and he requires express authority to enter into a judicial reference (*Livingston*, 1830, 8 S. 594). In questions with third parties a client cannot, by means of a secret reservation, divest his law agent of the authority implied by the work which the agent has been employed to perform (*Edmunds*, 1863, L. R. 1 Q. B. 97); but, on the

other hand, third parties are not entitled to rely on a law agent as holding a general authority (*Forbes' Exrs.*, 1854, 16 D. 807; *Stott*, 1879, 6 R. 1126; *Wishart*, 1879, 6 R. 1341). When the conduct of a cause is in the hands of counsel, a law agent is bound to act according to counsel's directions, and has consequently an implied authority to carry out such directions (*Batchelor*, 1876, 3 R. 918). As to the authority of counsel, see ADVOCATE. A law agent acting without counsel has no implied power to submit to arbitration a process which he has been employed to conduct (*Livingston*, 1830, 8 S. 594); and a practitioner in the Sheriff Court can neither propone improbation (A. S., 10 July 1839, s. 91), nor bind his client to a reference to oath, without written authority (A. S., 10 July 1839, s. 84). Whether he has ever an implied power to compromise an action or claim has never been positively decided in Scotland. Of course, proceedings in excess of the authority originally conferred may be subsequently adopted or homologated (*Robertson*, 1860, 22 D. 714).

A law agent's authority may terminate in any of the ways in which the relation of principal and agent may be dissolved. Thus the authority may be recalled by the client, not only by express revocation (*Cormack*, 1893, 20 R. 977), but by implication, as where the same powers are conferred on a different person (*Patten*, 1770, 2 Pat. 238), subject to due notification to third parties, who may have been led to rely on the agent's authority. A law agent is entitled to resign on giving reasonable notice of his intention (*Urquhart*, 1857, 19 D. 853; *Scott*, 1857, 19 D. 178). Further modes in which a law agent's authority may terminate are by the death, incapacity, or bankruptcy of either agent or client (*M'Kenzie*, 1894, 21 R. 904); but a short fit of insanity may not be sufficient (*Wink*, 1849, 11 D. 995); and a law agent may, notwithstanding his supervening bankruptcy, do any formal acts incumbent on him as agent.

VIII. REMUNERATION.

When a law agent is employed professionally, he does not require to stipulate that he shall be paid for his services; the mere fact of his having been employed implies an undertaking by his client to allow him remuneration at the ordinary rate, as well as to repay him his incidental outlays. See EXPENSES, vol. v. p. 169, and *Dunbar & Wilson*, 1887, 15 R. 210. The recent Statutes allowing English solicitors to enter into written agreements with their clients as to the amount and mode of remuneration do not apply to Scotland, and our law still regards with great suspicion and jealousy any alleged agreement to deviate from the fixed tariff, and it is thought that a law agent cannot enforce an agreement under which he is to receive more than the usual professional remuneration. See *post*, XIII. *Disabilities*, and *Bolden*, 1850, 12 D. 798.

A law agent is bound to make out his accounts at his own expense, whenever required by his clients. As to these, and the parties liable in payment of them, see EXPENSES. A law agent who renders a business account to a client, thereby offers to accept the amount stated in it; but the client is not bound to pay till the account has been taxed. See AUDITOR and TAXATION. Where the employment is admitted or proved, it is for the Auditor, in taxing the account, to see that the work charged for has been actually done (*Hamilton*, 1890, 17 R. 505). Where the account has been incurred in judicial proceedings, and liability is not denied by the client, either the law agent or the client may present a summary application to the Court of Session or to the Sheriff Court, as the case may be, to have the account remitted for taxation to the Auditor of Court, and decree given for

the taxed amount (A. S., 6 Feb. 1806, and A. S., 10 July 1839, ss. 110, 111, and 112).

The triennial prescription or limitation introduced by the Statute 1579, c. 83, is applicable to the business accounts of law agents, including ordinary professional disbursements as well as remuneration for services; so that, if such accounts are not sued for within three years from their close, the constitution and the subsistence of the debt can be proved only by the writ or oath of the client or his representative. See PRESCRIPTION.

A law agent who is employed to conduct litigation is entitled to a hypothec or preference on the costs to be recovered from his client's opponent, and the privilege has been extended by a recent Statute to the case of property recovered or preserved through the law agent's instrumentality. See HYPOTHEC. (See also *Welsh*, 1898, 5 S. L. T. No. 459).

Law agents acting as trustees (though of course entitled to be reimbursed their actual outlays properly made) are not entitled to make professional charges (*Home*, 1841, 2 Rob. App. 384; *Cullen*, 1855, 2 Macq. 80; *Aitken*, 1871, 9 M. 756), unless the trust deed confers the right to do so (*Orr's Trs.*, 1851, 14 D. 181; *Findlay's Trs.*, 1852, 14 D. 621; *Goodsir*, 1858, 20 D. 1141; *Welch*, 1864, 3 M. 303), or unless the beneficiaries, being *sui juris* and aware of this rule of law, either agree to give remuneration (*Lauder*, 1859, 21 D. 1353; *Scott*, 1868, 6 M. 753) or acquiesce in the making of professional charges (*Cullen, supra; Ommaney*, 1854, 16 D. 721; *Hope*, 1856, 18 D. 585; *Dixon*, 1863, 2 M. 61).

IX. Lien over Client's Documents.

Law agents are entitled to retain, in security of their business accounts, any documents belonging to their clients which may come into their possession in the course of their employment. This privilege is sometimes, but inaccurately, called a hypothec; it is merely a general lien or right of retention, not amounting to a real right either of hypothec or of pledge. It confers no active right on the law agent, but resolves into the inconvenience which a client may suffer from being deprived of the evidence of his rights as creditor or proprietor (*Christie*, 1862, 24 D. 1182). On the law agent's bankruptcy this privilege passes to the trustee on his sequestrated estate (*Paul*, 1839, 1 D. 867; *Inglis*, 1851, 13 D. 622), and, on the agent's death, to his personal representatives (*Wilson*, 1837, 15 S. 1211; *Paul*, 1868, 7 M. 235).

The lien extends to title deeds, securities, documents of debt, and all other papers properly belonging to the client, but not to judicial proceedings or to documents of which the law agent has got possession merely through their having been produced in process (*Callman*, 1793, Mor. 6255). The papers must, in order to be subject to the lien, have come into the law agent's possession lawfully and in the course of his employment (2 Bell's *Com.*, 5th ed., 111).

The lien covers the general balance due on the agent's accounts for professional services, whether such accounts were incurred before or after the papers came into his hands (*Menzies*, 1841, 4 D. 257), including disbursements properly made in the ordinary course of law agency (*Skinner*, 1823, 2 S. (N. E.) 312; *Kemp*, 1836, 16 S. 500; *Paul, supra; Richardson*, 1863, 1 M. 940), but not cash advances (*Christie*, 1862, 24 D. 1182), commission on money transactions (*Paul*, 1829, 1 D. 867), feu-duties or compositions, legacy or inventory duty, or expenses of advertising (*Grant's Reps.*, 1801, 13 F. C. 507; *Skinner, supra*), disbursements as factor (*Largue*, 1883, 10 R. 1229), or cautionary obligations (*Grant's Reps., supra; Lidderdale*, 1749, Mor. 6284; *Kemp, supra*).

The lien is pleadable not only against the client, but also against third parties claiming through him, such as his representatives, singular successors, creditors real as well as personal, and the trustee on his sequestrated estate (*Lidderdale, supra; Dalrymple*, 1751, 1 Bell's *Ill.* 465; *Campbell & Clason*, 1822, 2 S. (N. E.) 14; *Wight*, 1828, 7 S. 70; *Gray*, 1855, 2 Macq. 435). The lien is, however, not available against third parties whose right is paramount or adverse to that of the client, where such parties require the documents for the purpose of proving facts (*Sutherland*, 1738, Mor. 6247; *Stewart*, 1742, Mor. 6248; *Dalrymple, supra; Murray*, 1829, 8 S. 161; *Montgomerie*, 7 D. 553). The right of an heir of entail to the title deeds of the estate being of a limited character, his law agent is not entitled to retain them from a succeeding heir, or from an adjudging creditor of the entailer (*Callander*, 1834, 12 S. 417).

The lien is subject to the equitable control of the Court, to prevent its abuse (*Ferguson*, 1856, 18 D. 536; *M'Intosh*, 1883, 11 R. 8). Thus if the law agent's accounts are judicially disputed, he is bound to deliver the papers on consignation of the amount claimed (*Craig*, 1856, 18 D. 863), but not, generally speaking, on caution merely (*Ferguson*, 1856, 18 D. 536; *Skinner*, 1865, 3 M. 867). When the client's estates have been sequestrated, his law agent is bound to deliver all his papers to the trustee, but under reservation of his lien, the result being that, if his claim is well founded, he has a preference therefor over the whole sequestrated estates (*Johnstone*, 1823, 2 S. (N. E.) 133; *Paul*, 1826, 4 S. (N. E.) 424; *Skinner, supra; Renny*, 1847, 9 D. 619; *Adam*, 1884, 11 R. 863). In claiming in the sequestration, he must put a specified value on his lien, and deduct such value from his debt (*Renny, supra; Elder*, 1850, 12 D. 994; 19 & 20 Vict. c. 79, ss. 4, 59, and 65). The law agent of a company which is being wound up may be compelled to produce documents relating to the company, without prejudice to any lien he may have (25 & 26 Vict. c. 89, s. 115; *South Essex Co.*, 1869, L. R. 4 Chan. App. 215; *Garpel Co.*, 1866, 4 M. 617).

A law agent may waive his right of lien either by express agreement or by implication (*M'Creadie*, 1822, 1 S. (N. E.) 307; *Inglis*, 1851, 13 D. 622; *Smith*, 1858, 20 D. 912). To take a bill or promissory note for the amount of an account does not imply such a waiver (*Palmer*, 1880, 7 R. 651). A law agent who acts for both borrower and lender in preparing an heritable security will be held to waive his right to retain the title deeds as against the lender for the amount of accounts due by the borrower (*Wilson*, 1837, 15 S. 1211; *Allan*, 1842, 4 D. 1356; *Paterson*, 1846, 8 D. 1005; *Gray*, 1855, 2 Macq. 435).

The lien is, of course, discharged by payment of the law agent's accounts: but if, in consideration of a payment to account, he abandons his lien over the title deeds of a part of his client's property, he is entitled to retain the title deeds of the remaining property for the whole unpaid balance of his accounts (*Gray, supra*).

Although a lien naturally comes to an end with the loss of possession, there are several cases in which a law agent is regarded as the legal possessor of documents which have ceased to be in his actual custody. Thus a country law agent who sends his client's papers to his Edinburgh agent, and a law agent who lends them to another agent employed by the client, still retain their rights of lien (*Walker*, 1831, 9 S. 691; *Renny*, 1840, 2 D. 679, and 1841, 3 D. 1134). The mere production of a client's papers in a process does not seem to be such a loss of possession as to put an end to a lien over them (2 Bell, *Com.*, 5th ed., 112; *Finlay*, 1773, Mor. 6250; *Callman*, 1793, 12 F. C. 172, and Mor. 6255).

X. Professional Liabilities to Clients.

By the mere acceptance of employment, a law agent undertakes to perform, with due diligence and the requisite skill, the business committed to his charge (*Bell*, 1863, 2 M. 336); and he and his representatives after him are liable to his employers for any loss or damage the latter may sustain through the breach of his implied undertaking (*Haldane*, 1840, 1 Rob. Ap. 226; *Evans*, 1885, 12 R. 1295). He is, however, not liable to third parties, such as disappointed legatees or disponees (*Fleming*, 1861, 4 Macq. 167; *Race*, 1889, 16 R. H. L. 31; *Williamson*, 1887, 14 R. 720; *Tully*, 1891, 19 R. 65; *Auchincloss*, 1894, 21 R. 1091). But a claim once vested in a client, transmits to his representatives (*Goldie*, 1757, Mor. 3527, as explained in *Fleming*, *supra*, and *Goldie*, 1842, 4 D. 1489).

As regards the degree of diligence and skill required, *spondet peritiam artis*, every case depending upon its own circumstances (*Frame*, 1839, Macl. & R. 595). Law agents employed in the conduct of litigation are liable if they grossly neglect to perform such duties as are generally allotted to their branch of the legal profession, for example, to make the necessary preparations for a trial (*Ritchie*, 1854, 16 D. 554; *Urquhart*, 1857, 19 D. 853). For any error or miscarriage in such proceedings they are not liable if they have *bonâ fide* acted under the direction or by the advice of counsel (*Somerville*, 1818, 6 Pat. 393; *Burness*, 1849, 11 D. 1258; *Batchelor*, 1876, 3 R. 914). Law agents practising in the inferior Courts without the assistance of counsel, will not be held responsible for the consequences of a mistake in a matter of law upon which a reasonable doubt may be entertained. But the greatest vigilance is required in carrying through proceedings of a criminal nature (*Frame*, 1839, Macl. & R. 595; *Smith*, 1858, 20 D. 1077), and also in the execution of diligence (*Slater*, 1822, 1 S. (N. E.) 229; *Brown*, 1852, 14 D. 358). When a law agent requires to employ messengers-at-arms or sheriff-officers, he does not seem to be responsible for their negligence or misconduct, unless there has been some negligence or error on his own part (*Elliot*, 1790, Hume, 317: *Mark*, 1800, Hume, 326; *Russell*, 1859, 21 D. 1325). Conveyancing being a matter which falls within the proper and ordinary scope of a law agent's duties (the case of English solicitors seems somewhat different), he is not generally entitled to diminish his own responsibility by consulting counsel at his client's expense (*Hope*, 1856, 18 D. 585; *Dixon*, 1863, 2 M. 61). A law agent employed to draw a deed is generally expected to get it properly executed (*Currie*, 1823, 2 S. (N. E.) 361; *Wallace*, 1870, 9 M. 75), and to take the ordinary and usual steps to render it effectual (*Lillie*, 1819, 1 Bli. 315; *Rowand*, 1827, 4 Wils. & S. 177: *Donald's Trs.*, 1839, 1 D. 1249; *Fleming*, 1861, 4 Macq. 167). In acting for a purchaser of heritable property, or for a lender on heritable security, a law agent is strictly bound to have the records searched, in order to discover encumbrances, unless his client has expressly dispensed with such a search (*Graham*, 1831, 9 S. 543; *Campbell*, 1838, 1 D. 270; *Fearn*, 1893, 20 R. 352), and to investigate the title of the seller or borrower (*Donald's Trs.*, *supra*). A lender's agent is further bound to get for his client an effectual obligation (*Rowand*, *supra*; *Sim*, 1833, 6 Wils. & S. 452), and proper heritable security where that kind of security is required by the client (*Black*, 1885, 12 R. 990), and also to ascertain as far as possible the amount of arrears of interest due on prior securities (*Campbell*, 1840, 2 D. 1113, and 1843, 5 D. 1081). There is a considerable amount of English authority to the effect that a solicitor is not responsible for the pecuniary deficiency of a security,

unless his position is one of trust as well as agency, or unless he has been specially instructed to see to the sufficiency of the security; and this view seems to have been taken in Scotland in the case of *Ronaldson*, 1881, 8 R. 767. But in more recent Scotch cases a stricter rule appears to have been applied, a law agent being regarded as an adviser as well as a conveyancer, so that he cannot recommend a security, or even bring an investment favourably under the notice of a client, without incurring some risk, especially if the client is inexperienced in such matters (*Castler*, 1886, 14 R. 12; *Stirling*, 1886, 14 R. 179; *Clelland*, 1892, 20 R. 152).

A law agent who acts for both borrower and lender is in a very delicate position, being responsible to both parties for any failure in his professional duties (*Sim, supra*; *M'Leod*, 1835, 13 S. 287; *Haldane*, 1840, 1 Rob. Ap. 226; *Castler, supra*); and where no other professional man is employed than the agent of the borrower, he will be readily inferred to be acting also for the lender, even although he makes no charge against the latter (*Struthers*, 1827, 2 Wils. & S. 563; *Haldane, supra*; *Fleming*, 1861, 4 Macq. 167). In a transaction of sale a law agent cannot act for both seller and purchaser in settling the price (*M'Pherson's Trs.*, 1877, 5 R. H. L. 9); and if he acts for both thereafter in carrying out the sale, his position is as delicate as that of a person acting for both borrower and lender. The difficulties naturally arising from this objectionable practice are well illustrated by the case of *M'Clure*, 1887, 15 R. H. L. 1, where the House of Lords, while affirming the proposition laid down by the Court of Session, that the *onus* lay upon the law agent of proving that communications which ought to have been made, were actually made by the law agent to the lender, differed from that Court on the question whether the *onus* was sufficiently discharged. See also *Castler, supra*.

Giving advice on doubtful points of law is deeemed more peculiarly within the province of counsel than of law agents; but a law agent will not be held liable in damages for giving erroneous advice where there has been no clear and authoritative rule of law or practice (*Grant*, 1791, Bell's *Oct. Cas.* 319; *M'Lean*, 1805, 14 F. C. 495; *Cooke*, 13 D. 157; *Blair*, 1896, 23 R. H. L. 36). A law agent who follows the usual course of practice throughout the country is not liable, although such practice should eventually be held to be erroneous (*Grahame*, 1833, 6 Wils. & S. 518; *Hamilton*, 1868, 7 M. 173). A law agent of testamentary trustees has been held not bound to volunteer his advice to the trustees as to which of the investments made by the truster they were entitled to retain as trust investments (*Currors*, 1889, 16 R. 355).

As regards the extent of a law agent's liability, the general principle underlying all the decisions is that the agent is bound to put his clients in the same position as they would have occupied if he had properly performed the duties which he undertook. Thus when a client has been subjected in damages to a third party through the misconduct or blunder of his own law agent, he is entitled to recover, in an action of relief against the agent, the whole damages and expenses so incurred (*Frame*, 1839, Macl. & R. 595; *Smith*, 1858, 20 D. 1077). Similarly, when a debt or claim has been lost through the fault of the agent employed to use diligence for recovering it, his employer may sue him for the full amount of the debt or claim so lost; but in such a case the agent is entitled to an assignation of the debt or claim, *valeat tantum quantum* (*Graham*, 1831, 9 S. 543; *M'Farlane's Exrs.*, 1834, 12 S. 824, and 1835, 13 S. 477). Thus, also, a law agent who has failed in his duty to get a valid title for a purchaser must relieve his client of the transaction, by repaying him the price on receiving

from him a conveyance of the property and inept title (*Donald's Trs.*, 1839, 1 D. 1249), unless a valid title can still be completed, in which case it will generally be sufficient for him to make up such title at his own expense, and make good any loss occurring through the delay (*Brown*, 1831, 9 S. 573, and 1833, 11 S. 497). As to the application of the same principle to the law agent of a lender, see *Lillie*, 1819, 1 Bli. 315, as explained in *Campbell*, 1838, 1 D. 270, and 2 D. 1113, and *Graham*, 1831, 9 S. 543).

A claim for reparation on the ground of professional liability is extinguished by the negative prescription of forty years (*Cooke*, 1850, 13 D. 157, and *Lillie*, *supra*). *Mora*, or delay short of the prescriptive period, may, however, bar such a claim, where the circumstances raise an inference of abandonment or acquiescence on the part of the client (*Gillon*, 1724, Mor. 3522; *Hunter*, 1829, 8 S. 234; *Cooke*, *supra*).

XI. Liabilities to Others than Clients.

To parties other than clients, law agents owe only the negative duty of abstaining from the commission of actual wrong; and in the discharge of the positive duties which they owe to their clients, especially in the conduct of judicial proceedings, they necessarily enjoy considerable immunities and privileges. Thus a law agent is subject to no liability for having merely conducted, on the instructions of a client, ordinary judicial proceedings which have turned out to be unfounded (*Keith*, 1873, reported in Begg on *Law Agents*, 2nd ed., p. 267, note 8); nor for having used arrestments or inhibition on the dependence of an action, unless he has done so maliciously and without probable cause (*Duffus*, 1828, 4 Mur. 84; *Baillie*, 1853, 16 D. 161). But where a party applies to the Court for some special remedy, which is granted only on the faith of his statement, as in the case of interdicts and of sequestrations for rent, his law agent may be subjected in damages, not merely if there is an irregularity in the proceedings (*Cowan*, 1833, 11 S. 999; *M'Gill*, 1837, 15 S. 882; *Carne*, 1851, 13 D. 1253), but also if the application has been granted on his unjustifiable personal representations (*Anderson*, 1750, Mor. 13949 and 13955; *Jowett*, 1797, Hume, 403). For wrongfully executing a process caption, both the agent applying for it and his client are liable, conjunctly and severally, in damages (*Pearson*, 1833, 11 S. 1008; *Menzies*, 1839, Macfarlane, 281; *Hunter*, 1842, 4 D. 1175). The same observation applies to the execution of diligence against the goods or person of a debtor (*Hunter*, 1842, 4 D. 1175; *Bisset*, 1842, 5 D. 5; *Inglis*, 1861, 23 D. 1240; *Cook*, 1889, 16 R. 565). Even a purely technical objection to the validity of diligence is a relevant ground of damages (*Cowan*, 1833, 12 S. 999), as also the knowledge of extrinsic facts rendering improper the execution of diligence *ex facie* valid (*Henderson*, 1871, 10 M. 104).

A law agent who conducts legal proceedings without authority is personally liable to the opposite party in the expenses of process (*Noble*, 1825, 3 S. (N. E.) 358; *Cowan*, 1836, 14 S. 634; *Robertson*, 1873, 11 M. 910; *Bryce*, 1826, 2 Wils. & S. 481, and 1828, 3 Wils. & S. 323), and may even be subjected in damages to him (*Miller*, 1834, 13 S. 699). Expenses of process occasioned by a law agent's fault may be awarded against him personally (*M'Kechnie*, 1856, 18 D. 659). See also Dominus litus.

As to privilege pleadable by law agents in actions of damages against them for slander, see Advocate; Confidential Communications; and Defamation.

XII. Liabilities on Contracts.

As a general rule, law agents, like most other agents, are not personally liable for obligations which they undertake in name and on behalf of their clients, provided they do not exceed their authority, express or implied (*Rankin*, 1738, Mor. 4064; *Maxton*, 1777, 5 Bro. Supp. 441; *Bank of Scotland*, 1813, 1 Dow, 40; *King*, 1827, 5 S. (N. E.) 215; *Livingston*, 1830, 8 S. 594; *Glassford*, 1830, 9 S. 105; *Russel*, 1837, 15 S. 989). The usual way in which an agent contracts in writing so as not to render himself personally liable is by adding to his signature the words "as agent of" his principal (naming him); but the mere addition to his signature on a bill of words describing him as an agent does not exempt him from personal liability; he must add words indicating that he signs for or on behalf of his named client (45 & 46 Vict. c. 61, s. 26, subs. 1). Where the contract is not in writing, the agent's liability depends on the circumstances in each particular case, as showing to whom the credit was given (Bell, *Com.*, M'L.'s ed., vol. i. p. 541, note).

A law agent who enters into a contract in his own name is personally bound, though entitled to relief from his client for all obligations properly undertaken on the latter's behalf (*Sorley's Trs.*, 1832, 10 S. 319; *Edinburgh and Glasgow Bank*, 1853, 25 Jur. 245; *Gordon's Trs.*, 1862, 34 Jur. 232). A law agent who gives a distinct guarantee for a client is, of course, personally liable (*Gardiner*, 1839, 2 D. 155; *Woodside*, 1848, 10 D. 604; *Thomson*, 1851, 13 D. 1029; *Morrison*, 1870, 9 M. 35).

A law agent is, of course, personally liable to persons whom he has employed on his own credit, and he is presumed to have so employed printers (*Neill*, 1850, 12 D. 618) and accountants in extra-judicial work (*Hutcheon*, 1831, 9 S. 511; *Scott*, 1847, 10 D. 226). He is also liable for such fees and charges as are generally disbursed by law agents, such as fees of officers of Court, the expenses of witnesses and havers adduced by him, fees of advocates' clerks, fees of commissioners and their clerks (Mackay, *Practice*, ii. 570). In the Sheriff Court agents acting for parties on the poor-roll are not liable for the charges of witnesses, sheriff clerks, shorthand writers, sheriff or bar officers (A. S., 4 Dec. 1878, s. 13). Law agents are not now liable to persons to whom the Court has made remits in judicial proceedings (A. S., 15 July 1876, s. 7; A. S., 4 Dec. 1878, s. 12).

XIII. Disabilities.

The fiduciary character of the relation of agent and client imposes various disabilities on law agents as regards contracts with their clients, as regards gifts or bequests by clients, and also as regards transactions between law agents and third parties.

As regards contracts with clients, a law agent who is not acting as the legal adviser of a party *in hac re* is not disqualified from transacting with him, but is bound to show that he gave fair value and withheld no information (*Hotchkis*, 1820, 2 Bli. 303; *Aberdeen Rwy. Co.*, 1854, 1 Macq. 461; *Aberdein*, 1867, 5 M. 726; *M'Pherson's Trs.*, 1877, 5 R. H. L. 9; *Cleland*, 1878, 6 R. 156). The only safe course, however, for a law agent who proposes to transact with a client, is to see that the client's interests are committed to the charge of another and independent law agent, and to supply the latter with all the information that he himself possesses (see opinion of Ld. Gordon in *M'Pherson's Trs.*, *supra*). A law agent is not precluded from taking security for the amount of his business accounts and cash advances (*Walker's Exrs.*, 1833, 12 S. 44; *Fraser*, 1839, 1 D. 882;

Walker, 1843, 2 Bell's App. 57; *Hawarden*, 1861, 23 D. 923). When a person either occupies the position of a trustee for sale, or is the law agent of such trustee, he is absolutely disqualified from purchasing (*York Buildings Co.*, 1795, 3 Pat. 378; *Aberdeen Ruy. Co., supra; Thorburn*, 1853, 15 D. 845; *Aberdeen University*, 1877, 4 R. H. L. 48). A law agent who has been instructed by a client to find a purchaser for the latter's property is not entitled to become the purchaser himself without the express authority of the client, after the law agent has so divested himself of the character of agent for sale as to be dealing with the client "at arm's length" (*Gourlay's Trs.*, 1856 and 1857, 18 D. 619, 19 D. 135, and 789; *Cunningham*, 1874, 2 R. 83; *Gibson*, 1801, 6 Ves. 206).

A law agent ought not to request or accept any gift or gratuity from a client beyond his fair professional charges. In no case have our Courts sustained such gifts, while in four cases they have set them aside (*Long*, 1821, 1 S. (N. E.) 59; *Anstruther*, 1856, 18 D. 405; *Anderson*, 1884, 12 R. 1097, footnote; *Logan's Trs.*, 1885, 12 R. 1094). A will or legacy is not invalidated by the mere fact that it confers a benefit on the law agent who has drawn it (*Rooney*, 1895, 22 R. 761), but the *onus* is on him to show that the making of the deed was the free and uninfluenced act of the testator, deliberately entertained, and carried through with an entire knowledge of its effects (*Grieve*, 1869, 8 M. 317).

The general principle that a law agent is not entitled to make any gain or profit at the expense of a client is applicable also to transactions between agents and third parties (*Gillies*, 1846, 8 D. 487). He is thus bound to credit his client with all discounts or commissions he may receive from persons employed on behalf of the client (*Ronaldson*, 1881, 8 R. 956).

XIV. Summary Proceedings against Law Agents.

Law agents are amenable at common law to the summary jurisdiction and control of the judges before whom they practise, a sentence pronounced by an inferior judge being, however, subject to the review of the Court of Session (*Munro*, 1877, 5 R. 308; *Broatch*, 1878, 5 R. 702). That Court has also jurisdiction to deprive a notary public of his office on the ground of delinquency (*Incorpor. Society of Law Agents*, 1893, 21 R. 267). The Law Agents Act of 1873 expressly provides (s. 22) that in any complaint which may be made against a law agent for misconduct as such, it shall be lawful for either Division of the Court of Session to deal summarily with such complaint, and to do therein as shall be just, and also (s. 14) to strike the name of any person off the rolls of law agents, upon application duly made, and after hearing parties, or giving them an opportunity of being heard (see also sec. 11). The application is now usually made by the Incorporated Society of Law Agents (see cases reported in 14 R. 161, 20 R. 1106, and 21 R. 267). The striking of a law agent's name off the rolls does not necessarily create a perpetual disability to practise: for after some time his name may be restored if his subsequent conduct proves him to be deserving of lenity (*A. B.*, 1895, 22 R. 877).

A summary petition may be presented against a law agent for the delivery of documents improperly retained by him (*Fenwick*, 1826, 4 S. (N. E.) 500; *Ritchie*, 1828, 6 S. 552; *Burnet*, 1864, 2 M. 929; *Marshall*, 1864, 3 M. 191), or for money belonging to a client and improperly retained by the agent (*Fenwick, supra*; *Scott*, 1836, 14 S. 682; *Graham*, 1850, 12 D. 754; *Hendry*, 1868, 5 S. L. R. 544).

As to summary petition for taxation of account, see *Remuneration, ante.*

XV. Partnerships, Clerks, etc.

Law agents may, of course, enter into partnerships, and the rights and liabilities thence arising do not differ much from those implied in other partnerships. The re-trictions already mentioned under the heads of "Certificate or Licence to Practise" and "Unqualified Practitioners" have the practical effect of making it necessary for every member of the partnership to be an enrolled law agent or a notary public; but a share of the profits may be given to a managing clerk, or to the widow and children of a deceased partner, without making such persons partners (28 & 29 Vict. c. 86, ss. 2 and 3). As to circumstances sufficient to infer a partnership, see *Morrison*, 1879, 6 R. 1158. Although it is usual for each partner to have his own separate clients, the client's mandate or retainer is deemed to be given to the partnership: and any disqualification of one partner affects all the partners (*Mitchell*, 1878, 5 R. 1124; and as to Justices of the Peace, see 6 Geo. IV. c. 48, s. 27, and 19 & 20 Vict. c. 48, s. 4). On the other hand, the partnership is liable on contracts made by one partner in the usual course of the business of law agents (*Neil*, 1850, 12 D. 618), and similarly all the partners are liable to their clients for the negligence or want of professional skill of any one of them (*Slater*, 1822, 1 S. (N. E.) 229; *Graham*, 1831, 9 S. 543; *Ronaldson*, 1881, 8 R. 767; *Tully*, 1891, 19 R. 65), and also to third parties for wrongful acts within the limits of his implied agency (*Brown*, 1828, 4 Mur. 474; *M'Farlane*, 1835, 13 S. 725). In the case of professional men, there is no such thing as "goodwill" capable of being sold on the dissolution of a partnership (*Bain*, 1878, 5 R. 416; *Austen*, 1858, 2 De G. & J. 626).

It was formerly illegal for a law agent to enter into any agreement to participate with another agent in the profits of litigation in a Court in which he himself was not entitled to practise. But sec. 21 of the Law Agents Act of 1873 enacts that "agreements between law agents acting for the same client to share fees or profits shall be lawful," so that a practitioner in the Sheriff Court may now participate in the profits of litigation in the Court of Session, without having paid the stamp duty exigible on admission to practise in that Court, and without having an Edinburgh certificate or licence to practise. Whether he is now responsible for the Edinburgh agent's negligence or misconduct within the limits of the latter's authority has not yet been decided. It is still illegal for a law agent to participate in the fees of a public officer, such as a messenger-at-arms (*Henderson*, 1832, 11 S. 225). Sec. 21 of the Law Agents Act further enacts that "a law agent authorised and acting for a client whom he discloses shall incur no liability to any other law agent employed by him, except such as he shall expressly undertake in writing." The English rule is different, but it has been held not to apply to a Scottish law agent employing an English solicitor on behalf of a client whom he discloses (*Livesey*, 1894, 21 R. 911).

As regards apprentices, they are not bound, without their own consent, on the death or retirement of their master, to serve with his successors. To prevent the premature termination of an indenture by the death or retirement of a single partner of a legal copartnery, law apprentices to such a copartnery are generally bound to the individual partners as well as to the firm (*Hoey*, 1867, 5 M. 814; Fraser on *Master and Servant*, 3rd ed., 123, 328, 362). As regards return of premium or apprentice fee, when an indenture is terminated prematurely by the death of the master, his executors must repay a proportion thereof, the amount of which, however, will not

necessarily correspond with the period of unexpired apprenticeship, as the services of an apprentice generally become more valuable towards their close (Fraser, *supra*, p. 367). When the master retires from business, the matter is usually arranged by his assigning the indenture, with the apprentice's consent, to another qualified master, on such pecuniary terms as may be agreed to. On the death or desertion of the apprentice, the master is entitled to retain the whole premium or fee.

As regards clerks employed by law agents, they are, according to the general understanding and practice, hired only during pleasure; but a clerk engaged at a salary of so much a year will probably be entitled to a reasonable notice of dismissal, to afford him a fair opportunity of getting another situation (*Campbell*, 1851, 13 D. 1041; *Hocy*, 1867, 5 M. 814; *Cameron*, 1872, 10 M. 301). Remuneration for extra services may sometimes be due to a clerk (*Latham*, 1866, 4 M. 1084). A clerk has a limited preference for his salary or wages over the other creditors of his employers (38 & 39 Vict. c. 26, s. 3; 51 & 52 Vict. c. 62, s. 1 (*b*)).

A law agent is, of course, responsible for his apprentices and clerks within the scope of their employment, express or implied (*Galloway*, 1857, 20 D. 230).

XVI. Societies of Law Agents.

It is not now necessary for any law agent to become a member of any society or faculty of law agents (Law Agents Act of 1873, s. 15), and any such society may admit any enrolled law agent to be a member on such terms as it may see fit (ss. 19 and 20). The writers to the signet, however, still require an apprenticeship to a member of their society.

Besides the chartered societies mentioned in the historical introduction to this article, there are a large number of societies of law agents, most of which were incorporated under the Procurators Act of 1865. The number of societies is at present twenty-eight (for information as to which, reference must be made to the *Scottish Law List*, and Begg on *Law Agents*, 2nd ed., p. 370), besides the Incorporated Society of Law Agents in Scotland, and the four leading societies mentioned in separate articles of this Encyclopædia, viz. the Advocates in Aberdeen, the Procurators in Glasgow, the Solicitors in the Supreme Courts, and the Writers to the Signet.

The Incorporated Society of Law Agents, mentioned in the historical introduction to this article, is a general society, open to all enrolled law agents, all persons who have voluntarily retired from practising as enrolled law agents, and all notaries public. It was formed for two purposes, viz. to unite together the provincial law agents, whose union was endangered by the repeal of the Procurators Act of 1865 by the Law Agents Act of 1873, and to form ultimately a society including all law agents, metropolitan as well as provincial. Neither of these purposes can be said to be as yet fully attained, although the society already contains a very large number of members. In particular, there seems to be considerable indisposition on the part of writers to the signet and solicitors in the Supreme Courts to become members of this new society. For the direction and management of its concerns a council of twenty persons is elected from among the members, and a president and a vice-president are elected from the council annually. The annual general meeting is held in September. Every member of the society pays 10s. 6d. as entry money, and 10s. 6d. as annual subscription, due on first January yearly. Since its formation, the society has exercised very considerable influence on the Legislature, and has been the means of securing several valuable reforms. See the address of the

President, Mr. J. W. Barty, at the twelfth annual meeting of the society, held on 29 September 1896.

[Begg on *Law Agents*, 2nd ed., 1883].

Lawburrows is an ancient form of process, still extant, by which anyone who has, or thinks he has, reason to apprehend danger from another, obliges the other to find caution not to trouble him, the word "borrow" or "borgh" being an old word for caution.

I. Previous to the Civil Imprisonment Act, 1882, the warrant of lawburrows could be obtained either from the Courts of Session or Justiciary, or from the Sheriff or any Justice of the Peace of the county in which the party to be restrained resided (see Act 1617, and 1661, c. 38).

Where application was made to the Courts of Session or Justiciary, the letters were issued on bills being presented to the judges, and contained a warrant to charge the party complained of to give security within the days of charge that the complainer should be kept harmless from illegal violence.

At first these letters were only granted for safety against bodily harm in the person of the complainer (1429, c. 129), but the Act of 1581, c. 117, extended their application to harm done to the person or property of the complainer's family, servants, or tenants.

To obtain the letters it was, as a general rule, only necessary for the complainer to swear that he dreaded harm from the party complained of, citation or evidence in support of the complaint not being required (*Sellers*, Mor. 8042): but where the application was on behalf of one spouse against the other (*Calder*, 13 Jur. 170), or of a parent against his child, or *vice versâ* (*Taylor*, 7 S. 244), an order for previous service on the opposite party, and proof to support the complaint, was necessary.

On the execution of the letters, the person complained of required to find caution within the days specified in the letters, and lodge it with the Clerk in the Bill Chamber, who issued a certificate of the fact (Bankt. i. 283).

If caution was not found within the days specified, the letters might be followed by caption and imprisonment (*Thomson*, 7 Mar. 1815, F. C.; *Earl of Cassilis*, Mor. 8027; *Ld. Thirlstane*, Mor. 8030).

Lawburrows could not be used against a pupil (*Seytoun*, Mor. 8023), but a married woman is subject to lawburrows (see Bankt. i. 287).

A community may serve, or be served, with letters of lawburrows (*Old Town of Aberdeen*, Mor. 8026), but in such a case the complainer must specify some act of the community as such in order to infer contravention (Bankt. i. 285).

Contravention of lawburrows occurred where the party complained of did any violence to the complainer or his family after the letters had been taken out, and the pursuer did not need to prove any damage accruing by the deed of contravention (Bankt. i. 285).

The action, being penal, was brought at the instance of the public prosecutor of the Court whence the warrant was issued as well as of the private party, though where the deed was not sufficient to infer contravention, the party could insist in the same action for his damages (Bankt. i. 286; *Ld. Wemyss*, Mor. 8037).

Moreover, the offender could be prosecuted criminally at common law for the assault, breach of the peace, etc. (*Chrichton*, Mor. 8025; *Robertson*, 45 Jur. 536; see Hutchison, *Justice of Peace*, ii. 2, s. 2, i. 404).

The penalties of contravention were at first inflicted at the discretion

of the Council, and the fine equally divided between the Crown and the party injured (Acts 1491, c. 27, and 1581, c. 117), but they were afterwards fixed at precise sums, according to the quality of the defender, namely, for an earl or lord, 2000 pounds Scots (£166, 13s.); for a baron, 1000 pounds Scots (£83, 6s. 6d.); for a freeholder, 500 merks Scots (£27, 15s. 7½d.); for a gentleman, 200 merks Scots (£11, 2s. 3d.); for a yeoman, including every person of lower degree (Bankt. i. 283), 100 merks Scots (£5, 11s. 1½d.).

The amount of the penalty was properly that stated in the bond, but sometimes, when the contravention was trifling, less was awarded than the actual damage. In this last case the amount levied went to the party injured (*Anderson*, Mor. 8023), but in other cases the penalty was equally divided between the complainer and the fisc (*Brock*, 1874, 1 R. 991).

The uttering of reproachful words and mere threats of violence have not been held sufficient to infer the penalty of contravention (*Wallace*, Mor. 8027), nor likewise have boasting and chasing without striking, or knocking off a hat (*Constable of Dundee*, Mor. 8028); but a breach was held to have occurred where the party complained of pursued the other with a drawn sword, but did not strike therewith (*M'Kie*, Mor. 8029).

Violent entering into possession of land, moreover, was held a contravention, and likewise injurious words and spitting in the face; also where a sown field was ploughed up (*Strang*, Mor. 8024; *Bruce*, Mor. 8030; *Muirhead*, Mor. 8031; A. v. *B.*, Mor. 8033; *Laird of Whitlingham*, Mor. 8034); but the pasturage of cattle on another's ground without herding them thereon (*Shaw*, Mor. 8027; *Anderson*, Mor. 8031), and letting water into a coal pit (*Anderson*, Mor. 8033; *Hepburn*, Mor. 8034; see *Brock*, 1874, 1 R 991), were held not to be contraventions.

Nor is contravention sustained upon any illegal deed where the matter of right is dubious (*Balcaskie*, Mor. 8025).

Deeds done against servants are presumed on their master's account, and will infer contravention, unless the defender prove that it was on the servant's own account (Bankt. i. 284); but not deeds done against tenants, unless it appear from the circumstances to have been done on the heritor's account (*Grant*, Mor. 8036; *Lindsay*, Mor. 8040). Further, if several persons are charged with lawburrows, all who contravene are liable severally and *in solidum* to the full penalties contained in the letters (Bankt. i. 284).

The action is excluded by the private party's forgiveness or passing from the offence; and in such a case the public has no concern in the penalty, though the breach of the peace may be prosecuted criminally (Bankt. i. 286).

Where the letters have been obtained maliciously, they can be suspended; but the defender requires to prove not merely that the diligence has been used maliciously, but also that it has been used without probable cause (per Ld. Gifford in *Brock*, *supra*).

II. By the Civil Imprisonment Act, 1882 (45 & 46 Vict. c. 42, s. 6), considerable alteration has been made in the procedure, and it is now no longer competent to issue letters of lawburrows under the Signet in the Court of Session or Justiciary. Application must be made to the Sheriff, the Sheriff-Substitute, or to a Justice of the Peace, by a petition setting forth (in substance) the fear which the applicant entertains, and concluding that the defender be bound to find caution for a specified sum, or for such sum as the Justice (or Sheriff) shall think right, not to molest the pursuer, on penalty of imprisonment.

Upon the application being presented, the Justice of the Peace (or Sheriff) "shall immediately, and without taking the oath of the applicant,

order the petition to be served upon the person complained against, and shall at the same time grant warrant to both parties to cite witnesses" (45 & 46 Vict. c. 42, s. 6 (2)).

"At the diet of proof appointed, or at any adjourned diet, the application shall be disposed of summarily under the provisions of the Summary Jurisdiction Acts, and without any written pleadings or record of the evidence being kept; and expenses may be awarded against either party, if and as it shall seem just" (*ib.* (3)).

The parties are competent witnesses, and the prayer of the petition may be granted upon the sworn testimony of one credible witness, although such witness be a party (*ib.* (4)).

The amount of caution is in the discretion of the Justice (or Sheriff) (*ib.* (5)); and where caution is ordered to be found, the Justice (or Sheriff) may order the party complained against to grant his own bond, without caution, for duly implementing the terms of the order, under pain of imprisonment (*ib.* (7)).

"The applicant is not bound to aliment or contribute to the aliment of the person complained against when incarcerated; but the person so incarcerated shall be subject to the enactments and rules as to maintenance, worth, discipline, and otherwise applicable to the class of prisoners committed for contempt of Court" (*ib.* (8)).

No power to imprison for non-payment of expenses is given, which must therefore be recovered as a civil debt; nor does there seem to be a right of appeal if the petition be refused (Dove Wilson, p. 446).

[See Act 1661, c. 38; Stair, t. 9, s. 30; Bankt. i. 282; Ersk. iv. 1, s. 16; Dove Wilson, *Sheriff Court Practice*, 444.]

Lay Days.—See Demurrage; Charter Party.

Lease.—A lease is that form of contract by which the lessor or proprietor for the time of lands, or other subjects heritable in their nature, gives to a lessee or tenant the use or occupation of the subject let during a specific period, for payment of a certain rent or other consideration, and subject to such terms and conditions as may be mutually agreed upon between the parties. Under it a personal right or obligation arises between the parties *ex contractu*, while a real right is conferred upon the lessee by his possession of the subject let, following upon the lease.

The lease was originally in the form of a grant from the proprietor or lessor, but as civilisation advanced and its requirements became more extensive and diverse, it was found necessary to introduce into the contract a number of conditions which should be expressly made obligatory upon both parties, and thenceforward the lease became a mutual contract, and bilateral in form.

It will be convenient in the present article to deal with the subject under two leading heads—

I. *Leases of Ordinary Duration*, where the proper and recognised relations of landlord and tenant exist, and

II. *Building and Long Leases*, where the lessee practically acquires the rights of a proprietor, or *quasi* proprietor, during the period specified in the lease, subject to the payment of a rent or tack-duty, and the performance of other conditions as to buildings, etc., contained in the grant.

In dealing with leases of Ordinary Duration, it will further tend to simplify the subject if reference be made to rights, obligations, and conditions, and the powers of lessor and lessee, which are more or less common to all leases, and subsequently to deal with the special conditions or statutory provisions applicable to different classes of leases. The whole subject of leasehold rights is, however, an extensive and diverse one, and within the limits of the present article it cannot be dealt with exhaustively in any of its branches.

I. Leases of Ordinary Duration.

1. *Constitution and Requisites.*—In former times leases were regarded as in themselves merely personal grants, and where it was desired to make the right of the tenant real in the subject let it was usual to insert a precept of sasine in the lease, so that the tenant might be infeft thereon. If infeftment was not taken upon this precept of sasine, the right of the tenant, while binding upon the granter and his heirs, was not good against singular successors by purchase or adjudication, and the tenant was liable to be ejected. In order, therefore, to give tenants security of possession against singular successors without the necessity of sasine, the Act of Parliament 1449, c. 18, was passed, whereby possession of the subjects of lease was substituted for sasine. This Statute applies to leases of agricultural subjects, houses, mills, fishings, ferries, harbours, minerals, and whatever is *fundo annexum*, but is inapplicable to leases of game, which involve rights of personal privilege rather than real rights. In order to have the benefit of the Act certain things are essential.

(*a*) The lease (when for more than one year) must be in writing.

(*b*) It must specify a definite term of endurance, the Act being only applicable to tenants holding rights of possession for a definite term of years, and with an ish thereto.

(*c*) A rent must be named, but it may be in money, grain, or services. It need not necessarily be equivalent in amount to the value of the subjects let, but it must not be illusory.

(*d*) Possession must follow upon the lease.

1. As regards the first of these conditions, the lease should not only be in writing, it should also be probative. If the lease be informal or improbative, but if it contain the essentials of a regular lease under the Statute of 1449, as above expressed, it will nevertheless be effectual not only against the granter and his heirs, but against singular successors: (*a*) *if possession shall have followed upon it*, and if this possession can only be ascribed to the informal writing (*Duke of Hamilton*, 1877, 4 R. 322; affd. 1878, 5 R. (H. L.) 69); and (*b*) if there shall have been *rei interventus*. See *Wilson*, 1876, 3 R. 527; *Ballantine*, 1881, 8 R. 959; *Bell*, 1883, 10 R. 905; *Sutherland's Tr.*, 1888, 10 R. 16, and cases there cited: also *Barbour*, 1891, 18 R. 610. But there must be *consensus in idem* (*Buchanan*, 1878, 5 R. (H. L.) 69).

A written obligation to grant a lease is equivalent to an actual lease, as are also missives of lease, if holograph of the parties or tested, or if they have been followed by possession or by *rei interventus*, but an obligation to grant a lease *if required* will not bind a singular successor (*Clerk*, 1799, Mor. 15225).

A lease merely "verbal" (in which are included leases not constituted by a *probative* writ or writs) is not effectual for more than one year; and possession following upon a verbal agreement, although originally stipulated to be for a specific term of years, will not make it valid beyond twelve

months. Without such possession or any *rei interventus*, it is doubtful if it would be good even for that period (Tait on *Evidence*, 221, 222; Bell on *Leases*, i. 281–283, note; *Skeen*, 1637, Mor. 8401). This is in accordance with the rule of law that an agreement respecting heritage must be proved by a probative writing, and not *pro ut de jure*. The same result follows even where money has been expended or engagements have been entered into on the faith of the verbal lease; but a breach of the agreement on the part of either lessor or lessee may found a claim for damages at the instance of the party seeking to maintain the contract (*Bell*, 1841, 3 D. 1201; *Heddle*, 1846, 8 D. 376). Further, a verbal lease, while it may be enforced against the lessor and his heirs by *rei interventus*, cannot be made effectual against singular successors for a longer period than that above mentioned (see *Hutchinson*, 1851, 13 D. 837; affd. 1 M. 196; *Anderson*, 1870, 7 S. L. R. 319; *Gibson*, 1875, 3 R. 144).

2. The further statutory requisites, (*b*) that the term of endurance must be definite, and (*c*) that a specific rent in money, grain, or services shall be named, call for no special observations here, except that it is a sufficient compliance with the former of these requirements if the lease be granted for one or more liferents, and with the latter if, the rent being payable in grain, the price thereof is, *e.g.*, to be determined by the fiars prices of the year, or other definite mode of ascertainment (Ersk. ii. 6. 24; Bell, *Leases*, 38, 52; *Oswald*, 1688, Mor. 15194; *Wight*, 1763, Mor. 10461 and 15199; *Walpole*, 1780, Mor. 15249).

3. As regards the requisite of *possession*, (*d*), it is by this means that the tenant now perfects his real right under the contract, and obtains the security of tenure conferred by the Act. A lease completed by possession is preferable to a lease upon which possession has not followed, even although the latter lease may be prior in date (*M'Millan*, 1627, Mor. 7018 and 15229, and *Kerr*, 1620, Mor. 15227).

In the case of *Glen*, 1882, 10 R. 239, it was held that the occupier of a house or other subjects belonging to another person was bound to pay the annual value thereof to the proprietor, although no express obligation to pay rent was proved,—the fact of possession presuming tenancy.

The lease, in order to be effectual, should not only be probative but duly stamped. An unstamped lease cannot be produced in evidence nor founded on as a ground of action, but the want of the stamp duty may be supplied at any time during its currency on payment of the penalties required by Government.

If the lease have been entered into on the part of either party through error *in essentialibus* of the contract (as distinguished from mistakes with regard to qualities or conditions which are merely accessory), or by reason of the fraud of the other party or anyone acting on his behalf, it will be voidable at the option of the party defrauded, (*a*) if there has not been *mora* (*Grieve*, 1871, 9 S. L. R. 60), and (*b*) if a rescission of the contract can be made and parties can be restored *in integrum*; but this right will not be available where innocent third parties, in reliance on the lease, have onerously acquired rights which would be defeated by its rescission. See also *Beresford's Trustees*, 1877, 4 R. 363, as to effect of fraud in the impetration of a lease.

2. *Who may be Parties to the Contract*—

(*a*) As Lessor, and

(*b*) As Lessee.

(*a*) *As Lessor.* — 1. A proprietor whose right has been completed by infeftment is entitled to grant a formal lease, but even although his right is

merely a personal one at the date of the lease, the latter will be validated *accretione* by the subsequent completion of the lessor's title, provided that no mid-impediment has intervened (Bell, *Prin.* 1181; see also *M'Adam*, 1879, 6 R. 1256, and *Fleming's Trs.*, 1882, 9 R. 1013). If, however, a mid-impediment be created (see Rankine on *Leases*, p. 48, and examples there cited), or if the lessor should die or become bankrupt without having taken infeftment in the property leased, the right of the lessee may be defeated by a singular successor or trustee in bankruptcy, or anyone not representing the granter of the lease, subsequently acquiring and completing a proper feudal title to the subjects embraced in the lease. The heir of the granter, however, being *eadem persona cum defuncto*, could only take up the succession subject to the personal obligation undertaken by his predecessor.

2. Leases of a wife's heritable estate are valid although granted by the husband, but that only so long as the wife survives, and provided that the marital rights of the husband have not been effectually excluded (Fraser, *Husband & Wife*, p. 812; *Grieve*, 1797, Mor. 5951). The provisions of sec. 2 of the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21), whereby it is enacted that, in the case of a marriage contracted after the passing of the Act, the "rents and produce" of heritable property in Scotland belonging to the wife shall no longer be subject to the *jus mariti* and right of administration of the husband, would not appear to extend to the granting of leases of that estate, or to limit the administrative rights relative thereto acquired by the husband in virtue of the marriage.

Where, however, both the *jus mariti* and right of administration of the husband have been expressly excluded by marriage contract or other settlement, a wife may herself grant leases without her husband's consent during the joint lives of husband and wife (*Keygie*, 1815, F. C. 374; *Gordon*, 11 S. 36). If such exclusion has not been made, the husband's consent is required as her curator and administrator-in-law.

3. A husband is entitled to grant leases of lands over which he may, by marriage contract or otherwise, have given to his wife a right of locality; and these will be effectual even after the husband's decease if granted in *bonâ fide* and as acts of fair and ordinary administration (*Countess of Moray*, 1772, 1 Hailes, 485; affd. 2 Pat. 317).

4. Trustees are by the Trusts (Scotland) Act, 1867, 30 & 31 Vict. c. 97, s. 2, specially authorised (where the exercise of the power is not at variance with the terms and purposes of the trust) to grant leases of the heritable estate of the truster of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals. See case of *Wardlaw*, 1882, 9 R. 725; affd. 10 R. (H. L.) 65, where the question was raised *inter alia* whether the above-mentioned section of the Act gave to trustees a power to open up and let new mineral fields. In the case quoted this power was held to be *ultra vires* of the trustees in view of the terms of the trust deed. See also *Eliott's Trustees* (1894, 21 R. 858), as to a lease of a mansion-house and shootings granted by trustees which was likewise reduced as *ultra vires*. Trustees are, in regard to leases, subject to the general legal rule that they cannot be *auctores in rem suam*, so that if any profit should arise from a lease of part of the trust estate granted by a trustee in his own favour as an individual, the benefit must be communicated to the trust estate. The same rule applies to the members of a copartnery, or to trustees for a copartnership.

5. Formerly *curators bonis* and other judicial trustees had power, as an ordinary act of administration, to grant leases for their term of office.

But where it was desired to grant leasehold rights which should endure beyond that period, special powers were required from the Court under sec. 7 of the Pupils Protection Act (12 & 13 Vict. c. 51). In the case of *Douglas*, 1867, 6 M. 178, a father, as administrator-in-law of his pupil child, was empowered by the Court to concur in a lease of minerals for nineteen years, the pupil having succeeded to a *pro indiviso* half thereof. But in the case of *Molleson, Petitioner* (1890, 17 R. 303), it was held by the Court that, in virtue of the Judicial Factors (Scotland) Act, 1889 (52 & 53 Vict. c. 39, s. 19), a curator *bonis* was now entitled, without the authority of the Court, to grant a lease of agricultural subjects for a period not exceeding twenty-one years. This decision proceeded upon the ground that by sec. 19 of the last-mentioned Act the provisions of the Trusts Act of 1867 (s. 2), before referred to, were made applicable to judicial factors.

6. A lease by a minor *pubes* who has no curators or administrator-in-law is valid, but is subject to reduction, within the *quadriennium utile* on proof of lesion. A lease by a minor having curators requires their consent to make it effectual, but such lease may be granted for any period agreed on. It also is subject, however, to the like rule of law, as to the right of the minor to restitution if lesion be proved. If a lease be granted by a minor having curators without their consent, no lesion need be proved (*Seton*, 1622, Mor. 8939; *Thomson*, 1666, Mor. 8982; *Alexander*, 1813, Hume, 411).

7. The rights of a proprietor under entail to grant leases of land or minerals may be prescribed by the deed of entail, but otherwise his power is limited to granting leases of "ordinary duration," or to the extent expressly permitted by the Entail Statutes; and if this power be exceeded it is deemed an alienation of the entailed estate, and as such may be set aside. But see case of *Forbes*, 1873, 11 M. 454, as to the validity of a lease granted for a longer period than that allowed by the entail *quoad* the period permitted.

The Montgomery Act, 10 Geo. III. c. 56 (ss. 1–3, 7, and 8), contains provisions as to agricultural leases which may be granted under it, and which are to be subject to certain specified obligations upon the tenants in regard to fencing the lands let (see ENTAIL, vol. v. p. 46).

The Rosebery Act, 6 & 7 Will. IV. c. 42 (ss. 1 and 2), authorises the granting of ordinary leases of land at a fair rent for twenty-one years, and of minerals for thirty-one years, but prohibits the taking of any grassum. This Act also prohibits any lease by an heir of entail in possession, of the mansion-house and policies, or of the home farm, to endure beyond his own lifetime. The question whether an heir of entail can grant a lease of shootings over the entailed estate, which shall be effectual after his death, has never been authoritatively decided by the Court. In the cases of *Pollock, Gilmour, & Co.*, 1828, 6 S. 913, and *Birkbeck* (Ld. Barcaple), 1865, 4 M. 272, such a lease was held not to be binding upon a singular successor. But see *Earl of Fife*, 1859, 22 D. 191, and *Farquharson, Petitioner*, 1870, 9 M. 66 (Opinion of Lord President).

Under the Rutherfurd Act, 11 & 12 Vict. c. 36, s. 4, an heir of entail may grant leases of the entailed estate in whole or in part with the same consents as are thereby required to a disentail of the estate, and subject to the authority of the Court of Session being obtained thereto. The effect of this Statute as to the consents necessary to a disentail, and its application to entails executed after 1 August 1848, has of course been modified by subsequent entail legislation,—as to which, see ENTAIL, vol. v. pp. 42 *et seq.*

Reference may also be made to the Entail Act, 1882, ss. 5, 6, 8 and 9, containing further enlargements of the powers of heirs of entail as to the leasing of lands. Sec. 5 enables any application as to granting of leases under the Entail Acts to be made to the Sheriff. Sec. 6 authorises the feuing or leasing, with the approval of the Court of Session or the Sheriff, of part of an entailed estate, not exceeding two acres in extent, for scientific or public purposes at a rent below the fair value thereof, but without grassum or other consideration; while sec. 8 enables agricultural or other leases to be granted at a diminished rent, notwithstanding any prohibition in the entail; and sec. 9 permits an heir of entail to renew leases of not less than seven years' currency, within two years previous to the expiration of such lease, at a fair rent.

Stated generally, the rule of law in regard to the rents payable under such leases is that the rent stipulated for in the lease must not be illusory, and must fairly represent the value of the subject leased, and the taking of a grassum by the granter is illegal. If, therefore, the period of endurance be excessive, the rent an unfair equivalent, or a grassum be taken, the lease is reducible at the instance of subsequent heirs of entail. (See Acts of 1770, 1836, 1848, and 1882, above referred to.)

8. A proprietor does not limit his right of executing a valid lease by granting heritable securities affecting his estate,—the radical right being still in him. His title may, however, be affected by (*a*) real diligence following upon the security or upon other liquid debt contracted by him, such as adjudication, inhibition, the action of maills and duties, or the action of ranking and sale; (*b*) insolvency or bankruptcy; or (*c*) if the heritable security be granted in the form of an *ex facie* absolute conveyance of the property, in which case the ordinary rights of proprietorship, including that of granting leases, are transferred to the disponee. But see case of *Abbott*, 1870, 8 M. 791, as to the effect of the debtor being left in possession and administration of the subjects. The extent to which these several burdens upon the title of ownership affect the lessor's powers varies considerably (see Rankine on *Leases*, pp. 49 *et seq.*, and cases there cited).

Inhibition, for example (being a precautionary measure, and not an active transference of title), does not affect his radical right, provided that the leases granted are in accordance with the rules of ordinary administration, and do not amount to an alienation of the property, or impair the security of the creditor using the inhibition; while in the case of an heritable creditor in possession under a decree of maills and duties, the right of leasing is transferred to him, but the endurance of such leases is limited by the period of his possession under the decree (Bell, *Convey.* p. 1077).

9. A lease by a liferenter is only effectual during the subsistence of the liferent (*Fraser*, 1794, Mor. 8256, 7849). On the other hand, a proprietor whose right is burdened with a liferent is not entitled to grant leases of the liferented subjects without the consent of the liferenter.

(*b*) *As Lessee.*—1. Subject to the doctrine of *delectus personæ*, as applicable to leases of land, furnished houses, and shootings, or the implied right of a proprietor to choose his tenant and to control the destination of the lease in the event of the death or bankruptcy of the latter, the person or persons to whom a lease may be granted depends entirely upon the agreement of parties. Where a lease is granted to a tenant by name, the right being heritable in its nature will pass to his heir-at-law at his death, if the tenant should die before the expiration of the lease, even although there be no destination to heirs contained in it.

It is, however, usual in practice to exclude heirs-portioners, and to provide that the lease shall pass on the death of the tenant to the eldest heir-female (failing heirs-male) without division.

2. The power of a tenant of agricultural lands to bequeath his lease under the provisions of the Agricultural Holdings (Scotland) Act, 1883, will be afterwards specially noticed.

3. Where a lease is given to two or more persons as joint-tenants, the interest of one of the tenants who predeceases will pass to his heir-at-law on his death, and not to the surviving tenant. On the other hand, where the lease is granted to two joint-tenants and the survivor and "their heirs," each of the original tenants has a joint right during his life, but on his death the sole right in the lease passes to the surviving tenant (*Macalister*, 1859, 21 D. 560). But see case of *Burns*, 1885, 12 R. 1343, where there was a lease to two persons and the survivor, with a conjunct and several obligation for payment of the rent, and *Burns*, 1887, 14 R. (H. L.) 20, where the preceding decision was overruled by the House of Lords; also *Police Commissioners of Dundee*, 1884, 11 R. 586, upheld.

4. A lease may be granted to a company registered under the Joint Stock Companies Acts as such, or to a corporation, but where it is intended to take the right for the benefit of an unincorporated or unlimited company or firm, it may be granted in name of the individual partners, or to the partnership if it be a firm name, and not a descriptive or company title (*Denniston*, 1808, Mor. *voce* "Tack," App. No. 15; *Murray*, 1835, 13 S. 453). In practice it is usual to take the lease to the partners and the survivors and survivor, as trustees for the firm or company, and they should bind not only the firm or company and its stock and profits for the obligations in the lease, but also themselves personally.

Where a lease is granted to a company, it is terminated by the dissolution of the company, unless otherwise stipulated in the contract The same result follows where the company has been sequestrated and assignees have been excluded by the lease (*Walker*, 1886, 13 R. 599. See this case also as to effect of clause excluding assignees *quoad* future partners of the company).

5. The death of the granter before the term of entry voids the lease, even although it may have been executed by him prior to his death (*Redhead*, 27 November 1792, Bell's *Appeals*, 202).

3. *Variations as regards the Granters and Grantees.*—From what has been already said, it follows that in framing the lease care should be taken to set forth the right of the granter and the particular character in which he exercises that right, whether as an unlimited proprietor or one under entail, a minor with consent of his curators, a judicial factor, testamentary trustees, or a wife with consent of her husband or otherwise, and also where the lease is granted under any statutory powers, or the provisions of a deed of entail or other settlement, to narrate these. In the same way the character of the grantee and the destination of the lease to survivors, heirs, or assignees (where these are not to be excluded), should be expressly mentioned.

4. *Variations as regards the Subject-Matter of the Lease.*—The special forms of different classes of leases, and the mutual obligations respectively applicable to them and proper to different subjects, will be afterwards more particularly noticed, but it may be observed here that lands, minerals, quarries, mills (with or without fixed machinery), fishings, game, teinds, and urban subjects (such as dwelling-houses or shops), are all proper subjects of lease in which the tenant can, with the

exception after mentioned, be fully vested by actual and visible possession and use of the subject let. The only exception to this is the case of teinds where the use consists of the periodical uplifting by the lessee of the teind from the heritors, which is accordingly in that instance the badge of possession. The right, however, in each of these subjects infers different mutual obligations upon lessor and lessee, and the manner of possession by the tenant is likewise of a varied character.

5. *Rights, Obligations, and Conditions common to all Leases, and Powers of Lessor and Lessee.*—1. Under the contract the tenant acquires a right to the annual fruits, and to the use and possession of the subject let, in respect of the payment of the rent stipulated, and the proprietor's corresponding obligation is the warrandice of the tenant in the full and undisturbed possession of his right (see *Menzies*, 1888, 15 R. 470). This warrandice is implied in all ordinary leases, whether expressed or not, unless the contrary shall have been stipulated.

2. Where the subject of the lease is rendered unfit for the purpose for which it was let, or partially destroyed, there may be a claim for diminution, or in certain cases for a total discharge, of the rent, but this must have arisen either from the act of the lessor himself or from a *damnum fatale*, such as fire or inundation, or some cause outwith the power of the tenant (*Muir*, 1887, 14 R. 470). The tenant is entitled to the full possession of the subjects let, or to an abatement of rent if part is withheld (*Munro*, 1888, 16 R. 93).

3. If the tenant claim the right to abandon the subject leased, and to be freed from his obligation for payment of rent, on the ground of the sterility of the subject, due notice must be given to the landlord (*Thomson*, 1869, 7 M. 687); but it appears to be doubtful whether anything short of the actual destruction of the subject would now be held sufficient to entitle a tenant to claim abandonment of the lease on the ground of sterility or unworkability to profit (*Gowans*, 1871, 9 M. 485; affd. 1873, 11 M. (H. L.) 1; *Fleeming*, 1871, 9 M. 730). See case of *Shotts Iron Company*, 1881, 8 R. 530, as to the lessee's right to terminate the lease on the ground of sterility where special stipulations in lease. See also *Waddell's Trs.*, 1885, 13 R. 237, as to unworkability of minerals to profit to be determined by an arbiter.

4. In the case of damage by fire, where the fire has arisen through the negligence of the lessee, and the subjects have been damaged or destroyed, he has been held liable to restore (*Bain*, 1815, 3 Dow, 233). If, however, the fire has been the result of accident, neither the lessor nor the lessee is bound, independently of stipulation in the lease, to repair the loss; and the fact that there was an obligation in the lease to keep the subjects in repair does not bind the tenant to repair damage by fire, unless occasioned by his own negligence (*Duff*, 1870, 8 M. 769). See also *Drummond*, 1869, 7 M. 347, and *Allan*, 1882, 10 R. 383, as to the tenant's right to abandon on account of damage by fire in circumstances stated, and amount of damage required to entitle tenant to abandon.

If the failure of the subject is due to supervening legislation, the risk is with the tenant (*Holiday*, 1830, 8 S. 831; 2 Bell's *Ill.* 103; *Donald*, 1886, 13 R. 790).

5. An agricultural tenant has no right at common law and apart from stipulation, to kill game other than hares and rabbits, as to which his rights are now defined by the Ground Game Act, 1880 (*M. of Tweeddale*, 18 June 1808, F.C.). Where, however, the landlord has unduly increased the game on the farm beyond a fair average stock, the tenant has been held entitled

to damages (*Broadrood*, 1855, 17 D. 340 and 1139; *Syme*, 1868, 6 M. 217). An agricultural lease does not confer a right of trout-fishing (*Duke of Richmond*, 1861, 4 Irv. 10; *Maxwell*, 1868, 7 M. 142; affd. 1871, 9 M. (H. L.) 1).

6. A tenant is not entitled, without the consent of the landlord, to change the use of the subject from that for which it was let (*Duke of Argyll*, 1861, 23 D. 1236; *Reid*, 1868, 6 M. 768; revd. 1870, 10 M. (H. L.) 110). On the other hand, the tenant is entitled to the exclusive possession of the subject, except as to any rights and privileges reserved (either *ex lege* or by the contract) to the landlord, and also to the absolute use thereof for the purposes of the lease, and the benefit of any servitude rights belonging thereto (*Wood*, 9 March 1809, F. C.; see also *Critchley*, 1884, 11 R. 475). Growing timber is reserved from an agricultural lease *ex lege* (*Boque*, 1806, Mor. App. "Enclosing," No. 2); and even where woods are let as an accessory of a farm, the tenant can only cut timber for repairing or erecting farm buildings, and not for purposes of sale (*Touch*, 1664, Mor. 423 and 15252).

7. The erection of buildings and fences, etc., or other improvements by the tenant, except under the provisions of the Agricultural Holdings (Scotland) Act, 1883, which will be afterwards noticed, or apart from express stipulation in the lease or subsequent agreement with the landlord, are made at his own risk, and he has no claim for the value thereof at the termination of the lease. But a tenant may remove trade fittings or other fixtures erected by him for his own convenience, or in connection with his business, or if the buildings, machinery, or other fixtures fall within the provisions of sec. 30 of the Agricultural Holdings Act, 1883, which will be referred to hereafter. Subject to this right, they are, however, *partes soli*, and become the property of the landlord if the right be not exercised (*Brand's Trs.*, 1876, 3 R. (H. L.) 16; *Miller*, 1894, 21 R. 658). They also pass to the tenant's heir in heritage succeeding to the lease, to the exclusion of his executor (*Brand's Trs.*, *supra*; *Reid's Exrs.*, 1890, 17 R. 519). The same rule applies to dung made on the farm (*Reid's Exrs.*, *supra*). This right of removal has been held to extend, in the case of a farm tenant, to wire fences, wooden palings, and wooden folds for sheep of a temporary character, voluntarily erected by him for his own convenience, and not in substitution for previously existing fences (*Duke of Buccleuch*, 1871, 9 M. 1014), and, in the case of a nursery gardener, to greenhouses and hot-bed frames, etc. (*Sime*, 1861, 24 D. 202. See also *Burns*, 1880, 8 R. 226; *Ferguson*, 1885, 12 R. 1222; *Murray*, 1879, 6 R. 1163.) But a tenant is not entitled to enforce a right of removal of buildings authorised by his lease when he has not implemented his own obligations under the lease (*Smith*, 1893, 21 R. 330; *Miller*, *supra*).

8. There is an implied obligation on the tenant, apart from any express stipulation in the lease, to pay the taxes and public burdens imposed by the legislature or by the local authority in respect of occupancy, and it is unusual in modern practice to take the tenant bound to pay any public burdens other than those imposed on him by law. While there has been no decision on the subject, the rule in practice is that, apart from stipulation, the landlord pays the whole taxes in the case of a furnished house.

9. The tenant is also bound to make payment of the rent stipulated in the lease at the terms specified therein, and is not entitled to retain any part thereof on account of any illiquid claims for damage, or otherwise, which he may have against the landlord (*Drybrough*, 1874, 1 R. 909;

Humphrey, 1883, 10 R. 647). On the other hand, the tenant has been held entitled to a right of retention of the rent in the following, among other, cases: (*a*) Where a specific accessory of the subjects let has been improperly withheld by the landlord (*Kilmarnock Gas Light Co.*, 1872, 11 M. 58); (*b*) where a road stipulated for in a quarry lease was not made by the landlord (*Guthrie*, 1873, 1 R. 181); and (*c*) where there had been persistent violation by the landlord of a condition in the lease (*Davie*, 1876, 3 R. 1114).

10. The tenant is also bound, except in the case of agricultural subjects, to remove from the subjects of lease at the expiration of the tenancy. As regards urban subjects let on lease, or for any period exceeding four months, he must, however, receive forty days' warning prior to the term of removal before the Sheriff will grant warrant of ejectment under any application presented to him for that purpose. See also the Removal Terms (Scotland) Act, 1886 (49 & 50 Vict. c. 50), ss. 4–6. Sec. 5 of that Act deals with tenancies not exceeding four months. In agricultural subjects the provisions of the Agricultural Holdings (Scotland) Act, 1883, apply, and special legislation has also been passed with reference to the tenure of Crofters' holdings in certain counties in Scotland, the provisions of both of which Statutes will be afterwards noticed under another head. Formerly a summons of removing was necessary (executed and called forty days before the expiry of the lease), unless the lease contained an obligation to remove without warning, or the tenant had granted a letter containing such an obligation, which is equivalent to a decree of removal under the lease (*Bain*, 1852, 14 D. 1007). When the lease contains an obligation to remove without warning, it nevertheless requires, except as to subjects falling under the Agricultural Holdings Act (*q.v.*), to be made effectual by forty days' previous notice, in order to the landlord's obtaining a warrant of ejectment. See Sheriff Court Act, 1853, 16 & 17 Vict. c. 8, ss. 29–31; also 1 & 2 Vict. c. 119, s. 8. *Shotts Iron Company*, 1857, 19 D. 755; *Thomson*, 1883, 10 R. 694; *Macdonald*, 1883, 10 R. 1079; *Lord Macdonald*, 1884, 12 R. 228.

11. While a deed of entail may comprehend a leasehold right, it will, as to the lease, be good *inter hæredes* only. See also Entail Act, 1848, s. 49, as to entail prohibitions, limitations, etc., contained in any lease of heritable estate not being effectual against lessees born after date of lease, etc.

12. The heirs and executors of lessor and lessee respectively are mutually liable for any unfulfilled obligations under the contract (subject, of course, to the rules of law now existing with reference to the liability of heirs and executors for the debts of their ancestor or author), and a purchaser of, or successor in land, takes the subjects purchased or acquired under burden of all leasehold rights which have been validly granted by his author or predecessor. He is also liable for any unfulfilled obligations to the tenant under his contract, but may, under certain circumstances, have a claim of relief against his author in the case of a sale for an adequate price if the leasehold rights have not been excepted by the seller in the clause of warrandice in the disposition, or disclosed to the purchaser before the completion of the transaction. In any case, a prudent seller will invariably except all leases from his warrandice, subject to any defects in the leasehold rights themselves which the purchaser may be able to instruct.

13. A lease is not liable to the widow's right of terce; it does not require, except in the case of leases registered under the Registration of Leases Act (which will afterwards be referred to), service to transmit the right to it to the heir of the tenant, which vests in the latter *ipso jure* (*Boyd*, 1761, Mor. 14375), and it cannot be used as a fund of credit, or assigned

in security (except in the case of long leases registered under the above-mentioned Statute), unless possession follows upon the assignation (*Brock*, 1822, 2 Shaw, 52; 3 Wils. & S. 75; 5 S. 647; 5 Wils. & S. 476; *Ramsay*, 1842, 4 D. 405).

14. Where rent is due at a certain term, the landlord then in possession is entitled to enforce payment even although under obligation to account to third parties (*Lennox*, 1893, 21 R. 77). As to the rights of *pro indiviso* proprietors in the recovery of rents, see *Schaw*, 1889, 16 R. 336.

15. A landlord is not liable in damages to a tenant for injury to the subjects of let caused by the fault of another tenant (*Lyons*, 1886, 13 R. 1020).

As to the tenant's right to recover damages from his landlord and from contractors employed by the latter to carry out operations on adjoining premises, see *Miller*, 1885, 13 R. 309.

The special rights, obligations, and powers of lessor and lessee, and the conditions applicable to particular classes of subjects, will be noticed under subsequent heads.

6. *Transmission of the Lease.*—1. Where assignees are not expressly excluded, or where such exclusion is not implied at common law, a lease is effectually transmitted by *assignation* intimated to the landlord, and by the possession of the assignee following upon it. Without such possession the right of the assignee is ineffectual, except in the case of leases entitled to the benefit of the Registration of Leases Act, 1857 (20 & 21 Vict. c. 26), subsequently noticed, where registration is declared to be equivalent to possession by the lessee.

Agricultural leases for the ordinary period of endurance, and when not expressly granted to the tenant and his assignees, cannot be voluntarily assigned without the consent of the landlord, the doctrine of *delectus personæ* as regards the tenant being, in such leases, an inherent condition of the contract. They may, however, be adjudged by creditors, or taken up by the trustee in a sequestration, unless they contain a clause so expressed as to exclude all assignees, whether legal or voluntary, and trustees or managers for behoof of creditors. If the adjudger or trustee is entitled, by reason of the want of such exclusion, to take up the lease, possession must follow in order to confer on him a valid title.

Leases of urban subjects, long leases of agricultural subjects, and leases granted for one or more liferents, may be assigned, unless assignees are in terms excluded, the term of endurance and the nature of the subject implying *ex lege* the power of assignation (*Anderson*, 10 July 1811, F. C.).

2. The right under the contract may also be transmitted by the granting of a *sub-lease*, if the tenant possesses the power of sub-letting either at common law or by express grant; but even where this power exists the principal tenant nevertheless remains liable during the currency of the sub-lease for the fulfilment of the whole obligations continued in the principal lease, to the same effect as if the sub-lease had not been entered into. In granting a sub-lease the original tenant is therefore in a less favourable position than he would be as the granter of an assignation of the lease; for in the latter case, when the assignation is intimated to the landlord and assented to by him, the original tenant is freed (*Skene*, 1825, 4 S. 25). An express power to assign implies also a power to sub-let. The sub-lease can only be granted subject to the conditions of the principal lease, and the warrandice under the latter is available to the sub-tenant even although not specially assigned (*Maxwell*, 11 July 1827, F. C., and 5 Shaw, 935).

3. As already mentioned, the lease may also be transmitted by

succession to the heir of the tenant, or, in the case of agricultural subjects, by *bequest*, under the Agricultural Holdings (Scotland) Act, 1883.

7. *Termination of the Lease.*—1. A lease may be terminated in various ways—

(*a*) By the occurrence of a break in favour of the landlord or tenant, or of both landlord and tenant, stipulated for in the lease itself; but the lease usually requires that notice shall be given by the party desiring to take advantage of the break.

(*b*) By the running out of the stipulated term of endurance, which is known as the "ish," *or* by the tenant making, and the landlord agreeing to accept, a voluntary Renunciation of the contract. See *Lyons*, 1886, 13 R. 1020, as to effect of a Renunciation accepted by landlord in discharging tenant's claims, and *Walker's Trs.*, 1886, 13 R. 1198, as to effect of general reservation of claims by landlord.

(*c*) By the occurrence of a conventional irritancy expressed in the lease.

(*d*) By the occurrence of any of the statutory irritancies provided for, in the case of agricultural leases, under the Act of Sederunt anent Removings of 14 December 1756, or the Agricultural Holdings (Scotland) Act, 1883.

(*e*) By the bankruptcy or insolvency of the tenant, if this be stipulated in the lease. But this is an option in favour of the landlord, and the lease is not terminated *de facto* by the occurrence of the bankruptcy (*Bidoulac*, 1889, 17 R. 144). See also this case as to effect of Renunciation of lease by trustee upon landlord's claim in sequestration.

(*f*) By the destruction of the subjects *damnum fatale*, and if, in the case of destruction by fire of houses or other buildings, the landlord is not bound to restore them. In the event of destruction, or of damage amounting substantially to destruction, the tenant is entitled to abandon the subjects, and the lease is thereby terminated, unless the latter contains any special provision for this emergency (see cases of *Bain*, *Duff*, *Drummond*, and *Allan*, previously cited).

(*g*) The lease may also be terminated if the subjects be taken under the authority of an Act of Parliament, for the purposes of the undertaking authorised by any special Act, or in virtue of the powers contained in any General, Municipal, Police, or Improvement Acts, but subject to claims for compensation on the part of both landlord and tenant against the party or local authority acquiring the subjects.

2. Special rules apply to notice of termination of the tenancy in the case of agricultural subjects, and for the continuation of the lease by tacit relocation, if such notice be not given by the landlord. These will be noticed in the subsequent part of this article dealing with agricultural leases.

Reference may, however, be made here to the following cases as illustrating the doctrine of possession of subjects by Tacit Relocation, and its effects as regards the landlord and tenant respectively: *Tod*, 1889, 17 R. 226; *Sutherland's Trustee*, 1888, 16 R. 10; *Gilchrist*, 1890, 17 R. 363; and *Montgomerie*, 1895, 22 R. 465; also *Robb*, 1895, 22 R. 885, as to case of a sub-tenant.

8. *Special Conditions, Statutory and other Provisions, Rights and Obligations of Landlord and Tenant, and Forms Applicable to Different Classes of Leases.*

A. *Agricultural Leases.*—The special provisions applicable to an agricultural lease of lands are very numerous, and it is only possible in the compass of the present article to indicate their leading features.

For the form of a lease of arable lands containing various stipulations,

reference may be made to the *Juridl. Styles*, "Heritable Rights," vol. i. pp. 574 *et seq.* Reference may also be made to the Appendix hereto (Form A) for a form of lease of arable and pasture lands containing numerous provisions of a special character which will not be found in the *Styles*.

1. The first point is the destination in the lease as regards the right of the tenant. It is usually taken to him and his heirs, and it is proper and customary to exclude assignees, both legal and conventional, sub-tenants, and managers or trustees for behoof of creditors, as also heirs-portioners. Then follow a description of the subjects let, the period of endurance of the lease, the term of entry, and the reservations in favour of the landlord. These reservations should include mines and minerals, with right to work the same on payment of surface damages to the tenant; power to resume a portion of the lands let (the maximum extent being specified) for the purpose of planting or feuing or other purposes; right to the landlord to make, alter, and use roads, straighten marches, and excamb lands with a neighbouring proprietor or tenant (the value of any land taken from or added to the farm, in virtue of these reserved powers, being ascertained by arbitration, failing agreement between the parties); as also a reservation of all growing timber, with right to cut and remove the same, and of game, subject to the rights of the tenant therein as declared by the Ground Game Act, 1880 (see case of *Welwood*, 1874, 1 R. 507, as to right, prior to Ground Game Act, of a tenant under an agricultural lease for 999 years to kill rabbits), as also all fishings belonging to the proprietor. These reservations are followed by a clause of warrandice on the part of the lessor, which terminates his proper part of the contract.

2. The tenant's part begins with the obligation for payment of rent at the stipulated terms, and the further obligation to pay his proportion of all public and parochial burdens, one half of the annual premium of fire insurance over the buildings on the farm, and the whole premium on an insurance over the stock and crop, to be effected in name of the landlord. These obligations are further supplemented by obligatory clauses as to preservation of buildings and the keeping of the drains, fences, and gates on the farm in good order and repair (see *Gordon's Trs.*, 1870, 8 M. 906, as to right of landlord to present application to Sheriff, at tenant's outgoing, to have buildings and fences judicially inspected and reported on, and *Johnstone*, 1894, 21 R. 777, as to landlord's liability for extraordinary repairs to buildings). Then follow provisions as to the proper cultivation of the lands by a system of rotation of cropping, either specified in the lease or imported by reference to the custom of the district, the proper stocking of the farm (see *Macdonald*, 1888, 6 R. 168), the consumption on the farm of all turnips and straw or fodder raised thereon, and the application to the lands of the manure made thereon (*Nerison*, 1883, 11 R. 182; *Lord Elibank*, 1884, 11 R. 494).

As regards the obligation relative to cropping, if a regular system be set forth in the lease, and the tenant is expressly taken bound to adhere to it, this is frequently protected by the imposition of an additional rent (which should be stipulated to be pactional and not penal) in the event of the tenant acting contrary to the regulations.

The lease then proceeds to set forth various stipulations with reference to the obligations of the tenant in the last year of the lease, as to payment of rent and otherwise, and also the rights of the incoming and outgoing tenants respectively relative to the waygoing crop. (As to liability for meliorations by tenant as between successive heirs of entail, see *Learmonth*, 1878, 5 R. 548.)

The lease may conclude with an irritant clause providing for the landlord's right to terminate the lease in the event of the tenant becoming bankrupt, or being sequestrated, or voluntarily divesting himself of his estate by the execution of a trust deed for behoof of creditors, or by allowing the rent of the farm to run into arrear for more than six months, and also with an obligation to remove without legal warning or process of removing at the termination of the tenancy.

3. The terms of the lease will vary to some extent, according as the farm is—

(*a*) Arable:

(*b*) Pastoral; or

(*c*) Partly arable and partly pastoral;

and this will affect, *inter alia*,

(1) *The term of entry.* The usual terms of entry are as follows: In the case of pastoral farms, Whitsunday, and in the case of arable farms, Martinmas, while in the case of mixed farms (*i.e.* partly arable and partly pastoral) the entry is to the houses and grass lands at Whitsunday, and to the arable lands after the separation of the crop of each field, or at Martinmas following.

It is, however, necessary to determine, in the case of such mixed farms, whether the farm is to be regarded as in fact an arable or a pastoral farm, as various legal consequences follow this. It must fall under either the one category or the other, and the matter is determined by the preponderance and value of the arable or the pasture land respectively.

(2) *The payment of rent*, to which the following rules apply:—

(*a*) In arable farms the rents are legally payable at Whitsunday after sowing, and Martinmas after reaping, the first crop under the lease; but they may be made conventionally payable at Martinmas and Whitsunday before reaping the first crop, in which case they are known as "forehand," or postponed to Martinmas and Whitsunday, or Candlemas and Lammas, *after* reaping, in which case they are known as "backhand."

(*b*) In pastoral farms the first half-year's rent is due *at* the term of entry if that be the term of Whitsunday (on the ground that the grass is presumed to have been "hained" during the preceding six months), and the next half at Martinmas following; and the same results follow even although the entry has been at Martinmas of the previous year, the first half-year's rent in that case becoming payable at Whitsunday following.

(*c*) In mixed farms, according as they are chiefly arable or chiefly pastoral. Rents are now, however, since the abolition of the landlord's right of hypothec, frequently made conventionally payable at six and twelve months after the term of entry, and no postponement in payment is granted.

(3) *The provisions of the lease as to cropping the arable land or the stocking of the farm*,—including provisions as to the waygoing crop in an arable farm, or delivery of sheep stock in a pasture farm. With reference to the latter, see *Duke of Argyll*, 1889, 17 R. 135, and *Linton*, 1889, 17 R. 213.

4. Three important Statutes affecting agricultural leases have been passed within recent times. These are—

(1) The Hypothec Abolition (Scotland) Act, 1880 (43 Vict. c. 12);

(2) The Ground Game Act, 1880 (43 & 44 Vict. c. 47); and

(3) The Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), as amended by the Agricultural Holdings (Scotland) Act, 1889 (52 & 53 Vict. c. 20).

Under the former law of Scotland the landlord of agricultural subjects,

which were possessed under leases or other writings entered into prior to 11 November 1881, held security for his rent by hypothec, which was a right preferable to that of any ordinary creditor of the tenant, and which extended, subject to certain limitations, over the whole stock and crop of the tenant. In virtue of this right the landlord had the power of having the hypothecated subjects applied towards payment of the rent due to him, by means of the process of sequestration and sale. But by the operation of the Hypothec Abolition Act this right in the person of the landlord of "all land (including the rent of any buildings thereon) exceeding two acres in extent let for agriculture or pasture," ceased and determined under any leases entered into after the date above mentioned (11 November 1881). See *Clark*, 1888, 15 R. 458, as to effect of Act where houses and lands have been separately let.

This Act, however, under secs. 2 and 3 thereof, gave to the landlord certain remedies when rent was due and unpaid, in lieu of the right abolished by it; but those sections were repealed by sec. 27 of the Agricultural Holdings Act of 1883, and re-enacted therein with certain alterations, to which reference will hereafter be made.

The Agricultural Holdings Act is an important Statute, and contains numerous provisions with regard to the leasing and holding of agricultural land in Scotland.

Secs. 1 to 26 inclusive thereof relate to compensation to be made to the tenant for improvements executed by him upon the farm of the nature specified in the schedule appended to the Act, and contain *inter alia* elaborate provisions as to the mode of ascertaining the value of these improvements, the procedure under the statutory arbitration authorised by the Act, the deductions falling to be made from the tenant's claims, the counter claims competent to the landlord. As to notices by tenant to landlord relative to claims for compensation under Act, see *Hunter*, 1886, 13 R. 883; *Strang*, 1887, 14 R. 637; and *Black*, 1894, 21 R. (H. L.) 72. Also *Sinclair*, 1892, 19 R. 780, as to particulars which should be set forth in notice; and *Sinclair*, 1887, 15 R. 185, with reference to notice to landlord of improvements proposed by tenant.

Sec. 27 provides, in lieu of the provisions of the Hypothec Abolition Act thereby repealed, that: "In any case in which the landlord's right of hypothec for the rent has ceased and determined, when six months' rent of the holding is due and unpaid it shall be lawful for the landlord to raise an action of removing before the Sheriff against the tenant, concluding for his removal from the holding at the term of Whitsunday or Martinmas next ensuing after the action is brought; and unless the arrears of rent then due are paid, or caution is found to the satisfaction of the Sheriff for the same, and for one year's rent further, the Sheriff may decern the tenant to remove, and eject him at such term, in the same manner as if the lease were determined and the tenant had been legally warned to remove.

"A tenant so removed shall have the rights of an outgoing tenant to which he would have been entitled if his lease had naturally expired at such term of Whitsunday or Martinmas."

Sec. 28 relates to the notice of termination of tenancy, and is to the following effect:—

"Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end—

"(*a*) In the case of leases for three years and upwards, not less than one year nor more than two years before the termination of the lease.

"(*b*) In the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease.

"Failing such notice by either party, the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year" (see *Lord Macdonald*, 1884, 12 R. 228, as to notice required to prevent tacit relocation in case quoted).

"Notice by the landlord to the tenant under this section shall be given in the form and manner prescribed by the Sheriff Courts (Scotland) Act, 1853 (16 & 17 Vict. c. 80), and shall come in place of the notice required by the said Act.

"Provided that nothing contained in this section shall affect the right of the landlord to remove a tenant who has been sequestrated under the Bankruptcy (Scotland) Act, 1856, or who, by failure to pay rent or otherwise, has incurred any irritancy of his lease, or other liability to be removed.

"The provisions relative to notice herein contained shall not apply to any stipulation in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes, or to subjects let for any period less than a year."

Sec. 29 authorises a tenant, by will or other testamentary writing, to bequeath his lease to any person, subject to the qualifications set forth in that section of the Act, to which reference is made.

Sec. 30 relates to a tenant's property in fixtures, machinery, etc., and provides that where, after the commencement of the Act, a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not, under the Act or otherwise, entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of, and be removable by the tenant before, or within a reasonable time after, the termination of the tenancy, but that subject to the further provisions as to payment of past-due rents, and otherwise, contained in sec. 30.

Secs. 31 to 33 inclusive relate to Crown, ecclesiastical, and charity lands, and need not be further referred to here.

Sec. 34 provides for the Act coming into force on 1 January 1884.

Sec. 35 declares that it shall not apply to any holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and in part pastoral, or cultivated in whole or in part as a market garden, or to any holding let to a tenant during his tenancy in any office or employment under the landlord. See *Mackintosh*, 1886, 14 R. 282, where Act held not to apply to the lease of an hotel and thirty acres of land let as one subject, and *Taylor*, 1892, 19 R. 399.

Sec. 36 strikes at any contracts or agreements made by the tenant in virtue of which he is deprived of his right to claim compensation under the Act in respect of any improvements specified in the schedule thereto, *except an agreement providing compensation in substitution for compensation under the Act.*

Secs. 37 to 41 contain various special stipulations, which need not be referred to here.

The provisions of this Act in regard to arbitration have been amended in certain particulars by the Agricultural Holdings Act, 1889 (52 & 53 Vict. c. 20).

In view of the provisions of sec. 36 of the Act of 1883, it is not now unusual in modern agricultural leases for landlord and tenant to embody in the lease an agreement providing for compensation for improvements executed under the Act, and modifying in certain other respects, so far as this is competent, the provisions of the Act itself as to arbitration, compensation to the tenant, drainage, etc. The form of an agreement of this nature, with relative schedules, is embraced in the form of lease A given in the Appendix hereto. An alternative form of agreement and relative schedule are also given separately under Form B in the Appendix hereto.

It has been held that the termination of the lease by the sequestration of the tenant bars the tenant's claims for compensation under this Act (*Walker's Trs.*, 1886, 13 R. 1198); but not the voluntary renunciation of a lease accepted by the landlord (*Strang, supra*).

Under the Ground Game Act, 1880, it is declared—

Sec. 1, that every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land, but that subject to the limitations set forth in the Act.

Sec. 3 renders void any agreement, condition, or arrangement which purports to divest or alienate from the occupier the right reserved to him by the Act.

The Act did not extend to lands embraced in any leases of game made for valuable consideration to any third parties which were current at its commencement. Further, it does not apply to any tenant possessing merely a right of commonty over lands, or of occupation for grazing or pasturage for not more than nine months (s. 1, subs. 2). See *Broun*, 1882, 9 R. 1183, and *Fraser*, 1882, 10 R. 396, as to killing of rabbits by spring traps, and definition of a "rabbit-hole" under the Act.

5. As regards the landlord's security for rent under the law as it now stands, it will have been observed that he has no priority over ordinary creditors of the tenant.

Where rent is due, therefore, and unpaid, the landlord has now

(*a*) The statutory remedies provided by sec. 27 of the Agricultural Holdings Act above quoted for removing the tenant, or for obliging him to find caution for the arrears of rent then due and for one year's rent further. See *Lennox*, 1893, 21 R. 77, as to title of an heir to sue a removing in respect of non-payment of rent legally due prior to his succession, but conventionally payable subsequent thereto.

(*b*) A remedy by sequestration and sale of the tenant's stock and crop for the past-due rent, as in the case of any other subjects not agricultural, but that subject always to a *pari passu* ranking only with the claims of other ordinary and unsecured creditors of the tenant who may require such ranking to be made.

Reference may also be made to the provisions of the "Act of Sederunt anent Removings" of 14 December 1756, which relates to the irritancies which may be incurred by a tenant by allowing his rent to run into arrear, and to the tenant's obligation to remove at the expiry of the tack; but sec. 27 of the Agricultural Holdings Act of 1883 provides that the provisions of sec. 5 of this Act of Sederunt shall not apply in any case in which the procedure under the Act of 1883 is competent; and as that procedure (which is to apply in every case in which the landlord's right of hypothec for rent has ceased and determined) must now shortly be

universal, it seems unnecessary to deal further in the present article with the provisions of this Act of Sederunt.

6. It is not infrequent in certain of the northern counties of Scotland for landlords to grant what are known as *improving leases*, whereby the tenant acquires a small farm or piece of unreclaimed land for a term of years agreed on at a nominal rent, on condition of bringing it into cultivation, fencing it, and erecting a dwelling-house and offices suitable to the farm thereon. Leases of this nature were also of frequent occurrence in the 18th century in the midland counties of Scotland, and were usually granted for two or more liferents. The same principle was recognised in the case of entailed estates by the passing of the Montgomery Act of 1770 (already referred to), secs. 1–3 of which authorise the granting of such leases under the conditions and for the periods therein set forth.

7. *Additions to Buildings, etc.*—It is also a matter of frequent arrangement during the lease, where the tenant desires additional house or steading accommodation, that the landlord shall expend the amount required to provide this, and that the tenant shall pay interest on this improvement outlay during the lease, or, on the other hand, that the tenant shall himself execute the improvements, and receive, in respect of his outlay, either a deduction from his rent, or an allowance of interest from the landlord. Where no such arrangements are voluntarily made between the parties, the rights of the tenant as to buildings and other improvements added to the farm are limited by the provisions of secs. 2 and 3 of the Agricultural Holdings Act and the relative schedule, Part I. To improvements of this nature the consent of the landlord is required, under the conditions laid down in the Act, if compensation is to be claimed by the tenant in respect of them at the termination of the tenancy. Even where such consent has not been given, however, the tenant possesses a right of removal of the buildings under the conditions specified in sec. 30 of the Act already referred to.

In the case of *drainage*, notice to the landlord is required under sec. 4 of the Act (which relates to Part II. of the schedule thereto), unless this matter has previously been, or shall be, made the subject of special agreement between landlord and tenant, which, however, is quite competent.

As to *improvements to the lands themselves*, Part III. of the above-mentioned schedule prescribes those to which the consent of the landlord is not required, and in respect of which the tenant may claim compensation for any value thereof unexhausted at the time of the determination of his tenancy.

8. Should the tenant remain in possession of the holding after the term of removal specified in the lease he incurs what are known as *violent profits*, so called because they become due on account of the tenant's forcible or unwarrantable retention of possession of the subject after he ought to have removed. In agricultural subjects these are held to be the full profits which the landlord could have secured, either by possessing and cultivating the lands themselves or by letting them to other tenants. In urban subjects the violent profits are usually taken to be double the stipulated rent (*Watt*, 1822, 1 S. 556; *Gardner*, 1877, 4 R. 1091. See also *Houldsworth*, 1876, 3 R. 304; and 1877, 4 R. 369, as to case under mineral lease, where landlord's remedy was held to be a claim for damages for breach of contract, and not for violent profits).

If, however, the tenant, in resisting an action of removing at the landlord's instance, possess a *probabilis causa litigandi*, the rent decerned for will be limited to the rent stipulated in the lease, and if he litigates in good faith he will not be liable in violent profits until final decree is pronounced

against him (*Duke of Buccleuch*, 1824, 2 Sh. App. 54 ; *Carnegy*, 1827, 6 S. 206 ; *Stirling*, 1831, 9 S. 276). A sub-tenant may be removed at the end of the principal lease without calling the principal tenant as a party to the action (*Duke of Queensberry*, 7 July 1810, F. C.), but only if the sub-tenant has been recognised by the landlord (*Thomson*, 1823, 2 S. 581).

B. *Mineral Leases.*—These embrace contracts for the letting of coal, ironstone, shale, common or fire clay, limestone, freestone, etc., and are distinguished from the leasing of lands or houses in this particular respect, that the subject (except in the case of leases of works) perishes by the lessee's use of it. His right is accordingly not limited to the possession of the annual fruits of the subject let, but involves, by reason of the occupation and use of it, the gradual exhaustion of the subject itself. The particular clauses applicable to leases of the different subjects above mentioned will be found on reference to the *Jurid. Styles*, "Heritable Rights," vol. i. pp. 605 *et seq.* Within the scope of the present article it is impossible to notice them in detail. The provisions of these leases are frequently very elaborate, and require to be framed with special care. Their leading features may, however, be taken to be—

(*a*) The letting of a specified area and of specified minerals at a yearly fixed *minimum* rent, or, in the landlord's option, subject to the payment of certain royalties or lordships, to be named in the lease, in respect of the different minerals let.

(*b*) Powers and obligations on the tenants properly to fit and work the fields, and to sink bores and pits, and form roads and railroads.

(*c*) Provisions regulating the working of the minerals, the keeping of plans and surveys, and of books showing outputs and sales, with, in certain cases, special provisions relative to the leaving of barriers with adjoining fields in order to prevent influx of water, etc.

(*d*) Provisions as to payment by the mineral tenants to the landlord, or to his agricultural tenants if the lands be let to third parties, of surface damages in respect of land occupied or damaged, and for the restoration thereof, or the payment of permanent damages in lieu of such restoration, at the termination of the tenancy (see *Lord Elphinstone*, 1886, 13 R. (H. L.) 98); as also for payment of damages occasioned to buildings already erected on the lands, or to be subsequently erected by feuars and others from the landlord, if this be agreed to by the mineral tenants.

(*e*) Provisions empowering the landlord or incoming tenant to take over engines, machinery, etc., at a valuation at the termination of the tenancy, and as to the tenant's right to remove from the lands minerals in stock or unsold at that date.

It is not infrequent in practice to give to tenants a trial lease for two or more years, in order to enable them to prove the mineral field by means of bores, or the sinking of shafts, and to permit of the field being properly fitted with machinery, or to allow a break in the lease at the end of that time, and to provide that only lordships on the minerals actually wrought shall be payable by the tenants during this trial or probationary period.

The question of "workability to profit" has already been referred to (*Gowans*, 1871, 9 M. 485; affd. 1873, 11 M. (H. L.) 1). This is a risk which the tenant now, however, generally protects himself against by the stipulation for a trial lease, or for breaks in the lease at recurring periods of every two or three years.

Minerals form in themselves a separate heritable estate, and it is of frequent occurrence that a proprietor may sell or feu the surface of the lands, reserving the minerals, or may dispose of the latter, reserving the

lands. In either case the reservation should be accompanied by express rights to work the minerals, under an obligation upon the landlord and his mineral tenants, or upon the purchaser of the minerals, as the case may be, to pay surface damages to the proprietor of the surface of the lands. Even without such stipulation, however, a feuar or proprietor is entitled to surface damages. But this does not apply to buildings erected subsequent to the leasing or working of the minerals, apart from express stipulation (see *Andrew*, 1871, 9 M. 554; rev. 1873, 11 M. 13; *Neill's Trs.*, 1880, 7 R. 741).

A liferent proprietor of land is not entitled to grant a lease of minerals unless the right is included in the grant of the liferent (*Wardlaw*, 1882, 9 R. 725; affd. 10 R. (H. L.) 65); but a liferenter by reservation may have the power as regards a going mine, if there be no risk of exhaustion of the minerals (*Easton*, 1831, 9 S. 716). The fiar is entitled to let the minerals on payment of surface damages to the liferenter (*Roxburgh*, 1816, F. C. 65). An heir of entail is empowered to grant such a lease for an ordinary period of endurance (see *ante*, p. 332, Rosebery Act, ss. 1 and 2).

The special provisions applicable to a lease of a *stone quarry*, which differ materially from those in other mineral leases, will be found in the *Jurid. Styles*, "Heritable Rights," p. 677. In a lease of this nature an important point to be provided for is whether the tenant is to be taken bound to fill up the quarry and restore the land to an arable state, or pay permanent damages in lieu of restoration at the termination of the lease, or whether he is then to leave the quarry open and cleared for future working, and to give over the plant to the landlord at a valuation. This will depend upon whether or not the quarry is likely to be worked out and the stone exhausted during the currency of the lease; but the option should, in any case, be left with the landlord to declare at end of the lease.

C. *Various Rural Subjects.*—Mills, salmon-fishings, a mansion-house with shootings, and deer forests, all form proper subjects of lease, and reference may be made to the *Jurid. Styles*, "Heritable Rights," for the special provisions and forms applicable to each.

In the case of *mills* the lease usually includes the great or fixed machinery (as forming a proper part of the heritable subject), and an obligation upon the tenant to keep it in good working order and repair during his tenancy.

In the case of *salmon-fishings*, whether by net or rod, the right of the lessee is, in addition to any special stipulations or limitations which may be expressed in the lease itself, also limited by statute, as well as by various special Acts of Parliament and the Rules and Bye-Laws of Commissioners applicable to the principal rivers of Scotland and their tributaries, and to the jurisdiction of local or district boards. These prescribe *inter alia* the annual close time, the manner of fishing which is permitted, the size of net which may be used, and the observance of the weekly interval, or "Saturday slap" as it is technically termed.

In leases of *shootings and deer forests*, special provisions are usually made as to watching and preservation, and the head of game which may be killed, and other stipulations inserted with a view to protecting the subject let from abuse or extinction by the tenant; while there is in all such leases a general stipulation that the right conferred shall be exercised in a fair and sportsmanlike manner, and that a sufficient breeding stock shall be left on the ground at the termination of the tenancy. The tenant under a lease of shootings and fishings has no power to sub-let, unless such power is expressly given in the lease (*Mackintosh*, 1895, 22 R. 345). The following

cases relate to questions arising out of such leases: *Inglis*, 1871, 10 M. 204; *Kidd*, 1875, 3 R. 255 (liability of landlord or game tenant for damage by rabbits); *Winans*, 1883, 10 R. 941 (removal of cottars in deer forest); *Critchley*, 1884, 11 R. 475 (exclusive possession).

D. *Urban Subjects.*—These embrace *inter alia* houses, shops, manufactories, and subjects of the like nature.

The lessee has an implied power to assign or sub-let, unless this right has been expressly excluded by the lease; but the privilege is not applicable to the lease of a furnished house, nor does it entitle the assignee or sub-lessee to change the use of the subject to any objectionable purpose.

In the case of assignees the assignation must, as previously indicated, be intimated to and accepted by the landlord before the principal lessee is relieved of his obligations under the lease.

In the case of a sub-lease the principal tenant also remains bound, unless the landlord has expressly agreed to relieve him thereof, and has accepted the sub-tenant in his stead (*Skene, ante*, p. 10). A sub-tenant is not bound to remove without warning, and cannot be summarily ejected at the instance of the proprietor (*Robb*, 1895, 22 R. 885. See also this case as to competency of an appeal under sec. 44 of the Judicature Act, 1825, against a summary decree of *ejection*).

The usual obligations upon the landlord are, in addition to warrandice of possession, to keep the subjects wind and water tight (*Reid*, 1876, 4 R. 234, and *Allan*, 1891, 18 R. 932), and the drainage system in order. He is also bound to pay his proper proportion of imperial and local taxes, and of course the feu-duty exigible from the subjects, but is not—apart from stipulation—bound to insure them against fire, nor to rebuild them if they are destroyed from this cause.

With reference to the landlord's liability to repair defects in house, and the tenant's right to discontinue his possession if same are not remedied, see *Henderson*, 1888, 15 R. 859, and *Webster*, 1892, 19 R. 765.

The tenant, on the other hand, in addition to obliging himself to pay the stipulated rent, usually undertakes to keep the interior of the subjects in good order and repair, and to prevent deterioration (except from natural decay) during his tenancy.

In the case of urban subjects let as a public-house or place for the sale of excisable liquors, special provisions should be inserted in the lease for the purpose of preserving the certificate of licence (see *Jurid. Styles*, vol. i. pp. 686 *et seq.*).

Questions as to what are "fixtures," or what are the fittings which a tenant of such subjects is entitled to remove, are of frequent occurrence. The general rule of law, however, is that nothing can be removed which is built into, or made to form part of, the structure of the house, or which cannot be taken away without damaging the walls or floors (*Burns*, 1880, 8 R. 226).

E. *Miscellaneous Subjects.*—These may be regarded as embracing such diverse subjects as teinds, railways, canals, docks, tramways, warehouses, fishings belonging or annexed to the Crown, and Crown minerals.

Leases of teinds are now of infrequent occurrence.

Leases of railways and other industrial undertakings are subject to the general rules of law before stated, but the provisions in each case must be made of special application to the particular undertaking leased.

In the case of leases of Crown fishings there are no provisions which require to be specially noticed; while in the case of Crown minerals let to a subject, such as gold, silver, and lead mines, the ordinary rules of mineral

leases are also applicable to them, but the lordship or royalty paid to the Crown is usually fixed at one-tenth of the produce of the mine.

Under the Crofters' Holdings (Scotland) Act, 1886 (49 & 50 Vict. c. 29), as amended by the Crofters' Holdings (Scotland) Act, 1887 (50 & 51 Vict. c. 24), the Crofters' Commission Delegation of Powers Act, 1888 (51 & 52 Vict. c. 63), and the Crofters' Common Grazings Regulation Act, 1891 (54 & 55 Vict. c. 41), special provisions are made in regard to crofter holdings in certain counties embracing the Highlands and Islands of Scotland with a view to obtaining security of tenure and the fixing of fair rents by the Crofters' Commission, and these enactments also deal with the renunciation of the tenancy, compensation for improvements, enlargement of the holding, the cancellation of arrears of rent, bequest of the holding, stay of proceedings for sequestration of crofter's effects, and many other provisions of a special character. This legislation has introduced a tribunal between landlord and tenant, and limited the ordinary contracting rights of parties in a manner previously unknown as regards the leasing of other agricultural subjects in Scotland. Its existence falls to be briefly noticed here; but this subject has already been fully dealt with under the article CROFT—CROFTERS' HOLDINGS ACTS, in vol. iii. of the present work, pp. 393 *et seq.*; and reference is also made to the Acts themselves.

The provisions of (1) the Lands Valuation Acts and (2) the Lands Clauses Acts, with reference to the rights and obligations of tenants possessing under leases, and the claims competent to them under these latter Acts, are beyond the limits of the present article; but see Rankine on *Landownership*, pp. 208 *et seq.* and 879 *et seq.* respectively with reference thereto.

Reference may also be made to the Small Holdings Act, 1892 (55 & 56 Vict. c. 31), ss. 2–4, in regard to the powers of county councils and the rights of tenants in relation to land acquired and let under that Act.

II. BUILDING AND LONG LEASES.

By the Building or Long Lease the ordinary relationship of landlord and tenant is in some degree altered, and a right is created which is more of the nature of the feudal relationship of superior and vassal. There is, however, this material distinction, that while under a feu-right the vassal becomes, subject to the payment of the stipulated *reddendo* to the superior, an absolute proprietor, with all the powers pertaining to that character, except in so far as these powers are expressly limited or restricted by the terms of his charter, the tenant under a building or long lease holds the position of a *quasi* proprietor only, his title is a terminable and not a perpetual one, and the landlord retains the radical right of property. Moreover, the right of the tenant is further limited to this effect, that technically he cannot exercise actual rights of proprietorship beyond what he is expressly authorised to do by statute or by the terms of the lease itself. But see *Gordon*, 1883, 11 R. 67, where a tenant under a building lease of 99 years, granted in virtue of the Montgomery Act, was held entitled to cut growing timber on the land leased to him, for purposes connected with the buildings erected thereon.

In practice, however, the tenant under an ordinary building lease acquires a position analogous to that of an ordinary fee-simple proprietor, and by the terms of his contract he is placed under obligations as to building, enclosing the subjects leased, and otherwise, similar to those imposed on a vassal under a feu-contract. The lease, moreover, is distinguished from an ordinary agricultural lease of land in that it is usually restricted to a comparatively small area of ground, and that it is of longer endurance—99 years being a

usual term, and 999 years not an uncommon one. It is accordingly by operation of law assignable without any special destination to assignees, unless these have been expressly excluded; and the ground let may likewise be made the subject of a sub-lease without a special power to sub-let. The yearly rent is in most cases at least double or treble the agricultural value of the lands let: and in order to secure the rent it is usually made a matter of express stipulation in the lease that a house of sufficient annual value shall be erected by the tenant within a certain limited time, and thereafter maintained in good order and repair, and of at least the minimum annual value stated, during the currency of the lease. To these obligations are added what may be termed ordinary building conditions, *e.g.* against erecting more than one house, defining the character and elevation of the house to be erected, and making provision for the enclosure of the ground and the formation of pavements, drainage, etc. It is also usual to reserve to the proprietor all rights in mines and minerals, and in certain cases to add a clause of pre-emption; but, in contradistinction to the terms of feu-contracts, it is unusual to insert in the lease irritant and resolutive clauses, or certain others specially applicable to the relationship of superior and vassal, such as a stipulation for casualties of superiority, or a fixed payment in lieu thereof, in terms of the Conveyancing Act of 1874.

The granting of building or long leases by fee-simple proprietors was not recognised by the legislature, nor the legal effect of these leases defined by statute, until the passing of the Registration of Leases (Scotland) Act, 1857 (20 & 21 Vict. c. 26), the terms of which will be afterwards noticed.

By the Trusts (Scotland) Act, 1867 (s. 3), before mentioned, it is made competent to the Court of Session, on the petition of trustees acting under any trust deed, to grant authority to the trustees to do any of the acts specified in the section, and *inter alia* "to grant feus or long leases" of the heritable estate, or any part of it. But the Court are to be satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and they are authorised to determine all questions of expenses in relation to such applications.

If, however, all the beneficiaries under the trust in existence at the date of the petition are of full age, and capable of acting, the same section provides that it shall be in their power, by deed of consent, to grant authority to the trustees to do any of the acts therein mentioned, the same not being inconsistent with the intention of the trust; and such authority being obtained, the Act declares it to be as valid and effectual as if the authority of the Court had previously been obtained thereto. In the case of *Petrie's Trustees* (1868, 7 M. 64) it was held that where the trustees of a charitable foundation were directed by the trust deed "not to sell or dispose of" certain subjects, part of the trust estate, they had no power to grant a 99 years' lease thereof on terms advantageous to the trust. This action had apparently been raised before the passing of the Trusts Act, 1867, s. 3 of which was not founded on therein. See, on the other hand, *Birkmyre's Trustees, Petitioners* (1881, 8 R. 477), where the Court authorised trustees to grant a lease of certain trust subjects for 999 years, the expediency of which course was beyond dispute, and the same held not to be inconsistent with the intention of the truster. See also *Carlyle*, 12 March 1869, 41 Jur. 342, as to validation by prescriptive possession for forty years of an informal and incomplete lease for 99 years.

With regard to *Entailed Proprietors* it was, by the Act 10 Geo. III. c. 51 (the Montgomery Act), enacted, on the recital that the building of villages and houses upon entailed estates might, in many cases, be beneficial to the

public, "and might often be undertaken and executed if heirs of entail were empowered to encourage the same by granting long leases of lands for the purpose of building," that it should be in the power of every proprietor of an entailed estate to grant leases of land for the purpose of building for any number of years not exceeding 99 years. This power was, nevertheless, limited by the Statute (ss. 4 to 8 inclusive) in the following respects :—

(1) Not more than five acres are to be granted to any one person, either in his own name or to any other person or persons in trust for him.

(2) Every such lease must contain a condition that the lease shall be void if one dwelling-house at least, not under the value of £10 sterling, is not built within the space of ten years for each half-acre of ground comprehended therein, and that the said houses shall be kept in good tenantable and sufficient repair.

(3) The lease is to be void whenever there shall be a less number of dwelling-houses than one, of the value foresaid, to each half-acre of ground, kept in such repair as aforesaid, standing upon the ground so leased. These conditions, if not fulfilled, infer a nullity of the lease (*Carrick*, 1868, 6 M. (H. L.) 101 ; *Carter*, 1890, 18 R. 353).

(4) The power of leasing conferred by the Statute is not to extend to or comprehend the manor-place, offices, houses, gardens, orchards, or enclosures adjacent to the manor-place which have usually been in the natural possession of the proprietor, or have not been usually let for a longer term than seven years when the heir in possession was of lawful age. See *Montgomerie*, 1895, 22 R. 465, and authorities there cited.

(5) No lease is to be granted under the authority of the Act for the purpose of building villages or houses within three hundred yards of the manor-place usually in the natural possession of the proprietor.

(6) All leases granted under the Act are to be so granted for a rent not under the rent payable by the last lease or set, and without grassum, fine, or other benefit reserved or accruing directly or indirectly to the granter of the lease other than the rent payable under the lease.

(7) No lease is to be granted for less rent than was payable under the last lease, nor (*a*) until after the determination of any former lease of the same subjects, or (*b*) till within one year of such termination.

(8) If the deed of entail under which the lands are held should either expressly or by implication contain powers of leasing more ample than are given by the Act, the heir of entail in possession is to be at liberty to exercise such powers in the same manner as if the Act had not been passed.

A form of lease by an heir of entail granted under this Statute, and containing also various special stipulations, is printed in the Appendix to this article, Form 6.

Under the Entailed Estates Act of 1840 (3 & 4 Vict. c. 48) an heir of entail in possession may "grant or dispone in feu, or let or lease, " for any period of endurance," for such yearly feu-duty or rent as may be agreed upon, though inadequate and below the just value, portions of the entailed estate to the extents and for the purposes therein specified, viz. not exceeding one-fourth of an acre as a site for a place for public Christian worship, one acre for a burying-ground attached thereto, one-eighth of an acre for a dwelling-house for a minister or schoolmaster, one acre for a schoolhouse and playground attached thereto, and half an acre for a garden attached to such dwelling-houses respectively (s. 1). But this power is granted subject *inter alia* to the following conditions :—The feu or lease must be sanctioned under an application to the Sheriff for that purpose (s. 3). No grassum, fine, or other consideration is to be paid to the heir of entail in

possession, or the heir of entail consenting thereto (s. 1). Where the heir possesses more extensive powers of leasing or feuing under the deed of entail, these are not to be interfered with by the Statute (s. 2). The heir of entail is not to be liable to forfeiture or loss of right by granting the feu or lease (s. 4). The lands or buildings thereon are not to be diverted to or used for any purpose other than that for which they were granted, and buildings must be erected within five years, and occupied for the purpose stated in the lease or feu-right (s. 7). The feu-charters or leases granted are, when recorded, to be effectual to the successors in office of the grantees without any transference or renewal of the investiture (s. 5). Alienations by assigning, disponing, or sub-letting are prohibited; as also borrowing upon the security of the subjects; and adjudications of such lands are declared inept (s. 6).

Under the Rutherfurd Act (11 & 12 Vict. c. 36, s. 4) an heir of entail in possession is empowered, subject to the authority of the Court being obtained, to lease and feu the estate in whole or in part with the like consents as were by that Act required to a disentail (*Christie*, 1888, 15 R. 793). The same Statute in sec. 24 confers on an heir holding under an entail dated prior to 1 August 1848 power to grant feus or long leases of not more than one-eighth in value of the whole estate for the highest feu-duty or rent obtainable; but notice must be given to the next heir, and the sanction of the Court obtained. See *Farquharson*, 1870, 9 M. 66 (observations of Lord President), where it was held that a long lease under this Act included any lease exceeding one of ordinary duration.

The Entail Amendment Acts of 1853 (ss. 6 and 13) and 1868 (ss. 3, 4, and 5), and the Entail Act of 1882 (ss. 4–6), contain further provisions as to the granting of long leases by heirs of entail, and *inter alia* extend (Act of 1853, s. 13, and Act of 1882, s. 4) the powers of heirs under old entails to heirs holding under entails dated subsequent to 1 August 1848, where such powers are not expressly excluded in the entail itself.

These extended powers embrace: (1) (Act of 1853) Authority to the Court, on application of heir, to fix minimum rate or rates of tack-duty for the particular area or areas of ground sought to be leased, and to approve form of long lease therefor; the heir being thereafter empowered to grant leases in accordance therewith not exceeding *in cumulo* the extent authorised by the Rutherfurd Act as above mentioned. (2) (Act of 1868) Power to grant building leases for any period not exceeding 99 years, excepting garden, orchard, policies, or enclosures adjacent to mansion-house, on application to Sheriff, and on notice to next heir of entail,—the ground being leased within ten years from the date of the Sheriff's deliverance, at a rate or rates to be fixed on the report of one or more skilled persons. But the leases are to be void if buildings of the annual value of at least double the rent are not built within five years on the ground comprehended in each lease, and these buildings are constantly to be kept in good tenantable and sufficient repair. There are also other conditions, for which see the sections of the Act above referred to. (3) (Act of 1882) Power to lease lands, not exceeding two acres, for scientific or public purposes as before mentioned, and making any authority to lease granted to a preceding heir available to his successors in the estate.

With reference to all these powers, the prohibition against the taking of any grassum, fine, or consideration other than the annual rent is universal.

See also article ENTAIL, vol. v. of present work, p. 47, and cases of *Earl of Kinnoull*, 1862, 24 D. 379; *Stewart*, 1882, 9 R. 458; and *Christie*, 1888, 15 R. 793, there cited.

It has already been shown that under the Act of 1449 it was essential that the tenant under a lease should complete his right by *possession* of the subjects let, in order that the same should be valid against a singular successor, and that the right of the original lessee, or of an assignee, or sub-lessee from him, was preferable according to the priority of possession following upon the right, and not according to the date of the right founded upon. A consequence of this rule of law was that no effectual security could be given to a creditor by the party in right of the lease, over the subject of his right, unless the creditor could complete his security by entering into possession of the subjects, which might be impracticable, or might be expressly debarred by reason of the lease itself excluding assignees or creditors, legal or voluntary.

By the Registration of Leases (Scotland) Act, 1857, above referred to, however, the tenant under a long lease was enabled to make his lease-hold right a fund of credit, and to give to a creditor a valid security over the subjects leased, which should be good in any question with a singular successor of the landlord, although the right of the creditor had not been completed by actual possession of the subjects contained in the lease. This was effected by authorising the lease to be recorded for publication in the Register of Sasines, which, subject to the limitations stated in the Act, was declared to have the effect of possession. Tenants, therefore, who possess under leases which fulfil the requirements of this Statute have now substantially the same rights and privileges as feudal proprietors possessing under feu-rights, in so far at least as their rights of assigning the leasehold subjects, or borrowing upon the security of them, are concerned.

The requirements of the Act are as follows:—

1. The lease must be probative, *i.e.* either holograph or tested, according to the requirements now in force relative to deeds executed in Scotland (see Conveyancing (Scotland) Act, 1874, s. 1); but the lease may have been executed either before or after the passing of the Act.

2. The period of endurance must not be less than 31 years, but may be for any greater number of years that shall be stipulated (s. 1).

3. Leases containing an obligation upon the granter to renew the same from time to time at fixed periods, or upon the termination of a life or lives, or otherwise, are to be deemed leases within the meaning of the Act, provided that such leases shall, by the terms of such obligation, be renewable from time to time, so as to endure for a period of 31 years or upwards. The provisions of this section appear to be somewhat ambiguous, but its effect is that the lease must be actually or practically for a period of not less than 31 years (Bell's *Lect.* p. 1201).

4. The registration of the lease must take place at, or subsequent to, the term of entry. See sec. 2, which declares such leases to be effectual against any singular successor in the lands let whose infeftment is posterior to the date of such registration. This section also provides that registration of such leases shall only be necessary for the purposes of the Act.

5. As regards all leases dated subsequent to the passing of the Act (10 August 1857), unless these are executed in terms of an obligation to renew contained in a lease granted prior to that date, and unless of subjects held by burgage tenure, the *name* of the lands of which the subjects let form part must be set forth (s. 18).

6. Except in the case of leases of mines and minerals, and of lands held burgage, the *extent* of the land let must also be set forth, and the same must not exceed fifty acres (s. 18).

But a lease, although possessing all these requisites, and duly recorded

in the appropriate Register of Sasines, will not be effectual against singular successors unless the proprietor by or on whose behalf it is granted holds a complete feudal title by infeftment.

It has also to be noted that leases granted prior to the passing of the Act, or in implement of an obligation to renew contained in a lease of such prior date, do not fall within the requirements of sec. 18 as to setting forth the name and extent of the lands let, or the provision that such extent must not exceed fifty acres.

Sec. 1 authorises leases fulfilling the requirements mentioned above to be recorded in the Register of Sasines, or, if the subjects were (prior to the Conveyancing Act of 1874) held by burgage tenure, in the Burgh Register; and by the same section assignations and translations thereof, and assignations in security, may be recorded in the same way.

By sec. 3 recorded leases may be assigned in whole or in part, and such recording vests the assignee in the right of the granter, the assignation being in the form given in Schedule A annexed to the Act; but such assignation is to be without prejudice to the landlord's right of hypothec, or other rights. See case of *Rodger*, 1867, 6 M. 24, where, in a question between two assignees, it was held that the assignee who had completed his right by recording the lease had a preferable title to that of a prior assignee whose right was latent and had not been made public.

By sec. 4 such leases may also be assigned in whole or in part in security for money borrowed, or of annuities, or provisions to wives or children, or in security of cash credits or other legal debt or obligation. The assignation will be in the form prescribed under Schedule B, and the recording thereof constitutes a real security over the lease to the extent assigned, and completes the right of the assignee thereunder.

Sec. 5 provides for the completion of the title in the manner thereby prescribed of any party who is not the original lessee under the lease, while secs. 7 to 11 inclusive also deal with the matter of the completion of titles by heirs, disponees, assignees, adjudgers, and others.

By sec. 6 it is provided that, in default in payment of the capital sum for which such assignation in security has been granted, or of a term's interest or annuity for six months after the same shall have fallen due, the creditor may obtain from the Sheriff a warrant to enter into possession of the lands and heritages leased, and to uplift the rents and sub-let the same; but he is not to be personally liable to the landlord in any of the obligations and prestations of the lease until he shall have entered into possession of the subjects.

Sec. 20 confers on the creditor a right of sale similar to that possessed by the holder of a bond and disposition in security under the Heritable Securities Act of 1847 (10 & 11 Vict. c. 50), which, in terms of sec. 163 of the Titles Consolidation Act, 1868, is still in force as regards this matter.

Sec. 12 declares that all leases, assignations, translations, and all adjudications of such leases or assignations in security, are, in competition, to be preferable according to their dates of recording.

By secs. 13 and 14 renunciations or discharges of recorded leases, or decrees of reduction thereof, or of assignations of such leases, are likewise to be recorded in the Register of Sasines; while sec. 15 prescribes the mode of registration, and declares that extracts of such writs are to make faith in all cases except where offered to be improven.

Sec. 19 provides that extracts may be recorded where any lease shall, before the passing of the Act, have been recorded in the Books of Council and Session, or of any Sheriff Court, and that the recording of such extracts

shall be as valid and effectual as if the original lease had been presented for registration under the Act.

By sec. 16 registration of such leases, or of assignations thereof, or other deeds relative thereto provided for under the Act, is, as has been already mentioned, made equivalent to possession, to the effect of establishing a preference in virtue thereof in favour of the grantee or the party in right of the lease (see *Rodger*, 1867, 6 M. 24).

The Schedules to the Act contain forms of assignation of a bond and assignation in security, a translation thereof, notarial instruments for the completion of the title of parties acquiring a right to the lease, and of writs of acknowledgment in favour of an heir in the lease, or of the heir of a creditor in right thereof (see *Stroyan*, 1890, 17 R. 1170), as well as of a discharge of a bond and assignation in security, to which reference may be made. Reference may also be made, for further guidance as to forms, etc., to the *Jurid. Styles*, "Heritable Rights," pp. 716 *et seq.*

See Hunter on *Landlord and Tenant*, Rankine on *Landownership*, Rankine on *Leases*, and Johnston on *The Agricultural Holdings Act*, 1883.

APPENDIX.

FORM A.

(*Agricultural Lease.*)

Landlord and Tenant.

It is Contracted and Agreed between *A.*, heritable proprietor of the lands and others hereinafter let (he and his heirs, successors, and assignees being hereinafter referred to and designated, when not named, as "the proprietor," or "the landlord"), *on the one part*, and *B.* (he and his heirs and successors being hereinafter referred to and designated, when not named, as "the tenant"), *on the other part*, in manner following, That is to say, the said *A.*, in consideration of the rent and other prestations after written, and under the reservations, conditions, provisions, and declarations after expressed, hereby lets to the said *B.* and his heirs, excluding heirs-portioners (the eldest heir-female, when the succession would devolve by law on heirs-portioners, succeeding without division), and also excluding sub-tenants and assignees legal or voluntary, and creditors or managers for creditors in any form, unless with the consent in writing of the proprietor; but with power to the tenant to destine this lease by will to any member of his family, or to his widow, subject to the written approval of the proprietor, and provided that the legatee shall possess the necessary means of stocking the farm; which arrangement relative to the bequest of the lease shall supersede the provisions of the "Agricultural Holdings (Scotland) Act, 1883," as to the bequest of leases, which are hereby superseded accordingly by mutual consent,—All and Whole the lands and farm of , with the houses, yards, and pertinents lying in the parish of and county of , as the same were tenanted and possessed by *C.*, and are shown within a yellow border on the Ordnance Survey sheet or sketch plan of the said lands hereto annexed, And that for and during the space of nineteen years from and after the twenty-eighth day of May , which is hereby declared to be (or to have been) the term of the tenant's entry to the premises in virtue hereof, and from thenceforth to be peaceably occupied and possessed by the tenant during the said space of nineteen years: But declaring that either proprietor or tenant shall, subject to the provision after written, have the privilege or option of a break at any term of Whitsunday (being the twenty-eighth day of May) which shall occur during the currency of this lease,—that is to say, shall have a right and power to declare this lease to be at an end, or to relinquish or renounce the same, at the said term, provided the party desirous of exercising such privilege shall give three years' previous notice in writing to the other party of his (the former party's) intention to take advantage of the said break, and provided that, before the relinquishment

Lands let.

Moveable Break.

Three years' notice required by either party.

or renunciation of the lease shall become effectual, all rents and arrears of rents due by the tenant shall be paid to the proprietor, and all the other obligations incumbent upon the tenant, whether during the tenancy, or on the tenant's outgoing or otherwise, shall be fulfilled: Reserving to the landlord during the currency hereof—*First*, Power and liberty at any time to resume possession of such part or parts of the lands hereby let to an extent not exceeding imperial acres as may be required for the purpose of planting, feuing, or otherwise, the tenant being entitled to a yearly deduction from the rent on account of such land as may be resumed at a rate to be agreed upon between the parties, and failing agreement, then at a rate to be fixed by two arbiters mutually chosen as after mentioned, but under the obligation on the landlord at his own expense to enclose any ground so resumed with a suitable fence, the tenant being thereafter bound, without compensation, to keep the said fence in good order and repair during the currency of the lease: *Second*, All iron, coal, limestone, freestone, sand, gravel, clay, and all other minerals, metals, and fossils in the said farm, with full power and liberty to himself or others to work, win, and carry away the same, and to take and occupy ground in connection therewith, erect buildings and works necessary therefor, and to carry the said minerals under or over the lands hereby let, on payment of surface damages as after mentioned: And also reserving power to the landlord to alter or straighten marches and excamb ground with any neighbouring proprietor or tenant, the value of any ground that may be taken off or added to the said farm by such excambions being ascertained by arbitration as aforesaid, and deducted from or added to the rent hereinafter stipulated: As also the exclusive right to all trees, woods, and plantations upon, and all ground on which there are any plantation belts or clumps within the bounds of, the said farm hereby let, and a right of road to and from the same; as also the right of pasturing or cutting the grass within any plantation belts or clumps, and power to alter existing roads and burns, and make drains, ditches, and fences; as also the right to use all roads or footpaths within or through the said farm, and the property and use of all water in streams or springs rising in or traversing the lands, subject to the proper use thereof by the tenant for the purposes of the farm only: And it shall not be competent to the tenant to make any claims for damages or otherwise against the landlord in any year of this lease whereof the rent has been paid and unconditionally discharged: Declaring nevertheless that the tenant shall always be bound to pay his rent in full in the first instance, irrespective of any claims for damages or otherwise, and shall not be entitled to retain any part thereof on account of such claims; but he may intimate the said claims to the landlord or his factor along with or prior to the payment of said rent if he shall think proper: *Third*, In so far as not inconsistent with the Ground Game Act, 1880, the whole rabbits, hares, and other game on the said lands, and the fish in the rivers and streams, with the exclusive privilege of hunting, fowling, and fishing on the same, by himself or by others having his authority; the tenant being hereby bound to protect the plantations and fences and also the game on the lands, and to warn off trespassers: As also not to keep or allow to be kept by his servants or others any dogs not required for the purpose of attending to the sheep or cattle on the said farm: Declaring always, as it is hereby provided and declared, that no measurements or other particulars regarding the extent, acreage, or boundaries of the farm hereby let, whether contained in advertisements, conditions of let, or otherwise, nor the accuracy of the plan or sketch hereto annexed, are warranted by the landlord, and that the said tenant shall be held to have satisfied himself as to the extent and boundaries of the said farm hereby let, and also as to all other particulars relative thereto, and that no claim shall be competent at the instance of either party against the other in the event of its being hereafter found that the subjects either exceed or fall short of the measurement to which they are at present believed or understood to extend: Which tack, with and under the conditions, reservations, provisions, restrictions, and declarations before and after written, the said *A.* binds and obliges himself, and his heirs and successors in the said lands, to warrant at all hands: For which causes, and on the other part, the said *B.* binds and obliges himself, his heirs, executors, successors, and representatives whomsoever, to pay to the said *A.*, his heirs, executors, or assignees, or to

Reservations.

Warrandice.

Rent.

his or their factor for the time being, the sum of £ sterling, in name of yearly rent, and that half-yearly, during the currency hereof, in equal portions, at Martinmas and Whitsunday after entry, beginning the first term's payment at the term of Martinmas (that is to say, the 11th day of November) and the next term's payment at the term of Whitsunday (that is to say, the 15th day of May) following, in full of the first year's rent under this lease, and so forth half-yearly and termly thereafter during the occupancy of the lands hereby let, with a fifth part more of each term's rent of liquidate penalty in case of failure in the punctual payment thereof and the interest of each term's payment at the rate of five per centum per annum from the respective terms of payment thereof during the not-payment: Declaring that the whole of the rent of the last year's occupation, or last year prior to a break, or to the termination of notice of a break under these presents, shall be payable one month prior to the term of Whitsunday (that is to say, the 15th day of May) in that year and before any part of the stock or crop has been removed from the ground, or security shall be given to the landlord therefor, to his satisfaction, prior to such removal in addition to any other security provided for under these presents: And further, the tenant agrees, if required by the landlord, to pay the premium on a bond of security in favour of the landlord to be granted by some respectable insurance company for a sum equivalent to a year's rent, and shall duly exhibit the receipt, showing that such premium had been paid for the ensuing year, at each term of Whitsunday when entering upon another year's possession of the subjects hereby let: Further, the tenant binds and obliges himself personally to reside, or, in the event of his having a residence elsewhere, to provide a competent substitute to reside, personally upon the farm, and to have and keep continually a sufficient stocking of every kind thereon, which shall be *bonâ fide* his (the tenant's) own property; and, in so far as the land hereby let is arable, to labour and manure the same in a proper and husbandmanlike manner, and so as not to run out or deteriorate the land: And the tenant also binds and obliges himself to pay the tenant's proportion of all public and parochial burdens which may for the time be incumbent upon him by law or conformably to the usage of the said first party's estate; as also in the last year of his occupation of the lands hereby let to give any land intended for green crop one ploughing before the winter sets in, and to allow the incoming tenant to enter on and work the said arable land and the garden ground after the first day of March preceding the termination of his tenancy; and he also binds and obliges himself not to graze either sheep or cattle upon the meadow lands or young grass after the first day of April preceding the termination of his tenancy, and to leave for the use of the landlord or incoming tenant all farmyard and other manure that may be upon the said lands, which shall be paid for by the landlord or incoming tenant according to its value, as the same may be ascertained (failing agreement) by arbitration as after mentioned: And, further, if the tenant shall, in the opinion of the landlord, have mismanaged either the grazing or arable lands and deteriorated the same, the tenant shall in that case pay such additional sum over and above the rent then due as shall be ascertained by arbitration as after mentioned: And, further, the tenant accepts the houses, offices, and other buildings now on the farm, and also the fences, dykes, drains, and ditches thereon as in good tenantable order and repair, and binds himself to keep the same, and also any additions that may be made thereto during his occupation, constantly in good order and repair in manner after mentioned, and the said houses, offices, and other buildings in a proper sanitary condition; and also to keep clean and in order all courtyards, passages, burns, springs, wells, cesspools, house and other drains, and manure bins that may be upon the lands hereby let, conformably to the requirements of the Public Health Acts, and specially to replace or renew from year to year all chimney-cans, house-riggings, slates, gutters, rhones, down-pipes, windows, doors, etc., that may be injured or destroyed by storms or otherwise; to point chimney-heads, skews, gables, walls, and other masonry buildings, or erections that may require the same for their due and proper preservation; and annually to whitewash or otherwise disinfect the inside of all office-houses, sheep-reeves, or cattle-pens in which animals or birds, or other live stock, may from time to time be collected or kept; and

Terms of Payment.

Security for Rent.

Residence and Stocking.

Cropping for last year of occupation.

Buildings.

to paint with two coats of best oil paint all external doors and windows once at least every six years: And it is hereby specially provided and agreed that the tenant shall from year to year during his occupancy of the lands hereby let either drain, or redrain by means of surface-drains, not less than one-sixth of the whole drainable area of the farm as such drainable area is indicated on the said Ordnance Survey sheet or sketch plan of the said lands annexed hereto and coloured red thereon, and that at his own expense, and shall regularly, during the month of March, report to the landlord or his factor, as is hereinafter provided, that such drainage has been done; and upon the termination of his occupancy, the landlord hereby agrees to repay to the tenant or his representatives, for unexhausted improvements under the head of drainage, which shall have been executed by the tenant during the last three years of his occupancy (whether the same shall have been terminated by the natural issue of the lease or otherwise), a sum estimated according to the scale in the Sched. A affixed hereto: And further, the tenant binds and obliges himself and his foresaids to keep in good and sufficient tenantable condition, order, and repair, as aforesaid, all roads, bridges, dykes, fences, ditches, tile and surface drains, that may be upon the lands hereby let, made or to be made during his occupation thereof; and particularly to uphold both march and division fences, to repair from year to year the coping of stone dykes, and to renew the stobs in wire and other fences; but in the case of march fences, whether of stone or wire, to uphold and repair or renew them only in conjunction with the coterminous proprietor or tenant, and at their mutual expense: Declaring always, as it is hereby specially provided, agreed, and declared, that the tenant shall be entitled to compensation for all sums expended by him upon such repairs or renewals of houses, buildings, fences, roads, and others hereinbefore specified, as shall have been executed by him during the last three years of his occupancy (whether the same shall as aforesaid have been terminated by the natural issue of the lease or otherwise), and that according to the scale and subject to the conditions set forth in the Sched. B hereto affixed: And with reference to muir-burning it is hereby agreed that where the same is necessary the tenant shall, before commencing, be bound to report in writing to the landlord or his factor, or other authorised agent, the proportion in acreage he intends for the year in question to burn, but in no case shall the tenant have the right in any one year to burn more than one-sixth part of the whole of such area as may be subject to burning: Declaring that such burning as may be carried out shall be in selected patches or divisions, and not wholly on any one part of the farm; and in the event of the tenant in any year proceeding to burn without giving the proprietor due notice of his intention, he shall be liable in a penalty of not less than £20 sterling in addition to his annual rent, and that at the first term succeeding the act of such burning without notice: And the tenant and his foresaids shall be bound during the month of March in each year to report generally to the landlord or his factor, and that in writing either under his own hand or the hand of his authorised substitute, upon the following matters, viz.:—(First) As to the state of the farm-houses, office-houses, and other buildings on the farm; (Second) As to the state of the fences (both march and division), farm roads, road drains, ditches, bridges, etc.; (Third) As to surface and other farm drains and improvements that may have been made during the preceding year; (Fourth) As to the proportion of heather, etc., burned during the preceding year, and the proportion he intends to burn for the year specified; and (Lastly) As to any other matters connected with the condition or management of the farm or of the stock thereon, of which the landlord should be made cognisant, including, *inter alia*, any expenditure on drainage or on the repair or renewal of buildings, fences, and others which the tenant proposes to carry out during the immediately succeeding year: Declaring that the landlord shall be entitled personally, or through his factor or other authorised agent, after examining the report, to take such steps as he may consider necessary by inspection or otherwise to satisfy himself of the accuracy of the same; and should such report at any time prove to be unsatisfactory, or not be forthcoming, it shall be competent to the landlord to avail himself of the break before provided for, and to declare the lease at an end, by giving the requisite notice to the tenant stipulated

Drainage.

Compensation for Drainage.

Fences, Bridges, Roads, etc.

Compensation to Tenant for Repairs, etc.

Muir-burning.

Tenant's Annual Report.

in that event: And it is hereby further agreed and declared that in case the tenant shall become bankrupt or insolvent, or shall execute any trust conveyance of the stock or implements on the said farm to or for behoof of his creditors, during the currency of this lease, or in case sequestration shall be awarded against him, then at the first term of Whitsunday (28th day of May) or Martinmas (28th day of November) after any of these events shall take place the landlord shall have power to resume possession of the said farm and lands hereby let, and this lease shall *ipso facto* become void and null: And it is also hereby declared that the provisions of the said Agricultural Holdings (Scotland) Act, 1883, shall be excluded from this lease except such provisions as relate to compensation to the tenant for unexhausted improvements, and the following stipulations shall be held as coming in lieu and place of the provisions of said Act, with reference thereto: That is to say,—(*First*) Notices requiring to be given to the landlord in terms of the 4th section of said Act are dispensed with, and shall be of no force or effect during the currency of this lease, and in lieu of the provisions of the said Act with reference to drainage the provisions of these presents relative thereto, and of the said Schedule A hereto affixed, shall take effect; (*Second*) Compensation shall be payable to the tenant at the termination of this lease in respect of any improvements effected by him of the nature specified in the third part of the Schedule of the said Act, but subject always to the provisions of the said Act, and any sum due to the tenant in respect thereof shall be liable to the reductions and deductions specified in the 6th section of said Act; and (*Third*) A statutory reference under the said Act shall not be competent except by the mutual consent of the landlord and the tenant, but the tenant shall nevertheless be bound to give the notice required by the 7th section of the said Act, and a reference to two arbiters mutually chosen shall take the place of the reference provided by the said Act: And it is hereby further agreed and declared, that where any damage shall be occasioned to the surface of the lands and farm hereby let, or any part thereof by reason of the working of any minerals, metals, or other substances of the like nature therein, in virtue of any leasehold or other rights already granted, or to be hereafter granted by the landlord, relative to the working of such minerals, metals, or other substances, or where any ground shall be taken from the said farm and lands in connection with such working, the amount of such surface damages, and the rent or annual value of any ground taken and occupied as aforesaid, shall be adjusted and settled as between the tenant under these presents and the tenant working the said minerals or other substances as aforesaid; and the tenant under these presents shall accordingly be entitled to claim and receive payment from the said mineral tenant of the amount of such surface damages, and of the rent or annual value of any ground taken and occupied as aforesaid, and that at the term of Whitsunday yearly during the remaining period of this lease then to run, or until the land damaged as aforesaid shall have been restored to its former condition: Declaring always, as it is hereby expressly provided and declared, that in the event of the said tenants failing to adjust and settle said claims as aforesaid the same shall be fixed and determined by arbitration between the said tenants in manner after mentioned, the provisions of these presents with reference to arbitration being hereby made expressly applicable thereto: And declaring further that no claims shall be competent to the tenant under these presents against the landlord in respect of surface damages from mineral workings or ground taken and occupied in connection therewith, in the event of the failure of the tenant causing such damage or taking and occupying such ground, to pay the amount or value thereof when ascertained: And also that all claims for permanent damages in lieu of restoration of ground occupied or damaged to its former condition, or for subsidence, and in general all claims for damage arising from the working of any of the said minerals or other substances, other than claims for annual surface damages, or for the rent or annual value of ground taken and occupied as aforesaid, shall be vested in the landlord, and that he shall alone be entitled to enforce the same against the mineral tenant, and to receive and retain for his own use the amount or value of such damages: And it is hereby further agreed and declared that in all matters before mentioned stipulated to be ascertained and fixed by arbitration, or referred to two arbiters mutually chosen, or in the event of

Bankruptcy of Tenant.

Provisions of Agricultural Holdings Act, 1883.

Mineral Damages.

Arbitration Clause.

any dispute or difference arising between the landlord and tenant under this lease, whether hereinbefore specially referred to arbitration or not, the same shall be and is hereby referred to the final sentence and decree-arbitral of two neutral persons (in the event of a sole arbiter not being mutually agreed upon) to be mutually chosen as arbiters, or in the event of their differing in opinion, of an oversman to be named by them before proceeding with the reference, and the decision of such arbiter, arbiters, or oversman shall be final and binding upon both parties; and if one of the parties shall fail to name an arbiter within seven days after being called upon by the other party, then it shall be lawful for the Sheriff of the county or the Judge Ordinary of the district for the time, on the application of either party, to name two persons as arbiters, with power to them in case of difference of opinion to appoint an oversman before proceeding with the reference, whose award shall be final and binding on both landlord and tenant in the same way as the award of persons mutually chosen as aforesaid: And further, the tenant binds and obliges himself and his foresaids to flit and remove from the said lands and others hereby let at any term of Whitsunday (being the twenty-eighth day of May), as to which he shall receive or give notice of break as hereinbefore specified, and at the natural termination of this lease, without any notice, warning, or other procedure being necessary to that effect, any law or practice to the contrary notwithstanding; and failing his doing so, then the tenant hereby binds and obliges himself and his foresaids to pay double the yearly rent hereinbefore stipulated for each year or part of a year during which he shall continue in occupation, and that without prejudice to the right of the landlord to insist in a summary removal or ejection in course of law: And the landlord and tenant bind and oblige themselves and their respective foresaids to implement and perform their respective parts of the premises to each other under the penalty of one hundred pounds sterling to be paid by the party failing to the party observing, or willing to observe, the same, over and above performance: And they consent to the registration hereof, and of any decree-arbitral to be pronounced in virtue of the provisions herein contained for preservation and execution.—IN WITNESS WHEREOF,

Removal.

Penalty.

Clause of Registration.

Testing Clause.

SCHEDULE A, referred to in the foregoing Lease.

(*Compensation for Drainage.*)

1. All claims to be vouched by the tradesmen's or contractors' accounts bearing on their face the date of the supply of material and execution of the work, and also of payment; or in the case of labourers, the receipts for the wages, showing the date of the execution of the work.

2. Compensation shall be paid to the tenant, in terms of the lease, according to the following scale, viz.:—

(*a*) Nine-tenths of outlay incurred during last year of occupation.

(*b*) Five-tenths or one-half of outlay incurred during second last year of occupation, and

(*c*) Two-tenths or one-fifth of outlay incurred during third last year of occupation.

SCHEDULE B, referred to in the foregoing Lease.

(*Compensation for Repair or Renewal of Houses, Fences, Bridges, Roads, etc.*)

1. Where the total sum expended by the tenant within the period specified in the lease shall not exceed the sum of £50 sterling, compensation shall be paid to the tenant in respect thereof (subject to the provisions of the lease) upon the same scale as that set forth in the preceding Schedule with reference to Compensation for Expenditure on Drainage.

2. Where the total sum expended by the tenant within the period foresaid shall exceed the said sum of £50 sterling, and no Special Agreement shall have been made between the landlord and the tenant with reference to such expenditure prior to the execution of the work, the com-

pensation to be paid to the tenant in respect thereof shall, failing arrangement between the parties, be determined by Arbitration, in terms of the lease.

3. No expenditure exceeding the sum of £20 sterling, in respect of which compensation is to be claimed under the lease, shall be made by the tenant in any one year without previous notice in writing to the landlord or his factor, either in the Annual Report provided for by the lease or otherwise; and no expenditure exceeding the sum of £50 sterling, in respect of which compensation is to be claimed as aforesaid, shall be made by the tenant in any one year without his having previously obtained the express consent in writing of the landlord or his factor.

Notice required for Annual Outlay above £20, but not exceeding £50. Where Annual Outlay exceeds £50, consent of Landlord necessary in order to obtain compensation.

4. All claims shall be vouched in the manner prescribed under Schedule A, and in any claim falling to be determined by Arbitration under this Schedule the arbiters shall have power to make such deductions as they may think proper for use, tear and wear, etc., and to take evidence.

These are the Schedules referred to in the foregoing Lease, and are signed by us as relative thereto, of even date therewith.

FORM B.

(Compensation Clauses and Schedules for Agricultural Lease.)

And it is also hereby declared that the provisions of the Agricultural Holdings (Scotland) Act, 1883, shall be excluded from this lease except such provisions as relate to compensation to the tenant for unexhausted improvements, and the following stipulations shall be held as coming in lieu and place of said last mentioned provisions: That is to say,—(*First*) Notices requiring to be given to the landlord in terms of section fourth of the said Act are dispensed with and shall be of no force or effect during the currency of this lease, and in lieu of the provisions of that Act as to drainage these presents are entered into on condition that no drainage shall be undertaken by the said tenant without the consent in writing of the landlord or his factor for the time being; but if such consent be given, the landlord shall supply tiles free of charge laid down at Railway Station, and the said tenant binds and obliges himself to perform the carriages and lay the drains at his own expense, and without compensation being claimable therefor at the termination of this lease; (*Second*) Compensation shall be payable to the said tenant at the termination of this lease in respect of improvements effected by him during his occupancy, which improvements shall be such as are specified in Part III. of the Schedule to the said Act and that in conformity with the conditions following, *videlicet*—(First) The outlay by the said tenant and his management of the said farm and lands hereby let must have increased upon the whole the value of the farm as an agricultural subject, and any sum due to the said tenant shall be liable to the reductions and deductions specified in the sixth section of the said Act; (Second) The said tenant binds and obliges himself to preserve samples of all manures applied to the ground and feeding stuffs, and to exhibit to the landlord or his factor for the time being vouchers to instruct the amounts paid for such manures and feeding stuffs in respect of which compensation may be claimed by them at the termination of the lease; (Third) The said tenant's claim for unexhausted improvements at the termination of his occupancy shall fall to be made up subject to the provisions of the Schedule and Memorandum [or *Schedule*] annexed and signed by the parties as relative hereto, and the compensation payable to the tenant at the termination of the lease in respect of improvements specified in said Part III. of the Schedule to the said Act shall not exceed the rates and proportions of unexhausted value which are specified in the said Schedule annexed and signed as relative hereto, and which Schedule shall form the basis of and regulate the award to be issued in the arbitration, if any, which may follow in terms of these presents,—and the compensation so to be fixed on the basis of this Schedule shall be deemed to be substituted for compensation under the Act, but the tenant shall nevertheless be bound to give to the proprietor the notice required by section seventh of the Act, should he determine to claim compensation under the provisions hereof; and the tenant shall not use or be entitled to claim for having used a greater quantity of purchased manures and feeding stuffs on the farm in the last year of this lease than the average quantity thereof used during each of the preceding three years, provided always that in fixing the amount of compensation payable to the tenant, the arbiters and oversman shall be entitled to make such deductions as they may think fit, if in their opinion the manurial value of the substances used has been reduced through the mode of management or cultivation pursued by the tenant or in any way through his fault or

negligence, or if in their opinion the land is in such a state of cultivation as to prevent the substances used having their full beneficial effect on the soil; and provided further that in the ascertainment of the amount of such compensation the value of the manure which the tenant is hereby taken bound to import and lay on the land in lieu of any straw or green crop sold, shall not be taken into account, but the same is hereby expressly excluded. (*Add here Arbitration Clause, etc., as in Form A.*)

SCHEDULE.

I. Compensation for lime applied to the land.

After the first crop has been taken . . four tenths of original cost.
„ second „ . . three „
„ third „ . . two „
„ fourth „ . . one „
And thereafter the manure will be held as exhausted.

II. Compensation for crushed bones, bone dust, and other manures of equivalent value.

After the first crop has been taken . . five tenths of original cost.
„ second „ . . one fourth „
And thereafter the manure will be held as exhausted.

III. Compensation for dissolved bones, bone phosphate, and guano.

After the first crop has been taken, one fourth of original cost.
And thereafter the manure will be held as exhausted.

IV. Other artificial manures, and police manures.

Exhausted by first crop.

V. Compensation for linseed, cotton cakes, and other feeding stuffs not produced on the farm and consumed on the holding during the last year of this lease. One third of the value thereof shall be paid, provided the quantity shall not exceed the average of the preceding three years.

MEMORANDUM.

I. Vouchers in all cases to be produced, and also an analysis by a competent analytical chemist if required.

II. The tenants shall in all cases, when required, be bound to furnish proof that the manures in respect of which compensation is claimed, have been applied to the lands, and that the feeding stuffs have not only been purchased, but that they have been consumed on the farm, and the manure therefrom actually applied to the land.

III. No allowance to be made to the tenant for cartage of lime, manure, or feeding stuffs, or for the cost of applying the lime and manure to the ground.

IV. No compensation will be allowed for nitrate of soda, sulphate of ammonia, or other such stimulating manures.

NOTE.—If preferred, the following SCHEDULE may be adopted in lieu of the foregoing "Schedule and Memorandum":—

SCHEDULE referred to in the foregoing Lease

COLUMN I.	COLUMN II.	COLUMN III.	COLUMN IV.								
Character of Improvement Outlay.	How applied.	Improvements to be exhausted in	Proportion of Outlay to be held as Unexhausted Increment of Value to the Soil when Improvement made in								
			Last year of Tenancy.	2nd last.	3rd last.	4th last.	5th last.	6th last.	7th last.	8th last.	9th last.
Lime	To Arable land	8th year	28/36	22/36	15/36	10/36	6/36	3/36	1/36	—	—
	,, Permanent pasture	10th year	45/55	36/55	28/55	21/55	15/55	10/55	6/55	3/55	1/55
Crushed bones and bone meal	,, Arable land	4th year	6/10	3/10	1/10	—	—	—	—	—	—
	,, Permanent pasture	6th year	5/6	4/6	3/6	2/6	1/6	—	—	—	—
Purchased farm and police manure	,, Holding	4th year	6/10	3/10	1/10	—	—	—	—	—	—
Guano, dissolved bone, phosphates	,, Arable land	2nd year	1/3	—	—	—	—	—	—	—	—
	,, Permanent pasture	3rd year	4/8	1/8	—	—	—	—	—	—	—
Other artificial manures	Holding	Exhausted by one crop—no compensation	—	—	—	—	—	—	—	—	—
Linseed cotton or rape cake or other purchased artificial feeding stuffs of equal manurial value per ton	,, Arable land	3rd year	2/8	1/8	—	—	—	—	—	—	—
	,, Permanent pasture	4th year	3/8	2/8	1/8	—	—	—	—	—	—
Purchased grain consumed on holding	,, Arable land	2nd year	1/6	—	—	—	—	—	—	—	—
	,, Permanent pasture	3rd year	2/10	1/10	—	—	—	—	—	—	—
Other purchased feeding stuffs	,, Holding	Exhausted by one crop—no compensation	—	—	—	—	—	—	—	—	—

FORM C.

(Building Lease on Entailed Estate under Montgomery Act.)

It is Contracted and Agreed upon between *A.*, proprietor *qua* Heir of Entail in possession of the portion of land after mentioned on the one part, and *B.* on the other part, in manner following: That is to say, the said parties considering that by the Act of Parliament 10th George the Third, Chapter 51, every proprietor of an Entailed Estate in Scotland may grant leases of land for the purpose of building subject to the provisions of the said Act: Therefore the said *A.* has set and hereby lets to the said *B.* and his heirs, but subject to the declaration after written and expressly excluding, unless with the written consent of the landlord, sub-tenants, and all assignees legal or voluntary, All and Whole that plot or piece of ground part of the estate of *C.* [*describe it, giving extent and boundaries*]: Reserving to the landlord all mines, metals, minerals, coals, quarries of stone and lime, gravel, clay, marl, and all fossils of every kind within the said plot or piece of ground hereby leased with full power to search for, work, win, calcine, manufacture, and carry away the same at pleasure, and to sink bores and pits, make ponds, aqueducts, roads and railroads, and to erect and construct buildings and other works all as he may think proper, and whatever damage the tenant shall sustain by the exercise of the said reserved powers (other than damage caused by present or future underground workings for which the landlord shall incur no liability) the landlord shall be bound to pay the same as the amount thereof shall be ascertained by two neutral men to be mutually chosen, or in case of their differing in opinion by an oversman to be named by such neutral men: Which tack the said *A.* obliges himself and the heirs of tailzie succeeding to him in the said lands to warrant at all hands and against all mortals: For which causes and on the other part the said *B.* obliges himself and his heirs, executors, and successors whomsoever to pay to the said *A.* and his foresaids the yearly rent or tack-duty of £ sterling at the term of Whitsunday in each year, beginning the first term's payment thereof at the term of Whitsunday for the year preceding that term, and so forth yearly thereafter during the currency of this lease, with a fifth part more of each year's payment of liquidate penalty in case of failure in the due and punctual payment thereof, and the interest of the said rent at the rate of £7 per centum per annum from each term when the said rent becomes due until paid, and that at the office of the factor on the said estate of *C.*, or wherever else the same may be for the time, without the necessity of any demand being made therefor on the part of the landlord: Declaring that if at any time two years' rent together shall be unpaid these presents shall *ipso facto* become void and null without the necessity of any Declarator or other process of law whatever, and it shall be in the power of the landlord to resume possession of the said plot or piece of ground and all buildings and erections thereon in the same way in every respect as if this lease had actually expired: And the tenant binds and obliges himself and his foresaids as aforesaid to pay and to free and relieve the landlord of all public and parish or local burdens and other assessments imposed or to be imposed in respect of the plot or piece of ground hereby let and buildings that may at any time be thereon in the same way in every respect as if he, the said tenant, had obtained a feu-right thereof instead of this lease: And the tenant further obliges himself and his foresaids to erect upon the four sides of the said plot or piece of ground hereby let a suitable wall or fence to the satisfaction of the landlord or his factor, and to keep the same in proper repair during the currency hereof, and leave the same in similar repair at the expiry hereof, all at his the tenant's own expense: And it is also hereby declared that if upon the death during the currency hereof of the tenant in possession for the time no person shall lodge with the landlord or his factor within six months from the day of such death a writing claiming right as heir to this lease, or if the person so claiming right shall fail within six weeks after being required in writing to prove his or her propinquity to the landlord's satisfaction, and also to grant at his or her expense, and in such form as shall be approved of by the landlord, a personal obligation to pay the rents and fulfil the whole conditions and stipulations prestable from the tenant under these presents, then and in any of these events this lease if the landlord so chooses shall *ipso facto* cease and determine, and it shall be in the power of the landlord to enter into possession of the said plot or piece of ground and erections thereon in the same way as if this lease had been granted for the lifetime only of the tenant so dying; and the said tenant obliges himself and his foresaids to remove from the said premises hereby let at the term of Whitsunday [*insert here year of expiry*] without any legal warning or process of removing being used against them for that effect: Moreover, it is hereby declared in terms of the foresaid statute to be a condition of this lease that the same shall be void if one dwelling-house at least not under the value of £10 sterling shall not be built within the space of ten years from the date of the lease upon the ground comprehended in the

lease, and that the said house shall be kept in good tenantable and sufficient repair, and that the lease shall be void whenever there shall be no dwelling-house of the value aforesaid kept in such repair as aforesaid standing upon the ground hereby leased: And it is also hereby declared without prejudice to the foregoing obligation that the dwelling-house and other buildings to be erected by the tenant under these presents upon the said plot or piece of ground shall be of the annual value of not less than £ sterling [*insert here as a maximum three times the amount of the rent payable under the lease*]: And further, that the landlord shall have power at any time during the currency of this lease to purchase this lease, and such house or houses or other buildings as may be built upon the said plot or piece of ground hereby let at such price as may be fixed by arbiters mutually chosen, or by an oversman to be named by them in case of their differing in opinion, but such price shall in no case exceed the original or first cost of any house or houses or other buildings to be built upon the said piece of ground hereby let: And it is also hereby provided that the tenant shall lodge with the landlord or his factor within two months from the completion of the buildings to be erected by the tenant as aforesaid, and of his entry to the possession or use thereof a statement showing the actual cost of erection of the said buildings, and should the said tenant wish to sell or assign this lease and such house or houses or other buildings the landlord shall be entitled to the first offer of the same: And further, it is hereby specially provided and declared, that this lease shall become void and null and of no legal force or effect if any part of the buildings to be erected on the piece of ground hereby leased shall be at any time used as an hotel or public-house or place for the sale of excisable liquors without the written consent of the landlord for the time being: And further, that the tenant shall not be entitled to apply either by himself or through any other person or persons for any licence or certificate for the sale of such liquors in any part of the said buildings without previously obtaining such written consent, otherwise this lease shall similarly become void and null: And further, that the tenant shall be bound to form pavements and drains in connection with the said dwelling-house or other buildings, and maintain the same in proper order and repair if and when called upon by the landlord or the local authority for the district to do so: And the said *A.* obliges himself and his foresaids, and the said *B.* obliges himself and his foresaids, to implement and perform their respective parts of the premises to each other under the penalty of £50 sterling to be paid by the party failing to the party observing, or willing to observe, his part of the premises over and above performance: And the parties hereto consent to the registration hereof for preservation and execution.—IN WITNESS WHEREOF,

Leasing Making, or **Lese Majesty,** as it is more familiarly called, has been defined by Hume (i. p. 351) as "a verbal injury directed against the king; proceeding, or in the construction of law understood to proceed, from an evil disposition with respect to him, and intended to do him prejudice as a person."

The original meaning seems to have been broader, for by a Statute of Robert I. it is ordained "quod nullus sit conspirator nec inventor narrationum, seu rumorum, per quos materia discordiæ poterit oriri inter dominum regem et populum suum." The subsequent Statutes against leasing making, viz. 1424, c. 43; 1540, c. 83; 1584, c. 134; 1585, c. 10; and 1594, c. 209, condescend upon various ways in which the crime may arise, as "giving evil information," uttering speeches to the "disdain, reproach, and contempt of His Majesty," depraving his laws and Acts of Parliament, interfering between the king and his nobility; and they impose the punishment of death upon all who are guilty of any form of the crime. The last-named Statute even extends the like pains against "quhaever heares the said leesinges, calumnies, or slanderous speeches . . . and apprehends not the authors thereof or reveilis not the same." Finally, the Act of 1609, c. 9, was directed against those who raised discord between the inhabitants of the two kingdoms by writings or speeches tending to the remembrance of the ancient grudges between them.

The severity of these Statutes was declared a grievance in the Claim of Right. They had been unjustly used, notably in the case of the *Earl of*

Argyle (State Trials, vol iii. p. 441); and accordingly, by 1703, c. 4, the punishment was declared to be an arbitrary one. The penalty was still further reduced by 6 Geo. IV. c. 47, to fine and imprisonment, or, in case of a second conviction, banishment. By 7 Will. IV. c. 5, the punishment of banishment as relating to this offence was abolished.

The crime has ceased to exist *per se* in this country, and spoken words, except in so far as they are unaccompanied by actions, are not held to amount to sedition (Macdonald, 228). See SEDITION.

Legacies.

DEFINITIONS.

A legacy in our law is a bequest or gift *mortis causa* made by a testator, to take effect at or after his death, to the object of his bounty, who is called the legatee. Under the old law a legacy was, properly speaking, a gift of a moveable subject, but now the distinction between heritage and moveables is in this connection of little importance, since by the operation of the Conveyancing Statutes a will has been made capable of dealing with heritage.

There are two important rules which must be kept in mind in all questions of testate succession, a subject of which the discussion of legacies is a branch. These are: (1) that a Court of Construction is to be anxious to discover the intention of a testator, and, having discovered it, to apply it; and (2) that intestacy, as regards any part of a testator's estate, is, if possible, to be avoided (*Reynold*, 1884, 11 R. 759; *White's Trs.*, 1893, 20 R. 464).

It is the duty of the Court, if they can, to give a meaning to every clause of a will. If there is an absolute inconsistency, the latest clause will prevail, unless that is inconsistent with the general tenor of the will. In dispositions of heritage the dispositive clause prevails. The operative words of a deed, which are expressed in clear and unambiguous language, are not to be controlled, cut down, or qualified by a recital or narrative of intention (*Mackenzie*, 1896, 23 R. H. L. 33); nor is the substantive gift to be controlled by a subordinate clause (*Yeats*, 1880, 8 R. 171). The intention of the testator is to be gathered from the language which he used, and the circumstances in which he used it. The Court will not and must not make a will for him (*Schanck*, 1895, 22 R. 845).

The institutional writers discuss legacies under various heads. They distinguish—

General legacies.	The *legatum liberationis*.
Special legacies.	The *legatum rei alienæ*.
Universal or residuary legacies.	Legacies of heritage.
Demonstrative legacies.	Nuncupative legacies.

This classification is not free from the vice of cross division, but for convenience sake it may be retained.

A GENERAL LEGACY or *legatum quantitatis* is a legacy of so much money or other property not identified or rendered specific, as "I leave to A. £100." Such a legacy confers merely a personal right of action against the executor, who is liable for it if he has a sufficient sum of free executry in his hands to satisfy it. In the event of inadequacy of funds, general legacies abate *pari passu*, not according to priority of bequest (Ersk. iii. 9. 11. 12; Bell, *Prin.* 1876). But if a sum is left for a special purpose, what is necessary for that special purpose is to be left before abatement (Bell, *Prin.* 1876; *Caldwell*,

1736, Mor. 8066). If the free executry will not pay all the legacies, each legatee, in the absence of declaration to the contrary, must suffer a proportional abatement, and legacies granted for pious uses abate with the rest (*Monro*, 1630, Mor. 8048).

A *legatum generis* is a legacy of a subject bequeathed indefinitely, as a horse, a piece of tapestry, etc. This confers no *jus in re*; but the estate is not to be compelled to give the best, nor the legatee to accept the worst (Ersk. iii. 9. 13). When a legacy is otherwise general, the mere exception therefrom of something specifically described will not make the gift more specific, in the proper sense of the term, than it would be were there no such exception (*Robertson*, 8 App. Ca. 812). A power of selection may be conferred upon a legatee (*Macdonald's Trs.*, 1896, 23 R. 913; *Gray*, 1649, 1 Suppl. 408).

A Special Legacy is a bequest of a particular subject or debt or sum specially distinguished. It has the effect of an assignation *mortis causa*, and is completed by the testator's death; so that a special legatee has an action direct against the possessor of the fund or subject, or the debtor in the bond, the executor being made a party to the action in order that the rights of the creditors of the testator may be protected (Stair, iii. 8. 38; *Forrester*, 10 March 1627, Mor. 2194). Creditors of the deceased cannot be excluded by any legacy, but where they take in preference to a special legatee they must assign their debts to him. Special legacies do not abate so long as the estate can pay the testator's debts and the expenses of administration. A special legacy is not understood to be revoked by a posterior general disposition unless it contain an express revocation of it, but it will not be exigible if the subject of it perish (*Wauchope*, 1724, Mor. 8063), or if a bond is paid or uplifted (*Pagan*, 1838, 16 S. 383), unless it has perished through the fault or negligence of the executor (*Spreul*, 1665, Mor. 8052). In *Gray's* case, 1811, Mor. 8062, the executor was found not entitled to do diligence for a bond bequeathed to a special legatee. A special legacy of a personal bond was held to be evacuated by the testator taking an heritable bond for the same debt; but note that an heritable bond is now moveable *quoad* succession (Act 1868, s. 117).

A general legacy may come in the place of a special legacy if the testator declare that on the subject of the legacy being extinguished the legatee shall have a claim on the general estate.

A special legacy, if the subject of it is pledged, is taken *cum onere* (*Stewart*, 1891, 19 R. 310; *Murray*, 1890, 18 R. 287).

If an estate burdened by bonds affecting the heritable estate is left to a legatee by bequest, he, on taking the estate, is liable personally for the testator's debts to the extent of the value of it (37 & 38 Vict. c. 94, ss. 12 and 47; *Wright's Trs.*, 1891, 18 R. 841; *Welch's Exrs.*, 1896, 23 R. 772).

In England the rule would seem to be different. In *Ashburner*, 1786, 2 Bro. Ch. 107, Ld. Thurlow said: "I take it to be clear, if a testator gives a cup, which is in pawn, it is a full gift, and the executor must redeem" (see *Bothamly*, 1875, 20 L. R. Eq. 304). If the executor does not redeem it, the legatee is entitled to compensation out of the general funds. But this is not so when the testator shows that he meant the thing to be taken as it is (*Ledger*, 1862, 2 John. & H. 687; *Hawkins*, 1880, 13 Ch. D. 470). A special legacy must be of part of the testator's property itself, and of part, not the whole, and it need not be capable of ademption (Sir George Jessel in *Bothamly*, 20 L. R. Eq. 308, 309). A bequest of particular articles, followed by a gift of the residue, or a general gift followed

by an enumeration, will not make a special legacy (*Hodgson*, 1876, 2 Ch. Div. 122: *Chapman*, 1876, 4 Ch. Div. 800; *Fairen*, 1876, 3 Ch. Div. 309; *Fleetwood*, 1880, 15 Ch. Div. 594). The fact that a specific legacy is excepted out of a general legacy does not make the residue a specific bequest (*Ovey*, 1882, 20 Ch. Div. 676). A bequest of a specific fund to be sold and divided in definite shares is specific (*Jeffrey's Tr.*, 1866, 2 L. R. Eq. 68; *Walker*, 1827, 1 Y. & J. 557).

A Universal Legacy or Residue comprehends all the testator's estate, or what remains after satisfying expenses, debts, and other legacies (Stair, iii. 8. 38). It is a *unum quid*, though its amount may be affected by contingencies (*Storie's Trs.*, 1874, 1 R. 953); that is to say, a conditional bequest which lapses is to be regarded as a mere burden upon the original gifts of the residue, which flies off upon the lapse. The residuary legatee is not substituted or conditionally instituted to a special legatee, but is *ab origine* the residuary legatee, although the amount of the residue may be affected by contingencies. Where an entire estate is divided among a certain number of beneficiaries, and nothing is said about residue, if a share lapses from unforeseen causes it falls into intestacy, and the heirs of the testator, as at his death, are entitled to it (*Wilson's Trs.*, 1894, 22 R. 62; *Fulton's Trs.*, 1880, 7 R. 104; *Lord*, 1865, 3 M. 1083). The residuary legatee is so called because his universal legacy is burdened with the payment of particular legacies to others (Ersk. iii. 9. 6). A disposition, though it should bear to be of the grantor's whole goods and gear, will carry only such goods or moveables as have not before been made over or bequeathed to others (*Traquair*, 1826, Mor. 3591; *Munro*, 1712, Ersk. iii. 9. 11). The presumption is that the word "residue" occurring in a testamentary writing carries the residue of the testator's whole estate, and not merely the balance of a particular fund (*Millar*, 1894, 21 R. 921); but there may be partial residues (*Dournie's Trs.*, 1882, 9 R. 749; *Brown*, 1877, 5 R. 37; *Stobie's Trs.*, 1888, 15 R. 340). The residue clause has been held to carry heritage (*Wallace's Exrs.*, 1895, 23 R. 142). As a general rule, when other legacies lapse they fall into residue, lapsed shares of residue fall into intestacy (*Arbuthnot*, 1816, Hume, 274; *Fulton's Trs.*, 1880, 7 R. 566; *Wilson's Trs.*, 1894, 22 R. 62). The revocation of a gift to one of a body of joint legatees causes the share to fall into residue (*Scott*, 1843, 5 D. 520). The debtor of the deceased does not become the debtor of the residuary legatee any more than of a general legatee, and a residuary legatee has consequently no title to sue him (*Hinton*, 1883, 10 R. 1110; *Henderson*, 1889, 16 R. 341; *Rae*, 1888, 15 R. 1050; but see *Teulon*, 1885, 12 R. 971, and *Watt*, 1890, 17 R. 1201).

Demonstrative Legacy.—A demonstrative legacy is a bequest payable out of or secured upon a particular fund or security (*Douglas' Exrs.*, 1869, 7 M. 504). Where a legacy is to be paid out of a particular fund, the legatee cannot recover it from the executors if the fund out of which it is payable should perish or be exhausted, unless it appears from the will that the reference to a particular fund was merely to indicate a source of payment (*Wauchope*, 1724, Mor. 8063); and in case of doubt the presumption is in favour of the reference to a particular fund being demonstrative and not taxative (*Bell*, 1847, 9 D. 712; *Hagart*, 1834, 13 S. 35). A direction to apply a share of residue or a general legacy in the purchase of lands, etc., for a legatee does not give him a preferable right to the price over other legatees. The legacy is held to be not special but general (*Dewar*, 1864, 2 M. 910; *Hamilton*, 1833, 6 W. & S. 533). A demonstrative legacy is so far of the nature of a specific legacy that it will not abate until after the fund out

of which it is payable is exhausted; and so far of a general legacy that it will not be adeemed by the non-existence of the fund or property pointed out (*Mullins*, 1860, 1 Drew. & Sm. 210; *Williams*, 1857, 24 Beav. 474; *Vickers*, 1858, 6 H. of L. Ca. 885; *Hodges*, 1867, 4 L. R. Eq. 140). If a sum out of a debt is given to one person and the residue to another, the legacies are specific, but if the testator says, "I give a legacy of a particular sum to A. and desire it to be paid out of a particular debt," that is merely demonstrative (*Duncan*, 1859, 27 Beav. 390; *Vickers*, *supra*).

Legatum Liberationis.—This is the name given to the bequest to a debtor of the value of his debt. A bequest to debtors of "a free discharge of everything they may owe me at my death" does not comprehend sums coming into their hands on account of the testator (*Graham*, 1792, Mor. 8108). A right may also be conferred by the deceased upon his debtor by providing that the debt shall not be disturbed for a period of time (*Lowson*, 17 R. 571). A father directed his trustees to "allow the whole fund belonging to me which may, at the date of my death, be lent or invested in the business of J. L., to remain on loan for the period of twenty years." Sons and daughters were interested in the succession. It was held that although by the ordinary rule of law the death of a partner dissolved a partnership, yet it would be doing violence to the will of the testator to call up the money to pay a daughter's share.

Legatum rei Alienæ.—This is the bequest of a subject that does not belong to the testator. If he did not know that the thing was another's, which, *in dubio*, is to be presumed, there is no legacy; but if he knew that it was not his own, the legacy is good, on the principle that the executor is bound to purchase the subject. The same or a similar principle governed bequests of subjects in a testament which could not, under the old law, be so dealt with (*Falconer*, 1664, Mor. 13301; *Cranston*, 1674, Mor. 8059; *Douglas' Trs.*, 1862, 24 D. 1191; *M'Donald*, 1876, 4 R. 45; Ersk. iii. 9. 10).

Legacy of Heritage.—Prior to the Conveyancing Acts of 1868 and 1874, which introduced an important change into the law, heritage was not transmissible by testament, but even before these Acts a legacy of heritage could in certain circumstances be validly made. These circumstances were that there should be clear evidence in the deed that the testator meant to convey heritage; and that the legacy could be claimed from a person taking benefit from the deed in which the legacy was bequeathed, or so connected with the deed that he could be compelled under the principles of approbate and reprobate to give effect to it in its full intention.

Similarly, lands could be burdened by a clause in a testament if appropriate terms were employed, and not merely introduced as accessory to the testament. While the heir-at-law could not be burdened by a mere testament, yet where heritage was disponed by *mortis causa* deed to a stranger, the disponee could be burdened with debts and legacies in a separate testament (*Davidson*, 1755, 5 Bro. Supp. 289). Where moveable estate was conveyed to an heir-at-law, and at the same time burdens were imposed on the heritage, he could keep himself clear by refusing to accept the moveables. But if the deed validly embraced both heritage and moveables, and burdened them with legacies, he could not free himself by making up a title as heir-at-law. There was a valid conveyance of the heritage upon which burdens had been imposed, and the legatees could make good their claims against the heir in whatever way he took up the heritage. Even a simple bequest of lands in a testament was good if the testament contained provisions in favour of the heir, and he accepted them

(*Binning*, 1742, Elchies, *voce* "Test," No. 7; *Cunningham*, 1758, Mor. 617: *Dundas*, 1829, 7 S. 241; aff'd. 1830, 4 W. & S. 460).

But now, by sec. 20 of 31 & 32 Vict. c. 101, it is provided that where any deed or writing contains, with reference to lands, any words which would, if used in a will with reference to moveables, be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be taken to be equivalent to a general disposition of such lands within the meaning of the 19th section thereof, by the grantor of such deed or writing, in favour of the grantee thereof, or of the legatee of such lands, and shall create, in favour of such grantee or legatee an obligation upon the successors of the grantor to make up titles in their own persons to such lands, and convey them to such grantee or legatee. And it shall be competent to such grantee or legatee to complete his title to such lands in the same manner and to the same effect as if such deed or writing had been such a general disposition in his favour, and that either by notarial instrument or in any other manner competent to a general disponee. See also secs. 21 and 27 of Act 1874, 37 & 38 Vict. c. 94.

The deed must purport to convey heritage; "the only difference is that it is no longer a question of technicality, but of common construction, whether heritage was intended to be conveyed or not" (*Hardy's Trs.*, 1871, 9 M. 736; *Pitcairn*, 1870, 8 M. 604; *Edmond*, 1873, 11 M. 348). A bequest of heritage and a bequest of moveables are placed by the Statute of 1868 in precisely the same position as regards formality of conveyance (*M'Leod's Trs.*, 1875, 2 R. 481; *Urquhart*, 1879, 6 R. 1026). The mere nomination of an executor will not carry heritage (*Grant*, 1893, 20 R. 404).

Numerous decisions have been given in particular instances upon the question whether words used in wills would carry heritage or not (*Robb's Trs.*, 1872, 10 M. 692; *Studd*, 1883, 10 R. H. L. 53; *Oag's Curator*, 1885, 12 R. 1162: *Aim's Trs.*, 1880, 8 R. 294; *Ford's Trs.*, 1884, 11 R. 1129: *Farquharson*, 1883, 10 R. 1253; *Farquhar*, 1875, 3 R. 71; *Forsyth*, 1887, 15 R. 172). In the first place, there is no settled rule to the effect that any particular form of words is required to operate a conveyance of heritage under a testamentary deed. In the second place, though there are no direct words of gift, yet if the deed, taken as a whole, clearly imports an intention on the part of the testator to make a conveyance of heritage belonging to him, that is enough (*M'Leod's Trs.*, 1883, 10 R. 1056; *Campbell*, 1887, 15 R. 103).

The residuary clause in a will may convey heritage if the tenor and contents of the will show that the testator so intended (*Wallace's Exrs.*, 1895, 23 R. 142).

Nuncupative Legacy.—A legacy may be left verbally, and if proved by parole will be sustained to the amount of one hundred pounds Scots, and that though it be nominally a legacy of greater amount (*Kelly*, 1861, 23 D. 703). If expressly left, it will be effectual even though the testator directed that it should be put in writing (*Mitchell*, 1744, Elchies, "Legacies," No. 13; Dickson, 633), but an informal will will not be sustained as importing nuncupative legacies.

Where one who would not otherwise succeed is named residuary legatee, and verbal directions are given to him, which he acknowledges, they are effectual as a condition of the trust (*Hannah*, Mor. 3837). But this is not the rule where the residuary legatee is also one of the next-of-kin (*Smith*,

1749, Mor. 6594), nor does the rule apply to a disposition to a mere trustee (*Forsyth*, 1854, 16 D. 343).

Abatement.—If the whole legacies exceed the dead's part of the free gear, regularly, they are abated proportionally wherein there is no preference nor privilege granted to legacies granted *ad pias causas*. But if the defunct express his will to leave a legacy without defalcation, it will not be defalked with the other legacies (Stair, iii. 8. 39).

If abatement has to take place, the first to suffer is the residuary legatee, then the general legatees, lastly the special legatees; that is to say, the debts of the estate primarily affect the residue (*Tait's Trs.*, 1886, 13 R. 1104). A legacy for mournings is preferable to other legacies, to the extent of the cost of suitable mournings.

A legatee is entitled to decree constituting his legacy, although it is provided by the will that in the event of an insufficiency of funds the legacy shall abate, and it is not certain that the funds are sufficient (*Bazet & Co.*, 1826, 5 S. 50).

Who can Bequeath Legacies.

A legacy being a form of disposition, whether it be made directly to the legatee or indirectly through a trustee, the power of bequeathing legacies belongs to everyone who has the power of disposal of property. Consequently every person of full age, and subject to no legal or natural incapacity, can make a legacy, which will be good if he leaves free estate to satisfy it. Our law allows perfect freedom of bequest not only in the original limitations of a will, but in conditional institutions and other rights of a subsidiary character, intended to have effect in certain contingencies. The restrictions upon this power may be considered under the following heads:—

1. A married man who dies, leaving a wife and child or children, or a wife or child, can, apart from rights conferred upon him under marriage contract, affect no part of his moveable estate by testamentary writings, except the dead's part; that is to say, the claim of the widow to *jus relictæ*, and of the children to legitim, is preferable to the claim of a legatee. Similarly, over heritage the wife has a right to terce.

2. A married woman can dispose both of her heritable and moveable estate by *mortis causa* deed without her husband's consent, but in her case also the husband has a claim to *jus relicti* and to courtesy, the children to a share of her moveables, under the Act 1881 (*Simon's Trs.*, 1890, 18 R. 135).

3. A pupil cannot test or leave legacies.

4. A minor can test upon moveables with or without curators; and if he has curators, his testament dealing with moveables is good without their concurrence. But he cannot, even with his curator, alter the succession to his heritage, though this is not true of that part of his heritage which is heritable merely *destinatione* (*Brand*, 1874, 2 R. 258).

5. An interdicted person can test without the consent of his interdictors (*Mansfield*, 1841, 3 D. 1103; *Gray*, 1751, 5 Bro. Supp. 790).

6. *Insane Persons.*—A deed granted by a person labouring under mental incapacity may be reduced. But a will made during a lucid interval will be sustained, and the reasonable nature of the deed itself is an important element (*Nisbet's Trs.*, 1871, 9 M. 937; see also *Ballantyne*, 1886, 13 R. 652). Insanity does not as a matter of law constitute incapacity to test. It is evidence of incapacity, more or less conclusive, according to the extent to which it has affected the mental operations of the testator. It has been said that a testament does not require the same degree of mind as a bargain

does (*Hogg*, 1828, 4 Mur. 449; *Campbell*, 1827, 4 Mur. 179). A general allegation of insanity will not be sent to proof if there is nothing unreasonable in the will, and facts admitted are presumptive of sanity (*Hope*, 1896, 23 R. 513).

7. A blind man can make a will (*Fife*, Sh. App. 498); and so can a deaf mute, if he be intelligent and capable of conversing by signs (*Kirkpatrick*, 1853, 15 D. 734).

How Granted.

A legacy may be made in a testament or codicil or other testamentary writing, however informal; it may be by way of direct gift to a legatee, or by direction to an executor or trustees to convey, or by way of burden upon another's right; and in the case of a legacy of small amount it may be made verbally. But to grant a bill or cheque payable after death is not a *habile* way of making a legacy (*Milne*, 1884, 11 R. 887; *Dowie*, 1786, Mor. 817; *Wright*, 1761, Mor. 8088).

A codicil is a writing by which legacies are bequeathed without the nomination of an executor. The name is frequently given to deeds by which a testament is altered, whether they be testamentary in form or not. Codicils prior in date to the leading settlement, and ancillary to one which has been revoked, are not effectual (*Stewart*, 1841, 3 D. 463). A codicil need not be in ink (*Muir's Trs.*, 1869, 8 M. 53), though pencillings are presumed to be deliberative, at least if unsigned (*Lamont*, 1887, 14 R. 603; *Munro*, 1890, 18 R. 122).

If we omit nuncupative legacies, it may be said that for the constitution of a valid bequest it is necessary that the grantor should have expressed in writing, though not necessarily in ink (*Simson*, 1883, 10 R. 1247), a complete testamentary intention with respect to a subject which can be identified, and for the benefit of an object of his bounty capable of discovery from the indications in the will, assisted by such extrinsic evidence as the law allows: though as a testament the deed may be informal (*Kemps*, 2 Mar. 1802, F. C.). No improbative writing (including here under probative holograph writings) will by itself have effect as a will or codicil, though a writing, in itself improbative, may be adopted or provided for by anticipation in a will duly authenticated (*Wilson*, 1861, 24 D. 163; *Young's Trs.*, 1864, 3 M. 10; *Crosbie*, 1865, 3 M. 870; *Maitland's Trs.*, 1871, 10 M. 79). It is an invariable rule that testamentary deeds shall receive the most liberal interpretation, and that which carries the presumed intention of the testator into effect (Ersk. iii. 8. 47). It is settled that a testamentary and revocable deed is to be held as the *ultima voluntas testatoris*; that is, as approved of and confirmed down to the last hour that he is of a disposing mind (Ld. Corehouse in *Hyslop*, 1834, 12 S. 413). "It is not necessary for the validity of a will that the testator's scheme of disposition should be just, rational, or even self-consistent. A will may do violence to the rules of logic, grammar, and arithmetic, it may even be wanting in some of the essentials of a proposition, and yet it shall be the duty of a Court of Construction to make sense of it" (M'Laren, p. 637).

On the other hand, scrolls, drafts, and letters of instruction which do not embody a completed testamentary act will not have effect given to them (*Forsyth's Trs.*, 1872, 10 M. 616; *Sibbald's Trs.*, 1871, 9 M. 399; *Lowson*, 1866, 4 M. 631; *Scott*, 1864, 2 M. 613); and by uncertainty and unintelligible complexity a will is void (*Mason*, 1844, 16 Jur. 422).

In *Colvin*, 1885, 12 R. 947, it was found that a signed list of objects and sums of money, though entitled "Will of John Brennan," did not constitute

a will. In that case it was observed that while there was no objection to putting the legacies in a schedule, provided there were significant words of bequest capable of being applied to it, yet it was impossible to accept a mere schedule as an expression of testamentary intention on which a Court of Construction could safely act (see also *Speirs*, 1879, 6 R. 1359). It would seem that in Scotland a will is not void because witnessed by a legatee (*Ingram*, 1801, Mor. "Writ," App. No. 2; *Grahame*, 1685, Mor. 16887), nor does the legacy fall (*Simson*, 1883, 10 R. 1247).

"Where a man is his own conveyance, as it has been quaintly expressed, meaning when he himself conveys his property directly to the persons he means to favour, any technical expressions shall have their strict technical meaning and effect, and no other, unless it appears clearly from the context or other part of the deed that they were used in another sense. But in a will where the testator does not convey to the parties he means to favour, but to executors or trustees, to whom he expresses his wishes, leaving them to do what may be necessary to accomplish them or carry them into execution, the general rule is that any technical words occurring in the expression of the will or wish shall be construed with reference and in subservience to the intention of the testator, to be collected from the whole instrument, and that it is the duty of the trustees or other executors of the will to do what will be legally efficacious to fulfil the intention" (Ld. Young in *Mitchell's Trs.*, 7 R. p. 1090).

A bequest may fail because the quantity of the interest to be taken is indeterminate, and the context shows that the donee is not meant to take a gift of residue (*Ewen*, 1830, 4 W. & S. 346). Or it may be void for uncertainty, because the objects are not sufficiently designed. For example, in *Sutherland's Trs.*, 1893, 20 R. 925, a provision that the residue was to be disposed of "as my trustees think proper" was held invalid. A bequest to charitable and religious purposes to be selected by trust disponees fails by their death, as does also a power to select among individual legatees (*Robbie's Jud. Fact.*, 1893, 20 R. 358). The Court will not authorise assumed trustees or a judicial factor to exercise a discretionary power where there is a manifest *delectus personæ* and intention to intrust such powers to a particular person (*Robbie's Jud. Fact.*, 1893, 20 R. 358; *Mackay*, 1867, 5 M. 1004; *Allan*, 1869, 8 M. 139; *Hill's Trs.*, 1874, 2 R. 68; see *Simson, Petr.*, 1883, 10 R. 540). It is at the best doubtful whether by a will a general and unlimited power of distribution can be given to another (see *Sutherland's Trs., supra*; *Henderson's Trs.*, 1880, 7 R. 601), but where a trustee who had a power of selection was insane, the bequest was held unqualified (*Hill's Trs., supra*).

Precatory Trust.—The maker of a will, instead of directly bequeathing a legacy, may use expressions calculated to express a *wish to bequeath*, or a request to a trustee, which is termed a precatory trust, and in these cases the bequest is good. The wish is binding on the executors or trustees as an implied trust, and similarly in a bequest to A. for himself and B. (*Crichton*, 1828, 3 W. & S. 329; *Nasmyth*, 1662, Mor. 5483; *Dundas*, 1837, 15 S. 427; *Macpherson*, 1894, 21 R. 386; *Mags. of Dundee*, 1858, 3 Macq. 134).

Mr. Lewin, in his book on *Trusts*, 9th ed., 137, summarises the import of the cases in England as follows: "If the testator desire, will, request, will and desire, will and declare, wish and request, wish and desire, entreat, most heartily beseech, order and direct, authorise and empower, recommend, beg, hope, do not doubt, be well assured, confide, have the fullest confidence, trust, trust and confide, have full assurance and confident hope, be under the firm conviction, in the full belief, well know, or use such expres-

sions as 'of course the legatee will give,' 'in consideration the legatee has promised to give,' to be applied as I have requested him to do, then the legatee is bound to give effect to the injunction."

From this class of case must be distinguished that in which the wish of the testator is that the legatee shall dispose of the gift in a particular way on his (the legatee's) death. This in no view can amount to more than a simple destination, defeasible at pleasure (*Barclay's Exrs.*, 1880, 7 R. 477).

A gift may also be given by implication, so long as the implication implies testamentary desire. Thus if a testator shows that he supposes that he has bequeathed a certain subject, and refers to the bequest as an accomplished fact, this is equivalent to a bequest (*Grant*, 1851, 13 D. 805). Similarly, where a testator provided for payment of an annuity of £150 as the annuity provided in a marriage contract, and it turned out that the marriage contract only bound him to pay £100, it was said, "The collocation of this clause in which he mentions the annuity to his widow clearly showing it to be in the region not of debt but of gift, I think the intention of the testator was to confer a bounty, and not merely to discharge an antecedent liability" (*Forbes*, 1895, 20 R. 248). Again, a gift may be implied from a recital of intention to give, not followed by an express gift, especially in family settlements (*Mearns*, 1775, Mor. 13050; *M'Gowan*, 1842, 4 D. 1546), but such implication will not be made to serve to burden a gift (*Bryce's Trs.*, 1878, 5 R. 722).

If a legacy is given to take effect on the death of a particular person, or upon his death in minority or without issue, there is a strong presumption that he is meant to take a liferent of the fund, or that if he survives minority, or has issue, a vested interest is to be taken (*Aberdein's Trs.*, 1870, 8 M. 750). Again, a fee can be conferred by implication on the children of A. if an annuity or similar right be given to him, and third parties are made conditional institutes in the event of his death without issue, and this even where the *conditio si sine liberis* does not apply (*Douglas*, 1843, 6 D. 318; *Campbell*, 1852, 15 D. 173). Other gifts by implication may be found in *Wedderburn*, 1666, Mor. 6587; *Cromarty*, 1764, Mor. 6601.

A direction to trustees to apply the interest of a moveable fund for the benefit of legatees may be read as a bequest of the principal. For instance, where a testator directed his executors to invest £2000 for the benefit of his son and daughter equally, and as to each of the shares to pay the interest thereof, or apply it to the use of his said son and daughter, with the declaration, "I leave it to my executors entirely in what manner to apply these sums, whether to pay the same directly, or apply it and pay it to others for behoof of my son and daughter," there was held to be a bequest of capital (*Sanderson's Trs.*, 1860, 23 D. 227; *Lawson's Trs.*, 1890, 17 R. 1167). It was also stated in *Sanderson's Trs.* that there is no rule that the bequest of the interest of a sum of money carries the principal when not specially destined.

If an estate or a sum of money be given to an individual who is *sui juris*, with words indicative of the intention of the testator that he should have the absolute *jus disponendi*, the words are to be taken as indicating an intention that he should be the absolute owner (*Pursell*, 1865, 3 M. H. L. 59), and subsequent limitations are void from repugnancy (*Miller*, 1890, 18 R. 301; *Wilkie's Trs.*, 1893, 21 R. 198; *White Trs.*, 1896, 23 R. 836). Where a bequest is given absolutely with a declaration that the subject is not to fall under the legatee's marriage contract the declaration may be defeated for want of a trust (*Douglas Trs.*, 1879, 7 R. 295; *Simson's Trs.*, 1890, 17 R. 581).

Mutual Wills.—Mutual wills, in practice, are usually executed by spouses, in which case they are revocable by either party as donations, except in so far as they are onerous. "Mutual remuneratory grants between the spouses, made in consideration of each other, are not revocable where there is any reasonable proportion between the value of the two; for as trifling inequalities ought to be overlooked in the transactions of those who are so closely united, the excess on the one side ought to be considerable in order to found the party who is hurt in a right of revocation" (Ersk. i. 6. 30; *Stiven*, 1873, 11 M. 262; *Rae*, 1875, 2 R. 676; *Beattie*, 1884, 11 R. 846; *Kay's Trs.*, 1892, 19 R. 1071). So far as onerous, they are contractual, and cannot be revoked (*Buchanan's Trs.*, 1890, 17 R. H. L. 53: *Croll's Trs.*, 1895, 22 R. 677; *Mudie*, 1896, 23 R. 1074). Even if onerous as between the spouses, they may be gratuitous, and therefore revocable, as regards third parties (*Hogg*, 1863, 1 M. 647; *Lang*, 1867, 5 M. 789; *Martin*, 1893, 20 R. 835). If there is no mutuality, the deed may be revoked by one spouse (*Beattie*, 1884, 11 R. 846; *Mitchell*, 1877, 4 R. 800; *Hunter*, 1831, 5 W. & S. 455; *Melville*, 1879, 6 R. 1286). Power in a survivor to use or encroach has been construed as limited to encroachment during the life of the survivor and for the use of the latter (*Reddie's Trs.*, 1890, 17 R. 558). The exercise of a power of revocation operates the withdrawal of the estate of the person so revoking from the embrace of the settlement, and legacies and shares of residue suffer a proportionate diminution (*Wilson's Trs.*, 1861, 26 D. 163). The will may be so worded as to affect only the survivor's property at the date of his or her death; in which case he or she may affect that estate during her life by gift or otherwise; or the survivor may have a full right of fee (*Hagart's Trs.*, 1895, 22 R. 625; *Nicoll's Exrs.*, 1887, 14 R. 384). Mutual wills are presumed not to affect the savings of a surviving spouse (*Berwick's Exrs.*, 1885, 12 R. 565; *Morris*, 1882, 9 R. 952). In the case of *Berwick's Exrs.* a lapsed legacy went to the next of kin of the wife, who was the survivor.

It has been said that a mutual will is not merely a declaration of intention, but an obligation not to revoke. Therefore a mutual will is a sort of contract (*M'Millan*, 1850, 13 D. 187). Accordingly, it is usual to have an express power of revocation in the deed. There is a presumption in favour of the terms being testamentary and not contractual (*Traquair*, 1872, 11 M. 22). Ld. M'Laren says that mutual wills are simply two wills in one instrument, and that there is no difference in the principles of construction applied to those executed by spouses and those executed by persons who are not married to one another (vol. i. 421).

Where two sisters executed a mutual will, with power to revoke, and one of them revoked, it was held that this affected her part of the estate, but did not involve forfeiture of her rights in the sister's estate (*Lang's Trs.*, 1885, 12 R. 1265).

Destinations in Bonds, etc.

The succession to stock certificates, bonds, and certificates of debt of public companies, and, in principle, assignations of moveable estate of every description and railway debentures, may be regulated by the destination contained in these instruments (*Connal's Trs.*, 1886, 13 R. 1175; *Buchan*, 1879, 7 R. 211). The rule is different with regard to deposit receipts (*Walker's Trs.*, 1878, 5 R. 965; *Cuthill*, 1862, 24 D. 849; *Miller*, 1874, 1 R. 1107). The leading case on the subject is that of *Connal's Trs.*, which decided that where a person takes these securities with a destination, and either before or after makes a general disposition, the latter will not

evacuate the special destination. Such bonds would, however, probably fall under a general disposition of the legatee or successor. Just as there is a pretty strong presumption against the revocation of a special bequest by a general settlement (*Kenmore's Trs.*, 1869, 7 M. 771; *Walker's Exrs.*, 1878, 5 R. 965; *Glendonwyn*, 1870, 8 M. 1075; *Sutherland's Trs.*, 1893, 20 R. 925; rev. 1873, 11 M. H. L. 33), so a general revocation or general conveyance will not necessarily or usually affect a previous settlement or destination of a special subject by the same testator. Our law is more favourable to the admission of extrinsic evidence in these cases than the English law is (*Campbell*, 1878, 6 R. 310; rev. 1880, 7 R. H. L. 100; *Thoms*, 1868, 6 M. 704; *Lang's Trs.*, 1885, 12 R. 1265). In order to keep a special destination out of the embrace of a general settlement, it is the duty of the litigant who says that the special destination has not been defeated, to show to the satisfaction of the Court, either by the terms of the testator's settlement or by other documents to which it is legally competent to refer, that it was not the intention of the testator to disturb the standing investiture (*Hamilton*, 1894, 21 R. H. L. 38; see *Walker*, 1895, 23 R. 347; *Hamilton*, 1894, 21 R. H. L. 38). If the bonds or other deeds are undelivered, a general settlement will evacuate them (*Balvaird*, 5 Dec. 1816, F. C.; *Hill*, 1755, Mor. 11580).

Subject of the Gift.

The subject of the gift, whether it be special legacy, general legacy, or residue, may require construction. The intention of the testator as expressed in the will furnishes the fundamental rule.

When a man conveys his property directly to the persons he means to favour, any technical expressions have their strict technical meaning and effect and no other, unless it appears from the deed that they were used in another sense. But where the direct conveyance is to trustees or executors who are to carry the testator's wishes into execution, then technical words occurring in the expressions of the will are to be construed with reference to the intention of the testator to be collected from the whole instrument (see *Mitchell's Trs.*, 7 R. at p. 1090). With regard, therefore, to the subject of the gift, words used will be interpreted in their strict and primary sense, unless there is something in the deed to show that they were used in another sense.

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

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

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

3. The general words, whether heritable or moveable, must be appropriate to the quality of the estate to be given (*Paterson*, 9 Feb. 1800, Hume, 128; *Sutherland*, 1805, Hume, 133; *Clouston's Trs.*, 1889, 16 R. 937). In

this last case the word "heritable" was interpreted so as to affect the whole of a mixed estate (see also *Neilson*, 1860, 22 D. 646).

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

"Goods, gear, and sums of money" will carry corporeal moveables, not debts (*Mochrie*, 1736, Mor. 5018; *Brown*, 3 Dec. 1805, Mor. "Clause," App. No. 5). "Goods, gear, debts, etc.," will not carry heritable debts secured by adjudication (*Ross*, 1771, 2 Pat. 254; *Galloway*, 12 Jan. 1802, 13 F. C., 57 Mor. 15950; *Crawford*, 1838, 16 S. 1017). "Goods and gear, whether heritable or moveable," do not carry a lease (*Sutherland*, Feb. 1805, Hume, 133; *Paterson*, 1800, Hume, 128). "Moveables whatsoever," with words descriptive of corporeal moveables, will not carry moveable bonds (*Dunbar's Trs.*, 1808, Hume, 267). "Moveable estate" following corporeal moveables does not include moveable rights (*Carsewell*, 1858, 20 D. 516). "Cash" includes current coins and bank notes, but not bonds, bills, or securities (*Jarvie*, 1860, 22 D. 1395). "Money wherever deposited" was held equivalent to residue of moveable estate (*Easson*, 1879, 7 R. 251; *Grant's Trs.*, 1886, 13 R. 646). A gift of "income" has been distinguished from a gift of the liferent of a capital sum, in that under "income" recurring payments will be included (*Frier's Trs.*, 1896, 24 R. 437; *Strain*, 1893, 20 R. 1025). "Furniture" includes articles of domestic use, but not books or wine (Bell's *Prin.* 1872). "The whole of the furniture in her own bedroom and any other she may choose for furnishing her house," was held to give a power of choosing liberally but fairly similar articles to those in her own bedroom (*Reed*, 1835, 13 S. 810; see *Macdonald's Trs.*, 1896, 23 R. 913). Where a testator disposed separately of his heritable and moveable estate, "moveable estate" included heritable bonds, because they are moveable *quoad* succession (*Cunningham*, 1889, 17 R. 218; *Hughes' Trs.*, 1890, 18 R. 299). "Property and estate" are the two most general words, and they include both heritage and moveables (*Grant*, 1893, 20 R. 407; *Oag's Cur.*, 1885, 12 R. 1162). "Effects" does not apply to heritable estate (*Pitcairn*, 1870, 8 M. 604; but see *Forsyth*, 1887, 15 R. 172). A legacy of the interest of a particular sum has sometimes been interpreted so as to carry the capital (*Sanderson's Exrs.*, 1860, 23 D. 227). "Free money" includes moveable funds, not merely cash in bank, less debts but not legacies (*Smith*, 1829, 7 S. 734).

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

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

In *Melvin*, 1824, 3 S. 31, a testator left his estate to a general disponee, under burden of paying all legacies he might thereafter appoint by writing under his hand, however informal. He then, in a letter addressed to a third party, bequeathed a legacy payable out of a sum which he said was in a certain bank. At the date of the letter there was no such sum in the bank, but at the date of his death there was. The legacy was held to be good.

Panton, 1824, 2 S. 632, illustrates what will not and what will be held sufficient. A testatrix had left a general disposition for payment of debts and legacies. On her death there were found in a desk bills and deposit receipts and two documents. The one was pinned to a deposit receipt for £208, and was holograph. It ran as follows: "Sept. 15, 1820.—The bill within this paper you give Miss Panton £100; Janet Martin, my servant, £100; to Kitty, my girly, £5. The is more if Miss Martin serve be with at time, let have the remaining £3." This document was held to give the parties named right to the sum in the deposit receipt. The other one, which was found inoperative, was also holograph and signed, but had no bill or receipt attached to it. It was in these terms: "1820.—The bill within this paper you will give £100 to Miss Jane Panton; £50 to Janet Martin, my servant; £5 to my girly Kitty Martin, to receive after my death."

It would seem that a legacy of an indefinite sum would be void for uncertainty unless someone was given power to fix the amount (*Stewart*, 26 Nov. 1813, F. C.; *Murray*, 1749, Mor. 4075; *Snodgrass* 1806, Mor. "Ser. of Heirs," App. No. 1; *Campbells*, 1738, Mor. 4076).

Legacy by Heir of Entail of Charge on Entailed Estate.—By the Entail Amendment Act 1875, s. 11 (amended by Act, 1882), an heir of entail in possession may charge the entailed estate for improvement expenditure by granting a bond and disposition in security for three-fourths of the amount authorised to be borrowed: if he dies without doing so, anyone to whom he has bequeathed his right may have the heir in possession ordained to grant a bond and disposition in security for the amount with which the deceased might have charged the estate. It has been held that the legatee is only entitled to three-fourths of the amount expended, and three-fourths of the actual or estimated expenses of the application to secure the bond (*Leith*, 1888, 15 R. 944).

Object of the Gift.

The object of a testamentary gift may be: (1) individuals named and designed so as to be capable of being identified; (2) charities or objects of public utility; (3) a class of persons either in existence or yet to come into existence. Here also the rule is that the Court is to give effect to the testator's intention as expressed in the deed or deeds. And with regard to the description of the legatee, it is enough *dummodo constet de persona*. A legacy was sustained although both the Christian and married name of the legatee were wrongly given (*Keiller*, 1824, 3 S. 396). Again, where legacies were left to each of the daughters procreate of the marriage betwixt A. B. and C. D. £400 . . . £1200, and there were four daughters, each was held entitled to £400 (*M'Lehose*, 28 Feb. 1815, F. C.; see also *Macfarlane's Trs.*, 1878, 6 R. 288; *Millar's Trs.*, 1891, 18 R. 989; *Bryce's Trs.*, 1878, 5 R. 722). The principle applied in these cases seems to be that if there is an inaccurate enumeration of the persons composing a class, the enumeration will be disregarded, and the legacy will be payable to the class.

A designation may be defective in that it does not indicate with

certainty, to a person ignorant of the circumstances of the testator and the legatee, whom it is meant to favour. In that case the maxim applies *certum est quod certum reddi potest*. A legacy to my late brother James' son was held effectual though the only child of James was a daughter (*Macfarlane's Trs.*, 1878, 6 R. 288).

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

Where a legacy is left to a society, secular or religious, and it has changed its name or been amalgamated with another, if the elements of continuity of title and identity of purpose are present, the legacy will still be due (*Pringle*, 1823, 2 S. 588; *Sommervail*, 1830, 8 S. 370; *Wilson's Exrs.*, 1869, 8 M. 233). A bequest "to all my creditors of whatever sums shall be necessary for making up full payment of the balances remaining due to them, as the same shall be set forth in a list which I intend to leave," did not fail for want of a list (*Sprot*, 1855, 17 D. 840). A letter addressed to one of the beneficiaries has been held a competent means of interpreting an ambiguous bequest (*Ritchie*, 1880, 8 R. 101). A bequest to the testator's second cousins has been held to include, in the circumstances of the case, first cousins once removed (*Drylie's Factor*, 1882, 9 R. 1178). Bequests left to trustees for "any of the testator's blood relations" that the trustees should think the most fit, "to such of the truster's mother's relations as they should appoint," "to such of his friends and relations as should be pointed out by his wife," and other similar bequests, have been sustained (*Wharrie*, 1760, Mor. 6599: *Murray*, 1729, Mor. 4075: *Snodgrass*, 1806, Mor. "S. of H." App. No. 1; *Crichton*, 1828, 3 W. & S. 329; *Brown's Trs.*, 1762, Mor. 2318; *Cairnie*, 1837, 16 S. 1). But in these cases, if the trustees predecease or fail to take up the trust, the bequest lapses (*Robbie's Jud. Factor*, 1893, 20 R. 358; *Dick*, 1758, Mor. 7446). "Relations" includes relations on the mother's side as well as those on the father's (*Brown's Trs.*, 1762, Mor. 2318); and under "nearest relations" were included the children of a sister uterine, who was named in other parts of the settlement along with the testator's brother german (*Scott*, 1855, 2 Macq. 281; *Norris*, 1883, 2 D. 220). Similarly, where the testator said, "Any money left after paying all expenses I wish may be laid out on charities," and then left a legacy to her nephew, "with power to see this will executed," it was held that the term charities was sufficiently expressive of the objects of her bounty, and that a power of selecting particular objects and distributing among them was conferred on the executor (*Dundas*, 1837, 15 S. 427; *Kelland*, 1863, 2 M. 150; *Millar*, 2 S. & M'L. 866; *Hill*, 2 W. & S. 80; *Cobb*, 1894, 21 R. 638). But where a bequest is left simply to charities, and no power of selection is expressed or implied, the bequest is void for uncertainty (*Low's Exrs.*, 1873, 11 M. 744; see *Edwards' Trs.*, 1891, 18 R. 535). It would appear that the English law differs from the Scots, the latter being more favourable to charitable bequests. *Sutherland's Trs.*, 1893, 20 R. 925, is

an example of a case where the principle was applied, that to leave a residue to trustees to be disposed of as they think proper neither gives them a proprietary interest in it, nor imposes on them a trust with regard to it. Where the charities can be identified, or where a bequest is given to the poor of a presbytery, the bequest is good, and errors and misdescriptions are remedied if it can competently be done (*Hill*, 1726, 2 W. & S. 88; *Boe*, 1857, 20 D. 11; 1862, 24 D. 732; *Bruce*, 1865, 3 M. 402; *Synod of Aberdeen*, 1847, 9 D. 745; *Pringle*, 1823, 2 S. 588; *Wilson's Exrs.*, 1869, 8 M. 233).

A bequest to the testator's children or to the children of A., means legitimate children, though it must be remembered that gifts to illegitimate children *nominatim* are good; and it is thought that a bequest to the illegitimate children of A. in life at the date of the will, would be good (*Ballantyne*, 17 Feb. 1814, F. C.). It is well established in England, but not yet decided in Scotland, that a bequest to illegitimate children *nascituris* is *contra bonos mores*. In all questions of legacies a child *in utero* is considered as already born (*Mountstewart*, 1707, Mor. 14903; *Grant*, 22 May 1810, F. C.). The general rule in bequests to a class, as "children," or "issue," or "heirs," is that only those in existence at the period of distribution are included (*Grant*, 22 May 1810, F. C.; *Stewart's Trs.*, 1868, 7 M. 4; *Whittet's Trs.*, 1892, 19 R. 975; *Hayward's Exrs.*, 1895, 22 R. 757). But where no precise period of distribution is named, or the distribution is to be on the death of a parent, the expression may be read to include both persons born and persons to be born (*Scheniman*, 1828, 6 S. 1016; *Martin's Trs.*, 1864, 3 M. 326; *Hunter's Trs.*, 1865, 3 M. 514; *Carleton*, 1867, 5 M. H. L. 151), in which case there is vesting in the class, though the ultimate share of each cannot be determined till it can be seen how many are to share in the division (*M'Gowan*, 1864, 2 M. 943).

A legacy to the heir of A. is a legacy to the person who by operation of law would succeed to A. in the ownership of the subject mentioned, *i.e.* the word "heir" is to be construed *secundum materiam subjectam*. Where the succession is heritable, heir means heir-at-law, where it is moveable it means the person entitled to succeed under the Moveable Succession Act (*Gregory's Trs.*, 1889, 16 R. H. L. 10; *Blair*, 1849, 12 D. 97). In a destination to heirs of A., where the subjects are moveable, as sums of money (*Sutherland*, 1865, 4 M. 105; *Halliburton*, 11 R. 979; *Cleland*, 1891, 18 R. 377), the interest in a contract of copartnery (*Irvine*, 1851, 13 D. 1367), a residuary interest under a will (Ersk. iii. 8. 47; *Blair*, 1849, 12 D. 97), the right goes to the personal representative of A. If the subject of conveyance be landed estate or money heritably secured (*Glen*, 1874, 1 R. H. L. 48), or bonds secluding executors, the gift is to the heir-at-law (*M'Kay*, 1725, Mor. 3224; *Blair*, 1849, 12 D. 97; *Mitchell's Trs.*, 1872, 11 M. 206). But it must be borne in mind that by the Conveyancing Acts heritable bonds were made moveable *quoad* succession (see *Hughes' Trs.*, 1890, 18 R. 299; *Cunningham*, 1889, 17 R. 218). Where the testator himself is heir or next of kin of the institute, a bequest to A. and his heirs falls (*Birnie*, 1893, 20 R. 481). Generally a pecuniary legacy to the heir of A. is to his legal, not to his testamentary representatives; but if it is clear that the bequest was to fall under A.'s will, that interpretation will prevail, just as the donor of the bequest may indicate what he means by "heir." Nearest heirs and successors are those under the Act (*Nimmo*, 1864, 2 M. 1144; *Maxwell*, 1864, 3 M. 318). "Successors" has the same meaning as "heirs" (*Blair, supra*). "Assignees" only becomes operative after the legacy has vested (*Bell*, 1845, 7 D. 614). Heirs *in mobilibus* does not mean testamentary representatives (*Haldane's Trs.*, 1890, 17 R. 385).

"Next-of-kin" means those entitled at common law, not under the Act (*Young's Trs.*, 1880, 8 R. 242; *Gregory's Trs.*, 1889, 16 R. H. L. 10). Legal heirs *in mobilibus* is not equivalent to next-of-kin (*Hogg*, 1887, 14 R. 887). "Personal representatives" is generally equivalent to "next-of-kin" (*Stewart*, 1802, Mor. "Clause," App. No. 4; *Morrison's Exr.*, 1874, 1 R. 371). "Executors" means executors nominate or dative, as the case may be (*Scott's Exr.*, 1890, 17 R. 389). In the ordinary case they do not take a beneficial estate, though technical words are not essential to give an executor an estate as his own, provided the context shows this intention (*Jameson*, 1872, 10 M. 399). But the more flexible word "executor" receives a construction consistent with the associated words "heir" or "next-of-kin" (*Lawson*, 1827, 4 S. 384; *Stoddart's Trs.*, 1870, 8 M. 667). "Issue" has no technical meaning, and means "descendants" (*Macdonald*, [1893] App. Ca. 651). "Descendants" has the same meaning as "issue" (*Turner*, 1896, 24 R. 619). Family is equivalent to children (*Low's Trs.*, 1892, 19 R. 431 (not grandchildren); *Fyffe*, 1841, 3 D. 1205; *Irvine*, 1873, 11 M. 792 (*contra*, "family" included grandchild)). "Children" was held not to include grandchildren (*Adams' Trs.*, 1896, 23 R. 828). Relations generally means next-of-kin (*Williamson*, 1865, 4 M. 66; *Cunningham*, 1891, 18 R. 388; *Johnston's Trs.*, 1891, 18 R. 823; 1892, 20 R. 46). But you must always look to the meaning of the testator. A legacy by description to the lawful heirs or next-of-kin of A. has been held a legacy to those heirs of A. who are alive at the testator's death (*Lord*, 1860, 23 D. 111; *Cockburn's Trs.*, 1864, 2 M. 1185; *Ewart*, 1870, 9 M. 232; *Gregory's Trs.*, 1889, 16 R. H. L. 10).

Where a testator, in making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *primâ facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. A bequest to the whole of the testator's nephews and nieces included the half blood as well as the whole blood (*Norris*, 1839, 2 D. 220; *Scott*, 1855, 18 D. H. L. 25). A legacy to the heirs and successors of A. B. is a legacy to the heir or executor at law of A. B., and not to one nominated by him in a deed (*Blair*, 1849, 12 D. 97).

Where the gift is to the heirs or representatives of A., and A. predeceases the testator, the character is fixed at the death of A.; and the shares of his representatives who do not survive the testator accresce to the survivors (*Gregory, supra*; *Lord*, 1860, 23 D. 111, 3 M. 1083; *Maxwell*, 1864, 3 M. 318; *Ewart*, 1870, 9 M. 232 (depend on specialties); *Pearson*, 1825, 4 S. 119). In the case of a destination to the heirs of A., who survives the testator, in the absence of special intention the gift would remain in suspense during A.'s lifetime, and vest at his death.

Where a share of residue, whether original or lapsed, is given in liferent and fee to a person named and children, the division is *per stirpes*, not *per capitâ* (*Richardson*, 1866, 4 M. 372; 1868, 6 M. H. L. 18; *Horne's Trs.*, 1884, 12 R. 314; *Allen*, 1886, 13 R. 975). There is no *delectus personarum* in bequests to heirs and next-of-kin.

Primâ facie a gift to a class is to be divided *per capitâ*, and in order that the division should be *per stirpes* it must appear from the language or scheme of the will that the distribution is to be among families (*Macdougall*, 1866, 4 M. 372; *Bogie's Trs.*, 1882, 9 R. 453). Legacies to two or more families jointly, or to a family and individuals by name, will be divided *per capitâ* (*M'Kenzie*, 1781, Mor. 6602; *M'Courtie*, 15 January 1812, Hume, 270; *Rennie*, 1822, 2 S. 60). A gift to issue of the fee of what their parents liferented, or a conditional institution of children to their parents,

implies that the division is to be *per stirpes* (*Horne's Trs.*, 1884, 12 R. 314; *Allen*, 1886, 13 R. 975; *Low's Trs.*, 1892, 19 R. 431). If there is a bequest to the children of a person named, and no intention is expressed to include objects born after the death of the testator the legacy vests in the children in existence, to the exclusion of *post nati* (*Mackenzie*, 1781, Mor. 6602; *Stewart*, 1868, 7 R. 4; *Whittet's Trs.*, 1892, 19 R. 975). Where a liferent is given to a parent and the destination to children is not to survivors, the legacy vests in the children, but subject to *post nati* claiming a share unless there appear an intention to exclude them (*Calder*, 1842, 4 D. 1365; *Hunter's Trs.*, 1865, 3 M. 514; *Ross*, 1878, 5 R. 833). *Post nati* only shared in subsequent divisions. Where a benefit is given by will, and it is provided that in the event of the person benefited dying the benefit is to go to someone else, that will be held *primâ facie* to mean in the event of his dying before the testator, unless there is a clause of survivorship (*Peacock's Trs.*, 1885, 12 R. 878).

With regard to a gift of the same thing to different persons, the rule laid down by Stair is: "If one thing or sum be specially legated to one person, and by a posterior writ be legated to another, the posterior legacy takes place, and is a revocation of the former; and they do not come in together *concursu partes facere*; as they would do if left in one writ by the Roman law, and each legator would have but a half; but we have no such custom or style to legate the same thing entirely to different persons in the same writ" (Stair, iii. 8. 42; *Hamilton*, 1736, Mor. 8064). But, according to Ld. Brougham: "If the same thing be given first to A. and then to B. in the same will, then, unless the thing be an indivisible chattel, or A. be expressly excluded, they may take together" (*Sherrat*, 1834, 2 Myl. & K. 165; *Ulrich*, 1742, 2 Atk. 372).

A legacy to the children of A. *primâ facie* includes all the children of A. who are alive at the period of vesting, whether they were born at the date of the will or not. A legacy to the *n.* children of A. *primâ facie* is limited to the children of A. who were in existence at the date of the will. But the Court will always lean to a merely demonstrative construction (see *Millar's Trs.*, 1891, 18 R. 989).

Conditional Institution and Substitution.

A legatee is said to be conditionally instituted when the gift is made to him on the failure of a prior legatee; he is said to be substituted if it is meant that he should succeed on the death of the prior legatee, after the right has vested in the latter. A substitute takes not as a disponee, but as an heir.

In the case of a legacy to a class of persons and their heirs, there may have existed persons who would have been members of the class had they been alive at the date of the will. Such persons are never institutes, and their heirs cannot come in as conditional institutes (*Sturrock*, 1843, 6 D. 117; *Black*, 1844, 6 D. 689; *Rhind's Trs.*, 1866, 5 M. 104; *Morrison's Trs.*, 1890, 18 R. 135). "This is common to all legacies, that if the legatee die before the testator, the legacy becomes void, and is not transmitted to the heirs and successors of A." (Stair, iii. 8. 21); and a bequest to A. and his assignees is interpreted in the same way (*Bell*, 1845, 7 D. 614). On the other hand, if the bequest is to A. and his heirs, the heirs take as conditional institutes by the predecease of the legatee named (*Halliburton*, 1884, 11 R. 979; *Cleland*, 1891, 18 R. 377; Ersk. iii. 9. 9).

A legacy, where it is given to a legatee and his executors, is not evacuated by the predecease of the legatee, but passes after the testator's

decease to the legatee's executors, not by any right which those executors derive from the legatee to whom that legacy once belonged, he having died before it could have effect by the testator's death, but in their own right as conditional institutes in the legacy. But where the deed itself or the circumstances of the testator show an intention of excluding this rule, it is excluded (*Donald*, 1864, 2 M. 922; *Findlay*, 1875, 2 R. 909). And where the testator plainly assumes that the legatee shall take in the first place, the legacy will lapse by the legatee's predecease (*White*, 1859, 21 D. 286; *Findlay, supra*). A legacy to one and his heirs and anyone to whom he shall leave it, goes to the heirs on the legatee's predecease, but he has no power of disposal before the legacy vests in him (*Henry*, 1824, 2 S. 725).

In destinations of moveable and mixed estate, there is a presumption in favour of conditional institution and against substitution. Accordingly, where a bequest of moveables is made to A., whom failing to B., and A. survives to take, B.'s right, in the absence of plain declaration otherwise, becomes extinct. In a destination of heritage "whom failing" imports substitution, and unless A. by deed *inter vivos* or *mortis causa* disposes of the estate, B. will be entitled on his death to succeed as heir under the substitution (*Ogilvie*, 1852, 14 D. 363). If a legacy is paid to a legatee and mixed up with his fund, the substitution is evacuated (*Buchanan's Trs.*, 1868, 6 M. 536), or by a testament (*Davidson*, 1870, 8 M. 807; *Dyer*, 1874, 1 R. 943). In the case of moveables the presumption is always in favour of conditional institution only, not of substitution; in a case of heritage the presumption is the other way, in favour of substitution (*Watson*, 1884, 11 R. 444).

A substitution in moveables can be created, though it is said that there is only one safe formula for creating it, viz. by the words "whom failing either before or after the interest has vested"; but substitution is not *in dubio* to be presumed (*Allan*, 1845, 7 D. 908; *Henderson*, 1858, 20 D. 473; *Lockhart*, 1814, 6 Pat. 31; *Paul*, 1872, 10 M. 937; *Watson*, 1884, 11 R. 444). If there is to be a substitution in moveables, it must be expressed either in proper technical language or by a direction to trustees to insert a clause of substitution in the conveyance of the securities of the trust estate (*Greig*, 1833, 6 W. & S. 406). A substitution in moveables may be evacuated by merely changing the securities (Ersk. iii. 8. 44; *Brown*, 1792, Mor. 14863). Where a substitution of moveables is effectually constituted, it will be evacuated by a general settlement by the legatee (*Fyffe*, 1841, 3 D. 1205; *Dyer*, 1874, 1 R. 943), even where the will was executed before the legacy vested, where the will is so expressed as to convey *acquirenda*. A legacy had been left to a person who was insane at the time it vested in him, and who remained in this state till his death: yet the legacy was carried by his will, executed before he became insane. The Crown, as *ultimus hæres*, is not included in a destination to heirs (*Torrie*, 1832, 10 S. 597). If a legacy is to go to a third person in the event of the legatee dying without issue, that is simply a substitution.

Joint and Several—Survivorship—Accretion.

Joint, or Joint and Several—Survivorship.—A legacy may be left to two or more persons jointly, or severally, or successively (Bell, *Prin.* 1882; Stair, iii. 8. 27). A legacy to A. and B. jointly goes to them equally in case they both survive the period of vesting; if one of them predecease, the other takes the whole. "Jointly and severally" receives the same interpretation. If words importing severance are used, and the legacy is to "two

persons equally," or to be equally divided between them, the right is separately to each of one half without any *jus accrescendi*, and the survivor has only his own share, the other half falling into residue or intestacy. "There is a rule of construction, settled by a series of decisions beginning in the last century and coming down to the case of *Buchanan's Trs.* in 1883 (20 S. L. R. 666), to the effect that where a legacy is given to a plurality of persons *named or sufficiently described for identification* equally among them, or in equal shares, or share and share alike, or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees. The rule is applicable whether the gift is in liferent or in fee to the whole equally, and whether the subject of the bequest be residue, or a sum of fixed amount, or corporeal moveables. The application of this rule may of course be controlled or avoided by the use of other expressions, by the testator importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees," as by a gift to survivors (Ld President Inglis in *Paxton's Trs.*, 1886, 13 R. 1197; see also *Wilson's Trs.*, 1889, 22 R. 62; *Muir's Trs.*, 1889, 16 R. 954; *White's Trs.*, 1893, 20 R. 450; *Stobie's Trs.*, 1886, 15 R. 340). The rule as thus stated seems not to apply to legacies left to a class of unascertained number equally among them, or share and share alike. The right vests in the members of the class who survive the period of vesting as a whole (*Douglas*, 1864, 2 M. 1008; *Scott*, 1843, 5 D. 520; *Macdougall*, 1866, 4 M. 372; *Mackenzie*, 1840, 2 D. 833). Where a joint interest in a legacy or residuary bequest which is subject to a liferent comes to vest in the last surviving legatee, it would seem that the trustees are bound, if the liferenter tenders a discharge of his interest, to denude in favour of the fiar (*Foulis*, 1857, 19 D. 362; *Pretty*, 1854, 16 D. 667; *Brown*, 1890, 17 R. 517).

The rule to be noticed under vesting, that survivorship has relation to the period of distribution, does not apply to the survivorship *implied* in bequests to a class, and in any case the intention of the testator as expressed will fix the rule. It is doubtful whether the right of accretion implied in a joint bequest to a class imports a substitution as well as a conditional institution (*Wright's Exrs.*, 1855, 27 Jur. 341). Where a gift is to legatees jointly or to a class, and there is no clause of survivorship, then, unless the case falls under the *conditio si sine liberis*, there is no right given to the issue of the predeceasing institute (*Young*, 1862, 4 Macq. 337; *Rattray*, 1790, Hume, 526; *Binning*, 1767, Mor. 13047). Where the issue of some are mentioned and the issue of others not mentioned in the will, the express terms of the destination prevail (*Earl of Lauderdale*, 1830, 8 S. 771; *Greig*, 1835, 13 S. 607; *Carter's Trs.*, 1892, 19 R. 408; but see *Forrester's Trs.*, 1894, 21 R. 971). If there is a destination to a number of persons, with a clause of conditional institution of their issue in general terms, the conditional institutes are joint legatees along with the original institutes (*Laing's Trs.*, 1879, 7 R. 244), but the issue do not share in lapsed shares (*Henderson*, 1890, 17 R. 293; *Cunninghame's Trs.*, 1893, 20 R. 454; *White's Trs.*, 1893, 20 R. 460): though it has been said that there is no artificial rule of construction which obliges the Court to hold that where a residue is disposed of among different members of a family, the children of one of the residuary legatees, who may die leaving issue, are cut out from what their parents would have taken by accretion (*M'Culloch's Trs.*, 1892, 19 R. at p. 779; *Burnet*, 1894, 21 R. 1040). Where a liferent is given to a class of persons and the fee to their respective issue, the issue come into possession of their shares of the fee on the death of their respective parents (*Donaldson*,

1864, 2 M. 428: *Macdougall*, 1866, 4 M. 392; H. L. 26 Mar. 1868, 6 M. 18).

In *Scott*, 1865, 3 M. 1130, it was held that where a legacy of a liferent was left to a mother, and after her to a daughter, and the testatrix thereafter revoked the gift to the mother, this was equivalent to a gift of an immediate liferent to the daughter.

A bequest of an interest till a definite time or for the life of another will vest in the legatee, and pass to his representatives if he predecease the appointed time or the person for whose life the right is given (*Hill*, 1866, 5 M. 12; *Ramsay's Trs.*, 1876, 4 R. 243; *Paterson's Trs.*, 1893, 31 S. L. R. 200).

In order to avoid intestacy, or in the special circumstances of the case, "survivor" has sometimes been read as "other"; but the word will usually, in Scotland, receive its own meaning, even if the effect of this is to cut out the issue of predeceasing parents. The cases in which the words have been changed are: *Ramsay's Trs.*, 1876, 4 R. 243; *Paterson's Trs.*, 1893, 21 R. 253; but see *contra*, *Forrest's Trs.*, 1884, 12 R. 389; *Hairsten's Jud. Fact.*, 1891, 18 R. 1158; *Ward*, 1893, 20 R. 949; *Monteith*, 1894, 21 R. 615; *Neville*, 1895, 23 R. 351).

Revocation and Ademption.

An *inter vivos* agreement to make a testament or grant a legacy will bar revocation of a will or legacy made in implement of it (*Turnbull*, 1825, 1 W. & S. 80; *Murison*, 1854, 16 D. 529; *Duguid*, 1831, 9 S. D. 844; *Curdy*, 1775, Mor. 15948; *Paterson*, 1893, 20 R. 484), although a *mortis causa* deed will not be made irrevocable by delivery (*Sommerville*, 18 May 1819, F. C.; *Millar*, 1825, 4 S. D. 822), and a declaration that it is irrevocable may itself be revoked (*Dougal*, 1789, Mor. 15949); but where in a testamentary writing a provision has once been regularly created, it is not to be held to be taken away in a subsequent writing except by clear words of revocation, unless one of the presumptions afterwards noticed applies (*Scott*, 1865, 3 M. 1130; Stair, iii. 8. 28).

Revocation.—Legacies are ambulatory, and so long as they remain proper legacies they may be revoked at any time by the testator, and that either expressly or by implication. A legacy may be taken away—

(1) By express revocation of the deed or clause in which it is granted. A holograph or tested deed which expresses the intention to revoke will be effective according to its terms, that is to say; will operate total or partial revocation, as the case may be, and that even if the revocation is contained in a new settlement or conveyance by way of codicil which fails to operate its intended effects (*Stewart*, 1860, 22 D. 646; *Erskine*, 1850, 13 D. 223; *Leith*, 1863, 1 M. 949; *Kirkpatrick's Trs.*, 1874, 1 R. H. L. 37; rev. 11 M. 551).

(2) A will may be revoked by the subsequent birth of children to the testator. Where at the date of the making of a will the testator had no children, and thereafter a child is born, and the testator dies either before or shortly after its birth, there is a very strong presumption that the will was only to be operative if he died without children. This is a privilege personal to the child (*Watt*, 1760, Mor. 6401; *Oliphant*, 1793, Mor. 6603). In one case it was said that the condition would apply unless it was made "as plain as a pikestaff that the testator did not intend the succession to go to the child." In *Colquhoun*, 1829, 7 S. 709, Ld. Rutherfurd Clark said: "I am much inclined to the opinion that the revocation was absolute, and that even had the maker survived the birth of a child for a long time the will could receive no effect." In *Munro's Executors*, 1890, 18 R. 122, a will in favour of the testator's parents and nephews was set aside in the

interest of the widow and three children. But the presumption may be overcome. According to the law of Scotland, the question whether the testament of a parent is revoked by the subsequent birth of a child is one wholly dependent upon the circumstances of the case (*Hughes*, 1892, 19 R. H. L. 33). Erskine says (iii. 8. 46): "If the testator had afterwards children, and, notwithstanding their existence for some competent time before his death, made no alteration of the settlement in their favour, it is presumed that he neglected them from design, especially if the settlement was not of the whole or greatest part of his estate" (*Yule*, 1758, Mor. 6400; *Millar's Trs.*, 1893, 20 R. 1040). The *conditio* has also been held not to apply to a will which was not a general settlement of a whole estate, and which was executed in the knowledge of the wife's pregnancy (*Adamson's Trs.*, 1891, 18 R. 1133). In *Spalding*, 1874, 2 R. 237, and *Findlay's Trs.*, 1886, 14 R. 167, it was determined that the birth of a posthumous child did not revoke a settlement in favour of children previously born. Though *Elder's Trs.*, 1894, 21 R. 705, decided that the birth of a son to a testator who had left his means to his daughters, who were his only children at the date of the will, did revoke the will, and the son took the heritable estate.

It has been said that wherever a last will is cut down by the operation of the rule or presumption, all previous testamentary settlements must fall with it, except such as are obligatory and matter of contract (*Elder's Trs.*, 1895, 22 R. 505; *Leith*, 1863, 1 M. 955). The Court will not allow a proof of declaration of the deceased as either setting up the will or as fortifying the presumption against the subsistence of the will (*Elder*, 1895, 22 R. 505; 1894, 21 R. 704; *M'Kie's Tutor*, 1896, 24 R. 526). Mere survivance without making a new will, will not save the old one. The presumption applies to a mother's will as well as to a father's.

Mr. Bell, in his *Principles*, s. 1777, says that if a lawful child who was believed to be dead should afterwards turn up, or if an illegitimate child is legitimated, the presumption seems to apply; and that if the child shall not have survived the grantor or the institute, the presumption of revocation or substitution will not hold (*Watt*, 1760, Mor. 6401). A posthumous child will have the benefit of the condition.

(3) A will may be revoked by cancellation *animo et facto* of the instrument (*Nasmyth*, 1821, 1 Sh. App. 63; *Falconar*, 1848, 11 D. 220; *Dow*, 1848, 10 D. 1465), or by giving instructions to have it destroyed (*Chisholm*, 1673, Mor. 12320; *Buchanan*, 1704, Mor. 12320; see *Crosbie*, 1865, 3 M. 870), which instructions may be proved *prout de jure* (*Falconar, supra*); but the destruction of the will by accident, or in a moment of insanity or passion, will not revoke it, though the onus of proving its validity lies upon the person seeking to set it up. The presumption is for revocation when the will cannot be found (*Bonthrone*, 1883, 10 R. 779; *Winchester*, 1863, 1 M. 685). A testamentary act cannot be recalled by intention alone: there is required some definite act of the testator's will, which, in the case of alteration by subsequent writings, can only be proved by a probative instrument (*Stirling Stuart*, 1885, 12 R. 610).

(4) *Ademption.*—Ademption is the revocation or recall of a general or special legacy by some act of the testator, other than testamentary revocation. A special legacy is not due if the subject of it have perished before delivery, or have been converted to some other use by the testator (*Chalmers*, 1851, 14 D. 57; *Congreve's Trs.*, 1873, 1 R. 1102). Where the subject has been converted into something else,—where the actual thing bequeathed has ceased to be in the power of the testator,—the legacy is held to be adeemed, and that apart from any question of intention (*Ander-*

son, 1877, 4 R. 1101). Accordingly, where a testator left to a legatee "the sum of £1000 lent on bond," and thereafter the bond was paid up before his death, the legacy was not exigible (*Pagan*, 1838, 16 S. 383).

But in the case of *Mitchell*, 1889, 16 R. 902, the Court held by a majority that the statutory conversion of shares in a gas company into annuities payable to the shareholders, which annuities were, under the Act, to be conveyed by any will which disposed of the shares, did not operate ademption of a legacy of "the shares standing in my name in the Paisley Gas Company"; and further, that even upon redemption of the annuities and reinvestment of the money in corporation stock, the corporation stock was to be held as coming in the place of the gas shares. Ld. Rutherfurd Clark, however, said "that mortgage is neither gas shares nor has it been declared to be a statutory representative or equivalent for gas shares. It is nothing more than a security which the testatrix chose to take. When she parted with her shares, or rather with the annuity which was the equivalent of these shares, the subject of the legacy perished, and therefore, in my opinion, the legacy was adeemed." It would seem that where a sum is bequeathed out of a particular fund, or where the amount of the fund rather than a specific corpus is pointed to, or where the reference is to the money, not the security, the legacy is to be made good out of the general funds, although the investment should have been changed (Bell, *Prin.* 1886; *Hutchcson*, 1853, 15 D. 570; 1856, 2 Macq. 492; *Congreve's Trs.*, 1874, 1 R. 1102).

Revocation by Subsequent Will.—"I have always understood it to be a principle in the laws of Scotland that where a party deceased has left various writings, probative in themselves, for disposing of his or her property preserved in the testator's custody, they are to be understood as constituting one settlement, in so far as they have not been revoked and are not inconsistent with one another,—though a man cannot die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so they be all clearly testamentary papers, may be admitted to probate as together containing the last will of the deceased; and further, that though one may be partially inconsistent with another, the latter instrument will only revoke the former as to those parts where they are inconsistent" (Ld. Moncreiff in *Grant*, 1849, 11 D. 860). "If you can execute the whole of the papers as one testament, you are bound to do so" (Ld. Truro in *Grant*, 1852, 1 Macq. 163; *Ogilvie's Trs.*, 1870, 8 M. 427).

Where deletions were made in a settlement and a codicil was prepared but left unsigned, it was held (1) that the settlement was a valid deed, as the deletions could only operate partial revocation; (2) that no effect could be given to the unsigned codicil; (3) that the deletion of part of the deed and the making of the codicil must be regarded as one continuous act; and that as the testator had not completed the act, the whole settlement must receive effect (*Parker*, 1876, 13 S. L. R. 404).

A subsequent will revokes a prior one if the two are inconsistent; but the Court will take pains to give effect, if possible, to every testamentary writing (*Brander*, 1883, 10 R. 1258; *Tronsons*, 1884, 12 R. 155; *Doves*, 1827, 5 S. 734; *Tennent*, 1878, 6 R. 150; *Alves*, 1761, 23 D. 712; *Reynolds*, 1884, 11 R. 759). Settlements of the same date are construed as one deed (*Fergus*, 1833, 11 S. 362; *Inglis*, 1831, 5 W. & S. 785). If the last will is a total settlement, it revokes those that preceded it (*Bertram*, 1888, 15 R. 572; *Grant*, 1849, 11 D. 87, 860; rev. 1852, 1 Macq. 163); but a posterior will does not work a total revocation of a prior one unless the latter expressly revoke the former, or the two be incapable of standing together. In

general, if the first deed has not actually been destroyed, it can be set up by revoking the revocation of it (*Howden*, 8 July 1815, F. C.; *Dove, supra*). A clause in a will declaring it irrevocable will not make it so (*Dougall*, 1789, Mor. 15949).

Payment—Repetition—Expenses—Interest—Disappointed Legatee—Law Agent.

Payment of Legacies.—As has been already pointed out, legacies are always postponed to the payment of the testator's debts, whether these are secured or unsecured, including the legal claims of spouses and children. Accordingly, executors or trustees are bound, before paying legacies, to see that the estate is solvent; for if they pay away the fund liable to meet the obligations of the testator, they may subject themselves to personal responsibility. If no term be appointed, the legacy is due, and, as it would seem bears interest from the testator's death; but payment cannot be enforced till six months have passed (Act of Sed., Feb. 1662; *Duff's Trs.*, 1862, 24 D. 552; *Glasgow's Trs.*, 1830, 9 S. 87; *M'Alister's Trs.*, 1836, 15 S. 170). Trustees cannot refuse to pay a specific legacy on the ground that the legatee may have some further independent claim on the estate which, if it existed, would put him to his election (*Laing*, 1895, 22 R. 575).

There are three general rules that may be laid down for the guidance of executors and trustees—

(1) They cannot be compelled to pay any debt or legacy until six months have passed from the date of the death of the testator.

(2) After the lapse of that period, upon due inquiry and with reasonable ground to suppose that the estate is solvent, they may pay *primo venienti*, even to legatees (*Beath*, 1875, 3 R. 185; *Stewart's Trs.*, 1871, 9 M. 810).

(3) On the expiry of twelve months from the testator's death, after due inquiry as to the existence of debts, and after making provision for the payment of such debts as they know to exist, they may proceed to distribute the estate.

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

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

"Though a decree of constitution is not always necessary, yet, where the executry estate is small, and the amount of claims uncertain, and the existence or amount of the alleged debt at all doubtful, the executor is entitled to protect himself and the estate by requiring formal constitution" (Ld. Pres. Inglis in *M'Gaan*, 1883, 11 R. 250). An executor may obtain exoneration in an action of multiplepoinding, and for the competency of this action it is not necessary that there should be technical double distress; but he may not adopt this procedure if he can obtain exoneration without judicial proceedings (*Mackenzie's Trs.*, 1895, 22 R. 233); and the position of a beneficiary is different (*M'Nab*, 1894, 21 R. 827; *Robb*, 1880, 7 R. 1049). In the case of the executor or trustee it is enough that there should be

reasonable doubt as to the meaning of the instructions he has to carry out, or that the fund should be insufficient to meet all the claims upon it (see Ld. Young in *Jamieson*, 1888, 16 R. 15; *Fraser's Exr.*, 1893, 20 R. 374; *Winchester*, 1890, 17 R. 1046). The rule that a period of twelve months is allowed for distribution of the estate must be regarded as fixing a maximum, and probably only means that the executor is not held liable for interest on more than he actually receives until after the twelve months have elapsed.

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

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

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

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

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

Repetition.—Legatees may be called upon to pay back what they have received in order to meet the claims of creditors where it turns out that the estate is not solvent, even although the payments were not made to them precipitately or prematurely. But two points must be attended to in regard to such claims for repetition: (1) Until the legal representative has been sued and found to have no funds, such a claim cannot be enter-

tained. (2) Each legatee is only liable for his proportion of the debt (*Poole*, 1834, 12 S. & D. 481; *Wylie*, 1853, 16 D. 180; *Threipland*, 1855, 17 D. 487; *Mays. of St. Andrews*, 1893, 31 S. L. R. 225).

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

Interest payable on Legacies.—Apart from special instruction in the will, where of course the testator can appoint any rate he likes to be paid, no higher rate of interest is exigible than that which the estate has earned, unless the executor has been in default (*M'Innes*, 1827, 5 S. 862; *Williamson*, 1843, 15 Jur. 637; *Inglis' Trs.*, 1891, 18 R. 487; *Baird's Trs.*, 1892, 19 R. 1045; *Kelly*, 1861, 23 D. 703; *Duff's Trs.*, 1862, 24 D. 552). Intermediate income in the case of a postponed legacy may be carried to residue (*Brodie*, 1893, 20 R. 795; but see *Kirkpatrick*, 1878, 6 R. H. L. 4). In the ordinary case compound interest is not due. "It has often been said, and I think it is a rule of law, that interest is only due where there is either a contract to pay interest, or a duty to invest, or in respect of *morata solutio*" (Ld. M'Laren in *Ross*, 1896, 23 R. 802).

The old rule was that interest did not begin to run till twelve months from the testator's death (*M'Innes*, 1827, 5 S. 862; *Stevenson*, 1826, 4 S. 776); while the legatee paid 5 per cent. on advances (*Plaine*, 1836, 15 S. 194). But now interest is held to be due from the death of the testator, or the date of vesting, or at least from the date when the estate became productive (*Duff's Trs.*, 1862, 24 D. 552). Interest is payable on specific legacies as it is earned, provided the right vests; and special legatees share expense (*Glasgow's Trs.*, 1830, 9 S. 87; *M'Allister*, 1836, 15 S. 170). According to the usual rule, the legatees receive payment of their legacies, with interest from the testator's death, while the general fund bears the expense of management. In the absence of direct instructions, children may take a vested interest in the annual income, even where the vesting is uncertain (*Gillespie*, 1802, Mor. "Acces." App. 2; *Campbell*, 1840, 2 D. 1084; *Ogilvie*, 1852, 14 D. 363; aff'd. 19 D. 6; *contra*, *Smith*, 1867, 6 M. 83). A general legacy of a particular sum is not capable of being increased by accessions (see *Glasgow's Trs.*, *supra*; *Playfair*, 1891, 17 R. 1241; *Brodie*, 1893, 20 R. 795), but special legacies are.

It is quite usual to leave legacies free of legacy duty, and that is just equivalent to a bequest of an additional sum from which to pay the tax (*Kirkpatrick*, 1878, 6 R. H. L. 4; *M'Alpine*, 1883, 10 R. 837; *Beaton*, 1853, 15 D. 373). Whether it is legal to leave a legacy free of income tax is said to be still uncertain, but there is authority for saying that such a bequest is not struck at by the income tax laws. In England it was held good in *Turner*, 1861, 1 So. & H. 334, and *in re Buckle*, 1893, 63 L. J. Ch. 330; see *Robson*, 1861, 23 D. 429; *Mackie's Trs.*, 1874, 2 R. 312; *Roger*, 1875, 2 R. 294; *Kinloch*, 1880, 7 R. 596; *Blair*, 1858, 21 D. 150 (marriage contract). See EXECUTOR.

Expenses.—Trustees are, in the general case, entitled to be protected from all loss in the discharge of their duty, and consequently any litigation fairly arising out of the peculiarities of the trust, or of the situation of the

claimants on it, must generally fall on the fund of division ; but there may be exceptions from this rule, as trustees may, from overscrupulousness or obstinacy, engage in litigation occasioning great and unnecessary expense, which it would be unjust to impose on those holding the beneficial interest in the trust (*Smith*, 16 S. 1223 ; *Dickson*, 1829, 8 S. 99 ; *Clyne's Trs.*, 1848, 10 D. 1325). A general or special legatee is not liable to any deduction for expenses in realising the estate (*M'Eachern*, 1865, 3 M. 833 ; *Cameron*, 1844, 7 D. 92).

Where claimants on a trust estate endeavoured unsuccessfully to constitute special legacies against residuary legatees, they did not get their expenses out of the trust estate (*Moram*, 1867, 3 S. L. R. 208). The trustees' expenses in an action of distribution and exoneration fall upon the estate ; and if the estate is insufficient, they will fall rateably upon the legatees (*Cumming*, 1834, 12 S. 508 ; M'Laren, 564). The residue is liable before special legatees (*Cameron*, 1884, 7 D. 92 ; *Dunbar*, 1850, 13 D. 54 ; *Taylor*, 1836, 14 S. 817 ; *Nelson's Trs.*, 1822, 2 S. 89) ; but if the trustee has been in fault, he must pay for his own exoneration (*Hill*, 18 D. 316 ; *Presbytery of Dundee*, 1863, 1 M. 473).

Can a Legatee sue Testator's Law Agent.—In *Webster*, 1851, 13 D. 752, an action of damages was brought against a law agent, and found revelant to go to proof, in which the grounds stated were that he had been employed by a person deceased to make his will, that he was to prepare and present for signature a deed in favour of the pursuer, but that he had, either of set purpose or through negligence, omitted to obtain the deceased's signature. This is, however, inconsistent with the principle laid down in the House of Lords in *Robertson*, 1861, 4 Macq. 167, where the Ld. Chancellor Campbell said : "I never had any doubt of the unsoundness of the doctrine that A., employing B., a professional lawyer, to do any act for the benefit of C., A. having to pay B., and there being no intercourse of any sort between B. and C., if through the gross negligence or ignorance of B. in transacting the business, C. loses the benefit intended for him by A., C. may maintain an action against B., and recover damages for the loss sustained. If this were law, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. There must be privity of contract between the parties."

Currency in which Legacies are payable.—The intention of the testator is the rule ; but in the absence of expression of intention, legacies are payable in the currency of the country in which the testator was domiciled and made his will (*Saunders*, 1742, 2 Atk. 464 ; *Pierson*, 1786, 2 Bro. Ch. 38 ; *Noel*, 1836, 4 Cl. & Fin. 158). If a foreign legacy is paid by remittance to this country, the payment is without regard to exchange or the expense of remittance (*Cockerell*, 1810, 16 Ves. 461 ; *Campbell*, 1830, 1 Russ. & M. 453 ; *Yates*, 1849, 16 Sim. 613).

Conditions ; Accumulations.

Conditions in Legacies.—Legacies are pure or contingent, and in contingent legacies the conditions, if clear, intelligent, and lawful, will be effectual. If they are physically impossible, or inconsistent with law, or *contra bonos mores*, they will be held *pro non scriptis* (Stair, i. 3. 7 ; Ersk. iii. 3. 85 ; Bell, *Prin.* 1785).

The distinction must here be noticed between an unlawful condition in a trust or legacy, and an unlawful purpose. While an unlawful condition is disregarded, and the legatee takes the gift free of the burden, yet

if the purpose be unlawful, a principle of law which nullifies the gift comes into operation. Thus provisions granted to mistresses are assumed to be in consideration of cohabitation, and therefore reducible as being granted for an immoral consideration (*Hamilton*, 1765, Mor. 9471; *Durham*, 1622, Mor. 9469; *Young*, 1880, 7 R. 760; *A.* v. *B.*, 21 May 1816, F.C.; *Johnstone*, 1835, 14 S. 106). A similar rule is applied to the case of bequests to illegitimate children *nascituris* (*Wilkinson*, Y. & C. C. C. 657).

Conditions are implied or express. The most important implied conditions in legacies are the *conditio si testator sine liberis decesserit* and the *conditio si sine liberis institutus decesserit* (*q.v.*). Conditions may be precedent or subsequent, which nearly corresponds with the condition suspensive or resolutive. A condition precedent suspends vesting; a condition subsequent does not suspend vesting, but is to the effect that on something happening the gift shall be withdrawn; that is, the gift is subject to defeasance. Such a condition is construed more strictly in favour of the legatee than is a condition precedent, because the policy of the law is unfavourable to the imposition of conditions the effect of which is to divest one who has already acquired an interest (M'Laren, 1084).

Mr. Bell divides conditions into casual, potestative, and mixed, a mixed condition combining the peculiarities of the other two.

A potestative condition in a legacy depends on an act which is in the power of the legatee. It is obligatory on the legatee by his accepting the gift, which may indeed be meant to secure performance of some act by him. For instance, a legacy may be burdened with a debt, or with the condition that the legatee shall pay the debts of the testator (*Monerieff*, 1823, 1 W. & S. 672; *Bruce's Trs.*, 1858, 20 D. 473). Where a legacy is given to a person in a particular character, as that of trustee or executor, the gift would seem to be conditional on his acceptance of the office. In two cases of early date it was found that legacies, left to relations who were appointed tutors, were not due because they had not accepted office (*Scrimgeour*, 1675, Mor. 6357; *Henderson*, 1825, 4 S. 306; *Davidson*, 13 S. 1084; More, *Notes*, 37; *Lecky*, 1748, Mor. 6347). But where a legacy was left to an executor who could not have been expected to act personally, the legacy held good (*Bryce*, 19 June 1827, More's *Notes*, ccexliv; *Orphoot*, 1897, 24 R. 871).

Casual conditions depend upon something out of the power of the legatee—upon mere accident; or something to be done by a third party; or, some occurrence, such as the death of a liferenter, the attainment of majority, or a change in the circumstances of the legatee, which it is not any part of the intention of the testator to bring about. As already noticed, such conditions, if lawful and possible, obtain their effect.

Potestative conditions have again been divided into imperative and prohibitory. The imperative conditions are binding, unless they prescribe the doing of something impossible or illegal. If a legatee has done all that he can do to fulfil a condition attached to a gift, the condition is regarded as fulfilled. For instance, a legacy to purchase a commission in the army after the abolition of purchase, was held to be due (Ersk. iii. 3. 83; *Dunbar*, 1872, 10 M. 982); and when a bequest is made subject to a condition in favour of a third party, the condition is held to be fulfilled if the third party by his act renders its fulfilment impossible (*Pirie*, 1872, 10 M. 94). If a legacy is made to depend upon an event that must happen, such as the death of someone, then unless there is some specialty to suspend vesting, there is no proper condition, and the legatee's right is complete, though payment is postponed. If, on the other hand, the legacy

is made to depend upon some event which may or may not happen, such as a marriage or the survival of a particular time, there is a condition, according to the brocard, *Dies incertus pro conditione habetur* (Bell, *Prin.* 1883). If the legacy is made to depend upon two events, one of which must, though the other may not, happen, as on death or marriage, the legacy is not conditional in the strict sense (*Mackintosh*, 1872, 10 M. 933; *Home*, 1807, Hume, 530). A prohibitory condition may be inoperative, as having a tendency to interfere with the liberty of the legatee or with the rights of property. In *Reid* v. *Coates*, 5 March 1813, F. C., a legacy was given under the condition that the legatee should not reside with her mother. The Court inquired whether the legatee meant to observe the condition; and on obtaining an indefinite answer, they refused to interfere, as the condition was not unlawful. But in *Fraser* v. *Rose*, 1849, 11 D. 1467, it was held that a condition of non-residence with the legatee's mother, who was of good character, was altogether nugatory. The Court will certainly not hold such a condition good unless it is reasonable.

Total prohibitions of marriage are illegal and to be disregarded, as are very general prohibitions (Brown's *Synopsis*, 458); but it cannot be said to be decided that a prohibition to marry a particular person, or one out of a class of persons, is illegal (*Forbes*, 1882, 9 R. 675; *Ommaney*, 1796, Mor. 2985; *Graham*, 1823, 1 Sh. App. 365). Conditions that a legatee shall not marry in minority without certain consents may be good (*Buchanan*, 1680, Mor. 2968; *Feltemear*, 1680, Mor. 2969). Trustees cannot refuse their consent except upon reasonable ground; it is sufficient that they do not object, and their consent given after the event will suffice (*M'Kenzie*, 1750, Mor. 2977; *Bunten*, 1710, Mor. 2972; *Pringle*, 1688, Mor. 2972; *Wellwood's Trs.*, 1851, 13 D. 1211). The condition that a widow shall forfeit the whole or part of her provision on re-marriage is common. It is not the law of Scotland that where a condition in restraint of marriage diminishes the interest of the beneficiary in the legacy, it is to be held *pro non scripto* (Ld. J.-C. Moncreiff in *Sturrock*). In the ordinary case it is not the law of Scotland that a testator may not attach to any of his gifts such conditions as regards the marriage of the legatee as may seem reasonable. A husband may in the same way be restrained from a second marriage (*Kidd*); and a limitation of a provision to the period of the grantee's maidenhood is enforced (*Brown*, 1890, 17 R. 517; *Foulis*, 1672, Mor. 2965; *Kidd*, 1863, 2 M. 227; *Smith's Trs.*, 1883, 10 R. 1144; *Sturrock*, 1875, 2 R. 850).

The following are some of the conditions which have been judicially determined to be good :—

That the legatee shall execute a declaration that he desires to appropriate or test upon a certain estate (*Reids*, 1881, 9 R. 80). That the legatee shall be of a particular religion (*Hays*, 1883, 10 R. 460). Where a legatee was to get his legacy upon his having two children living at any time, the birth of a second child which did not cry was not fulfilment of the condition (*Roberton*, 1833, 11 S. 297). If a legacy is left the amount of which is to be fixed by a third person, on the predecease of that third person the legacy lapses (*Burnsides*, 1829, 7 S. 735; *Robbie's Jud. Fact.*). If a legacy is left with a burden upon it, the burden is preferable to the bequest (*Fergus*, 1833, 11 S. 362; cf. *Greig's Trs.*, 1854, 16 D. 899). Where a legatee has to give or perform something as a condition to his legacy, fulfilment of the condition gives him no preference over other legatees, at least where he gives up nothing (*Cameron's Trs.*, 1874, 1 R. 683). Where legacies were left under the condition that they should be claimed within a particular time, and failing their being claimed, to third parties, this was held to be a

suspensive condition (*Stevenson*, 1826, 4 S. 776). Where the condition was that the legatee should come home within a certain time to claim it, and in default the legacy was to go to another, it was held that the first would not lose his legacy unless he had due notice of the legacy and of its terms (*Neilson*, 1710, 2 Fount. 593).

In the case of *Cowe's Exrs.*, 1887, 15 R. 81, a testator by a codicil to his will left a legacy of £500, "which is to be handed over at such time as the legacies mentioned in clause D of this will are to be paid or handed over." These legacies were contingent on the testator surviving his mother, which he did not do. It was held that the direction did not import a condition into the legacy, which was therefore to be paid.

Perpetuities are illegal both as regards heritage and moveables (11 & 12 Vict. c. 36, ss. 1–3, 47–49; 31 & 32 Vict. c. 84, s. 17). A liferent in moveable estate may be constituted or reserved only in favour of one in life at the date of the deed. Where any person of full age and born after the date of the deed (which in testamentary deeds is the date of the death of the testator) is in right of a liferent of moveable estate under any deed dated after 31 July 1868, such moveable estate belongs to him absolutely, and if held by trustees must be made over to him.

Under the Thellusson Act, 39 & 40 Geo. III. c. 98, affecting moveables, and the Rutherfurd Act, 11 & 12 Vict. c. 36, s. 41, affecting heritage, property cannot be dealt with by will so far as to secure accumulation of the income from it for more than twenty-one years and the period of gestation, from the death of the testator. Accumulations for that period are legal; beyond that period they go to the person who would have been entitled had accumulation not been directed (*Maxwell's Trs.*, 1877, 5 R. 248; *Cathcart's Trs.*, 1883, 10 R. 1205; *Smyth's Trs.*, 1880, 7 R. 1176; *Campbell's Trs.*, 1891, 18 R. 992; *Elder's Trs.*, 1892, 20 R. 2; *Colquhoun*, 1892, 19 R. 946; *Logan's Trs.*, 1892, 23 R. 848; see *Edwards' Trs.*).

The Statute 55 & 56 Vict. c. 58, s. 1, provides that no person shall settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only for any longer period than during the minority or respective minorities of any person or persons who, under the uses or trusts of the instrument directing such accumulation, would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated.

Cumulative or in Substitution.

Where a testator by one or more instruments gives to the same individual two or more general legacies, there is a presumption, in the absence of any expression of intention to the contrary, that all shall have effect; and extrinsic evidence of an expressed intention is not admissible (Dickson, 114; Bell, *Prin.* 1875; *Horsburgh*, 1847, 9 D. 329; *Stirling*, 1704, Mor. 11442).

Where the same special or specific legacy is twice given to the same person, there is obviously merely a repetition (*Edgar*, 1828, 6 S. 963); and this principle has sometimes been applied to demonstrative legacies (*Horsburgh*, 1847, 9 D. 329; *Baird*, 1856, 18 D. 1246).

General legacies in the same instrument, if of the same amount, even if there are slight differences in the form of the bequest, are to be regarded as repetitions arising from forgetfulness; but if they are of unequal amount, both are due; and *à fortiori* if they are of different characters, or if there is anything in the instrument to show that one is in addition to the other

(*Baird*, 1856, 18 D. 1246; *Sutherland*, 1825, 4 S. 220; *M'Innes*, 1827, 5 S. 862; *Trs. of F. C. of Scotland*, 1887, 14 R. 333).

The principle is well established, that where several general legacies are given to the same person by different instruments, even where the bequests are similar, all are due (*Elliott*, 1823, 2 S. 250: *Lindsay*, 1827, 5 S. 297; *Royal Infirmary*, 1881, 9 R. 352). Where a testator bequeaths the same sums in two separate testamentary writings to the same legatees, the legacies must be regarded as cumulative, unless there is something to show that a different construction is necessary (*Royal Infirmary, supra*). The presumption may be contradicted by showing that the later instrument was meant to come in the place of the former, as where it professes to deal with the testator's whole succession, or where it is a mere re-execution of a former one (*Stoddart*, 1852, 1 Macq. 163; *Beattie*, 1861, 23 D. 1163); and only one legacy is due if the same sum is bequeathed on the same motive assigned, or if the later instrument merely copies a part of a former one.

If a testator expressly declares one gift to be in addition to another, and in another instance makes a gift without any such declaration, this is a circumstance that goes to show that the gift last referred to is substitutional; but too much weight must not be attached to the variation (*Horsburgh*; *Gillespie*, 1831, 10 S. 175). On the other hand, if one legacy expressly bears to be in satisfaction of another, there will arise an argument that other legacies in the same deed, of which this is not said, are cumulative (*Lindsay*, 1827, 5 S. 297; *Henderson*, 1858, 20 D. 402; *Elliot*, 1823, 2 S. 251).

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

The right of a legatee under the general rule of construction is not repelled by circumstances which raise a mere balance of argument that the legacies are substitutional. In such a case it is not the person entitled to the residue who is entitled to the benefit of the doubt.

There is no presumption against a residuary legatee getting also a quantitative legacy, whether in his own name or as one of a class (*Kirkpatrick*, 1878, 6 R. H. L. 4).

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

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

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

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

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

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

SATISFACTION—*Debitor non præsumitur donare.*

Though Mr. Erskine, in his *Principles*, iii. 3. 93, says, "A settlement to a daughter in a marriage contract is presumed to be granted in satisfaction or solution of all former provisions, though it should not bear the words 'in satisfaction'; because provisions granted by fathers in marriage contracts are generally intended to comprehend the whole estate that is to be expected by the husband from the wife or her father in the name of tocher," yet it has been decided, in *Kippen*, 1858, 3 Macq. 203; 1856, 18 D. 1137, that there is no presumption in the law of Scotland against double provisions, if the first in date is revocable and voluntary. Thus if a father has a child to whom he has left a legacy in a will, and thereafter in a marriage contract becomes bound to make certain provisions for that child, there is no presumption that the provision is to come in place of the legacy; but the intention of the testator will be looked to (*Grant*, 1840, 3 D. 89; *Rennie*, 1831, 9 S. 714). The English law is different. There is in that system a presumption against double provisions; but there is no rule in Scotland that a settlement on a daughter by marriage contract is presumed to be in satisfaction of previous provisions unless these provisions are *ex obligatione*. It is not possible to define what are slight differences between two provisions, and is wrong to argue from one case to another. It is contrary to the law of Scotland to lead evidence that the testator did not intend to give both (*Johnstone*, 1896, 23 R. H. L., 6 App. Ca. 1896, 95; *Keith Johnstone's Trs.*, 1894, 22 R. 28).

But if the legacy is given when the father is bound to grant a provision, that is, succeeds the onerous provision, then the maxim *debitor non præsumitur donare* applies, whether the provision is equal or not, and even though there be different destinations over (*Kippen, supra*; *Gallie*, 1782, Mor. 11374; *Yester*, 1688, Mor. 11479; *Nimmo*, 1841, 3 D. 1109). An express declaration that a bequest is additional will of course have effect given to it (*Cruikshank*, 1845, 4 Bell, 179). Satisfaction is not implied where the legacy and the provision are not of the same kind (*Clark*, 1823, 2 S. 313; *Dundas*, 1827, 5 S. 790; *Elliot*, 1873, 11 M. 735; *Somervell*, 1884, 11 R. 1004; *Haviland*, 1895, 22 R. 396). The same maxim, *Debitor non præsumitur donare*, applies where the testator has contracted an ordinary debt to the legatee; that is to say, the general rule is that the legacy is to be regarded as in satisfaction of the debt (*Balfour*, 1842, 4 D. 1044).

The thing which is not to be presumed to be donation where there is a previous debt must necessarily be such in its form and nature that it would import donation if there were no debt, but the maxim does not take effect in every case. The rule is in itself of general operation, but it is liable to exceptions wherever the facts are such as to show that not payment of the debt, but a free gift or donation independent of it, was intended; and differences as to the term of payment are of no great importance. Though the legatee has the onus thrown on him of displacing the presumption, this may often be readily done from the terms of the bequest, *e.g.* it may be displaced by the existence of a destination over (*Balfour, supra*), or the legacy may be conditional (*Hunter*, 1836, 15 S. 159), or it may be indefinitely postponed (*Spaden's Trs.*, 1822, 1 Sh. App. 164), or the two may be of different kinds (*M'Dowall*, 1833, 11 S. 952), or the debt may be to marriage-contract trustees, and the gift to a daughter (*Keith Johnstone's Trs.*, 1894, 22 R. 28). Where a testator stands in *loco parentis* to a legatee, and after the execution of a will or bequest in his favour pays him money,

there is no presumption that the advance is in satisfaction of the legacy, though slight evidence will raise such a presumption (*Robertson*, 1838, 16 S. 554; *Fyfe*, 1847, 9 D. 853; *Webster*, 1859, 21 D. 915). But the contrary is the rule in the case of a stranger legatee—the payments are to be set against the legacy in the absence of proof to the contrary (*Buchanan*, 1824, 2 Sh. App. 445; *Murray*, 1843, 6 D. 179). A legacy may be satisfied by the payment of a similar sum in the lifetime of the testator (*Robertson*, 1838, 16 S. 554; *Mollison*, 1822, 1 S. 345; *Burrell*, 1828, 6 S. 801). A declaration that advances are to be taken as in satisfaction of legacies is frequent in practice, and receives its effect (*Smith's Trs.*, 1894, 21 R. 633). Where the intention to satisfy a provision to a family by advances to the parent is expressly declared, it is no answer to say that the children are receiving no benefit from the advance (*Hutchison*, 1856, 2 Macq. 492). In England it seems to be settled that where a person, not in *loco parentis* to a legatee, gives a legacy for a particular purpose, and afterwards advances money for the same purpose, a presumption arises that the legacy is taken away. "Suppose A. bequeathed to his brother £5000 to buy a house in Merrion Square, and afterwards bought one which he gave to his brother, are there two houses to be bought?" (*Monck*, 1810, 1 Ball & B. 268; *Rosewell*, 1744, 3 Atk. 77.)

Extrinsic Evidence, etc.

The following are the seven propositions of Sir James Wigram, V. C., in which he sets forth the principles upon which extrinsic evidence is admitted or rejected in the interpretation of wills:—

1. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

2. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

3. But where his words, interpreted as above, are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense of which, with reference to these circumstances, they are capable (*Kerr* v. *Innes*, 1810, 5 Pat. 425).

4. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court of the proper meaning of the words.

5. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the

person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words (*Mags. of Dundee*, 1858, 3 Macq. 134; *Davidson*, 1803, Mor. 14584; *Keiller*, 1824, 4 S. 396; *Keiller*, 1826, 4 S. 724; *M'Intyre*, 1863, 2 M. 94; *Synod of Aberdeen*, 1847, 9 D. 745; *Pringle*, 1823, 2 S. 588; *Sommerrail*, 1830, 8 S. 370; *Wilson's Exrs.* (*Conversion of Jews*), 1869, 8 M. 233; *Duff's Trs.*, 1862, 24 D. 552; *Free Ch. Trs.*, 1887, 14 R. 333; *Waterpark* v. *Fennell*, 7 Cl. H. of L. Ca. 650 (general concurrence with Wigram expressed); *Grant*, 1846, 8 D. 1077; *Glendonwyn*, 8 M. at 1082; *Farquhar*, 1875, 3 R. 71.

6. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases) will be void for uncertainty.

7. Notwithstanding the rule of law which makes a will void for uncertainty where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, Courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended where the description in the will is insufficient for the purpose.

These cases may be thus defined: where the objects of a testator's bounty, or the subject of disposition (*i.e.* the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.

To these rules Ld. M'Laren adds that extrinsic evidence is admissible: (*a*) to prove the testator's knowledge of facts material to the construction of the will, where by any rule of law such knowledge is a legitimate element of construction. Thus Ld. Pres. Inglis, in *Free Ch. Trs.*, 1887, 14 R. 333, said: "Anything in the nature of a declaration of intention, or any statement of the testator, from which an inference can be drawn, subsequent to the execution of his testamentary papers, appears to me to be quite inadmissible. On the other hand, we are entitled to inquire into the facts affecting the position of the testator at the time when he made his settlement, and also at the time when he made his codicil. We are entitled to know, for example, what was the amount of his estate at each period, according to his own estimate, because considerable light may be thus obtained in ascertaining his intention as expressed in his testamentary writings, under reference to the fact that his estate was of greater or less value at one period, and at another." See also *Glendonwyn*, 8 M. at p. 1082; *Maclean*, 1891, 18 R. 874. It has been elsewhere laid down that the Court of interpretation is entitled to be put "into the chair of the testator."

(*b*) To disprove the presumption against double provisions drawn from their similarity. Though the general rule is that, in the case of double legacies, both are payable unless there is an implied revocation of the first, or the second is a mere repetition of it, and no extrinsic evidence is admissible (*Horsburgh*, 1847, 9 D. 341), yet evidence is admissible to show that two legacies were intended, it being legitimate thus to support the will, though not legitimate to contradict it (*Lindsay*, 1827, 5 S. 298, 297).

Accordingly, any evidence is admissible to show whether the circumstances are inimical to the existence of double legacies, and, that being done, to repel the presumption thus arising (*Livingstone*, 1864, 3 M. 20; *Campbell*, 1865, 3 M. 360). It must, however, be borne in mind that the English presumption against double portions does not hold in Scotland.

(*c*) Extrinsic evidence is also admitted to prove completed testamentary intention, *e.g.* whether a holograph writing was intended as a will or merely as a letter of instructions (*Inglis*, 1831, 5 W. & S. 785; *Robb's Trs.*, 1872, 10 M. 692; *Forsyth*, 1872, 10 M. 616; *Skinner* v. *Forbes*, 1883, 11 R. 88; *Colvin*, 1885, 12 R. 947; *Goldie*, 1885, 13 R. 138), or to prove that a will has been cancelled or destroyed, or that it was not meant to destroy it (*Nasmyth*, 1821, 1 Sh. App. 65; *Dow*, 1848, 10 D. 1465; *Falconar*, 1848, 11 D. 220; *Cuninghame*, 1851, 13 D. 1376); but evidence is not admitted to show that unauthenticated erasures were made by the authority of the grantor (*Grant*, 1847, 6 Bell, 171; *Reid*, 1834, 12 S. 781). As to the inadmissibility of evidence of intention in support of a will said to be revoked by the presumption arising from the subsequent birth of a child to the testator, see *Elder's Trs.*, 1894, 21 R. 705.

Instructions for the preparation of a deed are not to be looked to; nor are conversations of the testator admissible to control the written words. Subsequent writings may be looked at if they are formal deeds (*Glendonwyn*, 1870, 8 M. 1075; 1873, 11 M. H. L. 33), or even holograph writings (*Farquhar*, 1875, 3 R. 71).

According to Sir J. Wigram, it has been laid down in England that extrinsic evidence is inadmissible for the following purposes:—

(1) To fill up a total blank in a will.

(2) To insert a devise omitted by mistake.

(3) To prove what was intended by an unintelligible word.

(4) To prove that a thing in substance different from that described in the will was intended.

(5) To change the person described.

(6) To reconcile conflicting clauses in a will.

(7) To prove to which of two antecedents a relative word referred.

(8) To explain or alter the estate.

(9) To prove which guardian was to have the actual care of children.

(10) To explain what was to be done with the interest of a legacy until the time of payment.

(11) To prove that by a bequest of residue a particular sum was intended.

(12) To construe the will by instructions given to prepare it.

(13) To prove that an executor was intended to be a trustee of residue for next of kin.

(14) To prove that an executor was meant to be a beneficiary where the will showed he was intended to be a trustee.

(15) To control a technical rule of verbal construction.

(16) To explain in what sense the word "relations" was used.

(17) What the testator intended to give by the word "plate."

(18) What was to be covered by the words "land out of settlement."

(19) That a portion was intended to be in satisfaction of a bequest of residue.

(20) That a legacy in a codicil was in satisfaction of one in a will.

(21) That a devise to a wife was in bar of a dower.

(22) To supply a use or trust.

(23) To ascertain whether the real estate was charged with the payment of debt in aid only, or in exoneration, of the personal estate.

(24) To prove that the intention in appointing a debtor to be executor was to release the debt.

(25) To rebut a presumption which arises from the construction of words simply *qua* words.

(26) To raise a presumption.

(27) To increase a legacy.

(28) To increase that which is defective.

(29) To add a legacy to a will.

(30) To prove what interest a legatee was to take in a legacy.

(31) To ascertain an intention which, upon the face of the will, was indeterminate.

(32) To prove that words of limitation were intended to be construed as words of purchase.

(33) To prove that executors were intended by the testator to act only to the extent to which they had acted.

(34) To prove that general words were used in this or that particular sense.

(35) To add to, detract from, or alter the will.

(36) Generally to prove intention.

Vesting.

Vesting of Legacies.—A legacy is said to vest in a legatee when, according to the expression of the testator's testamentary intention, the time has arrived for it to become his, so as to be affected by his deeds *inter vivos* or *mortis causa,* and so as to pass to his representatives on his decease. Until that period come, he has a mere *spes successionis,* and though he assign it, nothing will pass to the assignee unless the cedent survive the date of vesting. Indeed, in Bell, *Com.* ii. 16, it is laid down that a legacy is not capable of assignation during the testator's life (*Bedwells,* 2 Dec. 1819, F. C.; Mont. Bell, vol. i. 328); but the case quoted seems to turn merely upon priority of intimation. Obviously, while the testator lives there is no debtor, and there can be no intimation to him. To fix the date of vesting, therefore, becomes a question of great importance, and sometimes of great practical difficulty.

The general rule, as usual, is that the will of the testator is the guide. "Every case must depend on the special phraseology of the deed." We must look at it as a whole and consider its provisions in order to ascertain the will of the testator. This is the only rule of law a Court can follow in such questions. I have difficulties in thinking that there is a principle established by any decision or series of decisions on the subject. We are bound to give effect to the will of the testator, whatever it is" (Ld. J. C. Boyle, in *Provan,* 1840, 2 D. 298).

In the simplest case a legacy vests if the legatee survives the testator; while, on the other hand, it is clear that if he predecease the testator, he acquires no right. It being in the interest of the legatees that they should be able to deal with their legacies at once, there is recognised a presumption that the legacy is to vest at the earliest period possible, that is to say, the death of the testator; so we may say that, in the absence of direction, express or implied, to the contrary, the death of the testator is the time of vesting (*Taylor,* 1878, 5 R. H. L. 217; *Mackinnon's Trs.,* 1897, 24 R. 981; *M'Lean's Trs.,* 1897, 24 R. 988).

If the testator expressly and unambiguously fix the time of vesting, the

question is solved, unless his direction is inconsistent with the general tenor of his last will (*Carruther's Trs.*, 1894, 21 R. 492; *Gray*, 1870, 42 Sc. Jur. 382; *Croom's Trs.*, 1859, 22 D. 45; *Chambers*, 1878, 5 R. H. L. at p. 166; *Davidson's Trs.*, 1871, 9 M. 995; *Taylor*, 1878, 5 R. H. L. 221, Blackburn; *Paterson's Trs.*, 1870, 8 M. 449). Thus in *Macdougall*, 1890, 17 R. 761, trustees were directed, on the death of a testator and his wife, and on the youngest of his children attaining the age of forty, to divide his estate among his children who should then be alive, and the issue of any who might be dead, under the declaration that their shares should not vest in them till actual payment and conveyance; and that if any one or more of his children should die before receiving payment, and without leaving issue, his share should go to the survivors. The youngest child survived his parents and reached the age, but died less than six months thereafter, without having received payment. It was held that he had acquired no vested right, the intention of the will being that actual payment and conveyance were essential (see *Howat's Trs.*, 1869, 8 M. 337; *Burnsides*, 1829, 7 S. 735).

Apart from the declaration of the testator, it is difficult to find any certain method for solving questions of vesting. The law on the subject is confined to a few elementary principles, and beyond these there is very little to be extracted from the numerous decisions which can be usefully applied to the construction of a will which is not identical with that in the particular case. The rules for the most part are merely presumptive.

This at least may be said, that the following are elements to be considered:—

(1) Whether the gift depends on an event certain or uncertain.

(2) What is the nature of the estate,—though this is not of great importance.

(3) Whether there is a direct gift, or merely a direction to trustees to pay.

(4) Whether there is, and what is the nature of, a destination over (*Cunningham*, 1889, 17 R. 225; *Hay's Trs.*, 1890, 17 R. 961).

A most important question is whether or not the legatee's right hangs upon a contingency. If it does, there is no vesting till the condition is purified (*Bell, Prin.* 1879 and 1883; Ersk. iii. 9. 9). Thus in *Jackson*, 1876, 3 R. 627, the Lord Justice-Clerk said:—

"In *mortis causa* settlements, legacies and provisions are presumed to take effect and vest from the testator's death; and in the case of provisions to the testator's immediate children, this presumption is unusually strong. The postponement of the term of payment has of itself no effect in overturning this presumption. A postponed term of payment only affects vesting where it is adjected as a condition of the gift itself, and is not merely a burden on, or a qualification of, the right. A liferent or annuity provision does not prevent vesting, because the interposed interest is only a burden on the gift. Where survivance of the term of payment is a condition of the legacy itself, no vesting takes place unless the condition be fulfilled. In order to determine whether survivance be a condition of the gift, or the postponement be only a burden on it, it is of the last importance to ascertain what is the primary object of the testator in postponing payment. If it appears to be to secure an interposed interest, the presumption is strong that the legacy is not conditional, and that its enjoyment only is qualified."

Ld. Colonsay, in *Carleton*, 1867, 5 M. H. L. 151, gives clearly and concisely the principles that regulate vesting—

"1. The general rule of law as to bequests is that the right of fee given vests *a morte testatoris*.

"The rule holds though (1) a right of liferent be given to another, or (2) though the liferent be given through the instrumentality of a trust, (3) whether the fee be given to an individual nomination or to a class.

"The circumstance that some of the members of the favoured class were unborn at the testator's death is no obstacle to the right vesting in each of them as soon as they respectively come into existence, although the amount of the benefit to accrue to each may not then be ascertainable.

"There may, however, be cases in which vesting is suspended. Thus where the right is made conditional on a contingency personal to the legatee, such as marriage or arrival at majority, events or dates uncertain, which may never take place, there is a presumption, though not insuperable, that the vesting was intended to be suspended. So also an inference to that effect may be deduced from an express clause of substitution or survivorship applicable to the members *inter se* of a class to whom the fee is destined.

"An inference of intention to suspend vesting may, in a particular case, be collected from the whole purpose and tenor of a deed.

"It has been contended that where, in addition to postponement of the period of payment during the life of a liferenter, there is a substitution, or, as it is sometimes called, a destination over, in favour of parties other than the fiars first named, there is a presumption that the vesting also was intended to be postponed till the death of the liferenter. There are cases in which that circumstance has, in connection with other circumstances, been taken into account; but it is by no means a conclusive circumstance."

Accordingly, the existence of a liferent, and *à fortiori* of an annuity, does not suspend vesting, these being regarded merely as burdens upon a vested fee.

It is usually immaterial whether a trust is interposed or not, whether the legacy is to individuals or to a class, or whether or not the class contain individuals unborn at the date of the testator's death. The postponement of payment to a day certain will not suspend vesting (*Archibald's Trs.*, 1882, 9 R. 942; *Finlay's Trs.*, 1886, 13 R. 1053; *Hood's Exrs.*, 1869, 7 M. 774): and this is independent of the number or succession of the life-interests which may be interposed.

In numerous cases legacies have been held to vest *a morte testatoris* where the vesting of residue was postponed (*Sanderson*, 1873, 1 R. 96; *Yeats*, 1880, 8 R. 171; *Sterling*, 1851, 14 D. 20).

Where survivance of the period of payment is a condition of the legacy, there is no vesting and *dies incertus pro conditione habitur*. It may perhaps be safely said that one main element in determining how far an uncertain term is adjected as a condition to a legacy, is to consider who is burdened by the legacy, and in whose favour the condition is conceived. An ulterior destination of a specific legacy will go far to solve the question with the legatee, whilst a bequest of residue to a third party will have a similar but by no means so conclusive an effect. But if no one but the heir-at-law or next of kin succeeding *ab intestato* is burdened by the legacy or benefited by the alleged condition, the presumption will be strongly the other way (*Alves*, 1874, 1 R. 969).

Directions to pay interest on legacies, or to make advances out of them, are in favour of vesting, the payment only being postponed (*Wood*, 1813, Hume, 271; *Nolan*, 1866, 5 M. 153; *Nelson's Trs.*, 1878, 5 R. 697; *Ross*, 1884, 12 R. 378; *Fyfe's Trs.*, 1890, 17 R. 450, *contra*). Such a clause may make for vesting *a morte testatoris*, though it is equally consistent with postpone-

ment; though if the destination be affected with provisions of survivorship and conditional institution, the implication of vesting, from a gift of income, will be displaced (*Boyle's Trs.*, 1892, 20 R. 108).

A power to expend income, or even capital, on beneficiaries, is not inconsistent with suspended vesting (*Fyfe's Trs.*, 1890, 17 R. 450; *Boyle's Trs.*, 1892, 20 R. 108).

Estates destined in a will to a family of children vest provisionally in those of the children who survive the testator. The question whether children born after the testator's death are entitled to participate depends on the provision of the will as to distribution; and if the fund is payable, or is declared to vest *a morte, post nati* will be excluded (*Carleton, Biggar's Trs.*, 1858, 21 D. 4; *Wood*, 1861, 23 D. 338; *Davidson's Trs.*, 1871, 9 M. 995; *Ross*, 1878, 5 R. 833; *Beattie's Trs.*, 1862, 24 D. 519, 535; *Hayward's Exr.*, 1895, 22 R. 757). A share may vest in a class though the individuals composing it have no vested right.

In the case of a direct gift to A., whom failing to B., followed by a direction to pay on the death of C., it is probable that immediate vesting would take place, though it does not where there is merely a direction to trustees to convey (*Bryson's Trs.*, 1880, 8 R. 142; *Hay's Trs.*, 1890, 17 R. 961).

An express declaration that a fund is to be divided among children in existence at a particular date will give those then living a right to insist on a division without finding caution (*Biggar's Trs.*, 1858, 21 D. 4).

Where a gift of residue is made subject to the exercise of an unqualified power of disposal given to some other person, it is impossible that the right to the residue should vest so long as that power subsists, because the amount to be taken by the legatee is wholly uncertain; indeed, it is in doubt whether he will receive anything. But where the power of disposal is confined to certain specified purposes, and is only to be used in certain circumstances, then vesting may exist concurrently with the existence of the power. That the sum the residuary legatee will get is of uncertain amount will not interfere with the leading presumption for vesting *a morte* (*Reddie*, 1890, 17 R. 565; *Robertson*, 1858, 20 D. 989; *Romanes*, 1865, 3 M. 348; *Miller*, 1875, 2 R. H. L. 1). There may be vesting of one half of a legacy as payable on a *dies certus*, while another part is in suspense as depending on a *dies incertus* (*Home*, 1807, Hume, 530; *Kilgour*, 1845, 7 D. 451). A legacy payable upon death or marriage vests *a morte* (*Mackintosh*, 1872, 10 M. 933); but where there was no gift, but a direction to trustees to pay on death or marriage, there was held to be no vesting (*Reeve's Factor*, 1892, 19 R. 1013).

A conditional institution of the issue of members of a class does not suspend vesting in the class (*Cuninghame*, 1889, 17 R. 219, *Carleton*); nor does the conditional institution of the heirs of a beneficiary (*Hay's Trs.*, 1890, 17 R. 961: *Douglas*, 1864, 2 M. 1008; *Wilson's Trs.*, 1878, 5 R. 697: *Ross's Trs.*, 1884, 12 R. 378; but see *Turner*, 1894, 21 R. 563).

There are five considerations that will suspend vesting: (1) The existence of a suspensive condition adjected to the gift, and *dies incertus pro conditione habetur*. (2) A proper destination over. (3) A survivorship clause pointing to a future date of payment. (4) A plain and unambiguous statement by the testator not inconsistent with the general tenor of his last will. (5) An unqualified power of disposal given to a third person.

In the more recent cases in which the rule of *dies incertus* has been applied, either there was the absence of any direct gift or there was a survivorship clause (*Muir's Trs.*, 1889, 16 R. 954: *Brodie*, 1893, 20 R. 795;

Smith, 1874, 1 R. 358). A proper destination over, for instance a direction to pay to A. on the expiry of a liferent, whom failing to B., suspends vesting (*Bell*, 1845, 7 D. 614; *Thomson*, 1834, 12 S. 911, 2 S. & M'L. 305; *Hay's Trs.*, 1890, 17 R. 961; *Byar's Trs.*, 1887, 14 R. 1034; *Johnston's Trs.*, 1891, 18 R. 823). The criterion is, that where the legatees of the second order are either mentioned by name or by some description independent of the first, then they may be taken to be *personæ delectæ*, and their contingent interest is sufficient to suspend vesting of the estate (*Hay's Trs., supra*).

A direction to pay to persons named in succession on the occurrence of an event creates only a contingent and eventual right in the institute. The most familiar illustration is the case of a destination to a plurality of persons and the survivors of the class. It was observed by Ld. Westbury, in one of the leading cases on this subject, that a direction to trustees to pay to the survivors of a family at a future period, in the absence of expressions of a contrary tendency, means that the trustees are to pay to those who are surviving at the period of payment. Consequently there can be no vested rights until the fact of survivance is ascertained (*Hay's Trs., supra*). A sole survivor of a class takes a vested interest from the time he becomes the sole survivor (*Foulis*, 1857, 19 D. 562). And where the issue of such legatees as may die leaving issue are called to the succession along with the surviving original legatees, the succession vests absolutely in the issue on the death of all the original legatees (*Cattanach*, 1858, 20 D. 1206; *Maitland's Trs.*, 1861, 23 D. 732).

If a testator gives a life estate in a sum of money, or in the residue of his estate, and at the expiration of that life estate directs the money to be paid, or the residue to be divided among a number of objects, and then refers to the possibility of some one or more of these persons dying, without specifying the time, and directs, in that event, the payment or distribution to be made among the survivors, it is understood by the law that he means the contingency to extend over the whole period of time that must elapse before the payment or distribution takes place (*Young*, 1860, 1862, 4 Macq. 314; *Howat's Trs.*, 1869, 8 M. 337; *Muirhead*, 1887, 15 R. 254; rev. 1890, 17 R. H. L. 45; *Forbes*, 1890, 18 R. 230; *Neville*, 1895, 23 R. 351; *Adams' Trs.*, 1896, 23 R. 828; *Wood*, 1896, 24 R. 105). For contrary intention, see *Henderson's Trs.*, 1876, 3 R. 320; *Campbell*, 1866, 5 M. 206; *Prinsell*, 1855, 2 Macq. 273.

It has also in some cases been held that though the testator spoke of vesting, he did not mean vesting (*Popham's Trs.*, 1883, 10 R. 885). In this case vest was read as equivalent to "be payable."

Vesting subject to defeasance.—A fee may vest subject to defeasance (*Balderston*, 1857, 19 D. 293; *Grant*, 1859, 22 D. 53; *Stewart*, 1859, 22 D. 72; *Robertson*, 186–, 7 M. 1114; *Bruce*, 1874, 1 R. 740; *M'Lay*, 1876, 3 R. 1124; *Snell's Trs.*, 1877, 4 R. 709; *Taylor*, 1877, 5 R. 49; rev. 5 R. H. L. 217; *Fraser*, 1883, 11 R. 196; *Bradford*, 1884, 11 R. 1135; *Steel*, 1888, 16 R. 204; *Lindsay*, 1880, 8 R. 281; *Dalgleish*, 1889, 16 R. 559; *Logan*, 1890, 17 R. 425; *Earl of Dalhousie*, 1889, 16 R. 681; *White's Trs.*, 1893, 20 R. 460; *Wilson's Trs.*, 1894, 22 R. 62; *Stewart's Trs.*, 1896, 23 R. 416).

"I see no reason against holding a fee to vest, not as a right absolute and indefeasible, but subject to the contingency of its being defeated in favour of issue by death before a certain date. A similar result occurs in the case of vesting in children as a class, where it is provided that future-born children shall have a share. A right of fee in the whole provision vests in the

child first born, subject only to its being partially defeated by the birth of future children, and as each child comes into existence there is corresponding restriction of the extent of the fee which was previously vested in the first child" (Ld. Shand in *Snell's Trs.*, 1877, 4 R. at p. 713).

Where a legacy is given subject to an event which may happen after as well as before the legatee's death, the testator's meaning is held to be that the legatee named shall be at liberty to dispose of the legacy, subject to the same contingency under which it was given him (Ld. Young in *Cumming's Trs.*, 1893, 20 R. 454).

"It is, in general, for the benefit of the object of the testator's bounty that they should be able to deal with their expectant interests at once, which they can do if their interest is vested, though subject to be divested by the happening of a subsequent event, but which they cannot do if their interests are kept in suspense and contingency until that event has happened. And therefore it is to be presumed that a testator intends the gift he gives to be vested, subject to being divested, rather than to remain in suspense" (Ld. Blackburn in *Taylor*, 1878, 5 R. H. L. 217).

"Where a fund is settled on the daughters of the testator for their liferent use allenarly, and their children, if any, in fee, whom failing to another person or other persons in absolute property, with no further destination, the vesting of the fee in the last-named person or persons will depend on these considerations: Whether the person so called to the succession, if only one, was a known and existing individual at the date of the death of the testator, or, if more than one, whether the persons so called were all of them known and existing at that date; or if the destination is to a class called by description, whether the individuals who constitute the class are ascertained at that date, or whether he or they cannot be known or ascertained till the death of the liferenters or the occurrence of some other event. The fee will not vest if they are not known. If they are known it will vest *a morte testatoris*, subject to defeasance, in whole or in part, in the event of the liferenters, or any of them, leaving issue" (Ld. Pres. Inglis in *Steel*, 1888, 16 R. 204).

In *Cumming's Trs.*, 1895, 23 R. 94, it was said that this principle would apply wherever the liferenter, whether male or female, is a person to whom the testator stood in *loco parentis*; and it was pointed out that, in *Steel's* case, if there had been issue in existence at the death of the testator, it would have been impossible to hold that there was vesting in the conditional institutes.

The doctrine was approved by the House of Lords in *Gregory*, 1889, 16 R. H. L. 10.

If the class to be benefited by the provision in favour of children is quite unascertained and has no existence at all, nothing can interfere with vesting (Ld. Pres. in *Dalhousie's Trs.*, 1889, 16 R. p. 685; see also Ld. Shand, at p. 686).

If a testator gives an absolute gift to his children, and then directs the bequest to be held for his children in liferent and their issue in fee, then the fee vests *a morte* in the original legatees, subject to defeasance in the event of issue appearing (*Lindsay's Trs.*, 1880, 8 R. 281; *Dalgleish's Trs.*, 1889, 16 R. 559; *Logan's Trs.*, 1890, 17 R. 425; *Stewart's Trs.*, 1896, 23 R. 416).

Again, a right may vest in existing members of a class subject to partial defeasance on the appearance of other members of the class (*Miller*, 1875, 2 R. H. L. 1; *Buchanan's Trs.*, 1877, 4 R. 754; *Cunningham*, 1889, 17 R. 218).

Discretionary powers conferred on trustees may affect vesting (*Smith's Trs.*, 1883, 10 R. 1144; *Haldane's Trs.*, 1890, 17 R. 385; *Paterson's Tr.*, 1870, 8 M. 449). If property is given to anyone absolutely, any direction as to the mode of dealing with it will generally be void from repugnancy (*Duthie's Trs.*, 1889, 16 R. 1002; *Jamieson*, 1889, 16 R. 807; *Ritchie's Trs.*, 1894, 21 R. 679, follows *Miller* and *Wilkie*). Where a person *sui juris* takes a right of fee, he is not restricted (*Mackinnon*, 19 R. 1051). Where a discretionary power is given to trustees to restrict the right of a beneficiary to a liferent, and settle the fee on his issue or other beneficiaries, this may be sustained as a competent condition of the grant, provided there is not an unconditional grant of the fee (*Weller*, 1866, 4 M. H. L. 8; *Chamber's Trs.*, 1878, 5 R. H. L. 151; 1877, 5 R. 97; *Muir's Trs.*, 1895, 22 R. 553; *White's Trs.*, 1896, 23 R. 836); but if there is an unconditional grant of the fee, and no ulterior destination dependent on the exercise of the powers, then powers given to trustees to manage or withhold the provision beyond the period of vesting will, except where necessary for trust purposes, be disregarded as inconsistent with the right of fee (*Miller's Trs.*, 1890, 18 R. 301; *Brown*, 1890, 17 R. 517; *Lawson's Trs.*, 1890, 17 R. 1167; *Wilkie's Trs.*, 1893, 21 R. 198; *White's Trs.*, 1896, 23 R. 836; *Greenlees*, 1894, 22 R. 136; *Russell*, 1896, 24 R. 668).

"There is a considerable body of authority regarding the effect of an original gift with a direction to hold in trust superadded. In the very well-considered cases of *Lindsay* and *Dalgleish* the two things were held to be reconcilable. And again, in two recent cases, *Greenlees*, 20 R. 136, and *Stewart*, 23 R. 416, this principle of construction was generalised; and I think it must now be held that an original gift, on partition of a residue amongst the members of a family, will not be cut down to a liferent by the effect of a subsequent direction to pay the income to one or more of the objects of the gift for life. Of course there may be cases where the primary gift is so qualified in expression as to show that no higher right is meant to be given than is more fully explained in the sequel; and no rule can be laid down which will dispense with the necessity of carefully considering the effect of all the clauses and provisions bearing on the right conferred" (Ld. M'Laren in *Mackay*, 1897, 24 R. 904).

Where trustees are directed to hold a fund for children and to pay the same when that can conveniently be done, and there is a clause of accretion to survivors, payment to one beneficiary fixes the period of vesting for all the children (*Sutherland's Trs.*, 1874, 2 R. 46; *Scott*, 1877, 4 R. 384).

Quod fieri debet infectum valet.—Where vesting is to take place on conveyance, and there is unreasonable delay on the part of the trustees in doing what they are directed to do, this brocard applies (*Low's Trs.*, 1879, 7 R. 410; *Simpson's Trs.*, 1889, 17 R. 248; *Earl of Stair*, 1826, 2 W. & S. 414; *Dickson's Tutors*, 1853, 16 D. 1; *Simpson's Trs.*, 1889, 17 R. 248).

"The leading question under the father's deed is, When did the vesting take place in the sons to all effects, so as to entitle each to deal with his share as his own property? According to the words of the deed, that is not to happen till the conveyances have been granted in their favour; but there is an important principle in our law that that which ought to have been done according to the direction of a testator shall be held to have been done. It has been settled by the cases of *Lord Stair*, 1827, 2 W. & S. 614, and *Dickson's Tutors*, 1853, 16 D. 1, that you are to construe a testator's deed as meaning that what he has directed to be done, without specifying a time, shall be done within a reasonable time; and the authorities have further

construed a 'reasonable time' to be within one year after his death" (Ld. Deas in *Love's Trs.*, 1879, 7 R. 410).

A similar result follows where they should have exercised a discretion to restrict (*M'Nicol's Ex.*, 1893, 20 R. 387).

The rules of vesting may perhaps be summed up thus:—

1. The primary presumption is for vesting *a morte testatoris*, and this is not affected by the existence of an annuity or a liferent in favour of someone else, these being merely burdens upon the fee.

2. A declaration by the testator will fix the period of vesting, unless such declaration be inconsistent with the tenor of his will.

3. There is a presumption that a *dies incertus* is to suspend vesting; but this is a mere presumption, and may be overcome.

4. That the income is given in the meantime is in favour of vesting, and that it is given to someone else makes in the opposite direction.

5. A power of division does not *per se* suspend vesting.

6. A survivorship clause does suspend if it has reference to a future date. So does a proper destination over; but notice that "heirs," "issue," etc., are not proper destinations over.

7. That there is no gift, except a direction to trustees to convey on a certain event, is unfavourable to vesting (*Bryson's Trs.*, 8 R. 142; *Forbes*, 1890, 18 R. 231).

Protected Succession.—Where trustees were directed to pay a legacy to a lady, "to be settled by my said trustee on herself and her issue, with power to her of disposal in case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband," when the lady was forty-two years of age and had had no children it was held: (1) that she was not entitled to have the legacy paid to herself absolutely; (2) that the trustees were bound to invest the money and take the securities in her name in fee, exclusive of the *jus mariti* of the husband, and after her death to any children she might have, also in fee, subject to the condition that the children's right of succession should not be defeated by her gratuitous act, and failing children, to her heirs (*Massy*, 1872, 11 M. 173). It was observed, in *Mitchell*, 1877, 5 R. 154, that the principle of *Massy's* case is not one to be extended, and the following were pointed out as its distinguishing features: (1) Lady Massy was married at the time the will was executed. (2) She had an express power of disposal, failing her issue. (3) Failing issue and disposal, the fee was to go to her heirs, excluding those of her husband. The Court will not create a trust or devise machinery for carrying out such a purpose, but will only insert words in the titles (*Duthie's Trs.*, 1877, 5 R. p. 861; see *Gibson's Trs.*, 1877, 4 R. 1038; also *Murray*, 1895, 22 R. at p. 943, where it is observed that there are cases where the Court has sanctioned payments under receipts which took note of the restrictions; but these cases prove nothing, because the insertion of the restrictions in the receipt has no effect). Accordingly, to declare an annuity alimentary and inalienable where there are neither trustees to hold it nor conditional institutes to challenge the annuitant's right, is of no effect. The Court will not supply means for protecting property against creditors, or for restricting the rights of legatees.

In *Simpson*, 1888, 16 R. 40, a truster directed his trustees, so soon as they should see fit, to convey certain heritable property to two daughters in liferent respectively, and to two grandchildren *nominatim*, and others *nascituri*, "equally among them, share and share alike," any of whom failing, the share or shares of the deceaser or deceasers to the survivors equally among them, share and share alike, in fee. It was held that no fee vested

in the grandchildren at the truster's death, but that on the death of each daughter the half liferented by her fell to be divided among the grandchildren or their issue then in existence exclusively.

Where a bequest is made absolutely with a declaration that it shall not fall under the legatee's contract of marriage, if the contract contains a disposition of *acquirenda*, the declaration may fail of its purpose (*Douglas Trs.*, 1879, 7 R. 295; *Simson's Trs.*, 1890, 17 R. 581)

Acceleration of Vesting and Anticipated Payment.—1. A beneficiary who has an absolute right of fee will always be relieved of a trust management which is cumbrous, unnecessary, or expensive (*Speirs*, 1875, 3 R. 50; *Miller*, 1890, 18 R. 301; *Brown*, 1890, 17 R. 517). A fee destined contingently, which has become absolute by the death of the other parties interested, will vest at once in those surviving (*Lindsay's Trs.*, 1885, 12 R. 964).

2. Where there is a condition personal to the legatee, such as attaining majority or marriage, vesting cannot be accelerated.

3. Payment may be anticipated with the consent of all the members of a class to whom a fee is destined (*Louson's Trs.*, 1886, 13 R. 1003; *Grant*, 1876, 3 R. 280; *Brown*, 1890, 17 R. 517).

4. Charitable trusts are under the same disabilities as individual legatees (*Elder's Trs.*, 1881, 8 R. 593).

5. Consent cannot be given where the liferenter or annuitant has an interest that is alimentary merely, and unassignable (*White's Trs.*, 1877, 4 R. 786; *Duthie's Trs.*, 1878, 5 R. 858; *Hughes*, 1892, 19 R. H. L. 33; *Elliott's Trs.*, 1894, 21 R. 975; *Muirhead*, 1890, 17 R. H. L. 45). Division has been allowed on caution where lady of advanced age was in right of the burden, but it has been said that there is no presumption in law that a woman is past child-bearing at any age (*Anderson*, 1890, 17 R. 397; *Scheniman*, 1828, 6 S. 1019; *Urquhart's Trs.*, 1886, 14 R. 112; *Fleming*, 1879, 6 R. 588; *Shaw*, 6 S. 1149; also in *Blackwood*, 1833, 11 S. 699).

Ld. Watson said, in *Muirhead*: "I see no reason to doubt that, in cases where the final distribution of a trust estate is directed to be made on the death of an annuitant, and it clearly appears that in postponing the time of division the testator had no other object in view than to secure payment of the annuity, it may be within the power of the Court, upon the discharge or renunciation of the annuitant's right, to ordain an immediate division. But in order to the due exercise of that power it is, in my opinion, essential that the beneficiaries to whom the trustees are directed to pay or convey shall have a vested and indefeasible interest in the provisions" (*Roberton*, 1846, 9 D. 152; *Rainford*, 1852, 14 D. 450; *Pretty*, 1854, 16 D. 667).

International Law.

1. By the Wills Act of 1861 (24 & 25 Vict. c. 114) it is provided that every testamentary instrument made by a British subject made out of the United Kingdom shall, as regards personal estate, be well executed if it is made according to the forms of (*a*) the place where it is executed; or (*b*) the place where the maker is domiciled; or (*c*) that part of Her Majesty's dominions where the testator had his domicile of origin.

2. Wills made within the United Kingdom are to be good if made according to the forms required by the laws of that part of the United Kingdom where they are executed.

3. A change of domicile is not to be held to invalidate or alter the construction of a will (see *Purvis' Trs.*, 1861, 23 D. 812).

The general rule with regard to the succession to personal estate is that the law to be looked to is that of the domicile of the testator at the time of his death. This is the law that regulates the determination of the question of testacy or intestacy and the construction of the will, as indicating the intention of the testator (*Smith*, 1891, 18 R. 1036; Story, s. 479; *Trotter*, 1829, 3 W. & S. 407; Bar, 110; *Enohin*, 1862, 10 Cl. H. L. p. 1; *Anstruther*, 2 Sim. 1; *Studd, infra*). At common law the form is good if it satisfies the requirements of the law of the domicile, or that of the place of execution.

With regard to heritable estate, the questions of form are settled by the law of the place where the property is situated (Ersk. iii. 3. 40). *Mortis causa* dispositions of heritage in Scotland should therefore be in the Scots form. Where an Englishman conveyed heritable estate in Scotland to trustees, he could then affect it by his will (*Ker*, 1829, 7 S. 454; *Cameron*, 1833, 7 W. & S. 166).

Since the passing of the Titles to Land Consolidation Act of 1868, the intention as manifested in the will prevails in heritage as in moveables (*Studd*, 1883, 10 R. H. L. 53, viii. App. Ca. 577; *Connel's Trs.*, 1872, 10 M. 627). The character of a subject as heritable or moveable is determined by the law of the place where it is situated (*Monteith*, 1882, 9 R. 982). As regards ascertaining the class of persons to be benefited, and the quality and amount of the gift, the law of the testator's domicile governs (Story, 479; *Harrison*, 9 Peters (Sup. Ch.), 483; Binge, ii. 855), unless the context supplies some other rule.

24 & 25 Vict. c. 121. This Statute confers power upon the Queen by Order in Council, under convention with a foreign State, to declare that a British subject residing abroad, or a foreign subject residing in the United Kingdom, shall retain his domicile as regards succession in moveables, unless certain conditions are complied with. The power has so far not been exercised.

[Stair, iii. 8. 20; More's *Notes*, cc *et seq.*, cxli; Bankt. ii. 388; Ersk. iii. 9. 6; Bell, *Com.* i. 137; Bell, *Prin.* 1873; M'Laren on *Wills*; Menzies, *Convey.* 490; Mont. Bell, ii. 975; Dickson on *Evidence*, 208, 221, 629.]

See TESTAMENT; WILL; VESTING EXECUTOR; INSTITUTE; CONJUNCT RIGHTS; SUBSTITUTE; CONDITIO SI SINE; FALSA DEMONSTRATIO; VESTING; DONATION MORTIS CAUSA; RESIDUE; SURVIVORSHIP; ALIMENTARY INTEREST; APPOINTMENT, POWER OF; ELECTION; BASTARD; BENEFICIARY; CHARITABLE TRUST; COLLATION; DIES CEDIT, VENIT; HEIR; HERITABLE AND MOVEABLE.

Legacy in Roman Law is defined in the *Institutes* of Justinian as *donatio quædam a defuncto relicta* (*Inst.* ii. 20. 1). In its strict sense a legacy was a bequest charged by the use of words of command (*verbis imperativis*) on a testamentary heir. A legacy thus implied a testament: for although there might be a FIDEICOMMISSUM (*q.v.*), in cases of intestacy, there could be no legacy without a testament. As contrasted with the succession of the heir to the *hereditas*, which is a universal succession, the succession of a legatee (*legatarius*) to his legacy is, in its nature, a singular succession (*Inst.* ii. 10. 11).

In the more ancient law there were four recognised modes of leaving

legacies—*per vindicationem*, *per damnationem*, *per præceptionem*, and *sinendi modo*. For each of these kinds of legacy there was a certain form of words, and, up to the time of Nero, unless a legacy was given precisely in one or other of these forms, it was void. In the later law these distinctions were abolished, and testators in giving legacies were free to use what words they chose. Justinian finally assimilated legacies in every way to *fideicommissa*, so that in the latest Roman law there is but one kind of bequest, which is called indifferently *legatum* or *fideicommissum*.

In course of time certain statutory limitations were put on the liability of an heir for legacies. These limitations were devised in the interest alike of the heir and the legatees. The former was given a substantial inducement to enter on the inheritance; while the latter were secured in the receipt of at least a portion of the benefits intended for them by the testator. See FALCIDIA PORTIO.

A legacy was void if left to a person who had not *testamenti factio* with the testator. Until late in the history of Roman law, no legacy could be validly given to *incertæ personæ*; but the only trace of this rule in Justinian's time was that certain corporations could not be validly made legatees without permission of the emperor. Again, up till the time of Justinian, legacies given *pœnæ nomine*, *i.e.* for the purpose of inducing the heir to do or not to do some particular act, were void; but Justinian repealed this rule, except where the act or forbearance which the testator wished to secure was either illegal or *contra bonos mores* (*Inst.* ii. 20. 36). A legacy of a *res extra commercium*, or of property which at the moment of the execution of the will already belonged to the legatee, was void. A mistake in the *nomen*, *prænomen*, or *cognomen* of a legatee, or an incorrect description (*falsa demonstratio*), or a false reason for giving the legacy, did not make it invalid.

Anything *in commercio*, whether corporeal or incorporeal, might be bequeathed as a legacy. The thing might be the testator's own property, or it might belong to another. In the latter case the heir was bound to endeavour to get the thing for the legatee, or, failing this, to pay him its value. The thing need not be actually in existence; it was enough if it would probably exist at some future time. A servitude or other *jus in re alienâ*; the discharge of a debt due to the testator by the legatee; a debt due by the testator to the legatee, provided the latter is in some way put in a more favourable position than he held before; a claim of the testator against a third person; in fact, any act or forbearance which could lawfully be the object of an obligation, might be bequeathed as a legacy.

The legatee acquired a *jus in re* in the *res legata* in all cases in which it belonged to the testator. He acquired a personal right against the heir in every case, and this was secured by a statutory hypothec over everything which the person on whom the legacy was charged had himself received from the inheritance (*Cod.* 6. 43. 2). Two persons were said to be co-legatees when the same thing is given to both of them. When the conjunction is merely *verbis*, the beneficiaries are not co-legatees in the proper sense; for what is bequeathed to them is not the same thing, but equal shares in the same thing, *i.e.* different things (*Dig.* 28. 5. 66). Genuine co-legation, in which co-legatees are regarded as against other legatees as one person, might be effected in two ways: (1) *re et verbis*, *i.e. conjunctim* (*Dig.* 50. 16. 142), or (2) *re*, *i.e. disjunctim* (*Dig.* 32. 89; 50. 16. 142). In both these cases the legacy is divided between the co-legatees, and, if one dies or fails to take, the whole goes to the co-legatee. On this subject, see *Inst.* ii. 20. 8; *Cod.* 6. 51. 1. 11.

A legacy might be transferred from the legatee to another person (*translatio legati*, *Dig.* 34. 4. 6), or altogether revoked (*ademptio legati*, *Inst.* ii. 21). Revocation might be effected either expressly or tacitly. (As to modes of transference and revocation, see *Inst.* ii. 21; *Dig.* 34. 4. 16 and 17; 34. 4. 3. 11; 34. 4. 6. pr.) In the later law any act from which it could be gathered that the testator no longer wished the legatee to have the legacy might be construed as a revocation of the legacy (*Dig.* 34. 4. 15), *e.g.* the alienation of the *res legata* by the testator during his lifetime was so construed (*Inst.* ii. 20. 12).

[Gaius, ii. 191–245: *Inst.* ii. 20: *Dig.* 30–32; *Cod.* 6. 37: 6. 43.]

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