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OF

THE LAW OF SCOTLAND

Legacy and Succession Duties.—These duties are under the management of the Commissioners of Inland Revenue (12 & 13 Vict c. 1; 16 & 17 Vict. c. 51, s. 9; see 53 & 54 Vict. c. 21).

They are treated below under the following headings:—

A. *Legacy Duty.*
- (1) *Introductory; Domicile.*
- (2) *Upon what Subjects Duty is Chargeable:*
  - (a) *What has been deemed a Legacy.*
  - (b) *Proceeds of Heritable Estate directed to be sold.*
- (3) *Legacies directed to be paid free of Duty.*
- (4) *Disclaimer by Legatee.*
- (5) *Legacies for Charitable Purposes.*
- (6) *Exemptions.*
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- (8) *When the Duty is Payable; Interest; Discount.*
- (9) *By whom the Duty is Payable.*
- (10) *On what Amount the Duty is Payable.*
- (11) *The Method of Charge.*
- (12) *The Method of Payment; Proof of Payment; Rectification of Duty.*
- (13) *The Method of Recovery.*
- (14) *Return of Duty overpaid.*
- (15) *Compounding the Duty.*
- (16) *Avoidance of Administration.*
- (17) *Passing Accounts.*

B. *Succession Duty.*
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(39) *Securing the Duty in Advance; Discount.*
(40) *Compounding and Commuting the Duty; Enlarging the Time for Payment.*
(41) *Avoidance of Administration.*
(42) *Passing Accounts.*

A. Legacy Duty.

(1) *Introductory; Domicile.*—Duty upon personal property, devolving by will or intestacy, total or partial, was originally imposed by the Act 20 Geo. III. c. 28, in the form of a stamp duty upon the receipt. By the Act 36 Geo. III. c. 52, the duty was made payable not upon the receipt, but upon the legacy or share of residue itself. By sec. 2 of the Act last cited, duty was imposed upon any legacy which amounted to £20, and upon any residue where the deceased's personal estate was of the clear value of £100, after deduction of debts, funeral expenses, and other charges, and legacies. By the Act 45 Geo. III. c. 28, s. 1, legacies charged upon heritage, and the proceeds of the sale of heritage, directed by will to be sold, were brought into charge. By the Act 48 Geo. III. c. 149, any share of residue amounting to £20 was made dutiable, without regard to the value of the deceased's personal estate. And by the Act 44 Vict. c. 12, s 42, duty was made payable on any pecuniary legacy or residue, save when the deceased's whole personal estate was of less value than £100 (see the Act 43 Vict. c. 14, s. 13). Observe that sec. 42 does not apply to bequests of specific articles of which the value is under £20.

Personal property is not liable to legacy duty unless it is situated within this country, and its situation depends, in point of law, upon the domicile of the owner at the time of his death (*Thomson*, 1845, 4 Bell's App. 1; *Attorney-General* v. *Napier*, 6 Ex. 217, 20 L. J. Ex. 173). Thus debts secured on foreign realty, if moveable *ex lege loci*, have been regarded as dutiable where the owner was domiciled in the United Kingdom (*Lawson*, Ir. R. [1896] 2 Q. B. 418); and the same view has received effect in regard to leasehold or real property situated abroad and forming an asset of a firm in which the deceased was partner (*Forbes*, L. R. 10 Eq. 178; *Stokes*, 38 W. R. 535). But the principle is inapplicable to the case of a legacy charged by will upon foreign heritage, and to the proceeds of foreign heritage sold under a testamentary direction. Conversely, when the lands charged are situate in the United Kingdom, duty is chargeable.

(2) *Upon what Subjects Duty is Chargeable.*—Duty is chargeable upon the personal property of a person domiciled at the date of his death in the United Kingdom, whether the subject of bequest, or devolving under intestacy, total or partial. Observe that the expression "personal property" includes legacies charged upon heritable estate, and also the proceeds of heritable estate, directed to be sold for the purpose of distribution as money among the objects of the gift (55 Geo. III. c. 184, Sched. pt. iii.; 8 & 9 Vict. c. 76, s. 4); and that such legacies and proceeds, where the testator died on or after 1 July 1888, are made chargeable under the Succession Duty Act, 1853, as succession to personalty, and liable to the additional duties (51 Vict. c. 8, s. 21 (2)).

(*a*) *What has been deemed a Legacy.*—The statutory definitions of a legacy are contained in 36 Geo. III. c. 52, s. 7; 45 Geo. III. c. 28, s. 4 (both enactments being repealed by the Statute Law Revision Act, 1872); and 8 & 9

Vict. c. 76, s. 4. The enactment last cited provides that "every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of, or which gift is or shall be payable or shall have effect or be satisfied out of, or is or shall be charged or rendered a burden upon, the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof, which such person hath had or shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any moneys to arise by the sale, burden, mortgage, or other disposition of any such real or heritable estate, or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a donation *mortis causâ*, shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject and liable to the said duties accordingly; provided always, that no sum of money which by any marriage settlement is or shall be subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, shall be liable to the said duties on legacies under the will in which such sum is or shall be appointed or apportioned in exercise of such limited power." In the case figured in the proviso succession duty is chargeable.

As to donations *mortis causâ*, see DONATION MORTIS CAUSA.

A legacy must be a gift. It has been held in England that a bequest of residue is none the less a gift because it is made in implement of an obligation (see *Jervis*, L. R. 18 Eq. 18; and cf. *Jones*, 7 Hare, 267, 19 L. J. Ch. 324; *re Brookman's Trust*, L. R. 5 Ch. App. 182). It is otherwise, however, where the obligation is to bequeath a certain sum of money (*Eyre*, 3 Kay & J. 305, 26 L. J. Ch. 757; *Graham*, 1 De G. J. & S. 474, 32 L. J. Ch. 639). These cases seem to give effect to the principles recognised in *Lord Advocate* v. *Hayart's Exors.*, 1872, 10 M. (H. L.) 62: *Arthur & Seymour*, 1870, 8 M. 928; *Moir's Trs.*, 1874, 1 R. 345; *Marshall's Exors.*, 1874, 1 R. 847. Compare also *Murray*, 1895, 22 R. 927, and *Lord Advocate* v. *Reid's Exors.*, 1880, 7 R. 483, and *re Thorley*, L. R. [1891] 2 Ch. 613.

Further, it must be a gift by will or testamentary instrument (see *Advocate-General* v. *Ramsay's Trs.*, 2 C. M. & R. 224, note; *Advocate-General* v. *Trotter*, 1847, 10 D. 56), and payable out of some portion of the testator's estate, or out of some estate of which he had a power of disposal (*Lord Advocate* v. *Reid's Exors, ut supra*; *Lord Advocate* v. *Methven's Exors.*, 1893, 20 R. 429; *sub nom. Lord Advocate* v. *Bogie*, 1894, 21 R. (H. L.) 6). It has been held that a legacy is constituted by the release of a debt recoverable at law (*Attorney-General* v. *Holbrook*, 3 Y. & J. 114), by a direction to pay a debt which no longer subsists (*Turner*, 7 De G. M. & G. 429, 26 L. J. Ch. 216), or the debt of another for whom the testator is not liable (*Foster*, 2 Bing. N. C. 269), or the interest on a Statute-barred debt, *quoad* the interest (*Cooke*, MS., reported on other points in 15 Sim. 611). But a direction to pay a debt, subsisting but Statute-barred, is not liable to duty (*Williamson*, 3 Y. & C. 208). A gift to an executor for his trouble is chargeable (*Duncan*, 16 Beav. 204). On the question whether a testamentary direction that a solicitor-trustee shall be entitled to profit

costs against the estate constitutes a legacy liable to duty, see the cases in Hanson, 420, *re Pooley*, L. R. 40 Ch. D. 1; *re Thorley*, L. R. [1891] 2 Ch. 613, and 102 L. T. 35, 58. A gift under condition that some portion of the property is to be applied for the benefit of others is chargeable against each beneficiary in proportion to the amount received (*in re Harris*, 7 Ex. 344, 21 L. J. Ex 92: cf. *Thorp*, 2 Ha. 607, 12 L. J. Ch. 417; *Byne*, 26 Beav. 41, 27 L. J. Ch. 788; *Newill*, L. R. 7 Ch. App. 253. As to a provision for the maintenance of animals, see *re Dean*, L. R. 41 Ch. D. 552); and a legacy on condition of surrendering a right (*Attorney-General* v. *Henniker*, 7 Ex. 331, 21 L. J. Ex. 331; *Sweeting*, 1 Drew. 331, 22 L. J. Ch. 441), or of releasing a debt (*Kirk*, L. R. 21 Ch. D. 431), or of performing a service (*Lord Advocate* v. *Reid's Exors.*, 1880, 7 R. 483; *re Thorley*, L. R. [1891] 2 Ch. D. 613) is dutiable. A legacy is not the less a legacy because the testator directs how the money shall be applied (*re Parker*, 4 H. & N. 666, 29 L. J. Ex. 66; *Lord Advocate* v. *Dunlop's Trs.*, 1894, 21 R. 348, 21 R. (H. L.) 28). As to a gift made in implement of an obligation, *see above*. An annuity charged by a testator on real estate is dutiable, unless that estate belong to the annuitant (*Attorney-General* v. *Jackson*, 2 C. & J. 101; *Stow*, 5 B. & A. 359; *Shirley*, 1 Ph. 167, 12 L. J. Ch. 111; *De Hoghton*, L. R. [1895] 2 Ch. 517; [1896] 1 Ch. 855: *Lord Advocate* v. *Paterson's Trs.*, 1879, 6 R. 906; cf. *Attorney-General* v. *Metcalfe*, 6 Ex. 26, 20 L. J. Ex. 329). Money left to pay duty is not chargeable as a legacy (36 Geo. III. c. 52, s. 21; and see (6) below). Where a person claiming her legal rights against the estate accepts less than their value, the balance of the estate is liable to legacy duty on passing to the legatee (*Lord Advocate* v. *Miller's Trs.*, 1884, 11 R. 1046).

A gift by will or deed in exercise of a limited power, created by will, is chargeable, if at all, as a legacy under the will creating the power (*Attorney-General* v. *Pickard*, 3 M. & W. 552, 7 L. J. Ex. 188; 6 M. & W. 348, 9 L. J. Ex. 329; *Sweeting, ut supra*; cf. *Attorney-General* v. *Henniker, ut supra*). A gift by will in exercise of a general power, created by will (*Platt*, 3 Beav. 257, 10 L. J. Ch. 131; *sub nom. Drake*, 10 Cl. & Fin. 257), or deed (*re Cholmondeley*, 1 C. & M. 149, 2 L. J. Ex. 65), is chargeable as a legacy under the will exercising the power (see (23) *infra*). A general power includes a power to appoint in favour of any other than certain excepted persons (*Platt, supra*). Where the donee of the power has a limited interest in the subject thereof, he is chargeable with duty, irrespective of any duty for which the appointee may be liable (36 Geo. III. c. 52, s. 18; see 16 & 17 Vict. c. 51, s. 4).

(*b*) *The Proceeds of Heritable Property directed to be sold.*—The policy of the Acts is to tax everything which comes or is directed to come into the donee's hands in the shape of a money gift or bequest (*Advocate-General* v. *Ramsay's Trs.*, 2 C. M. & R. 224, note). Where there is a direction to sell, duty will be chargeable although the estate be not sold, *e.g.* because the beneficiary prefers to take *in formâ specificâ* (*Attorney-General* v. *Holford*, 1 Pr. 426; *Advocate-General* v. *Williamson*, 1840, 13 D. 436; 1843, 2 Bell's App. 89); but it is otherwise where there is a power only to sell, and an option is given to the legatee to take certain heritage at a specified price to account of his share (*Lord Advocate* v. *Meiklam*, 1860, 22 D. 1427; cf. *Attorney-General* v. *Mangles*, 5 M. & W. 120; *Attorney-General* v. *Simcox*, 1 Ex. 749, 18 L. J. Ex. 61). In so far as the purposes for which the sale was directed have failed or are revoked, conversion is not operated (*Thomas*, 1868, 7 M. 114; *Cowan*, 1887, 14 R. 670; see 1 M'Laren, *Wills*, ss. 433 *sqq*). A direction to sell is not to

be inferred from a mere power, although exercised, if exercised merely for the advantage of the estate (*in re Evans*, 2 C. M. & R. 206, 4 L. J. Ex. 201), or for the convenience of parties (*Advocate-General* v. *Smith*, 1852, 14 D. 585; 1854, 1 Macq. 760); unless that power be combined with the clear intention that it must be exercised in order to give effect to the trust purposes (*Advocate-General* v. *Williamson, ut supra*; *Advocate-General* v. *Blackburn's Trs.*, 1847, 10 D. 166; *Weir*, 1865, 3 M. 1006; cf. *Buchanan*, 1862, 4 Macq. 374); or unless trustees, directed to consider the propriety of selling, and invested with an absolute discretion, determine upon a sale, and sell accordingly (*Advocate-General* v. *Hamilton*, 1856, 18 D. 636). In the last case, the charge will be limited to the portion of the estate actually realised (*Attorney-General* v. *Mangles, ut supra*; *Attorney-General* v. *Simeon, ut supra. In re Evans, ut supra*, is not overruled by these cases, see *Advocate-General* v. *Smith, ut supra*). Observe that the charge does not extend to the proceeds of lands sold, expended by trustees in paying off heritable debts secured on lands unsold (*Lord Advocate* v. *Hill*, 1862, 24 D. 808). Nor is duty chargeable where there is a direction to sell, and to invest the proceeds in heritage (*Heal*, 8 Ex. 839, note; *Mules, ib.* 830, 22 L. J. Ex. 350; see (34) below). As to the term from which conversion takes place, see *Morris*, L. R. 26 Ch. D. 601; *Seton's Tr.*, 1886, 13 R. 1047; Ersk. *Prin.* (Rankine's ed.) II. ii. 10 (A). Heritage sold by the direct act of the owner is converted whether the sale be voluntary or involuntary. A trustee or administrator cannot voluntarily alter the quality of the succession of him for whom he holds; and the rule operates *quoad* the excess where creditors have used legal diligence to sell more of the debtor's estate than is necessary to satisfy their claims. Sometimes the terms of the Statute or decree authorising the sale are such as to impress the proceeds with a heritable character (*Garland*, 1841, 4 D. 1; *Monereiff*, 1856, 18 D. 1286; *Dugdale*, L. R. 9 Eq. 212, 6 Ch. App. 501; cf. *Advocate-General* v. *Anstruther*, 1842, 13 D. 450; *Heron*, 1856, 18 D. 917; *Macfarlane*, 1895, 22 R. 405; *Attorney-General* v. *Ailesbury*, L. R. 12 A. C. 672; and see 8 & 9 Vict. c. 19, ss. 67, 68). It has been held in England that where a sale is directed by the Court in order to raise a charge, duty will attach to the amount required to meet the charge, if the will contain a power of sale, and the Court compel the donees of the power to exercise it; but that it will not attach if the Court act upon its general jurisdiction (*Hobson*, 17 Beav. 178; cf. *Harding*, 2 Gif. 597).

(3) *Legacies directed to be Paid free of Duty.*—No duty is chargeable upon money to be applied in payment of duty pursuant to a testamentary direction for payment, out of some other fund, of the duty chargeable on any legacy, so that the person entitled may receive his legacy duty-free (36 Geo. III. c. 52, s. 21). Thus residue cannot be given free of duty (*Londesborough*, 19 Beav. 295, 23 L. J. Ch. 646). Where all the legacies are left free of duty, and there is a shortcoming of funds to meet the entire amount of the legacies, the legatees are liable in duty on the amount of their legacies, including the portion thereof to be applied in payment of duty (*Lord Advocate* v. *Miller's Trs.*, 1884, 11 R. 1046; cf. *Wilson*, L. R. 17 Eq. 419). Where, however, some of the legacies are, and some are not, left free of duty, all are equally subject to abatement; but the whole duty must come out of the legacies not given free of duty (*Warbrick*, 30 Beav. 241; *re Wilkins*, L. R. 27 Ch. D. 703). Where a specific legacy is given free of duty, the gift of the duty is a common pecuniary legacy for the benefit of the specific legatee; which, in the event of the general estate proving insufficient, must abate along with other pecuniary legacies (*Farrer*,

L. R. 16 Eq. 19). It has been observed that where a legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund (*Noel*, 7 Pr. 241, per Richards, L. C. B.). Accordingly, where an annuity charged on real estate is given duty-free, the owners of the real estate must pay the duty (*Stow*, 5 B. & Ad. 359; cf. *Attorney-General* v. *Jackson*, 2 C. & J. 101; *Wilkinson*, L. R. 14 Eq. 96). What amounts to a direction for payment duty-free appears from *Bulloch*, 1853, 15 D. 373; *M'Alpine*, 1883, 10 R. 837, and the cases collected in Hanson, 464; Norman, 73; Jarman on *Wills*, 5th ed., 151, note; Williams on *Executors*, 9th ed., 1506.

(4) *Disclaimer by Legatee.*—When the legatee disclaims, duty is not payable (see *Attorney-General* v. *Munby*, 3 H. & N. 826; *Attorney-General* v. *Brackenbury*, 1 H. & C. 782, 32 L. J. Ex. 108; cf. *Lord Advocate* v. *Miller's Trs.*, *ut supra*).

(5) *Legacies for Charitable Purposes.*—As to the question whether such gifts are dutiable, although none of the recipients might ever receive £20, see Hanson, 3rd ed., 201; Trevor, 64; and 44 Vict. c. 12, s. 42. As to the exemption in favour of Ireland in regard to such gifts, see Hanson, 520.

(6) *Exemptions.*—Legacy duty is not chargeable in respect of bequests to a deceased's husband or wife, or to any member of the Royal Family (55 Geo. III. c. 184, Sched. pt. iii.); bequests of specific articles to bodies corporate for preservation (*ib.*; see also 39 Geo. III. c. 73, s. 1. This exemption is in practice extended to certain unincorporated bodies. Observe, further, that the Treasury is empowered to remit any death duty in respect of pictures, etc., bequeathed to the nation, or to a university, county council, or municipality (57 & 58 Vict. c. 30, s. 15)); plate, etc., while enjoyed in kind by persons not having the power of sale or disposal (36 Geo. III. c. 52, s. 14); legacies and residue out of the estate of any deceased depositor in any savings bank, where the whole of such estate does not exceed £100 in value (26 & 27 Vict. c. 87, s. 41; 46 & 47 Vict. c. 47, s. 3); bequests of money to pay legacy duty (36 Geo. III. c. 52, s. 21 This section is extended in practice to money applied in payment of succession duty; see (28) below, and 16 & 17 Vict. c. 51 s. 18); bequests of leaseholds (16 & 17 Vict. c. 51, s. 19. They are liable to succession duty); and certain bequests to Irish charities (see Hanson, 520). As to the property of a nominator in a friendly or industrial society, under £80, see 46 & 47 Vict. c. 47, s. 10; 56 & 57 Vict. c. 39, ss. 26, 27; and 59 & 60 Vict. c. 25, ss. 57, 58. Duty is not chargeable in respect of any legacy or residue or share thereof in the following cases: (1) Where the deceased died before 1 June 1881, and the legacy, etc., did not amount to £20 (55 Geo. III. c. 184, Sched. pt. iii.); (2) where the gross value of the personal estate of a person dying on or after 24 March 1880 does not, including foreign assets, if any, amount to £100 (43 Vict. c. 14, s. 13. Effect is given to this exemption in practice where the whole estate is reduced by debts below £100, whatever may be the date of death); (3) where the gross value of the personal estate of a person dying on or after 1 June 1881 does not, including foreign assets, if any, exceed £300, and where the fixed duty of 30s. has been paid (44 Vict. c. 12, ss. 33–36); (4) where the gross value of the estate, heritable and moveable, of a person dying on or after 2 August 1894 (exclusive of property settled otherwise than by the will of the deceased) does not exceed £500, and the fixed duty of 30s. or 50s. has been paid (*ib.*; 57 & 58 Vict. c. 30, s. 16); and (5) where the net value of the estate of a person dying on or after 2 August 1894 (exclusive of property settled otherwise than by will of the deceased) does

not exceed £1000, and the fixed duty or estate duty has been paid (*ib.*). The one *per cent.* legacy duty is not payable in respect of property whereon inventory or account duty (44 Vict. c. 12, s. 41), or estate duty (57 & 58 Vict. c. 30, s. 1, Sched. I.), has been paid.

In practice, the duty is not exacted in Scotland where the Crown takes as *ultimus hæres* (see Currie, *Confirmation of Executors*, 2nd ed., p. 93; Clerk and Scrope, *Forms and Powers of the Court of Exchequer in Scotland*, 221–224); nor is it usual to require duty on any sum not exceeding £100, paid to the representatives of deceased owners without representation under the provisions of 27 & 28 Vict. c. 36 (extended by 31 & 32 Vict. c. 90); 28 & 29 Vict. c. 111; and 56 Vict. c. 5, as to deceased soldiers and sailors.

(7) *Rates of Duty.*—The rate of duty is one *per cent.* in case of children of the deceased or their descendants, or the father or mother or other lineal ancestor of the deceased; three *per cent.* in the case of the brothers and sisters of the deceased, or their descendants; five *per cent.* in the case of the brothers and sisters of the father or mother of the deceased, or their descendants; six *per cent.* in the case of the brothers and sisters of a grandfather or grandmother of the deceased, or their descendants; and ten *per cent.* in the case of persons in any other degree of collateral consanguinity, or strangers in blood to the deceased (55 Geo. III. c. 184, Sched. pt. iii.), *e.g.* his illegitimate children. Where a legatee, before his legacy becomes chargeable, has married a spouse more nearly related to the testator than he himself is, he pays duty at the lower rate (16 & 17 Vict. c. 51, s. 11. Observe that this provision does not extend to the case where the testator has married a relation of the legatee more nearly related to him than is the legatee).

Legacies or moneys payable out of, or arising from, the sale or mortgage of real estate are liable to the higher rates imposed by 51 Vict. c. 8, where the testator died on or after 1 July 1888 (see (29) below).

See also (16) below.

(8) *When the Duty is Payable; Interest; Discount.*—The duty is to be accounted for and paid upon the retainer of the legacy or residue, or part thereof, for the benefit of the person entitled, and upon delivery, payment, or other satisfaction or discharge whatsoever of the same (36 Geo. III. c. 52, s. 6). Observe that an executor entitled to any legacy, residue, etc., is chargeable with duty whenever he becomes entitled, in the due course of administration, to retain to his own use any part of the estate (*ib.* s. 35). If, by reason of the infancy or absence of the person entitled, the legacy or residue cannot be paid over, the money may be paid into the Bank of England, after deduction of the duty (*ib.* s. 32; see 35 & 36 Vict. c. 44, s. 26; Hanson, 491). Duty is payable upon each devolution, notwithstanding that he, for whose benefit the legacy is liable to be retained, may not have lived to come into beneficial enjoyment thereof (*Attorney-General* v. *Malkin*, 2 Ph. 64, 16 L. J. Ch. 99; *Attorney-General* v. *Maxwell*, 10 Ir. C. L. R. 262; *Attorney-General* v. *Cleave*, 31 L. T. R. 86; *Kenlis*, L. R. [1895] 2 Ch. 458; see (26) below). It is payable, not when the right accrues, but upon retainer or satisfaction (*in re Hillas*, 2 Ir. Jur. 36). Mere appropriation does not amount to retainer, unless it operates to take the fund out of the executor's control (*Attorney-General* v. *Manners*, 1 Pr. 411; *Attorney-General* v. *Wood*, 2 Y. & J. 290; *Attorney-General* v. *Hancock*, 2 M. & W. 563, 6 L. J. Ex. 168), *e.g.* payment into Court under a decree (*Hill*, 2 Mer. 45; *Coombe*, 1 My. & C. 69; *Attorney-General* v. *Loscombe*, 5 H & N. 564, 29 L. J. 305). Duty is chargeable on the satisfaction of the legacy, by whatever means it may have been brought about (*Attorney-*

General v. *Holford*, 1 Pr. 426; *Attorney-General* v. *Metcalfe*, 6 Ex. 26, 20 L. J. Ex. 329).

Arrears of duty were chargeable with interest at the rate of four *per cent.* under 31 & 32 Vict. c. 124, s. 9. Sec. 18 of the Finance Act, 1896, provides that simple interest at the rate of three *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.

Observe that, in practice, sec. 40 of the Succession Duty Act, 1853, is regarded as applicable where legacy duty, payable by instalments, is paid in advance. In such cases, discount is allowed at the rate of three *per cent.* (see (39) below).

Acceptance or recovery of duty and interest operates as an absolute waiver of penalties (31 & 32 Vict. c. 124, s. 9).

(9) *By whom the Duty is Payable.*—The deceased's executors, or those administering or intromitting with his estate, are primarily liable for the duties. If the bequest is payable in money, duty must be deducted before payment; if it is to be transmitted *in specie*, payment of duty must be required from the person entitled before transfer. The primary liability remains till the duty is satisfied; and if the person primarily liable has paid or transferred the subject of the legacy to the legatee without providing for the duty, the latter is also liable (36 Geo. III. c. 52, ss. 6, 24). Moneys received for payment of duties are recoverable by the Crown from the recipient (54 & 55 Vict. c. 38, s. 2). When a settled fund is appointed by will in virtue of a general power contained in the settlement, the executors of the will are primarily liable (*re Philbrick's Tr.*, 34 L. J. Ch. 368; *Hayes*, L. R. 14 Eq. 1; *re Hoskins' Tr.*, L. R. 5 Ch. D. 229, 6 Ch. D. 281). He who has received his legacy without payment of duty, may be called upon to reimburse the person primarily liable, if the latter has met the Crown's claim (*Foster*, 2 Bing. N. C. 269; *Bate*, 13 Q. B. 900, 18 L. J. Q. B. 273; *Brooke*, L. R. 6 Eq. 25; *Hales*, 1 B. & B. 391); and the rule applies to the purchaser of a money legacy (*Nisbett's Trs.*, 1845, 8 D. 69; *Bryan*, 26 L. J. Ch. 510; see also *Farwell*, 3 De G. & Sm. 359, 18 L. J. Ch. 189) to the extent of the interest purchased (*Hicks*, 3 Beav. 141; *Wright*, 19 L. J. Ch. 38; *Attorney-General* v. *Giles*, 5 H. & N. 255, 29 L. J. Ex. 176). The duty upon an annuity charged upon a legacy is payable by the legatee, who may retain the amount in paying the annuity (36 Geo. III. c. 52, s. 9). In case of legacies enjoyed by several persons in succession, who are liable at the same rate, the duty shall be deducted by the executor upon payment or satisfaction to the trustee (see *re Jones's Trs.*, 21 L. J. Ch. 566) of the persons entitled, or upon receipt of any part of the income by the primary legatee. In the case of legatees liable at different rates, the executor is chargeable with the duties in succession in the same manner as in the case of an immediate bequest, unless the property bequeathed shall have been paid or satisfied to any trustee for the person entitled. In that case the trustee is chargeable (36 Geo. III. c. 52, ss. 12, 13). The only persons accountable for the duty upon a life interest are the persons paying and receiving the income (see *Bowra*, 10 W. R. 747). In case of a bequest of articles not yielding any income to be enjoyed by different persons in succession, the legatee is chargeable only if and when he is capable of disposing of the property, or the articles are actually sold (*ib.* s. 14; cf.

Hamilton, 1892, 30 S. L. R. 138). Duties on legacies charged on real estate are payable by the person to whom it is devised (*Attorney-General* v. *Jackson*, 2 C. & J. 101; see (3) above), or, where there is a trust, by the trustees (45 Geo. III. c. 28, s. 5; *Hales*, 1 B. & B. 391; *Stow*, 5 B. & Ad. 359). In the case of a compounded legacy, where nothing is said about the duty, it is not payable out of the general estate, but is to be deducted from the sum paid to the legatee (cf. *Fischer*, 1825, 4 S. 192, with *Greville*, 27 Beav. 396). Sec. 25 (supplemented by 16 & 17 Vict. c. 51, s. 53) secures the payment of legacy duty on funds *in manibus curiæ*; see A. S., 1 March 1878); but the agent is not thereby relieved from seeing that the duty is provided for (*Bryan*, 26 L. J. Ch. 510; *Bowra*, 10 W. R. 747; see *Foster*, 2 Bing. N. C. 209).

As to the provisions of 43 Vict. c. 14, s. 12, and of 52 Vict. c. 7, ss. 12, 14, as to the exemption from liability to duty after a specified period, see (31) below.

(10) *On what Amount the Duty is Payable.*—It is chargeable upon the amount or value of the property as it stands with its accretions of income, or with the interest accrued, at the time when the duty is computed, or when the gift is satisfied, and not as it stood at the time of the deceased's death (*Attorney-General* v. *Cavendish*, Wight. 82; *Thomas*, 3 Russ. 502; *Advocate-General* v. *Oswald*, 1848, 10 D. 969; *Nisbett's Trs.*, 1845, 8 D. 69; *Bate*, 13 Q. B. 900, 18 L. J. Q. B. 273). Effects, other than money or securities for money, if not sold, should be valued. The Commissioners may accept the parties' estimate, or may themselves have a valuation made (36 Geo. III. c. 52, s. 22). Where, owing to the nature of the property, actual sale is the only satisfactory test, the amount of duty cannot be regarded as settled until a sale, or until the property has been handed over *in specie* on the conclusion of the administration of the estate (*Attorney-General* v. *Dardier*, L. R. 11 Q. B. D. 16; *Attorney-General* v. *Smith*, L. R. [1892] 2 Q. B. 289; [1893] 1 Q. B. 239; Hanson, 470). As to the valuation of contingent interests, stocks, etc., see *Lord Advocate* v. *Pringle*, 1878, 5 R. 912; *Galletly's Trs.*, 1880, 8 R. 74. In ascertaining the clear residue, deduction is allowed of debts, funeral expenses, legacies, and other charges first payable thereout (55 Geo. III. c. 184, Sched. pt. iii.; see *Johnson*, 2 Carr. & P. 207; *Lord Advocate* v. *Dunlop's Trs.*, 1892, 19 R. 461; *sub nom. Macfarlane* v. *Lord Advocate*, 1894, 21 R. (H. L.) 28). The costs of an administration suit can be deducted. An appraisement for legacy duty is exempt from stamp duty (54 & 55 Vict. c. 39), save when made for the purpose of obtaining a return of duty.

See also (15) (16) *infra*.

(11) *The Method of Charge.*—Where the whole beneficial interest in the property given vests in the legatee, the duty is chargeable on the full amount or value, even where it is so given as to pass, in certain events, to some other person, who may be liable at a different rate (36 Geo. III. c. 52, s. 17; see Hanson, 454, and s. 34). If the gift be by way of annuity for life or for years, the duty is chargeable on the value of the annuitant's interest as calculated by the tables appended to the Succession Duty Act, under sec. 31 of that Act, and is payable by four annual instalments. If an annuitant die before four years' payments of his annuity are due, the duty shall be payable according to the number of annual payments due. If the annuity be determinable by some event other than death, on the event happening the duty is recalculated according to the actual duration of the annuity, and the duty overpaid is refunded (ss. 8, 9. As to the valuation of an annuity for a single life or two joint lives, see *Attorney-General* v.

Wynford, 9 Ex. 746, 33 L. J. Ex. 223). The duty payable on a legacy given to purchase an annuity is to be paid at once, and the annuity purchased reduced in proportion (s. 10). In the case of legacies of which the value can be ascertained only by application of the fund allotted, the duty is charged on the fund as applied (s. 11). Where the gift is to be enjoyed by several persons in succession, all liable at the same rate, the whole duty is payable at once; but if the rates be different, the duty is calculated by way of annuity for the duration of interest of the person for the time being entitled, until the property falls to someone absolutely entitled, when the duty is paid on the capital (s. 12; Hanson, 436–445; see *re Greenwood*, L. R. 4 Ex. 327; *Kenlis*, L. R. [1895] 2 Ch. 458). Where articles unproductive of income, *e.g.* plate, are given to different persons in succession, no duty is chargeable until they are sold or fall to someone absolutely entitled (s. 14; cf. *Hamilton*, 1891, 29 S. L. R. 213; 1892, 30 *ib.* 138). These rules are equally applicable where some of those successively entitled take by virtue of intestacy (s. 15). In cases of joint tenancy, where one or some of the tenants are exempt, the duty is payable in proportion to the interest of each tenant; and if any of them, being liable to duty, acquire a larger interest in the legacy by survivance or severance, they must pay duty in proportion to the increase of interest (s. 16). In the case of legacies subject to powers of appointment, the legacy is charged as a legacy given to different persons in succession, where the power is limited. But where the donee of an absolute power takes also a limited interest under the will, if he does not take in default of appointment, the legacy is chargeable (after giving allowance for any duty already paid) on the execution of the power, as if it had been given immediately to the donee. If he does take in default of appointment, it is chargeable as if it had been given to him absolutely in the first instance (s. 18; *Attorney-General* v. *Brackenbury*, 1 H. & C. 782, 32 L. J. Ex. 108). Money directed to be laid out in the purchase of real estate is chargeable as personal estate, except when given to be enjoyed by different persons in succession, in which case, when they are liable to different rates of duty, each successive owner shall be charged by way of annuity, unless and until the money is actually laid out. If, however, before the money is actually laid out, anyone becomes absolutely entitled to an estate of inheritance in possession in the real estate to be purchased, he must pay duty as for an absolute bequest (s. 19; *in re De Lancey*, L. R. 4 Ex. 345, 5 Ex. 102, 6 Ex. 286, 7 Ex. 140; *Lord Advocate* v. *Dunlop's Trs.*, 1892, 19 R. 461; 1894, 21 R. 348; *sub nom. Macfarlane* v. *Lord Advocate*, 21 R. (H. L.) 28; *Advocate-General* v. *Stair*, 1850, Ex. Ca.).

(12) *The Method of Payment; Proof of Payment; Rectification of Duty.*—The method of paying the duty is prescribed by 36 Geo. III. c. 52. The accountable person may not distribute any part of the dutiable property without taking a receipt in the form prescribed (s. 27); which receipt he must bring to the Commissioners within twenty-one days, to be stamped on payment of the duty (s. 29). If he make default in either respect, he incurs a penalty of ten *per cent.* upon the amount of the property distributed; and the recipient thereof is made liable in a like penalty on failure to give a receipt in the form prescribed (s. 28). No evidence shall be given of payment of a legacy or residue without production of the stamped receipt, unless the actual payment of the duty shall be first proved, as by a copy of the entry in the Commissioners' books, proved by a person who has himself compared it with the original (s. 27; *Harrison*, 10 Sim. 380, 9 L. J. Ch. 72; see, however, *Howe*, L. R. 2 Ch. App. 155). The receipt may be stamped after twenty-one days and within three calendar months on payment of the

duty and ten *per cent.* thereon (s. 29); and after three calendar months on payment of the duty and ten *per cent.* on the amount of the property distributed (48 Geo. III. c. 149, s. 44). Where too little duty has been paid in the first instance by mistake, the difference between what was paid and the full duty, with ten *per cent.* on the difference, may be accepted (36 Geo. III. c. 52, s. 30. See also (14) below). If, by reason of the legatee's infancy or absence beyond the seas, the legacy cannot be paid, the money may be paid into the Bank of England, after deduction of the duty (s. 32; see (8) above). An executor, when himself entitled, shall, before retaining his legacy, transmit to the Commissioners the particulars with the duty which he offers. If he neglect to pay the duty due within fourteen days of retainer, he is liable in treble the amount of the duty (s. 35). The Act 16 & 17 Vict. c. 51 gives the Commissioners power to enforce returns from executors and administrators for the purposes of the Legacy Duty Acts (s. 48), and to sue them in the Court of Exchequer on failure to make such returns (s. 47; see s. 45).

As noted above, sec. 9 of 31 & 32 Vict. c. 124 provides that the acceptance or recovery of duty and interest shall operate as an absolute waiver of penalties.

(13) *The Method of Recovery* is regulated by the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56). See also 54 & 55 Vict. c. 38, s. 2, which provides for the recovery of money received for payment of duty, and not appropriated thereto.

(14) *Return of Duty Overpaid.*—Sec. 34 provides for the repayment of duty to a legatee who has been forced to refund his legacy in whole or in part, in respect of any debt recovered against the deceased's estate, or for any other good cause (cf. ss. 8, 17, noted (11), and s. 37, noted (16)). Sec. 40 of 16 & 17 Vict. c. 51, as applied to legacy duty, is noted (8) above; see also (12) above.

(15) *Compounding the Duty.*—Sec. 11 of 43 Vict. c. 14 provides that, on the application of the trustee, executor, or other accountable person, the Commissioners may commute the duty presumptively payable in respect of certain interests in expectancy. Sec. 43 of 44 Vict. c. 12 provides that, on the application of the person acting in execution of a deceased's will, and on delivery of an account showing the amount of the estate and the persons entitled in possession or expectancy, the Commissioners may assess the duty at such sum, by way of composition, as shall in the circumstances appear proper (see also 36 Geo. III. c. 52, s. 33). Where a legacy or a residue is compounded for less than its value, duty is payable on the amount of the composition (s. 23; see *Lord Advocate* v. *Freckleton's Judicial Factor*, 1894, 21 R. 743). See also (10) above and (16) below.

(16) *Avoidance of Administration.*—If the authority under which an estate is administered is made void, any duty improperly paid must be returned (s. 37). When the will is set aside as a whole by decree, whether of consent or *causâ cognitâ*, the rate of duty will depend upon the propinquity of the testator to the persons entitled (*Stracey's* case, 6 Q. B. 657). If it be allowed to stand, the case will be regarded as falling under sec. 23, although the compromise receive effect in the form of a decree (*Lord Advocate* v. *Freckleton's Judicial Factor, ut supra*).

(17) *Passing Accounts.*—All legacy duties must be paid personally, or by an agent, at the Legacy and Succession Duty Office at Edinburgh, or to a stamp distributor in the country, and executors, trustees, or their agents will be supplied with the necessary forms on application to the local official.

B. Succession Duty.

(18) *Date from which the Act is Operative.*—The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), came into operation on 19 May 1853 (s. 54).

(19) *Canon of Interpretation.*—It is to be borne in mind in construing the Statute that, as it applies to the whole of the United Kingdom, and as the language which it employs is adapted to the technicalities of the law of property in both portions of the island, its terms must be taken in their popular sense, without regard to the technicalities, whether of English or Scotch law (*Saltoun*, 1860, 3 Macq. 659, per Ld. Chan. Campbell: see *Commissioners of Income Tax* v. *Pemsel*, L. R. [1891] A. C. 531).

(20) *Definitions.*—"In the construction and for the purposes of this Act, the term 'real property' shall include all freehold, copyhold, customary, leasehold, and other hereditaments and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, except money secured on heritable property in Scotland, and all estates in any such hereditaments; the term 'personal property' shall not include leaseholds, but shall include money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property; the term 'property' alone shall include real property and personal property; the term 'succession' shall denote any property chargeable with duty under this Act [see (22) *infra*]; the term 'trustee' shall include an executor and administrator, and any person having or taking on himself the administration of property affected by any express or implied trust; the term 'person' shall include a body corporate, company, and society; the term 'Legacy Duty Acts' shall denote the Acts now in force for charging duties on legacies and shares of the personal estates of deceased persons" (s. 1). The terms "successor" and "predecessor" are defined in sec. 2 of the Act (see (22) *infra*).

(21) *The Property Subject to the Duty* is either real or personal (see (20) *supra*). Real estate is not dutiable unless *de facto* situated within the United Kingdom; and the personal estate of a testator or intestate who is, at the time of his death, domiciled abroad, is not, on his death, liable to succession duty any more than it is to legacy duty (*Wallace*, L. R. 1 Ch. App. 1; Westlake, *Private International Law*, 3rd ed., s. 116; see (1) *supra*). But succession duty is chargeable where a foreigner exercises a power of testamentary appointment created by an instrument which must be construed by the Courts of this country (*in re Lovelace's Trusts*, 4 De G. & J. 340, 28 L. J. Ch. 489; *in re Wallop's Trusts*, 1 De G. J. & S. 656, 33 L. J. Ch. 351; *Lyall*, L. R. 15 Eq. 1); or where he places his property in the hands of trustees, so as to subject the trust fund exclusively to the jurisdiction of the said Courts (*in re Smith's Trusts*, 12 W. R. 933; *in re Badart's Trusts*, L. R. 10 Eq. 288; *Attorney-General* v. *Campbell*, L. R. 5 H. L. 524; *Thomson*, 1876, W. N. 177, 278; *Littledale's Trs.*, 1882, 10 R. 224; *Duncan's Tr.*, 1888, 15 R. 638; *Attorney-General* v. *Felce*, 10 T. L. R. 337); even where the trustees are not all subject to that jurisdiction (*in re Badart's Trusts, ut supra*; *Campbell, ut supra*; *Littledale's Trs., ut supra*), and the property consists of the stocks of foreign Governments, and shares in foreign companies (*in re Cigala's Settlement Trusts*, L. R. 7 Ch. D. 351).

(21A) *Gifts Duty-free.*—There is not in the Succession Duty Act a provision corresponding to that in the Legacy Duty Act (see (9) above, (31) below), which requires the executor to deduct the duty. Accordingly,

where a person bound himself to pay, within twelve months of his death, to the trustees of a settlement, a sum "free from all deductions," it was held that the duty could not be deducted by the deceased's executors, but must be paid by the trustees of the settlement (*re Higgins*, L. R. 29 Ch. D. 697, 31 Ch. D. 142; see also *Floyer*, 3 De G. J. & S. 306, 33 L. J. Ch. 1; *Peareth*, L. R. 22 Ch. D. 182). It is to be observed that under an appointment of so much stock as shall be sufficient to raise a certain sum, the appointee takes the gift subject to the duty. What is given is not a net sum, but stocks sufficient to produce that sum (*re Saunders*, L. R. [1897] 1 Ch. 888). See (3) above.

(22) *What is a Succession?*—By sec. 2 it is enacted that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after" 19 May 1853, "either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after" 19 May 1853, "to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." The term "disposition" covers any act, other than by way of sale (see below (24) (25)), whether *inter vivos* or testamentary, by which one person confers upon another a beneficial interest in property, or in the income thereof, to arise upon a death (*Attorney-General* v. *Gell*, 3 H. & C. 615, 34 L. J. Ex. 145; *Ring*, L. R. 14 Eq. 357). Thus it has been held to include an obligation in an antenuptial contract by the lady's father to pay a sum to trustees on his death, for her liferent use (*Lord Advocate* v. *Robert's Trs.*, 1858, 20 D. 449; *Lord Advocate* v. *Meiklam's Trs.*, 1878, not reported; noted in Hanson, 544; see also *in re Higgins*, L. R. 29 Ch. D. 697; *Attorney-General* v. *Montefiore*, L. R. 21 Q. B. D. 461, and (2) (*a*) above). But where the Legislature thought fit to supplement a testator's provisions, it was held that those who derived their interests under the Act alone did not take under a disposition (*Lord Advocate* v. *Jamieson*, 1886, 13 R. 737, and cf. *Attorney-General* v. *Leconfield*, 2 Ir. L. R. 290; see also *Attorney-General* v. *Abdy*, 1 H. & C. 266, 32 L. J. Ex. 9, and (23) *infra*). "Devolution" denotes the operation of law by which, in the absence of any act, property passes from one person to another. By the words "beneficially entitled" and "beneficial interest" is intended actual enjoyment or possession by the person entitled (*Lord Advocate* v. *Stevenson*, 1869, 7 M. (H. L.) 1; *Wilcox*, 4 Drew. 40, 26 L. J. Ch. 596). The term "succession" includes not only property charged with duty, but an increase of benefit in such property (*Attorney-General* v. *Robertson*, L. R. [1893] 1 Q. B. D. 293, per Lindley, L. J.; see also ss. 3, 5, 7, 20). But where a father assigned a policy, upon which he had paid the premiums for many years, gratuitously and absolutely to his daughter, who thereafter kept up the policy, it was held that the assignation did not so dispose of the policy moneys, as, on the father's death, to create a succession, for it was owing to the daughter's payments that the policy subsisted at the father's death (*Lord Advocate* v. *Robertson*, 1895, 22 R. 568; 1897, 34 S. L. R. 485; see (25) below). When a person by irrevocable deed settled moveable property in trust for himself for four years, and for his nieces absolutely on the expiration of the term or on his

death, whichever should first happen, it was held that, on his death within the term, duty was chargeable on the whole sum as a succession to the nieces (*Attorney-General* v. *Noyes*, L. R. 8 Q. B. D. 125). Observe that a disposition creates a succession in cases where the right of the successor, although it accrued prior to 19 May 1853, did not fall into possession until a date subsequent to that day (*Wilcox, ut supra*; *Attorney-General* v. *Middleton*, 3 H. & N. 125, 27 L. J. Ex. 229; *Attorney-General* v. *Gell*, 3 H & C. 615, 34 L. J. Ex. 145; *Ring*, L. R. 14 Eq. 357; *Lord Advocate* v. *Constable*, 1880, 7 R. 855). The liability to duty attaches immediately upon the creation of the succession—*i.e.* at the moment when the disposition takes effect—although the duty is not payable until the succession falls into possession (see s. 20). Sec. 8 provides that dispositions taking effect at periods ascertainable only by reference to the death of a person dying after 19 May 1853, and dispositions made fraudulently for the purpose of evading duty, shall confer successions.

As to bonds and contracts for valuable consideration, see (25) below. As to transmitted successions, see (26) below.

(23) *Successor and Predecessor.*—These terms are defined in sec. 2 above quoted. Where the succession is by "disposition," the settlor is the predecessor, and where by "devolution" the last possessor is the predecessor (*Lord Advocate* v. *Saltoun*, 1858, 21 D. 124; 1860, 3 Macq. 659). In the case of an entail, the terms of the destination laid down for the deed of entail must be regarded as the *regula regulans*; and any alteration upon the maker's intention by those appointed to carry it out is to be ignored (*Lord Advocate* v. *Murray Graham*, 1884, 12 R. 318; cf. *Lord Advocate* v. *Macdonald*, 1862, 24 D. 1175). The maker selects the various *stirpes*, but *intra stirpem* the law takes its course: and, accordingly, so long as the property passes from one to another member of the same *stirps*, it passes by way of devolution (*Lord Advocate* v. *Saltoun, ut supra*; *Lord Advocate* v. *Drummond*, 1867, 40 Sc. Jur. 21; *Breadalbane*, 1870, 8 M. 835; *Lord Advocate* v. *Gordon*, 1872, 10 M. 1015; *Lord Advocate* v. *Zetland*, 1876, 4 R. 199; 1878, 5 R. (H. L.) 51; *Lord Advocate* v. *Murray Graham, ut supra*; *Lord Advocate* v. *M'Culloch*, 1895, 22 R. 356). Where, however, the successor takes by way of disposition, it is necessary, in order to ascertain the predecessor, to inquire what is the disposition which created the succession, and who was the maker of the disposition, *i.e.* who was the last person who, as absolute owner, disposed of the property (see *Attorney-General* v. *Maule*, 56 L. T. R. 611; *Attorney-General* v. *Wolverton*, L. R. [1896] 2 Q. B. 389; [1897] 1 Q. B. 231). Thus, in the case of an entail, the first member of each new *stirps* must refer to the maker of the entail as his predecessor (*Lord Advocate* v. *Saltoun*, and the other entail cases above cited).

So, too, a succession, created by the exercise of a general power of appointment, is, unless the case falls within sec. 4, to be referred to the instrument creating the power; and, accordingly, the donor of the power is the predecessor (*in re Lovelace*, 4 De G. & J. 340, 28 L. J. Ch. 489; *Braybrooke*, 9 H. L. C. 150, 31 L. J. Ex. 177; *Charlton*, L. R. 4 A. C. 427; *in re Barker*, 7 H. & N. 109, 30 L. J. Ex. 404; *Attorney-General* v. *Mitchell*, L. R. 6 Q. B. D. 548). Sec. 4, however, provides that the appointer, in exercising a general power, taking effect on a death other than his own (see *in re Lovelace, ut supra*), and subsequent to 19 May 1853, is to be deemed to be entitled to the property as a succession. In the view of Turner, L. J., the power "takes effect" when it becomes certainly operative; not when, under its exercise, the property falls into the appointee's possession (*in re Lovelace, ut supra*). But this construction has been

doubted (*Charlton*, L. R. 4 A. C. 427, per Ld. Selborne: see Hanson, 594 *et seq.*). The term "general power" in that section points to a power possessed by one person enabling him to dispose of property as an absolute owner, and not to a power which cannot be exercised without the concurrence of two minds, the one donee having, and the other donee not having, an interest to be displaced by its exercise (*Charlton, ut supra*, per Ld. Cairns and Ld. Selborne). Where such a general power is exercised, duty is payable by the donee of the power as successor of the donor. Where the appointment is made by deed, and a new succession is not created, no further duty is payable by the appointee (Hanson, 598). But where the appointment is made by will, he will be liable, in the case of personal property, to legacy duty, if the appointer's domicile be British, and to succession duty if the appointer be domiciled abroad and the property be situated in the United Kingdom (see (1) *supra*; *in re Wallop's Trusts*, 1 De G. J. & S. 656, 33 L. J. Ch. 351); and, in the case of real property, to succession duty. So, too, the appointee is chargeable as a successor where the appointment is made by deed to take effect upon the appointer's death (*Attorney-General* v. *Upton*, L. R. 1 Ex. 224). Where any person takes property by the exercise of a limited power of appointment, the person creating the power is the predecessor (s. 4).

Where the successor derives his interest under the exercise of a joint power, created by himself—a tenant in tail—and the tenant for life (see *Charlton, ut supra*, per Ld. Cairns and Ld. Selborne), he takes under his own disposition (see s. 12; *infra* (28)), for it is out of his own estate that his interest is derived. He is himself chargeable as if no such disposition had been executed; and he is the predecessor of those who come after him in the settlement (*Attorney-General* v. *Sibthorp*, 3 H. & N. 424, 28 L. J. Ex. 9; *Braybrooke*, 9 H. L. C. 150, 31 L. J. Ex. 177; *Attorney-General* v. *Floyer*, 9 H. L. C. 477, 31 L. J. Ex. 404; *Attorney-General* v. *Smythe*, 9 H. L. C. 497, 31 L. J. Ex. 404; cf. *Charlton, ut supra*, and *Attorney-General* v. *Dowling*, L. R. 6 Q. B. D. 177. See also *Lord Advocate* v. *E. of Glasgow*, 1875, 2 R. 317, and *Lord Advocate* v. *Constable*, 1880, 7 R. 855, per Ld. Shand).

Where a person purchases for money or money's worth the right to property vested in another, and directs it to be settled so as to create a succession, he is to be regarded as sole predecessor, whatever may be the form of the disposition (*in re Jenkinson*, 24 Beav. 64, 26 L. J. Ch. 241; *Attorney-General* v. *Yelverton* 7 H. & N. 306, 30 L. J. Ex. 333; *Attorney-General* v. *Cecil*, L. R. 5 Ex. 263; *Attorney-General* v. *Baker*, 4 H. & N. 19: *Attorney-General* v. *Floyer, ut supra*: see also (25) below, and cf. *Attorney-General* v. *Dowling*, L. R. 5 Ex. D. 139, 6 Q. B. D. 177, with *in re Ramsay's Settlement*, 30 Beav. 75, 30 L. J. Ch. 849, where the question whether a lady who brought £6000 into settlement on marriage had purchased the corresponding provisions made by her husband, was answered in the negative).

Where, on or before 19 May 1853, reversionary property, which in the original owner would have been a succession, is vested in another, under any such disposition as is mentioned in sec. 2, the derivative owner stands *quâ* duty as regards rate and time of payment in the place of the original owner. Where, after 19 May 1853, any succession has, before the successor shall have become entitled thereto in possession, been vested by alienation or by any title not conferring a new succession in any other person (see *Cuddon*, L. R. 4 Ch. D. 583), the latter stands *quâ* duty as regards rate and time of payment in the place of the former owner (s. 15;

Attorney-General v. *Rushton*, 2 H. & C. 812, 33 L. J. Ex. 184; *Solicitor-General* v. *Law Reversionary Society*, L. R. 8 Ex. 233; *in re Cooper & Allen's Contract*, L. R. 4 Ch. D. 802; contrast *Attorney-General* v. *Mander*, 65 L. J. Q. B. 246. Cf. *re Jenkinson, ut supra*; *Attorney-General* v. *Yelverton, ut supra*; *Attorney-General* v. *Gardner*, 1 H. & C. 639, 32 L. J. Ex. 84. See also (31) below).

The beneficial interest accruing to a surviving joint tenant is to be deemed a succession; and the predeceasing joint tenant is the predecessor, save where the property was vested in the joint tenants as a succession. In that case, the person from whom the joint title is derived is the predecessor (s. 3; see Hanson, 591).

The increase of benefit accruing to any person on the extinction or determination of a charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, is deemed a succession; and his predecessor is the person from whom the successor derived title to the property so charged (s. 5; *Lord Advocate* v. *Macdonald*, 1862, 24 D. 1175; *Harding*, 2 Gif. 597; see also *Wilcox*, 4 Drew. 40, 26 L. J. Ch. 596).

"Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the Commissioners to agree with the successor as to the duty payable; but if no such agreement shall be made, the successor shall be deemed to have derived his succession in equal proportions from each predecessor, and shall be chargeable with duty accordingly" (s. 13; *Floyer*, 3 De G. J. & S. 306, 33 L. J. Ch. 1). The existing official practice is to regard him as predecessor out of whose interest the succession in the event comes.

Where a person, who by paying an annual premium to a benevolent fund became entitled under the rules to direct how the sum to which he would be entitled on death should be applied, bequeathed the said sum to his sister, it was held that the case did not materially differ from that of a bequest of a sum insured (see s. 17)—that the testator was predecessor, on the ground that by subscribing to the fund he had created the power under which he acted (*Attorney-General* v. *Abdy*, 1 H. & C. 266, 32 L. J. Ex. 9. See also (25) below, and s. 17, there quoted).

As to the case of a person taking under a disposition made by himself, see (28) below.

(24) *Dispositions accompanied by a Reservation of Benefit.*—A disposition, if neither a *bonâ fide* sale nor conferring an interest expectant on death on the disponee, if accompanied by the reservation or assurance of, or contract for, any benefit to the granter or any other person for life, or for any period ascertainable only by reference to death, shall be deemed to confer on the disponee, at the time appointed for the determination of such benefit, a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for (s. 7). Thus where moveable property was assigned by a father to his sons on condition that they should pay him a life annuity equivalent to £4 *per* £100 on the property assigned, it was held that the case fell within this section (*Lord Advocate* v. *M'Kersies*, 1881, 19 S. L. R. 438; approved in *Crossman*, 18 Q. B. D. 256; see also *Attorney-General* v. *Brown*, *Times*, November 1897; and (25) *infra*).

(25) *Insurance Policies; and certain Bonds or Contracts for Valuable Consideration.*—Sec. 17 provides that "no policy of insurance on the life of any person shall create the relation of predecessor

and successor between the insurers and the assured, or between the insurers and any assignee of the assured, and no bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the moneys payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession." It has been observed that, "looking at the Act as a whole, it is in fact an Act to grant a duty on successions to property by persons succeeding to estates by gratuitous title. The only exception is, that a marriage consideration is treated as a gratuitous title" (*Floyer*, 3 De G. J. & S. 306, 33 L. J. Ch. 1; *Lord Advocate* v. *Sidgwick*, 1877, 4 R. 815; *Attorney-General* v. *Wolverton*, L. R. [1896] 2 Q. B. 389; [1897] 1 Q. B. 231). "It is opposed to the Act to say that a purchaser for value is to pay duty" (per Jessel, M. R., *Fryer*, L. R. 3 Ch. D. 675). Thus duty is not payable by a person who acquired right to certain policies not by gratuitous grant, but by an assignation which formed part of an onerous transaction (*Lord Advocate* v. *Fife*, 1883, 11 R. 222), or by the surviving subscribers to a tontine in respect of the increase of benefit accruing to them from time to time (*Oldfield*, 3 De G. F. & J. 398), or in respect of an assignment of a policy in the Customs Benevolent Fund to a nominee for a money consideration (*in re Maclean's Trusts*, L. R. 19 Eq. 274; cf. *Attorney-General* v. *Abdy*, (23) *supra*. See also *De Rechburg*, L. R. 38 Ch. D. 192). Where a person gratuitously assigned a policy to his daughter, who, from the date of the assignation kept up the policies, it was held that duty was not exigible on the assignor's death (*Lord Advocate* v. *Robertson*, 1895, 22 R. 568; 1897, 34 S. L. R. 485). But where a tenant for life settles a sum for the benefit of his daughters,—the sum, which is to be raised after his death, being the price of an immediate life annuity secured by him to the remainderman—a succession is created as between the tenant for life and his daughters (*in re Jenkinson*, 24 Beav. 64, 26 L. J. Ch. 241; *Attorney-General* v. *Yelverton*, 7 H. & M. 306, 30 L. J. Ex. 333; *Attorney-General* v. *Abdy*, 1 H. & C. 266, 32 L. J. Ex. 9; see (23) above).

(26) *Cumulative Duties; Transmitted Successions.*—It has already been observed ((8) *supra*) that legacy duty is payable upon each devolution, although he for whose benefit the legacy is liable to be retained, may not have lived to come into beneficial enjoyment thereof. This principle is not affected by sec. 14 of the Succession Duty Act (*Attorney-General* v. *Cleave*, 31 L. T. R. 86), which provides that "where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them." This section applies although the person who comes in as double successor takes *quoad* one succession as a legatee (*in re Chapman's Trust*, 2 H. & M. 447, per Wood, V. C.; *Attorney-General* v. *Littledale*, L. R. 5 Ex. 275, 5 H. L. C. 290; see also (28) *infra*). No such provision was necessary with regard to real estate (see s. 21, cited *infra* (34) (*b*) (i.)).

(27) *Disclaimer by Successor.*—In England, an heir at law to

whom realty passes by devolution cannot disclaim the inheritance which the law casts upon him (Hanson, p. 659). In Scotland, a person who succeeds as heir to heritage is, since the passing of the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94, s. 9; cf. *Lord Advocate* v. *Stevenson*, 1869, 7 M. (H. L.) 1), chargeable upon his beneficial interest, however soon he may die; unless, indeed, he renounce the succession within the six months which the law allows. See ANNUS DELIBERANDI, and *infra* (41).

(28) *EXEMPTIONS.*—Sec. 12 provides that a successor shall not be chargeable with duty upon a succession taken under a disposition made by himself, save only if, at the date of the disposition, he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after 19 May 1853, and such person shall have died during the continuance of such disposition. Nor shall any person be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless, at the date of the creation thereof, he shall have been entitled to the property subjected thereto expectantly on the death of some person dying after 19 May 1853. Sec. 18 provides that succession duty shall not be chargeable as well as legacy duty in respect of the same acquisition (either in point of interest or in point of possession—*Attorney-General* v. *Littledale*, L. R. 5 H. L. C. 290; see per Ld. Hatherley, C. J.) of the same property; or "upon any money applied to the payment of duty on any succession according to any trust for that purpose"; or upon any succession which, were it a legacy bequeathed to the successor by the predecessor, would fall under one of the express exemptions from legacy duty (*Attorney-General* v. *Fitzjohn*, 2 H. & N. 465, 27 L. J. Ex. 79; *re Wallop's Trusts*, 1 De G. J. & S. 656, 33 L. J. Ch. 351); or in respect of any interest surrendered or extinguished before 19 May 1853 (*Lord Advocate* v. *Constable*, 1880, 7 R. 855); or where the amount of the whole succession or successions, derived from the same predecessor, is under £100; or where the succession is of less value than £20 in the whole. This last exemption does not apply to a succession by a death on or after 1 June 1889 (52 Vict. c. 7, s. 10 (2)); or, although they are made chargeable as successions to personalty (51 Vict. c. 8, s. 21), to legacies charged on real estate. Nor is succession duty chargeable upon the determination of any lease, purporting at the date thereof to be a lease at rack-rent, in respect of the increase accruing to the successor upon such determination (s. 20); nor in respect of the personal estate of a person dying on or after 1 June 1881, of which the gross value does not exceed £300, and on which the fixed duty of 30s. has been paid (44 Vict. c. 12, ss. 34–36); nor where the gross value of the estate, heritable and moveable, of a person dying on or after 2 August 1894, exclusive of property settled otherwise than by the will of the deceased, does not exceed £500, and the fixed duty of 30s. or 50s. has been paid (*ib.*; 57 & 58 Vict. c. 30, s. 16); or where the net value of the estate of a person dying on or after 2 August 1894, exclusive of property settled otherwise than by the will of the deceased, does not exceed £1000, and the fixed duty or estate duty has been paid (*ib.*).

Succession duty at the rate of one or one and a half *per cent.* is not payable in respect of property whereon inventory or account duty (44 Vict. c. 12, s. 41; see *re Haygarth's Trusts*, L. R. 22 Ch. D. 545), or estate duty (57 & 58 Vict. c. 30, s. 1, and Sched. 1), has been paid.

The exemption provided by 51 Vict. c. 8, s. 21, from the additional rates imposed thereby, applies to leaseholds. Where charges upon heritable

estate determine by a death on or after 1 July 1888, and the original succession opened prior to that date and after 19 May 1853, the additional duties are not charged; and they are not chargeable in respect of property which has become the subject of a charitable trust, as defined in sec. 16 of the Succession Duty Act, 1853 (*Lord Advocate* v. *Marshall*, 1893, 30 S. L. R. 599).

(29) *The Rate of Duty* is one *per cent.* in case of the lineal issue or lineal ancestor of the predecessor; three *per cent.* in case of the brothers and sisters of the predecessor, and their descendants; five *per cent.* in case of the brothers and sisters of the father or mother of the predecessor, and their descendants; six *per cent.* in case of the brothers and sisters of a grandfather or grandmother of the predecessor, and their descendants; and ten *per cent.* in case of persons in any other degree of collateral consanguinity, or strangers in blood to the predecessor (s. 10).

When any person chargeable with succession duty, before his succession becomes chargeable, has married a spouse more nearly related to the predecessor than he himself is, he pays duty at the lower rate (s. 11). Observe that this provision does not extend to the case where the predecessor has married a relation of the successor more nearly related to him than is the successor.

The Act 51 Vict. c. 8, s. 21, imposes rates additional to the rates imposed by sec. 10 of the Succession Duty Act, 1853 (see *Lord Advocate* v. *Marshall*, 1893, 30 S. L. R. 599),—one half *per cent.* for lineals, and one and a half *per cent.* for collaterals and strangers,—in respect of any succession upon a death on or after 1 July 1888; and these additional rates are chargeable in respect of legacies or moneys payable out of or arising from the sale or mortgage of real estate of a person dying after that date, as successions to personal property.

As to the time at which the rate is determinable, see (22) *sub fin.* As to the estate duty chargeable under 52 Vict. c. 7, see Estate Duty under 52 Vict. c. 7.

(30) *When the Duty is Payable; Acceleration; Interest.*— The duty is payable when the successor or any person in his right or on his behalf becomes entitled in possession to his succession, or to the receipt of the income and profits thereof; except that if there be any prior charge, estate, or interest, not created by the successor himself, upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate, or interest shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination (s. 20; see *Attorney-General* v. *Robertson*, L. R. [1893] 1 Q. B. 293). Observe that if a person upon whom a succession will devolve on the death of another, by anticipation charges the estate with an annuity for the benefit of a third person (thus creating a new succession), the latter is liable to pay duty in respect of his annuity, and the former pays the duty upon his original succession, under deduction of the annuity, and upon the increased value of his estate when the annuity ceases (per Wilde, B., in *in re Peyton*, 7 H. & N. 265, 287, 31 L. J. Ex. 50; cf. s. 12). Sec. 15 provides that "where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as" if no such acceleration had taken place. There is no acceleration when the succession comes to the person entitled at the moment intended by the settlement. The cause of the acceleration must be something dehors the

settlement (*ex parte Sitwell*, L. R. 21 Q. B. D. 466; *Attorney-General* v. *Robertson*, L. R. [1893] 1 Q. B. 293; cf. *Commissioners of Inland Revenue* v. *Harrison*, L. R. 7 H. L. C. 1). Sec. 37 provides that when a successor does not obtain the whole of his succession at the time of the duty becoming payable, he shall be chargeable only with duty on the value of the property or benefit from time to time obtained by him.

By 31 & 32 Vict. c. 124, s. 9, arrears of legacy or succession duty were made chargeable with interest at the rate of four *per cent.* Sec. 18 of the Finance Act, 1896, provides that simple interest at the rate of three *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, where it is not worth the expense and trouble of calculation and account.

(31) *By whom the Duty is Payable.*—Sec. 44 makes certain persons, beside the successor, personally accountable for the duty, as a debt to the Crown, but to the extent only of the property actually received, or disposed of, by them;—a restriction which appears to apply to the case of the successor. The persons are every trustee (see (20) above), guardian, committee, tutor, curator, or husband, in whom respectively any property, or the management of any property, subject to such duty, shall be vested, and every person in whom the same shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession. The purchaser of a succession, sold prior to its falling into possession, is thus a successor, and is liable for the duty, save when the original claim is displaced by the creation of a new succession (*Solicitor-General* v. *Law Reversionary Interest Society*, L. R. 8 Ex. 233; *in re Cooper & Allen's Contract*, L. R. 4 Ch. D. 802. Contrast *re Kidd & Gibbon's Contract*, L. R. [1893] 1 Ch. 695; and cf. *Cooper*, 28 Beav. 194), and the rate of duty is that payable by the alienor, while the value to be paid upon will be that of the alienee's own life, where it is not upon the capital value of the succession (*Solicitor-General* v. *Law Reversionary Interest Society*, *ut supra*; contrast *Attorney-General* v. *Mander*, 65 L. J. Q. B. 246; and see (32) (33) below).

The Act 43 Vict. c. 14, s. 12, provides that an executor who has notified to the Commissioners his intention to distribute a fund, and has satisfied their claim to legacy or succession duty, is entitled to a discharge, which shall affect only his liability in whose favour it is expressed to be given.

The Act 52 Vict. c. 7, s. 12 (1), discharges lands from liability to succession duty, in case of purchasers and mortgagees, on expiry of six years from the date of the notice to the Commissioners of the fact that the successor, or any one in his right, has become entitled in possession to his succession, or from the date of the first payment of any instalment or part of the duty, or, if he has availed himself of the option given to him by 51 Vict. c. 8, s. 22 (see (34) (*b*) (i.) below), after two years from the time for the payment of the last instalment or part of the duty; "or in the absence of any such notice or payment, after the expiration of twelve years from the happening of the event (whether before or after the passing of this Act) which gave rise to an immediate claim to such duty, or if such period of twelve years expires within six years from the date of the passing of this Act, then after the expiration of six years from the last-mentioned date."

Sec. 13 of the same Act limits the liability, in the case of a person who

deposits with the Commissioners in the manner prescribed an attested copy (exempt from stamp duty) of a document creating a liability for succession duty, other than a testamentary document admitted to probate, to six years from the date of notice to the Commissioners of the fact which gives rise to an immediate claim to such duty.

Sec. 14 of the same Act provides that no one shall, under a testamentary document admitted to probate, or under letters of administration, or under a confirmation, be liable for payment of legacy or succession duty after the expiration of six years from the date of the settlement of the account, if the account be full and true and contain all the material facts; and that the liability of a trustee, executor, or administrator shall cease after the expiration of the same period, if the Commissioners are satisfied that the account rendered was correct to the best of his knowledge, information, and belief.

Sec. 53 of the Succession Duty Act, 1853, provides for the payment of succession duty out of any property in the possession or control of the Court; see A. S., 1 March 1878; *Harding*, 2 Gif. 597; *Bailey*, 18 Jur. 668.

(32) *Duty a First Charge; Shifting of Charge.*—Sec. 42 provides that the duty "shall be a first charge on the interest of the successor, and of all persons claiming in his right" (see *Attorney-General* v. *Mander*, *ut supra*), "in all the real property in respect whereof such duty shall be assessed"; and also "a first charge on the interest of the successor in the personal property in respect whereof the same shall be assessed, while the same shall remain in the ownership or control of the successor, or of any trustee" (see (20) *supra*), "for him or of his guardian or committee or tutor or curator, or of the husband of any wife who shall be the successor; and the said duty shall be a debt due to the Crown from the successor, having, in the case of real property comprised in any succession, priority over all charges and interests created by him, but such duty shall not charge or affect any other real property of the successor than the property comprised in such succession" (cf. 57 & 58 Vict. c. 30, s. 18); "provided that where any settled real property comprised in a succession shall be subject to any power of sale, exchange, or partition exercisable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorising by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys." Thus in *Dugdale* (L. R. 6 Ch. App. 501) lands charged with payment of a jointure were settled, a power of sale exercisable with the consent of the tenant for life for the time being given to the trustees, who were directed to purchase with the proceeds other hereditaments to be settled on the same trusts. Part of the lands were sold with the consent of the tenant for life and the jointress; and it was held that the duty payable on the death of the jointress would, under sec. 42, be a charge on the proceeds of sale or the hereditaments purchased therewith. The same principle was applied in the case of a sale by the Court under the Settled Estates Act, 1877 (*re Warner's Settled Estates*, L. R. 17 Ch. D. 711; 40 & 41 Vict. c. 18, ss. 22, 34).

(33) *Annual Value; Allowances.*—(*a*) *Annual Value.*—It is to

be ascertained at the time when the successor becomes entitled in possession. If the property has at that time no annual value, actual or potential, it is not dutiable. If it is not exempt from the operation of the Act, and has a saleable value, its annual value may be taken as equivalent to £3 per £100 thereon (*Attorney-General* v. *E. of Sefton*, 2 H. & C. 362, 32 L. J. Ex. 230, 11 H. L. C. 257, 34 L. J. Ex. 98,—the decision proceeded upon the Crown's admissions; see *Lord Advocate* v. *D. of Buccleuch*, 1888, 15 R. 333, and *Lord Advocate* v. *M. of Ailsa*, 1881, 9 R. 40). In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges, and other property yielding, or capable of yielding, income not of a fluctuating character, an allowance is made for all necessary outgoings (s. 22). These include repairs, fire insurance, and public rates, but not income tax or the expenses of estate management (*in re Elwes*, 3 H. & N. 718, 28 L. J. Ex. 46; *in re Earl Cowley*, L. R. 1 Ex. 288). Sec. 18 (2) of the Finance Act, 1894, provides that in the case of any agricultural property, where no part of the principal value is due to the expectation of an increased income therefrom, the annual value for the purpose of succession duty on the principal value shall be arrived at in the same manner as under the first part of the said Act for the purpose of estate duty (see s. 7 (5)). In the case of timber, trees, or wood, not being coppice or underwood, the successor is chargeable on his interest in the net moneys received from the sales thereof, after deducting all necessary outgoings for the year; provided that no duty shall be payable in any year in which such moneys do not exceed £10 (s. 23; see *Lord Advocate* v. *M. of Ailsa*, 1881, 9 R. 40). As to commutation of the duty on timber, *vide infra* (40). The yearly value of any manor, opened mine, or other real property of a fluctuating yearly income (see *Lord Advocate* v. *M. of Ailsa*, *ut supra*), shall be calculated either upon the average profits, after deducting all necessary outgoings, of such number of years preceding the date when the first instalment of duty shall have fallen due, as may be agreed upon between the Commissioners and the successor; or, in the absence of such agreement, by taking three *per cent.* on the ascertained principal value (s. 26). As to the method of ascertaining the value for commutation, see (40) *infra*; for the purposes of Estate Duty under 52 Vict. c. 7, see Estate Duty under 52 Vict. c. 7.

(*b*) *Allowances.*—As to allowance in the case of agricultural property, see (33) (*a*) above. A successor in real property is entitled to allowance in respect of any fines, casualties of superiority, compositions, reliefs, or charges incident to the tenure thereof, from the assessable value of his interest therein (s. 28). Sec. 33 provides that where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him thereunder, allowance shall be given for any duty he may have already paid in respect of any limited interest taken by him in such property (see *re Cooper & Allen's Contract*, L. R. 4 Ch. D. 802, and (23) above). Sec. 34 provides that no allowance shall be made in respect of any incumbrance created or incurred by the successor, not made in execution of a prior special power of appointment; but an allowance shall be made in respect of all other incumbrances, and also in respect of any moneys laid out by the successor previously to his possession in substantial repairs or permanent improvements. Where the incumbrance is a principal charge, the allowance shall be limited to the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value *pro tanto* of the property (see *Lord Advocate* v. *E. of Glasgow*, 1875, 2 R. 317, and *in re Peyton*, 7 H. & N. 265, 31 L. J. Ex. 50; therein commented

upon). *A fortiori*, no allowance is given in respect of costs incurred by the successor in making good his claim to the property (Hanson, 682). Further, no allowance is made in respect of contingent incumbrances, unless they take effect, or in respect of any contingency upon the happening of which the property may pass to some other person, unless it so passes (ss. 35, 36; *vide infra* (38)). Sec. 38 provides that allowance shall be given in respect of property which any successor upon taking a succession shall be bound to relinquish or be deprived of. Thus allowance has been given on the cessation of an annuity, without reference to the time of its creation, or the mode in which it is secured, and although unconnected with the succession (*in re Micklethwaite*, 11 Ex. 442, 25 L. J. Ex 19; *Lord Braybrooke*, 9 H. L. C. 150, 31 L. J. Ex. 177; *Comm. of Inland Revenue* v. *Harrison*, L. R. 7 H. L. 1; *Le Marchant*, L. R. 10 Ex. 292, 1 Ex. D. 185, with which cf. *Lord Advocate* v. *E. of Glasgow*, 1875, 2 R. 317, and Hanson, 695). Observe that sec. 10 (1) of 52 Vict. c. 7 provides that in the case of a successor taking a succession upon the death of any person dying on or after 1 June 1889, this allowance shall only be made in respect of the value of property which the successor may have acquired by any title not conferring a succession on him, and which passes from the successor to some other person.

(34) *The Method of Charge and Payment.*—(*a*) *In the Case of Personal Property.*—The duty is chargeable upon the full amount or capital value when the whole beneficial interest vests at once in the successor (see ss. 1, 10; cf. *Attorney-General* v. *Noyes*, L. R. 8 Q. B. D. 125). By sec. 32, ss. 8, 10, 11, 12, 14 (see (11) above), and 23 (see (15) (16) above and (41) below) of the Act 36 Geo. III. c. 52 are made applicable to successions in personal property, and to the assessment and payment of duty thereon. Sec. 29 provides that the interest of a successor in moneys to arise from the sale of real property under any trust for the sale thereof, shall, so far as not chargeable with legacy duty (see (2) (*b*) above), be deemed to be personal property chargeable with succession duty; save that where such moneys are subject to a trust for reinvestment in the purchase of other real property to which the successor would not be absolutely entitled, such moneys shall be deemed to be real property. Sec. 30 provides that the interest of any successor in personal property, subject to any trusts for the investment thereof in the purchase of real property, shall, so far as not chargeable with legacy duty (see (2) (*a*) above), be chargeable with succession duty as personal or real, according as the successor is or is not absolutely entitled thereto. Money paid into Court for the purchase of land taken compulsorily by Statute does not fall under secs. 29, 30, but retains the character of real estate (see *Shard*, 14 Ves. 348; *in re De Beauvoir*, 2 De G. F. & J. 5).

(*b*) *In the Case of Real Property* (see (34) (*a*) as to secs. 29, 30)—

(i.) *Prior to 2nd August* 1894.—Sec. 21 provides that (subject to certain exceptions noted below) the interest of every successor in real property shall be considered to be of the value of an annuity equal to the annual value of such property, after making the allowances authorised by the Act, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof, during the residue of his life, or for any less period during which he shall be entitled thereto. The annuity is to be valued according to the tables annexed to the Act. The duty is to be paid by eight half-yearly instalments, the first to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the property (observe that sec. 9 of 37 & 38 Vict. c. 94 meets the point in *Lord Advocate* v. *Stevenson*, 1866, 4 M. 322; 1869, 7 M. (H. L.) 1), and the following instalments at half-yearly

intervals of six months each, to be computed from the day on which the first instalment shall have become due. If the successor shall die before they have all become due, those not due shall cease to be payable, save in the case of a successor competent to dispose (see *Attorney-General* v. *Hallett*, 2 H. & N. 368, 27 L. J. Ex. 89; *Lilford*, L. R. 2 H. L. 63) by will of a continuing interest in such property, in which case the unpaid instalments shall be a continuing charge on such interest in exoneration of his other property, and shall be payable by the owner for the time being on such interest. The duty may be tendered in advance, and discount allowed at 3 *per cent.*, as prescribed by the Treasury; and such payment shall not prejudice any right to repayment (s. 40). Sec. 22 of 51 Vict. c. 8 gives to a successor who has become entitled to a succession on the death of any person dying on or after 1 July 1888, the option of paying the duty either as above, or by two equal moieties, whereof the first shall be paid by four equal yearly instalments: of these the first shall be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the property, and the three following at yearly intervals to be computed from the day on which the first shall have become payable. The second moiety shall be paid on the day for payment of the last instalment of the first moiety, or, if not so paid, shall be payable by four yearly instalments, with interest at 4 *per cent.* (see (30) *supra*) from such last-mentioned day on so much of the moiety as shall for the time being remain unpaid, the first of such instalments, with the interest, to be paid at the expiration of twelve months from that day. If he avail himself of the second alternative, he may tender duty in advance, and receive such discount as the regulations of the Treasury may prescribe. If he die before all the duty, with interest (if any), shall have been paid, then the portion unpaid shall, just as under the Succession Duty Act, 1853, be a continuing charge, if he shall have been competent to dispose by will of a continuing interest in the property; if he shall not have been so competent, it shall be a debt due to Her Majesty, and payable out of his estate either in advance, under the provision of this section, or at the same time and in the same manner as the amount unpaid would have been payable by him if he had not died. If he shall have died before the day for the payment of the last instalment of the first moiety, the debt shall be reduced by so much as would have ceased to be payable if the duty had been payable by eight half-yearly instalments under the Act of 1853.

Successions subject to trusts for charitable or public purposes are chargeable at the rate of ten *per cent.* on the capital value (s. 16). They are not liable to the additional duties imposed by 51 Vict. c. 8, s. 21 (*Lord Advocate* v. *Marshall*, 1893, 30 S. L. R. 599). So also successions devolving upon corporations are chargeable upon the capital value, under sec. 27, which provides for payment of the duty by instalments.

(ii.) *On and after 2nd August* 1894.—Sec. 18 of the Finance Act, 1894, provides that the value of a succession to real property, for succession duty purposes, shall, where the successor is competent to dispose of the property, be the principal value thereof, after deducting the estate duty payable in respect thereof, and the expenses, if any, properly incurred, of raising and paying it. The duty shall be a charge on the property, and shall be payable by the same instalments as in the case of estate duty on real property, with interest at the rate of three *per cent.* The first instalment shall be payable, and the interest shall begin to run, at the expiration of twelve months after the date on which the successor became entitled in possession to his succession, or to the receipt of the

income and profits thereof; and, after the expiration of the said twelve months, the provisions with respect to discount (see (39) *infra*) shall not apply. The principal value shall be ascertained as in case of estate duty (see ESTATE DUTY UNDER THE FINANCE ACT, 1894). As to the case of agricultural property, see *supra* (33). Observe that sec. 23 of the Finance Act, 1896, provides that, for the purposes of sec. 18 of the Finance Act, 1894, an institute or heir of entail shall not be deemed to be a person competent to dispose, unless he be entitled to disentail without the consent of any subsequent heir, or having such consent valued and dispensed with.

(*c*) *In the Case of Advowsons.*—No duty is chargeable on any advowson or Church patronage, unless the same, or right of presentation, or some other interest therein, is disposed of by or in concert with the successor for money or money's worth, when the duty is payable on the amount or value received (s. 24; see *Attorney-General* v. *Lord Leconfield*, 2 Ir. L. R. 290).

(*d*) *In the Case of Property subject to a Beneficial Lease.*—A successor entitled to real property subject to such a lease, who has not paid duty on the full yearly value of such property, shall be chargeable with duty upon his interest in any fine or grassum or other consideration received during his life for the renewal of any such lease, or the grant of any reversionary lease of the same property (s. 25; see *Attorney-General* v. *Mander*, 65 L. J. Q. B. 246).

(*e*) *Separate Assessments.*—Sec. 43 provides that the interest of the successor in separate properties, or in defined portions of the same property, may, on his request and where reasonably required, be the subject of separate assessment;–each property to be charged only with the amount of duty separately assessed in respect thereof.

(35) *THE METHOD OF COLLECTION.*—Sec. 45 provides that the accountable persons shall give notice to the Commissioners of their liability, and shall at the same time deliver to them a full and true account of the dutiable property, of its value, and of the deductions claimed by them, with the names of the successor and predecessor, and their relation to each other, and all particulars necessary for the ascertainment of the duty. The notice is to be given, in the case of personal property, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of the same or part thereof to or for any successor or person in his right; and, in the case of real property, when any duty in respect thereof shall first become payable. If dissatisfied with the account, the Commissioners may appoint some person to take an account and estimate, and may assess thereon, subject to the appeal provided by sec. 50 (see below); the expenses of such account and estimate, if duty exceed that tendered—where no appeal is taken, to be charged in whole or part, in the discretion of the Commissioners, on the successor's interest, and to be recovered as part of the duty:—where an appeal is taken, to be in the discretion of the Court; or, under the provisions of 52 Viet. c. 7, s. 10 (3), the Commissioners may assess the duty on the account provided by the successor, and upon such estimate as they may place thereon, subject always to the appeal aftermentioned. In the case of wilful neglect to give such notice or deliver such account, or pay duty within twenty-one days after it has been finally ascertained, sec. 46 imposes a penalty of ten *per cent.* upon the amount of the duty, calculated at one *per cent.*, for every month of delay. Observe that the acceptance or recovery of duty with interest operates as an absolute

waiver of penalties (31 & 32 Vict. c. 124, s. 9). On the production of the account, the Commissioners may require the persons accounting to verify the account by production of books and documents (16 & 17 Vict. c. 51, s. 49). Sec. 50 provides that the accountable person may, upon giving written notice within twenty-one days after the date of the assessment, appeal to the Court of Exchequer, or, where the duty does not exceed £50, to the Sheriff Court.

(36) *Proof of Payment.*—The stamped receipt for the duty granted by the Commissioners is the proper evidence of payment (s. 51; see *Earl Howe*, L. R. 2 Ch. App. 155). The Commissioners shall deliver a certificate of payment to any person interested in the property affected by duty, on an application for any reasonable purpose approved by them (s. 51).

(37) *The Method of Recovery* is regulated in Scotland by the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56). See also 54 & 55 Vict. c. 38, s. 2, which provides for the recovery of money received for payment of duty, and not appropriated thereto.

(38) *Return of Duty Overpaid.*—In estimating the value of a succession, no allowance is made for a contingent incumbrance. Where, however, it takes effect as an actual burden on the successor's interest, he shall be entitled to a return of a proportionate amount of duty (s. 35). Nor is allowance given in respect of any contingency upon the happening of which the property may pass to some person other than the present successor. But, on the happening of the contingency, he shall be entitled to a return of the duty paid by him in excess of that payable in respect of the actual duration or extent of his interest (s. 36). Whenever it shall be proved to the satisfaction of the Commissioners that duty, not due, was paid by mistake, or in respect of property which the successor cannot recover, or from which he has been evicted by any superior title, or that for any other reason it ought to be refunded (*e.g.* where duty has been received in advance under sec. 40 (see (39) *infra*), and the successor, entitled merely for life, dies before all the instalments would have become due), it shall be refunded (s. 37).

(39) *Receiving Duty in Advance; Discount.*—The Commissioners may receive the duty tendered in advance, and allow discount thereon at three *per cent.*, as directed by the Treasury (s. 40; and 51 Vict. c. 8, s. 22. See also (30) above).

(40) *Compounding and Commuting the Duty and Enlarging the Time for Payment.*—The Commissioners may compound the duty on such terms as they think fit, when the value of the succession is not ascertainable under any of the preceding directions, or where the matter is so complicated as to render such a course advisable. They may also, in special cases, where they deem it expedient, enlarge the time for the payment of the duty (s. 39).

Sec. 41 provides that upon the application of any person entitled to a succession in expectancy, the Commissioners may commute the duty presumptively payable. Sec. 11 of 43 Vict. c. 14 makes similar provision in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in personal property comprised in a succession, where the duty (if any) payable upon the life or temporary interest shall have been satisfied, upon application by the executor or trustee or other accountable person.

In the case of timber (see (33) (*a*) *supra*), the successor may commute the duty on delivering to the Commissioners an estimate to be approved

by them of the net money obtainable by him from sales of timber, etc., as may, in a prudent course of management, be felled by him during his life (s. 23).

(41) *Avoidance of Administration.*—Observe that sec. 32 applies sec. 23 of the Act 36 Geo. III. c. 52, only to successions in personal property. It appears that where a special legatee or heir of provision declines the bequest or provision, or consents to a decree of reduction as regards his interest, the rate of duty will be determined by the relationship to the predecessor of the person actually taking in consequence of such declinature or consent. But it is otherwise where the legatee or heir assigns his bequest or provision, the instrument under which he takes standing unchallenged (*Lord Advocate* v. *Gordon*, 1895, 22 R. 639; cf. *Lord Advocate* v. *Freckleton's Judicial Factor*, 1894, 21 R. 743; see (16) and (27) *supra*).

(42) *Passing Accounts.*—All succession duties must be paid personally, or by an agent, at the Legacy and Succession Duty Office in Edinburgh, or to a stamp distributor in the country. Executors, trustees, or their agents will be supplied with the necessary forms on application to the local official.

[See Hanson, *Death Duties*, 4th ed., 1897; Trevor, *Taxes on Succession*, 4th ed., 1881; Norman, *Digest of Death Duties*, 1892; Dowell, *History of Taxation and Taxes in England*, 2nd. ed., 1895. See also Estate Duty under 52 Vict. c. 7.]

Legal.—See Adjudication.

Legitim.—Legitim (*legitima portio*), *bairn's part of year*, is a right of succession to a share of the free moveable estate of their father, or of their mother, which vests *ipso jure* in the children on the parent's death. The share extends to one-third of the whole free moveable estate of the first deceasing parent, and to one-half of the whole free moveable estate of the last deceasing parent. In other words, if, *e.g.*, the father be survived by a widow and children, his moveable estate is divided into three equal parts, whereof one vests in the widow by virtue of Jus relictæ (*q.v.*); one vests in the children as *legitim*; the remaining third being Dead's Part (*q.v.*), of which last he may dispose by will. If, on the other hand, a father is survived by children only, his moveable estate is divided into two parts, one of which is *legitim*, and the other *dead's part*.

Previous to the passing of the Married Women's Property Act, 1881 (44 & 45 Vict. c. 21), legitim was claimable only from the father's estate; but sec. 7 of that Act gives children an equal right in the case of the estate of their mother, and provides that "after the passing of the Act the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be."

The right vests in the children by their survivance of the parent; and the parent can neither deprive them of it nor even apportion it among them against the equal distribution which the law enjoins (*Monteith*, 1882, 9 R. 982, Ld. Young, at p. 994).

All children of the same parent, although they be by different marriages,

share equally in legitim (*Chapman*, 1631, Mor. 8163; *Henderson*, 1634, Mor. 8164). A posthumous child is entitled to legitim (*Jervey*, 1762, Mor. 8170). The issue of a child who has predeceased the parent are not entitled, there being no representation in legitim (Bankt. iii. 8. 24; Stair, iii. 8. 44; Ersk. *Prin.* iii. 9. 8; Fraser, *H. & W.* ii. 995). The claims of children who survive the parent pass to their executors, although not claimed by them during their lives (Stair, iii. 8. 50; Bankt. iii. 8. 40; *M'Murray*, 1852, 14 D. 1048). By FORISFAMILIATION (*q.v.*) the share of legitim accrues to the other children. If there be one child, legitim is due although that child is heir (*Howden*, 1821, 1 S. 14).

The *fund* from which legitim is payable is the whole moveable estate of which the parent was possessed at the time of his death. Policies of insurance "current at death, and kept up by the payment of the premiums, form part of the moveable estate of the deceased person by whom they have been effected" (*Chalmer's Trs.*, 1882, 9 R. 743). Succession to which the parent was entitled at the time of his death is included. So also are mortgages over lands in England (*Monteith, ut supra*). (See further, as to what is included, article on JUS RELICTÆ; also *Dawson's Trs.*, 1896, 23 R. 1006.)

The estate subject to the claim of legitim is the free moveable estate of the parent to be ascertained at the date of his death (*M'Murray*, 1852, 14 D. 1048). The moveable debts are deducted before the legitim is computed (1 Bell, *Com.*, 7th ed., 678; *Johnston*, 1829, 7 S. 226), and amongst such debts are included provisions to spouse and children by antenuptial contract (Stair, i. 5. 6; Ersk. iii. 9. 22; M'Laren, *Wills*, i. 126; Bell, *Prin.* s. 1584). The executor is not entitled to debit the legitim with a share of losses arising from improper investments, or from the default of a factor (*Earl of Dalhousie*, 1868, 6 M. 659; M'Laren, *Wills*, i. 125). On the other hand, legitim, being a debt to be measured by the amount of the fund at the father's death, does not infer a right to participate in the profits realised by the application of the fund after the parent's death (*M'Murray, ut supra*; *Minto*, 1833, 11 S. 632; but see *Ross*, 1843, 5 D. 483, where a widow consented to the employment of the funds from which her *jus relictæ* was payable, and was held entitled to the profits on her share). Where, however, from any cause payment of legitim is postponed, interest thereon is due from the date of the parent's death (*Minto, ut supra*; *Hardie*, 1823, 2 S. 213).

The amount of the fund from which legitim is payable may be diminished by any deed *inter vivos* of the parent alienating his moveable estate (*Agnew*, 1775, Mor. 8210; M'Laren, *Wills, etc.*, i. 128), provided such deed is not a simulate transaction, fraudulently contrived for the purpose of disappointing the right of the children, without touching the father's own right during his lifetime (*Hog*, 1800, Mor. App. "Legitim," 3, 4 Pat. 581; *Millie*, 1803, Mor. 8215; affd. 5 Pat. 160; *Nicolson's Assignee*, 1841, 3 D. 675; Stair, iii. 4. 24). The real question is not what was done in form, but what was intended in substance; the mere form must yield to the actual purpose (per Ld. J.-C. Moncreiff in *Buchanan*, 1876, 3 R. 556, at 559). Legitim cannot be diminished or defeated by a *mortis causâ* deed (Ersk. iii. 9. 16; *Lawrie*, 1816, Hume, 291; see *Andrews*, 1836, 14 S. 589). An important point as to a parent's power to withdraw part of his estate from the legitim fund, has been raised but not decided—reduction on the ground of death-bed has been abolished by the Act 34 & 35 Vict. c. 81, in so far as relates to "deeds, instruments, or writings," but the question has been raised (*Hay*, 1890, 18 R. 244) as to whether this ground of reduction has been taken away also with respect to gifts made without writing. "Should such a case arise for consideration, we shall have to consider whether the enacting

words can receive aid from the preamble ('it is expedient to abolish all challenges and reductions in Scotland *ex capite lecti*'), or whether they must be taken as they stand" (Ld. M'Laren in *Hay, ut supra*, at p. 247).

Discharge and Satisfaction.—The right to claim legitim may be extinguished either by discharge or by satisfaction. The right is *discharged* when it is excluded by the antenuptial contract of the parents, expressly or by a total settlement inconsistent with the right (*Fisher's Trs.*, 1844, 7 D. 129; *Maitland*, 1843, 6 D. 244); or when it is excluded by the child's own deed. A trustee in bankruptcy was held entitled to reduce a discharge of legitim granted by a bankrupt during his father's lifetime (*Obers*, 1897, 24 R. 719). The legal claim is *satisfied* when a testamentary provision is given and accepted in place of it, the renunciation of the legal claim being made a condition of the gift. In this case the child has the right of election between the legal right and the conventional provision. As to election and its effect, see ELECTION. Renunciation is not to be inferred by implication (Stair, iii. 8. 5; Ersk. iii. 9. 23; *Clark*, 1835, 13 S. 326; *Rait*, 1892, 19 R. 687; *Crellin*, 1892, 20 R. 51). See also COLLATION.

[Stair, iii. 8, s. 44; Bankt. iii. 8. 1 *et seq.*; Ersk. iii. 15 *et seq.*; Ersk. *Prin.*, 19th ed., 511; Bell, *Prin.* ss. 1582 *et seq.*; Fraser, *H. & W.* ii. 993; M'Laren, *Wills, etc.*, i. 123; Murray, *Prop. of Married Persons*, 32, 74, 136.]

See COLLATION; ELECTION; FORISFAMILIATION; HEIRSHIP MOVEABLES; HERITABLE AND MOVEABLE; COMMUNIO BONORUM; JUS RELICTÆ; DEAD'S PART; LEGITIMA PORTIO.

Legitima portio.—The Roman law imposed on testators the duty of providing for certain persons, under a penalty of having their entire testamentary disposition made void. The persons who had a legal right to a *portio legitima* in the estate of a testator were his descendants and ascendants, as well as his brothers and sisters of the full blood and consanguinean, but not uterine. Brothers and sisters, however, were entitled to claim only when a *persona turpis* was preferred to them in the will. Further, no person could, in any case, claim unless he would have had an actual right of succession if the deceased had died intestate.

A person who was entitled to a *legitima portio* could, if he had been passed over or disinherited by the testator, maintain a *querela inofficiosi testamenti*, a complaint which was based on the fiction that the testator was *non sanæ mentis*, and therefore had no capacity to make the will. The *querela* was tried before the Centumviral Court, so long as that Court existed (Pliny, *Ep.* v. 1). If the testament was declared to be *inofficiosum*, it was rescinded to the extent of allowing the complainer to succeed to his intestate share; for the rest, the provisions of the will remained in force. Originally the *querela* could be brought whenever the claimant had received from the testator less than his legal share. But, by the law of Justinian, if any portion, however small, was left by the will to the complaining party, he could not maintain a *querela inofficiosi testamenti*; his remedy was to bring an *actio ad supplendam legitimam*.

The *legitima portio* which a claimant could demand was one-fourth of what he would have got if the testator had died intestate (*Dig.* 5. 2. 8. 8). Justinian subsequently enacted that if a man had less than five children, he must leave them together, in equal shares, at least one-third of the inheritance; if five or more, at least one-half. The *legitima portio* might be given by the testator in his will by appointing the person entitled to it heir, legatee, or *fideicommissarius*; but gifts made by the testator during his lifetime were

not counted as part of the *portio legitima*, unless made *mortis causâ*, or *propter nuptias*, or by way of *dos* (*Cod.* 3. 28. 29). Moreover, the fourth must be given free of all charges and limitations, and it must not be encumbered with conditions, or restrictions as to time (*dies*), or as to the purpose (*modus*) for which it is to be used. Originally the gift, if it was limited in this way, was inoperative; but in Justinian's time all such limitations are simply *pro non scriptis*. The *querela* must be brought within five years from the date of the testator's death, and is not transmissible to the complainer's heirs.

Justinian, in the 115th Novel, effected a fusion between the law regulating the *legitima portio* and the law regulating disinherison. A testator was compelled to institute as heirs such of his descendants or ascendants as would be entitled to succeed him on intestacy. Disinherison was allowed only on certain definite grounds specified in the statute, and the testator, in the event of his exercising the right to disinherit, must declare in his will the particular statutory ground of disinherison on which he had proceeded.

The Roman law doctrine of *legitima portio* has been adopted in Scots law under the name of legitim. Formerly it was generally held that the Scots law doctrine of legitim was borrowed directly from the Corpus Juris, and came into Scotland at some time prior to the Reformation. In the reported cases of the seventeenth and eighteenth centuries, and in most text books, the doctrine is directly traced to a Roman origin. At the same time the notion of the *jus relictæ*, which is closely bound up with the Scots law of legitim, was wholly unknown to the Romans, and there are marked dissimilarities on other points between the two systems in this department of law. The suggestion has, accordingly, been recently made that the doctrine of legitim was introduced into Scotland, not from Rome, but from England. By the old customary law of England a testator who was survived by wife and children had his power of bequest restricted to one-third of his personalty, his widow having a right to one-third of his estate, and his children to the remaining third (Glanville, l. 2, c. 5; Blackstone, *Com.* ii. 443). The right on the part of the widow and children to such a *rationabilis pars*, as it was called, ultimately died out in England, though it lingered in many parts of the country till the seventeenth century, and in some districts was got rid of only by passing Statutes prohibiting the custom. The suggestion is that the rule of the *rationabilis pars* was copied from Glanville into the *Regiam Majestatem*, and that the Scottish doctrine was virtually the same as that of England down to the time of the Reformation. The doctrine did not fall into desuetude in Scotland after the Reformation, as it did in England, because it was attributed to the Roman principle of *portio legitima*, and throughout the sixteenth and seventeenth centuries was supported by the authority of the Corpus Juris. On this subject, see Professor Goudy on *The Fate of Roman Law North and South of the Tweed*, 1894, London. On the whole subject, see Savigny, *System, etc.*, vol. ii. p. 127; *Inst.* ii. 18; *Dig.* v. 2. For Scots law, see LEGITIM.

Legitimacy.—See BASTARD; LEGITIMATION.

Legitimation.—*LEGITIMATION IN ROMAN LAW.*—In the time of Justinian *liberi naturales*, children not begotten in *justæ nuptiæ*, could be subjected to their father's *potestas* by legitimation in three ways: (1) *per*

oblationem curiæ; (2) *per rescriptum principis*; (3) *per subsequens matrimonium*.

Legitimation *per oblationem curiæ*, by the father making the son a *decurio* in a provincial town, was introduced by Theodosius II. in 443 A.D. The office of *decurio*, though honourable, was onerous and expensive, and legitimation was really a bribe to induce men to undertake it. A natural daughter, who married a *decurio*, was also legitimated (*Cod.* 5. 27. 3. 4).

Legitimation *per rescriptum principis*, by declaration of the emperor, was first introduced by Anastasius. It was fordidden by later emperors, but Justinian reintroduced it by two Novels, 74 and 89. It was granted upon the requisition of the father in certain special circumstances, as, for instance, when the marriage of the parents was no longer possible, owing to the death or disappearance of the woman, and the man had no legitimate children. A special form of this mode of legitimation was where the emperor's sanction was granted to a provision in a father's testament that his natural children should succeed him as lawful children (*Nov.* 74. 1. 2).

Legitimation *per subsequens matrimonium* had its origin in a constitution of Constantine. The original enactment has not come down to us, but its tenor is given in a law of the Emperor Zeno, who renewed it. It enacted that children born in concubinage,—a relation recognised by social customs and not regarded with censure,—whose parents might have been lawfully married at the time of the birth of such children, should be legitimated by the subsequent marriage of the parents, provided the man had not already children by a lawful wife. Justinian abolished this restriction, enacting that the law should apply whether the father had legitimate children or not. The children so legitimated were subjected to the *patria potestas*, and entitled to all the rights of lawful children. The purpose of these enactments seems to have been to encourage persons living in concubinage to contract a lawful marriage.

Legitimation *per subsequens matrimonium* was strictly confined by Roman law to the offspring of concubinage, and did not extend to bastards in general. Under the canon law, however, the privilege of legitimacy was conferred on all bastards, when their parents afterwards married, provided the father and mother were capable of contracting marriage at the date of the child's conception.

Legitimation in Scots Law.—The law of Scotland has followed the rule of the canon law, and allows the legitimation of all bastards by the subsequent marriage of their parents, provided they were not the offspring of an incestuous or adulterous connection. The recognition of the principle is not, as has been supposed, based on any legal fiction; it rests simply on grounds of justice and morality (see opinions in *Kerr*, 1840, 2 D. 752; also per Ld. Gillies in *Rose*, 1830, 4 W. & S. 80, 81). Further, the legitimation of previous offspring by the marriage of the parents is the result solely of law, and does not in any degree depend on the intentions of the parents. To be available, the parties, according to what seems the better opinion, must have been under no legal impediment to marry at the date of the child's procreation. Thus a child conceived in adultery cannot be legitimated, even though at its birth the parents are free to marry (Bankt. i. 5. 54; Ersk. i. 6. 49). This is also the rule of French law (Pothier, *Tr. du Mariage Par.* 5, c. 2, s. 415). Several authorities, however, lay it down that the time to be looked to, in determining whether legitimation *per subsequens matrimonium* is possible, is, not the date of the child's conception, but the date of the child's birth (see per Lord Chancellor in *Munro*, 1860,

1 Rob. 492; Fraser, *P. & C.*, 2nd ed., p. 36. This view finds support in *Cod.* v. 27. 11). In *Kerr*, 1840, 2 D. 752, it was held by a narrow majority of the judges in the Court of Session, after an elaborate argument, that the marriage of either of the parents with a third person, after the birth of a natural child, formed no bar to the legitimation of the child by the subsequent marriage of the parents. A marriage, in order to effect the legitimation of previous issue, need not be a public or regular marriage. Thus in *M'Adam* (1807, Mor. App. "Proof," No. 4; affd. 1 Dow, 148) an acknowledgment by the man of the woman as his wife, and of the children as his, in presence of the domestic servants, was found to be sufficient; and in *Lauderdale Peerage*, 1885, 10 App. Ca. 692, legitimation was effected by marriage on deathbed. The question may arise as to whether a child born of a woman before marriage is the child of the man whom she has subsequently married. In such a case a proof is allowed as to whether the person claiming legitimation is, *de facto*, the child of the two persons whose child he alleges himself to be (*Innes*, 1837, 2 S. & M'L. 444). The French law gets rid of the necessity for such inquiries by requiring—in this respect differing from the Roman, Canon, and Scots law—that the children shall be recognised by the married persons as their children, before the marriage or at the time of its celebration. After the marriage any acknowledgment or recognition of the children is unavailing in France.

Legitimation by subsequent marriage confers upon the bastard the status and rights of a lawful child. He is entitled to legitim, and succeeds under a destination to lawful children (Ersk. i. 6. 52). In a question with the children born of the bastard's parents in lawful wedlock, the child legitimated by subsequent marriage has the same rights, as regards succession and otherwise, as he would have enjoyed if he had been born in lawful marriage. But where there exists lawful issue of an intermediate marriage of one of the parents with a third person, a child legitimated by the later marriage can claim, in respect of priority of birth, no preference which would have the effect of prejudicing the rights of succession of the children of the former marriage arising at their birth. In other words, a child legitimated by a second marriage is in the position of being the eldest lawful child of the second marriage (Bell, *Prin.* s. 1627; Fraser, *P. & C.*, 2nd ed., p. 39). The weight of authority seems to be in favour of the view that, although a child legitimated by a subsequent marriage should die before the subsequent marriage, the legitimation operates to confer on the descendants of the predeceasing child all the rights which would belong to the descendants of one lawfully born (Bell, *Prin.* s. 1267; Bankt. i. 5. 58. The authorities for and against this view are collected in Fraser, *P. & C.*, 2nd ed., pp. 40, 41).

Legitimation *per rescriptum principis* is also recognised in Scotland. After the fall of the Roman Empire the Popes exercised this prerogative of the Roman emperors. The general opinion, however, seems to be that in Scotland such papal legitimations conferred legitimacy only *quoad spiritualia*, so as to enable the bastards to hold office in the Church, and not *quoad civilia*, so as to give them rights of succession. Even before the Reformation it appears that rescripts by the sovereign, embodied in royal letters of legitimation, were issued by the Scottish kings. This species of legitimation is strictly limited in its effects. It does not confer on the legitimated party an active right of succession *ab intestato* to any of his relations by blood, nor give him a claim for legitim with the other lawful children of his father. By granting royal letters of legitimation the sovereign merely resigns his right of succession to the bastard, and thereby entitles those

parties who would have been the bastard's heirs-at-law, had he been born in lawful wedlock, to take his succession (Stair, iii. 3. 45; Ersk. iii. 10. 7; Bell, *Prin.* s. 2064; Fraser, *Parent and Child*, 2nd ed., pp. 43, 44). In the older law bastards did not have testamentary capacity, so that letters of legitimation were valuable as containing a clause conferring a power to test. By the Statute 6 Will. IV. c. 22, bastards now possess testamentary power without being legitimated.

International Law.—Owing to the differences in the laws of different countries in the matter of legitimation, the rules of private international law on the subject are important. In determining a question of legitimacy, the *lex domicilii* of the father is entitled to prevail. The Scots Courts have not yet had before them a case in which the child was born when the domicile of the father was in a country where legitimation *per subsequens matrimonium* is not sanctioned, while the marriage with the mother took place when the domicile of the father was in a country where such legitimation is recognised. In *Munro* (1837, 16 S. 18; affd. 1840, 1 Rob. 492, 7 Cl. & Fin. 842) the view was expressed that in such a case the law of the domicile at the time of the marriage must rule. On the other hand, in a later case (*Udny*, 1866, 5 M. 164; affd. 1868, 7 M. (H. L.) 89), Ld. Hatherley laid it down that the law of the country in which the father was domiciled at the date of the birth of the child determined the child's legitimacy (cf. Burge, *Com.* i. 104; Savigny, *Priv. International Law* (Guthrie), 284 *et seq.*). In England it is now settled that, in the case of a change in the domicile of the father between the dates of the birth of the child and the subsequent marriage, the law of the father's domicile at both these dates must recognise legitimation *per subsequens matrimonium*, in order to confer the status of legitimacy on the child (*in re Grove*, 1888, 4 Ch. D. (C. A.) 216). "The domicile at birth must give a capacity to the child to be made legitimate, but then the domicile at the time of the marriage, which gives the status, must be a domicile in a country which attributes to marriage that effect" (per Cotton, L. J., in *in re Grove*, 1888, 40 Ch. D. (C. A.) 216, at 233). Thus in England, if the law of the father's domicile at the time of the child's birth does not allow legitimation *per subsequens matrimonium*, the child's bastardy is indelible (*in re Wright's Trusts*, 1856, 2 Kay & J. 595, 25 L. J. Ch. 621; *Shedden*, 1849, 11 D. 1333; 1854, 1 Macq. 535). The domicile of the mother has no effect in determining whether subsequent marriage avails to make a child legitimate (*Munro*, 1838, 16 S. 18; affd. 1 Rob. 492). It is equally immaterial for this purpose to inquire either into the place of the child's birth (*in re Wright's Trusts*, 1856, 2 Kay & J. 595, *vide* per Page Wood, V.C., at 614), or into the place where the marriage was celebrated (*Munro*, 1838, 16 S. 18; affd. 1 Rob. 492). Thus although both the birth and the subsequent marriage take place in Scotland, yet, if the father's domicile is English, legitimation does not follow (*Rose*, 1830, 4 W. & S. 289); and, on the other hand, although both the birth and the subsequent marriage take place in England, yet, if the father's domicile is Scotch, legitimation follows (*M'Donald*, 1840, 1 Rob. 475; 1852, 14 D. 525; *Aikman*, 1861, 3 Macq. 854). In Scotland a person legitimated by the subsequent marriage of his parents is allowed to inherit heritable property; but a person born out of lawful wedlock, even though he has attained the status of legitimacy, cannot be heir to English real estate, for the descent to real estate is regulated by the *lex rei sitæ* (*Birtwhistle*, 1835, 2 Cl. & Fin. 571); nor can he transmit a right to land to his father or to collateral relations (*re Don's Estate*, 1857, 4 Drew. 194). As a rule, the status of legitimacy, when once established by the *lex domicilii*, is recognised by other countries;

but if the legitimacy is derived from a foreign marriage which is incestuous in the view of Scots law, the status of legitimacy will not be recognised in Scotland (*Fenton*, 1859, 3 Macq. 497).

[Stair, iii. 3. 45; Ersk. i. 6. 52, iii. 10. 7; More, *Notes to Stair*, xxxii; Bell, *Prin.* ss. 1627, 2064; Fraser, *Parent and Child*, 2nd ed., chs. ii. and iii.; Savigny, *Private International Law* (Guthrie), 284, 301, 308; Story, *Conflict of Laws*, s. 93; Foote, *Private International Jurisprudence*, 2nd ed., pp. 62 *et seq.*; Dicey, *Conflict of Laws*, pp. 497, 761.]

See Bastard; Domicile; Parent and Child.

Lenocinium, or Connivance.

A husband or wife who is pursuer of an action of divorce for the adultery of the other spouse is barred from obtaining decree if it is shown that he or she has been guilty of this offence in relation to the adultery complained of. It ought to be pleaded on record, but has been considered when not so pleaded (*Munro*, 1877, 4 R. 322; see English cases cited by Fraser, *H. & W.* ii. 1193). The Lord Advocate may enter appearance, and the Court may direct a case to be laid before him in order that he may determine whether he should do so (Conjugal Rights Act, 1861 (*q.v.*) (24 & 25 Vict. c. 86), s. 8. See *Ralston*, 1881, 8 R. 371; *Paul*, 1896, 4 S. L. T. No. 260). In *Paul* a defence of condonation was withdrawn, and Ld. Low directed the papers to be laid before the Lord Advocate. The Lord Advocate decided not to take any action.

Lenocinium in its primary sense means the making of gain by the prostitution of another, and a husband who has taken profit from his wife's adultery cannot divorce her. But it is not necessary for the offence of *lenocinium* that this element of pecuniary gain should be present (*Mackenzie*, 1745, Mor. 333; *Wemyss*, 1866, 4 M. 660).

In the leading case Ld. J.-C. Inglis declined to define *lenocinium*, but described it in these terms: "When a husband is accessory to the crime of adultery by his wife, or is participant in the crime, or is the direct occasion of her lapse from virtue, he will be obnoxious to the plea of *lenocinium*" (*Wemyss, ut supra*, at p. 662). This description was quoted with approval by Ld. Ormidale in *Munro*, 1877, 4 R. at p. 342. In the same case Ld. Gifford said the questions were: "Did the husband by his own conduct cause or conduce to his wife's guilt? or, Did he connive at or consent thereto?" (*ib.* at p. 344). Other descriptions are, an "attempt to corrupt his wife's chastity, or a pandering to her guilt" (per Ld. Ormidale in *Donald*, 1 M. at p. 743); and "there must be conduct on the part of the husband which makes him the pander to his own dishonour, the wilful tempter and inciter of his wife to the commission of adultery" (per Ld. Ardmillan, *ib.* at p. 748).

In *Wemyss*, Ld. J.-C. Inglis said the Court could get no light from English cases on connivance. "The plea of connivance in England is founded on the maxim *volenti non fit injuria*, but *lenocinium* in our law, as in the canon law, is not founded on any such maxim" (*ut supra*, at p. 661).

But, with great respect, it is thought that this distinction is not borne out by the authorities. Sanchez expressly says the rule of the canon law is founded on this maxim. After saying: "*Deinde, quia cum vir eodem crimine implicetur, perinde est ac si ipse sit adulterii reus*"—a reason no longer applicable in Scotland, where recrimination is not a defence—he goes on: "*Tandem, quia injuria illata viro ob adulterium est causa et fundamentum divortii. Quæ cessat ipso consentiente. Nam scienti et volenti non fit injuria*"

(*De Sancto Matrimonio*, x. 5. 4; see also x. 5. 5 and x. 12. 52; and, to the same effect, Freisen, *Geschichte des Canonischen Ehercchts*, p. 836 *ad init.*). The bar is now statutory in England, relief not being granted where it is found that the petitioner has been "accessory to or conniving at the adultery" (Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 30). But this was merely declaratory, and the rules of the old Consistorial Court are followed in determining what amounts to being "accessory to or conniving at the adultery." These rules, like those laid down in Scotland, are based on the canon law (*Phillips*, 1846, 4 Notes of Cases, at p. 524; Pollock and Maitland, *Hist. of English Law*, ii. 366 *ad init.*). The Scots authorities on *lenocinium* are meagre, and in none of them is it said that the principle of the canon law has been rejected. There is a presumption that the Scots law on this point is the same as the English, both being founded on the canon law (see *Collins*, 1884, 11 R. H. L. at p. 23, per Ld. Blackburn). Remarks by writers who are treating of adultery as a crime must be applied with caution, divorce being a remedy granted to an innocent spouse, and not primarily a penalty imposed on a guilty one. In England, connivance has been defined as a "willing consent to the act" (*Marris*, 1862, 31 L. J. P. & M. at p. 72, per Sir C. Cresswell; and see *Moorsom*, 1793, 3 Hag. Ec. 107; *Rogers*, 1830, *ib.* 59; *Timmings*, 1792, *ib.* 81). It is more than mere negligence, and the Court will overlook great imprudence on the part of the husband if not satisfied that there was any corrupt intention on his part, or that his conduct was the direct occasion of his wife's adultery (*Glennie*, 1862, 32 L. J. P. & M. 17; *Phillips*, 1844, 1 Rob. E. 144; affd. 1846, 4 Notes of Cases, 523; *Rix*, 1777, 3 Hag. Ec. 74; *Gilpin*, 1804, 3 Hag. Ec. 150; *Stone*, 1844, 1 Rob. E. 99; *Gipps*, 1863, 32 L. J. P. & M. 78). In one case a husband who had virtually consented to his wife's adultery was held not barred because his consent was against his will (*Marris*, *ut supra*).

Strong evidence is needed to support the plea, which is one much more often taken than sustained (*Phillips*, 1844, 1 Rob. E. 144). In some of the cases where it has been sustained there has been an active conspiracy to procure the adultery (*Allen*, 1859, 30 L. J. P. & M. 2; *Picken*, 1854, 34 L. J. P. & M. 22; *Gower*, 1872, L. R. 2 P. & D. 428; not however, in *Timmings*, *ut supra*; *Lovering*, 1792, 3 Hag. Ec. 85). Taking a wife to a brothel is not *lenocinium*, unless it is done to tempt her to commit adultery (*Donald*, 1863, 1 M. 741; *Wemyss*, *ut supra*). But a husband was held barred from divorce who, having married a prostitute, deserted her without supplying her with means of support, and recommended her to return to her former mode of life (*Marshall*, 1881, 8 R. 702). It rather seems that this is the only reported case in Scotland in which the plea has been sustained. But such a recommendation is not *lenocinium* unless meant to be acted upon, and so understood (*Hunter*, 1883, 11 R. 359). It is not *lenocinium* to watch a wife whose infidelity is suspected (*M'Intosh*, 1862, 20 S. L. R. 117). Desertion is not connivance (*Donald*, *ut supra*). It has been said in England that a husband who has once connived at an act of adultery is barred from founding on a subsequent act either with the same or another paramour (*Lovering*, 1792, 3 Hag. Ecc. 85; *Gipps*, *ut supra*). This, however, seems a matter of circumstances (see Fraser, *H. & W.* ii. 1191; *Hodges*, 1795, 3 Hag. Ecc. 118; *Rogers*, 1830, 3 Hag. Ecc. at p. 72; *Stone*, 1844, 3 Notes of Cases, 278). Connivance may be pleaded against the wife, but will be even less readily sustained than against the husband (*Turton*, 1830, 3 Hag. Ecc. 338; *Angle*, 1848, 12 Jur. 525; *Dance*, in note to *Beeby*, 1799, 1 Hag. Ecc. 794; *Palmer*, 1859, 29 L. J. Mat. 27). In the last case it was sustained, but the facts were very special. It was pleaded against the wife in Scotland

in a recent case, but was not sustained (*Glasgow*, 1 Nov. 1895, Ld. Kincairney, N. R.).

For connivance implied from long delay to raise the action, see CONDONATION.

[See Bankt. i. 5. 129; Sir. G. Mackenzie, *Crim. Law, voce* "Adultery," s. 6; Fraser, *H. & W.* ii. 1184–1194; Voet, 24. 2. 5, and 48. 5. 21; Sanchez, x. 5. 4, and x. 12. 52; Freisen, *Geschichte des Canonischen Ehercchts*, 835; Walton, *H. & W.* 51; Bishop, *Marriage and Divorce*, ii. s. 203; Browne and Powles on *Divorce*, 60; Dixon on *Divorce*, 100.]

See DIVORCE.

Læsio enormis.—See LÆSIO ULTRA DIMIDIUM.

Lese Majesty.—See LEASING-MAKING.

Letter of Attorney.—See POWER OF ATTORNEY.

Letter of Guarantee to a Bank.—Such guarantees are distinguished as those applicable (1) to a past advance; (2) to operations on a current account, limited as against the guarantor to a certain specified sum, or without any such limit; (3) to any ultimate balance that may become due on a course of dealings; and (4) to discounts. The following are forms of guarantees usually adopted:—

I. FORM OF GUARANTEE WITH NO PECUNIARY LIMIT. This form may be adapted to a case where the guarantor's liability is to be limited to a certain specified sum.

To the Bank.

Gentlemen,—We hereby jointly and severally guarantee you due payment of any advances made, and which may hereafter be made, to , whether by way of overdrafts or by bills, promissory notes, cash orders, or other obligations discounted and held, or to be discounted and held, by you, and we dispense with any necessity for intimation being made to us of the dishonour of any or all said bills, promissory notes, cash orders, or other obligations, and declare that the claim under this guarantee shall be sufficiently ascertained by an account made out from the books of the bank, and certified by the accountant or other officer thereof, and the balance appearing due thereon shall be exigible from us at any time upon a demand being made therefor, and without the necessity of enforcing payment from the parties to said bills, promissory notes, cash orders, or other obligations: declaring, however, that it shall be in the power of you, the said bank, at your own discretion, and without consulting us, to transact or compromise with, or give time to, any of the parties on bills, promissory notes, cash orders, or other obligations, and generally to transact with the said in the same manner as if he were the only party bound or liable, without thereby impairing or affecting the liability of us, the said .—In witness whereof, etc.

This form is taken from the case of *Young*, 1889, 17 R. at p. 232.

II. GUARANTEE FOR ULTIMATE LOSS.

To the Bank.

You having agreed to give certain banking accommodation, I, , guarantee you against any ultimate loss to an extent not exceeding arising on banking transactions with you, whether in respect of advances in money, discounting bills, acceptances for or on account of , or in any other manner whatsoever, you being always entitled to make calls on me from time to time in respect

of such loss for such sums as you may fix : And I further declare that you may at any time or times, at your discretion, grant to the said , or to any drawers, acceptors, or endorsers of bills of exchange or promissory notes received by you from , on which may be liable to you any time or other, indulgence, and compound with , or such drawers, acceptors, or endorsers, without discharging or satisfying my liability. This guarantee shall be without prejudice to any other securities or remedies which you have or may acquire for the general obligations of the said : declaring that this guarantee shall subsist and be binding upon me notwithstanding any change in the constitution or partners of the said firm of .—In witness whereof, etc.

This form is taken from the report of *National Bank*, 1892, 19 R. at p. 886.

III. Guarantee for Discounts.

To the Bank.

Gentlemen,—I (or We) hereby (jointly and severally) guarantee you due payment of all bills and promissory notes which you may now or hereafter hold binding on , the amount which I (or We) am (or are) to be bound to pay under this guarantee not to exceed £ sterling : I (or We) agree that you shall be entitled to make calls on me (or us or any of us) from time to time in respect of said guarantee for such sums as you may fix : And I (or We) further declare that you may at any time or times, at your discretion, grant to the said , or to any drawers, acceptors, or indorsers of bills of exchange or promissory notes received by you from , or on which may be liable to you any time or other, indulgence, and compound with him, or with the said drawers, acceptors, or indorsers respectively, without discharging or satisfying the liability of me (or us or any of us), and that this guarantee shall apply to and secure any ultimate balance of the sums that shall remain due to you after applying any dividends, compositions, and payments which you may receive : And it is further declared that this guarantee is to remain in force until recalled by me (or us) or my (or our) heirs or executors in writing [and is not to be affected by any changes in the partnership of the said firm of]. —In witness whereof, etc.

Negotiations Preliminary to Execution of Guarantee.—There is no legal obligation incumbent upon a banker, when taking a guarantee from a third person, to disclose the affairs of his customer or the state of accounts between them. On the other hand, it is the duty of the guarantor, should he so wish, to make such inquiries as he may deem necessary before undertaking the obligation. Further, it is not the duty of a banker to explain to a guarantor the meaning or legal effect of a document which he is asked to sign, and which he should read for himself. The banker's silence on this subject is not considered such undue concealment as gives a ground for a reduction of the deed (*Young*, 1889, 17 R. 231). The law is thus stated by Ld. Shand in *Young's* case: "Nothing is better settled than this, that a bank agent is entitled to assume that the cautioner has informed himself upon the various matters material to the obligation he is about to undertake. The agent is not bound to volunteer any information or statement as to the accounts, although, if information be asked, he is bound to give it, and to give it truthfully." The guarantor would, however, be freed from his obligation if, in reply for information asked, facts material to the risk were withheld (*British Guarantee Association*, 1853, 15 D. 834: *Davies*, 1878, 8 Ch. D. 469. See also Cautionary Obligation). Again, it is not the duty of a banker to volunteer the information, if such be the case, that the account of the customer had been previously guaranteed, and that the guarantor had withdrawn his obligation (*North British Insurance Co.*, 1875, 10 Ex. 523). The law, however, requires that the utmost good faith should exist between a banker and a guarantor at the time the obligation is undertaken, and will protect a guarantor from fraud or undue concealment (*Royal*

Bank, 1844, 6 D. 1418; *Hamilton*, 1845, 4 S. Bell, 67; affd. 5 D. 280; *British Guarantee Association*, *supra*; *French*, 1893, 20 R. 966).

Constitution of Obligation.—The obligation of a guarantor, before it can be enforced in a Court of law, must be reduced to writing, although writing does not seem necessary to its constitution (Mercantile Law Amendment Act, 1856, s. 6, as interpreted in *Wallace*, 1895, 22 R. H. L. 56; see also Ld. Blackburn's opinion in *Walker's Trs.*, 1880, 7 R. H. L. at p. 88). This distinction, however, so far as Scots law is concerned, can never be of any but academical interest (per Ld. Watson in *Wallace*, *supra*). So long as the obligation can be proved by writing, no particular form of words is necessary (per Lord Chancellor in *M'Kenzie*, 1831, 5 W. & S. 504). Accordingly, it has been decided that an undertaking in writing to give, when required, a guarantee for the repayment of money to be lent, is a good cautionary obligation within the meaning of sec. 6 of the M. L. A. Act, 1856, and is binding as a direct obligation (*Wallace*, *supra*). The question seems still open whether a guarantee to a bank is a writing in *re mercatoria*, and entitled to the privileges of such documents (*Johnston*, 1844, 6 D. 875 (not the rubric), and *National Bank of Scotland Ltd.*, 1892, 19 R. 885). So far, however, as the liability of a guarantor under an informally executed guarantee in favour of a bank is concerned, the law seems to be that an improbative guarantee to a bank for future advances, when followed by *rei interventus*, will be binding, not because it is a document in *re mercatoria*, but because it has been followed by *rei interventus*; for if a person, by an improbative writing, undertakes an obligation of guarantee, and actings of the kind which he contemplated follow upon it, then the actings will validate the obligation or agreement. This principle is illustrated by reference to the following case. A bank agreed to make advances to A. on his obtaining B.'s guarantee. A formal letter of guarantee, ending with the words "in witness whereof," was then prepared by the bank and handed to A. for execution by B. A. obtained B.'s signature, and afterwards got two persons to sign as witnesses who had not seen B. subscribe nor heard him acknowledge his subscription. A. returned the document to the bank with the names and designations of the witnesses, the testing clause was filled up by the bank, and the bank made an advance to A. upon the faith of the guarantee. In an action by the bank upon the letter of guarantee against B., the defender pleaded that he was not bound, as the deed was not tested. The above facts were admitted or proved. It was decided that the defender, having signed the deed and delivered it to A., who was *in hac re* the bank's agent, he had delivered it to the bank as a guarantee for advances to be made to A., and that the bank having made advances upon the faith of it, the defender's imperfect obligation had been validated by *rei interventus* (*National Bank*, 1892, 19 R. 885; see also *Paterson*, 1810, F. C.; affd. 1814, 17 F. C. 683, 6 Pat. 38; *Thomson*, 1831, 9 S. 520; *Ballantyne*, 1842, 4 D. 419; *Johnston*, *supra*; Ld. Shand's opinion in *Kirkpatrick*, 1880, 8 R. at p. 343). But there is no satisfactory authority for the opinion either that a guarantee for past advances, which by its nature is incapable of support by *rei interventus*, or that a guarantee for future advances, unsupported by evidence of *rei interventus*, will be binding (*National Bank of Scotland Ltd.*, *supra*).

Printed Forms of Guarantee.—Guarantees in favour of banks are usually, although not invariably, executed upon printed forms. There are certain blanks left in the form for the purpose of inserting the amount to be guaranteed, and the person on whose behalf the guarantee is to be given. When such documents are not tested, and when the blanks in the form are

filled up by the guarantor and the form signed by him outwith the presence of subscribing witnesses, the question arises for determination whether such documents, when so completed, are holograph of the granter, so as thereby alone to constitute a valid obligation. It will be noted that the only parts to be filled up are those which could not be printed as parts of the form, but which, taken by themselves and apart from the printed form, would neither be a complete sentence nor be intelligible. Stair, iv. 42. 6, in treating of holograph writs, says: "Writs are accounted holograph when large sentences are written with the party's hand, although not the whole writ" (see also HOLOGRAPH WRITINGS). The test seems to be whether the essentials of the obligation are holograph, and in the case under consideration it is thought they are not. Consequently a guarantee in the form indicated would not be binding as a holograph writing. The form might, however, be rendered holograph by the granter appending to his subscription a memorandum or docquet to the following, or similar, effect: "adopted as holograph" (*Gavine's Trs.*, 1883, 10 R. 448).

Interpretation of Guarantee.—Nothing will be implied which the terms of the guarantee do not warrant (*Smith*, 1829, 7 S. 244; *Scott*, 1866, 4 M. 551; *Rennie*, 1866, 4 M. 669), and extraneous evidence is incompetent to modify the terms of the written contract (*Nicholsons*, 1882, 10 R. 121). The guarantee is confined to the person to whom it is addressed (*Bowie*, 1840, 2 D. 1061; *Raimes*, 1842, 4 D. 1167). So, also, if the guarantee is limited as to time, or the number of transactions to take place on the faith of it, such limitations will receive effect (*Caledonian Banking Co.*, 1870, 8 M. 862). Where, in a guarantee, the person undertaking the obligation limits his liability to advances made during a fixed period, if the creditor does not expressly and in writing accept the guarantee, the guarantor is entitled at any time within the specified period to intimate that he withdraws from the obligation, and this notification will receive effect as to subsequent advances (*Offord*, 1862, 12 C. B., N. S. 748).

Continuing Guarantees.—See GUARANTY.

Guarantee for ultimate Loss.—When in a letter of guarantee the person undertaking the obligation guarantees the due payment to the creditor of the whole debts due, or to become due, to him by the principal debtor, but stipulates that his liability is to be restricted to a certain specified sum, it is a question, to be determined on a fair construction of the terms of the letter of guarantee—no universal rule being applicable,—whether on the insolvency of the principal debtor the guarantor is entitled to make payment of the amount of his liability, and to rank for the sum he has so paid, or whether the creditor is entitled to rank for the whole sums due to him, irrespective of the amount of the guarantee, draw a dividend therefor, and thereafter call upon the guarantor to make good any deficiency up to the limit of his liability (*Houston's Exrs.*, 1835, 13 S. 945; *Ellis*, 1876, L. R. 1 Ex. D. 157; *Harvie's Trs.*, 1885, 12 R. 1141). As there can be no double ranking upon the same estate, the effect of the creditor being entitled to rank precludes the guarantor from participating in the division of the insolvent's estate unless and until the amount due to the creditor is paid or provided for.

Hypothecation of Letters of Guarantee.—Letters of guarantee are not negotiable instruments, and hence the hypothecation of the *ipsa corpora* of letters of guarantee creates no right or security over the fund or the letters in favour of the person in whose hands the letters may be placed (*Robertson*, 1891, 18 R. 1225; see also Bell, *Com.* (M'L. ed.), vol. ii. p. 24).

Stamp Duty.—A letter of guarantee is subject to a duty of sixpence

The duty may be denoted by an adhesive stamp, which must be cancelled by the first person who signs the guarantee (Stamp Act, 1891, 54 & 55 Vict. c. 39, s. 22; see also Sched. to Act, sub-title Agreement).

See also CAUTIONARY OBLIGATIONS; CAUTIONARY OBLIGATIONS, SEPTENNIAL LIMITATION OF; GUARANTY.

Letters of Credit.—The nature of a letter of credit is thus defined in Bell's *Com.* (M'L. ed.) vol. i. p. 389—a definition which is adopted by Story on *Bills*, s. 463:—"Letters of credit, strictly speaking, are mandates, giving authority to the person addressed to pay money or furnish goods on the credit of the writer. They are generally made use of for facilitating the supply of money or goods required by one going to a distance or abroad, and avoiding the risk and trouble of carrying specie, or buying bills to a greater amount than may be required. The debt which arises on such a letter in its simplest form, when complied with, is between the mandatory and mandant, though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory.

"1. Where the letter is purchased with money by the person wishing for the foreign credit, or is granted in consequence of a check on his cash account, or procured on the credit of securities lodged with the person who grants it, or in payment of money due by him to the payee, the letter is in its effects similar to a bill of exchange drawn on the foreign merchant. The payment of the money by the person on whom the letter is granted raises a debt, or goes into account between him and the writer of the letter; but raises no debt to the person who pays on the letter, against him to whom the money is paid.

"2. Where not so purchased, but truly an accommodation, and meant to raise a debt against the person accommodated, the engagement generally is, to see paid any advances made to him, or to guarantee any draft accepted or bill discounted; and the compliance with the mandate in such case raises a debt both against the writer of the letter and against the person accredited." The person accredited is the real debtor, and the writer of the letter is his cautioner. Letters of credit are distinguished as either general or special.

General Letters of Credit.—A general letter of credit is not directed to any person, but to all merchants or other persons in general, and operates as an authority, to anyone to whom it may be produced, to give credit to the person named in it. General letters of credit are equivalent in import and intention to the following language: "Take this letter of credit, show it to any person whatsoever, and I promise any person who shall, on the faith thereof, advance you money on bills, cheques, or other orders within the scope thereof, that I will accept and pay those bills." Such letters partake of a negotiable quality to this extent, that the person who on the faith of the letter gives credit to the person therein named, is entitled, as against the person signing the letter, to recover full payment of his debt without reference to any change of circumstances which might occur in the intermediate time between the giving of the letter of credit and the drawing of the bills under the same of which the person advancing the money had no notice (*in re Agra and Masterman's Bank*, 1867, L. R. 2 Ch. App. 391). It is incumbent on the person giving the credit to see that he duly complies with the terms of the letter. The letter may specify the amount of the credit to be given, or it may leave the amount unrestricted. It may further request that credit be given on a specified date during a specified

time, or it may be of the nature of a continuing guarantee (see LETTER OF GUARANTEE). It may further specify the mode in which credit is to be given and the manner in which it is to be drawn upon, which directions must be strictly complied with in order to render the writer of the letter liable (*British Linen Company*, 1859, 21 D. 1197; 1861, 23 D. (H. L.) 3, 4 Macq. 107; *Union Bank of Canada*, 1877, 47 L. J. C. P. 100). Occasionally the authority given is to cash drafts when presented along with shipping documents representing merchandise, familiarly known as "document credits"; and if the draft be cashed without complying with the condition, the writer of the letter cannot be rendered liable for the amount so paid (*Maitland*, 1865, 2 H. & M. 440). As to marginal letters of credit, which are letters of credit written in the margin of blank bills of exchange, see *Banner*, 1871, L. R. 5 (H. L.) 157; *Maitland*, 1869, 38 L. J. Ch. 363. In this case there is a form given of a marginal letter of credit. Further, the person giving the credit is bound to see that he gives credit to the proper person. Mere possession of the letter of credit on the part of the person presenting it does not relieve the person to whom it is presented from the duty of satisfying himself that such person is the person named in it. Hence payment on a forged cheque or order is not of itself any payment at all as between the party paying and the person whose name is forged, unless, probably, in the case where a forgery has been successfully accomplished by reason of the want of due caution on the part of the person whose name is forged (*Orr & Barber*, 1852, 24 Jur. 196; 1854, 17 D. (H. L.) 24, 1 Macq. 513). The Act 16 & 17 Vict. c. 59, s. 19, which gives protection to bankers in respect of certain forged endorsements, does not apply to letters of credit (*British Linen Company, supra*).

Special Letters of Credit.—Such letters of credit are addressed to a specified person or persons, or, as in the case of special letters of credit issued by bankers, addressed to the correspondents of the bank as given in a letter of indication which is issued along with the letter of credit. Such letters constitute a contract between the issuing bank and the persons mentioned in the letter of indication, but with no other person. The contract is simply one of the deposit of money, with an obligation by the receiver thereof to repay it abroad, through the medium of one of the bankers whose names are given in the letter of indication. Special letters of credit can only be operated upon by the person in whose favour they are issued, and accordingly they are not negotiable instruments; but it is competent for the person in whose favour they are conceived to endorse and deliver the same for value, and such delivery requires no intimation. As the document is not negotiable, the endorsee only acquires such rights as the endorser had at the time of transference (*Struthers*, 1842, 4 D. 460; *Orr & Barber, supra*). The bearer of the letter of credit is not bound to require the whole sum mentioned therein at the place or places indicated, but is entitled to recover back the balance from the person with whom and at the place where the deposit was originally made, and that without any indemnity. Such letters of credit have always been understood as giving an option to, not imposing an obligation upon, the bearer to cash his credit to the full amount expressed (*Conflans Quarry Company*, 1867, L. R. C. P. 1).

Stamp Duty.—By the Stamp Act, 1891 (54 & 55 Vict. c. 39, s. 32), the term "bill of exchange," for the purposes of the stamp duties, includes *inter alia* a letter of credit and any document or writing (except a bank note) entitling, or purporting to entitle, any person, whether named therein or not, to payment by any other person of, or to draw upon any other

person for, any sum of money. By exemption 4 a letter of credit granted in the United Kingdom, authorising drafts to be drawn out of the United Kingdom, payable in the United Kingdom, is exempt from stamp duty.

Letters of Marque.—See Reprisals.

Letter-stealing.—See Post Office Offences.

Lewd Practices.—See Indecent Practices.

Lex commissoria; Pactum legis commissoriæ.—*Pactum legis commissoriæ*, in the Roman law of sale, denoted an agreement between buyer and seller that the latter shall be at liberty to rescind the contract, if the former does not perform his obligations under it in the proper manner and at the proper time (*Dig.* 18. 3. 1). This agreement did not make the sale a conditional one. In a conditional sale, if the property were destroyed or lost before the time for payment, the loss fell on the seller, whereas, in case of a *lex commissoria*, if the property were destroyed or lost, the loss fell on the buyer. If the seller intended to take advantage of the *lex commissoria*, he must give notice of his intention to the buyer as soon as the latter has made default; and if he accepted or claimed payment after the day agreed on, he thereby waived the right which the *lex commissoria* conferred upon him. It was also usual to stipulate in the *lex commissoria* that if the seller had to sell the subject a second time, the first buyer (by whose default the second sale was rendered necessary) should be liable for any difference between the price at which he had bought it and the price which was got for it at the second sale.

Neither in Scotland nor in England, under the former law, was a contract of sale rescinded by the buyer's default, unless rescission was expressly stipulated (Blackburn on *Sale*, p. 484; Benjamin on *Sale*, p. 796; *Stoppel & Co.*, 1850, 13 D. 61; *Adamson, Howie, & Co.*, 1868, 6 M. 347; but see *Booker & Co.*, 1870, 9 M. 314). By the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 48, subs. 4, it is provided that "where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages." This kind of rescission is not for the advantage of the buyer. "He runs all the risk of resale without any chance of profit, for he has clearly no right to the surplus if the goods are sold for a higher price" (Benjamin on *Sale*, p. 796). Compare on this subject Ersk. iii. 3. 11; Bell, *Com.* i. 260, ii. 270; Brown on *Sale*, 430; Brown on the *Sale of Goods Act*, p. 232.

This pact had also a place in the Roman law of pledge. In this connection it meant an agreement between pledgor and pledgee that the property pledged should be vested absolutely in the latter, unless the debt which it secured was discharged on the day fixed for payment. Such an agreement was declared unlawful and void by Constantine (*Cod. Theod.* 32; *Cod.* 8. 35).

In Scotland, irritant clauses in contracts, infeftments, and the like are effectual. Under the Pawnbroking Acts (consolidated by 35 & 36 Vict.

c. 93) a thing which has been pledged is forfeited to the pawnbroker at the end of a year, to the effect of entitling him to have it sold, unless notice be given for a further indulgence of three months; but the expiration of the year does not, in the case of pledges for more than ten shillings, prevent the pledgor having the right of redemption at any time before the pledge has been actually sold. In Scotland an agreement of this sort that the right of redemption should be irritated, if the subject were not redeemed by a fixed day, would certainly not be operative without a declarator of irritancy. "The *pactum legis commissoriæ* was reprobated in the civil law, and is not much favoured with us" (quoted from MS. Notes of Ld. Pres. Campbell in Ross, *L. C.* i. 153). In the ordinary contract of pledge the subject of pledge cannot be sold, by the law of Scotland, without the order of a judge, which is obtained on a summary application to the Sheriff.

[Ersk. ii. 8. 14; Stair, i. 13. 14; ii. 10. 6.]

Lex loci contractus.—See International Private Law; Jurisdiction; Foreign.

Lex talionis.—A *talio* is a penalty of the same kind and degree as the injury done by the guilty party to another. The principle of *talio* is found generally in all systems of primitive law, giving place, with the progress of law, to a system of pecuniary penalty or damages. Thus *talio*, as a penalty, was recognised in the Mosaic law: "eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again" (Lev. xxiv. 20). So in Roman law it was provided in the Twelve Tables: *Si membrum rupit ni cum eo pacit talio esto* (Gaius, iii. 223). The breaking of a limb was, however, the only case in which the punishment of *talio* was inflicted under the Twelve Tables; for other kinds of bodily injury a system of pecuniary reparation was already established. Further, as appears from the fragment of the Tables quoted (*supra*), it was recognised that, even in the case of *membrum ruptum*, a pecuniary composition might be substituted for retaliation.

Libel.—See Defamation; Criminal Prosecution; Indictment: Summons.

Liberation.—Where an appeal is taken in a criminal case in which the sentence has been one of imprisonment, the accused may apply for *interim* liberation. This may or may not be granted, and with or without caution, according to circumstances. See Appeal to Circuit Court (vol. i. at p. 252); Appeal to High Court of Justiciary (vol. i. at p. 265); Suspension; Advocation to Court of Justiciary (vol. i. at p. 152). As to *interim* liberation on bail, see Bail. For the purpose of preventing undue delay in the trials of persons committed to prison until liberated in due course of law, it is enacted by the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35, s. 43, partly repealing 1701, c. 6), that any person who is in prison on such commitment, and who is not served with an indictment within sixty days of such commitment, is entitled to give notice to the Lord Advocate through the Crown Agent in Edinburgh, that, if he is not served with an indictment within fourteen days of such notice,

the prosecutor will be called on to show cause before the High Court why the accused should not be released; and if no indictment is served within the said fourteen days, the Court shall call upon the prosecutor to show cause; and if sufficient cause is not shown, the Court shall grant warrant for accused's release within three days, unless within such three days an indictment is served. If an accused be liberated in this way, the prosecutor may raise an indictment against him and obtain from the Court (the judge of the jurisdiction or the High Court) a warrant for his apprehension and recommitment to await his trial on such indictment. If he is not tried at the second diet to which he is cited in such indictment, or at an adjourned or postponed diet, on his application by note the Court may (after hearing parties) order his liberation. All imprisoned persons, however, must be brought to trial, and the trial concluded within one hundred and ten days from the date of commitment until liberated in due course of law. If not, the accused must be forthwith set at liberty and declared for ever free from all proceedings in regard to the crime on which he was committed (*ib.*).

See also IMPRISONMENT FOR DEBT.

Libraries (Public).—Public libraries in Scotland are regulated by the Public Libraries Consolidation (Scotland) Act, 1887 (50 & 51 Vict. c. 42), and the Public Libraries (Scotland) Act, 1894 (57 & 58 Vict. c. 20), which are to be construed as one Act. These enactments repeal the Public Libraries Acts, 1867 to 1884, so far as relating to Scotland, and consolidate and enlarge the provisions of those Acts. They apply to "libraries" and "museums," which terms include "schools for science," "art galleries," and "schools for art." The authority for the administration of the Acts, if adopted, is in all burghs including police burghs, the town council, and in parishes exclusive of burghs, the parochial board, now the parish council. In parishes partly landward and partly burghal, the landward committee is the authority in the landward part (sec. 23 Local Government (Scotland) Act, 1894). The term "householder" in the Act means, in the case of a burgh, any person entered on the municipal register of voters; in the case of a parish, any person entitled to vote for a school board for that parish. In the case of a burgh, the principal Act (*i.e.* of 1887) may be adopted by a resolution of the town council. One month's notice of the proposed resolution must be given to each member, and the resolution, when passed, shall be advertised in a local paper. In the case of a parish, upon the requisition in writing of ten or more "householders" in any parish, the Sheriff of the county shall ascertain the opinion of the householders in such parish as to the adoption of the Act in the manner set forth in Schedules A or B which are annexed to the Act. It shall be optional to the Sheriff to adopt either the procedure by way of voting paper set forth in Sched. A, or the procedure by way of public meeting set forth in Sched. B. By Sched. A a form of voting paper is to be issued to every householder, and in it he is to vote "yes" or "no" as to the adoption of the Act. These voting papers are to be returned to the Sheriff by a certain day, and the adoption or rejection of the Act is to be determined by a majority of votes. In the case of Sched. B the Sheriff is to convene a meeting of householders for the purpose of determining whether the Act shall be adopted or not. The Sheriff shall preside at the meeting, and in case of equality of numbers shall have a casting vote (s. 4).

In the case of a parish, if the proposal is rejected it is not to be brought

forward again for two years. If the Act be adopted, the expenses of carrying it into execution are to be paid out of the "library rate," which is to be levied in the case of a burgh in the same manner as the burgh general assessment, and in the case of a parish as the poor-rate. The amount of the library rate is not to exceed one penny per pound. The authority under the Act have power to borrow money and to acquire land and buildings. They shall also appoint a committee annually, consisting of not less than ten nor more than twenty members, half of whom shall be chosen from amongst the town council or parish council, as the case may be, and the remaining half from amongst the householders of the burgh or parish; three members of the committee to form a quorum. The committee are to manage, regulate, and control all libraries and museums established under the Act, or to which the Act applies, and have power to appoint and dismiss librarians and other officials, to purchase books, papers, statuary, pictures, specimens of art and science, etc., to provide suitable rooms for reading, and to lend out books to householders and inhabitants of the burgh or parish. They have also powers to make bye-laws regulating all matters within their control, and also to impose penalties for breach of such bye-laws. The committee shall, in the month of April in every year, make up an estimate of the sums required to defray expenses in the coming year, and shall report the same to the town or parish council; and the town or parish council, as the case may be, shall provide the amount required out of the library rate to be levied by them, and shall pay over to the committee the sum necessary for their annual expenditure in terms of their estimate. All libraries, museums, or art galleries established under this Act, or to which this Act applies, shall be open to the public free of charge, and no charge shall be made for the use of books or magazines issued for home reading.

Licence to deal in Game.—Two separate licences are required by game dealers—one from the justices of the peace and the other from the excise. Prior to 1860 such licences were not required in Scotland. But the Game Licence Act, 1860 (23 & 24 Vict. c. 90), by sec. 13, makes applicable to Scotland the whole of the provisions of the Statutes 1 & 2 Will. IV. c. 32, and 2 & 3 Vict. c. 35, with reference to licences and to dealing in and selling game.

The Game Licence Act, 1831 (1 & 2 Will. IV. c. 32), provides (s. 13) that the justices of the peace of every county, riding, division, liberty, franchise, city or town, shall hold a special session in the division or district for which they usually act in every year in the month of July for the purpose of granting licences to deal in game, of the holding of which session seven days' notice shall be given to each of the justices acting for such division or district; and the majority of the justices assembled at such session, or at some adjournment thereof, not being less than two, are thereby authorised (if they shall think fit) to grant under their hands to any person being a householder or keeper of a shop or stall within such division or district, and not being an innkeeper or victualler or licensed to sell beer by retail, nor being the owner, guard, or driver of any mail coach or other vehicle employed in the conveyance of the mails of letters, or of any stage coach, stage waggon, van, or other public conveyance, nor being a carrier or higgler, nor being in the employment of any of the above-mentioned persons, a licence according to the form in the Sched. (A) annexed to the Act, empowering the person to whom such licence shall be so granted to buy game at any

place from any person who may lawfully sell game by virtue of this Act, and also to sell the same at one house, shop, or stall only kept by him; provided that every person while so licensed to deal in game as aforesaid shall affix to some part of the outside of the front of his house, shop, or stall, and shall there keep, a board having thereon in clear and legible characters his Christian name and surname, together with the following words (that is to say), "Licensed to deal in game"; and every such licence shall continue in force for the period of one year next after the granting thereof.

Game.—The word "game" in connection with this provision, as defined in sec. 2 of the said Act, includes "hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards." What "heath or moor game" means in an enumeration which contains also "grouse" and "black game," it is vain to conjecture.

Appeal.—There is no appeal against the refusal of the magistrates to grant a licence to deal in game.

Innkeeper.—Although an innkeeper cannot obtain a game dealer's licence, he may (s. 26) without a licence sell game for consumption in his house in the ordinary course of his business, always provided that he has acquired the game from some person qualified to sell the same to him.

Forfeiture.—By sec. 22 it is provided that if any person licensed to deal in game shall during the period of such licence be convicted of any offence whatever against the Act, his licence shall thereupon become null and void for the remainder of the period of its currency.

A partnership or company carrying on business at *one* place does not require (s. 21) to take out more than one licence, however many individuals may be interested in the concern.

Excise Licence.—After having obtained a licence from the council, the dealer, before beginning business, must obtain an excise licence (23 & 24 Vict. c. 90, s. 14). This is only issued on production of the licence obtained from the magistrates. The duty is £2, and it is under the control of the Inland Revenue Department.

Penalties.—The provisions with reference to penalties are confused and perplexing. Under the Game Licence Act, 1860 (23 & 24 Vict. c. 90), a penalty of £20 is imposed (s. 14) upon any person who, having obtained a licence from the justices, shall deal in game without having an excise licence. The Revenue Act of the following year (24 & 25 Vict. c. 91) provided (s. 17) that this penalty should be incurred by any person dealing in game without an excise licence, whether or not he had obtained a licence from the justices. In addition to these provisions there are various penalties imposed by the Game Act of 1831.

Sec. 25 provides that if any person not having a game licence or a licence to deal in game shall sell or offer for sale any game to any person, or if a person having a game licence but no licence to deal in game shall offer for sale any game to any person other than a licensed game dealer, such offender shall forfeit and pay for every head of game so sold or offered for sale such sum, not exceeding £2, as the Court shall determine, together with the costs of the prosecution.

Sec. 27 provides that if any person not being a licensed game dealer shall buy any game from any person other than a licensed game dealer, or a person whom, by reason of his sign-board, he has reasonable grounds for believing to be a licensed game dealer, he shall for every head of game so bought be liable in a penalty of such sum, not exceeding £5, as the Court shall determine, together with the costs of prosecution.

Sec. 28 provides that a penalty not exceeding £10, together with the costs of conviction, shall be incurred by—

(1) Any licensed game dealer who shall buy game from a person not having a game licence or a licence to deal in game.

(2) Any licensed game dealer who shall

(*a*) Neglect to affix the necessary sign-board with the words "Licensed to deal in game" to his shop or stall;

(*b*) Affix such sign-board to more than one shop or stall;

(*c*) Sell game at any place other than the shop or stall where the sign-board is exhibited.

(3) Any person not being a licensed game dealer who shall pretend to be so by exhibiting any sign-board, certificate, or otherwise.

Sale by employees of licensed dealers is sale by the licensed dealer. The penalties imposed by the Game Act, 1831, and the Acts 23 & 24 Vict. c. 90, and 24 & 25 Vict. c. 91, are excise penalties, and therefore a suspension of a conviction for dealing in game without a licence obtained in a prosecution before the justices is incompetent (*Lazenby*, 1874, 3 Coup. 23; 2 R. (J. C.) 6).

Foreign Game.—The Customs and Inland Revenue Act, 1893, s. 2, provides that the provisions of the Game Licence Act, 1860, as amended by the Revenue Act, 1861, s. 17, relating to excise licences to deal in game, and the dealing in and selling of game without an excise licence, shall extend and apply to the dealing in and selling of hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards imported from foreign parts into Great Britain or Ireland.

Live Game and Eggs.—The Acts apply to live game, whether wild or tame, as well as to dead, and dealers commit an offence if they buy live game from persons not qualified to sell game (*Helps*, 8 B. & C. 553; *Loome*, 30 L. J. M. C. 31). A licensed dealer or any other person who knowingly has in his premises or possession the eggs of any bird of game, or of any swan, wild duck, teal, or widgeon, wilfully taken out of the nest upon any land by a person not having the right to kill game upon such land, or not having permission from the person having such right, is liable to pay for every egg so found such sum, not exceeding five shillings, as the Court shall determine, together with the costs of prosecution (Game Act, 1831, s. 24).

With reference to the provisions imposing penalties upon dealers who shall purchase game from a person not having a game licence or a licence to deal in game, there is an exception as regards hares in favour of the occupier or person authorised by him to kill game under the Ground Game Act, 1880, s. 4, and also one in favour of a person authorised to sell game by an order of the Sheriff under the Poaching Prevention Act, 1862, s. 2.

In regard to the provisions concerning close time as affecting licensed dealers, reference is made to the article upon CLOSE TIME.

[Irvine, *Game Laws*; Oke, *Game Laws*, new edition, 1897; Warry, *Game Laws of England.*]

Licence to Kill Game.—Apart altogether from the Game Laws for the protection of game, the Revenue Laws require that the pursuer of game shall take out a licence entitling him to participate in the sport. The present regulations with regard to licences to kill game are now contained in the Game Laws Act, 1860 (23 & 24 Vict. c. 90), as amended by the Inland Revenue Act, 1883 (46 & 47 Vict. c. 10, ss. 4 and 5).

The leading Act provides (subs. 4) that the following licence duties shall be paid in respect of licences to take or to deal in game:—

For a licence in Great Britain, or a certificate in Ireland, to be taken out by every person who shall use any dog, gun, net, or other engine for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail, or landrail, or any conies, or any deer; or shall take or kill, by any means whatever, or shall assist in any manner in the taking or killing, by any means whatever, of any game, or any woodcock, snipe, quail, or landrail, or any coney, or any deer—

If such certificate shall be taken out after (5th day of April now, 46 & 47 Vict. c. 10, s. 4) 31st day of July and before the 1st day of November—

To expire on the 31st day of July in the following year, £3.

To expire on the 31st day of October in which the licence or certificate shall have been taken out, £2.

If such licence or certificate shall be taken out on or after the 1st day of November—

To expire on the 31st day of July following, £2.

Or if the licence be for any continuous period of fourteen days, to be specified in such licence or certificate (46 & 47 Vict. c. 10, s. 5), £1.

Provided that any person having the right to kill game on any lands in England or Scotland shall be entitled to take out a licence to authorise any servant for whom he shall be chargeable to the duty of assessed taxes as a gamekeeper, to kill game upon the same lands upon payment of the duty of £2.

And for every licence to deal in game in England or Scotland to be granted under this Act, £2. (See article LICENCE TO DEAL IN GAME.)

The penalty (s. 4) for taking or pursuing game without the necessary licence is forfeiture of a sum of £20.

The duties are excise duties, and are to be collected as such, and penalties are to be recovered by excise prosecutions. The prosecution must therefore be at the instance of the excise, and a private person or informer cannot prosecute. A conviction for trespass forfeits the licence in England and Scotland (23 & 24 Vict. c. 90, s. 11), but not in Ireland.

EXCEPTIONS AND EXEMPTIONS.

The Act applies generally to all persons who take part in the pursuit of game, with or without successful capture, but certain exceptions and exemptions are expressly allowed.

Exceptions.

(1) The taking of woodcock and snipe with nets or springes in Great Britain.

(2) The taking or destroying of conies (rabbits) in Great Britain by the proprietor of any warren or of any enclosed ground whatever, or by the tenant of lands, either by himself or by his direction or permission.

(3) The pursuing and killing of hares by coursing with greyhounds or by hunting with beagles or other hounds.

(4) The pursuing and killing of deer by hunting with hounds.

(5) The taking and killing of deer in any enclosed lands by the owner or occupier of such lands, or by his direction or permission.

Exemptions.

(1) Any of the Royal Family.

(2) Any person appointed a gamekeeper on behalf of Her Majesty by the Commissioners of Her Majesty's Woods and Forests.

(3) Any person aiding or assisting in the taking or killing of any game, or any woodcock, snipe, quail, landrail, or coney, or any deer, in the company or presence, and for the use of, another person who shall have duly obtained, according to the directions of the Act, and in his own right, a licence to kill game, and who shall, by virtue of such licence, then and there use his own dog, gun, net, or other engine for the taking or killing of such game, woodcock, snipe, quail, landrail, coney, or deer, and who shall not act therein by virtue of any deputation or appointment.

(4) And as regards the killing of hares only, all persons who, under the provisions of the two several Acts 11 & 12 Vict. c. 29 and 30 respectively, are authorised to kill hares in England and Scotland without obtaining an annual game certificate (see article HARES, vol. vi. p. 160).

(5) As regards the killing of ground game, the occupier and the persons authorised by him under the Ground Game Act, 1880, are expressly exempted from obtaining a licence to kill game if the ground game is killed or taken on the land in the occupation of such occupier (see GROUND GAME ACT, vol. vi. p. 145).

(6) In Scotland, by the Game Laws Amendment (Scotland) Act, 1877 (40 & 41 Vict. c. 28, s. 8), any lessee, in actual occupation of land, having the right to kill hares by himself, or any person authorised in writing by him, may kill hares without a game licence.

The third exemption relates to persons employed as beaters or game carriers. It will be observed that the assistance must be given to a licensed person using "his own dog, gun, net, or other engine." Accordingly, it has been said (Oke, p. 55) that if a person goes out to shoot with a borrowed dog or gun, all the beaters accompanying him are liable to a penalty of £20 for taking game without a licence. Whether or not that be the proper construction of the section, it is unlikely that the revenue authorities will seek to enforce so extravagant a claim.

Gamekeeper's Licence.—As above mentioned, the amount of licence duty is £2. The licence belongs to the master, not to the man, and on a change of servant during the year the master may have the licence endorsed to the new man (23 & 24 Vict. c. 90, s. 8). The licence qualifies the keeper to kill game only on his master's ground. Accordingly, a gamekeeper cannot, in virtue of his licence, kill game on a neighbouring proprietor's lands.

If any person be found doing an act for which a game licence is required, his licence may be demanded by any officer of Inland Revenue, or by the lord of the barony, or gamekeeper, or a person having a game licence, or the owner, lessee, or occupier of the land on which the person is found. If the licence be not produced, and the person failing to produce it refuses to give his name and address, he is liable in a penalty of £20 (23 & 24 Vict. c. 90, s. 10). The penalty is not incurred by the mere refusal to produce the licence, unless the person also refuses to give his name and address (*Molton*, 4 Esp. 215; see also, in relation to this provision, Ld. Tenterden in *Searth*, 5 C. & P. 38).

Lists of licences are published by the Inland Revenue locally, in such manner as they find most expedient (s. 12).

Game licences are available throughout the whole of the United Kingdom (s. 18).

[Irvine, *Game Laws*; Oke, *Game Laws*, 1897 edition; Warry, *Game Laws of England*].

Licence to Preach.—See MINISTER.

Licensing (Scotland) Acts, 1828 to 1897.—The Home Drummond Act, 1828 (9 Geo. IV. c. 58); The Forbes-Mackenzie Act, 1853 (16 & 17 Vict. c. 67); The Public Houses Acts Amendment (Scotland) Act, 1862 (25 & 26 Vict. c. 35); The Publicans Certificates Act, 1876 (39 & 40 Vict. c. 26); The Publicans Certificates Act Amendment Act, 1877 (40 Vict. c. 3); The Public Houses Hours of Closing Act, 1887 (50 & 51 Vict. c. 38); and The Licensing Amendment (Scotland) Act, 1897 (60 & 61 Vict. c. 50).

The first public general Statute regulating certificates for publicans' licences in Scotland was 44 Geo. III. c. 55 (1804), entitled "An Act for more effectually preventing the sale of exciseable liquors in Scotland by persons not duly licensed, and for altering the times of granting licences to sell such exciseable liquors by retail." That Act was repealed, so far as regarded Scotland, by the Act 9 Geo. IV. c. 58 (1828), which is the first and principal Act of the series now in force.

The 1828 Act was passed to regulate the granting of certificates by justices and magistrates authorising persons to keep common inns, alehouses, and victualling houses in which ale, beer, spirits, wine, and other exciseable liquors are sold by retail under excise licences, for the better regulation of such houses, and for the prevention of such houses being kept without such certificates. It had only one form of certificate for all kinds of houses in which exciseable liquors were sold, and did not provide for preventing other goods being sold in the licensed premises, or prohibit in any case the consumption of exciseable liquors in the licensed premises. The certificate contained several conditions, which are still in existence, and among the original conditions were the following: "do not keep open house, or permit, or suffer any drinking or tippling in any part of the premises thereunto belonging during the hours of divine service on Sundays, or other days set aside for public worship by lawful authority, nor keep the same open at unseasonable hours."

Many of the provisions of this Statute are still in force, but it has been extensively amended by subsequent Acts.

The 1853 Act, according to its preamble, was passed because of great evils having been found to arise from the granting of certificates for spirits, wine, and exciseable liquors, to be drunk or consumed on the premises, to dealers in provisions and other such commodities. By its first section it was provided that no certificate was to be granted for exciseable liquors to be drunk or consumed on the premises unless on the express condition that no groceries or other provisions to be consumed elsewhere were to be sold in the house or premises to which the certificate applied.

By that Act three forms of certificate were provided, namely, (1) for inns and hotels; (2) for public-houses; and (3) for dealers in spirits, and grocers and provision dealers trading in spirits.

By these certificates the holders were bound, except in the case of hotel-keepers being entitled at all times to supply refreshment to *bonâ fide* travellers or to persons requiring to lodge in their hotels, to refrain from selling exciseable liquors on Sundays and on other days of the week except

between the hours of 8 o'clock in the morning and 11 o'clock at night. The three classes of certificate above described still remain, although they have been somewhat altered in their terms by subsequent Statutes, and no other certificates are granted either by the justices or magistrates, except those for the retail of table beer sold at a price not exceeding the rate of one penny halfpenny the quart, and not to be drunk or consumed on the premises (see sec. 3 of 24 & 25 Vict. c. 21, and sec. 17 of 39 & 40 Vict. c. 26).

The 1862 Act extended and amended the 1828 and 1853 Acts on the recommendations of a Royal Commission. That Act, in addition to many other amendments, made provision for more effectually preventing the sale of exciseable liquors without certificate and licence.

The 1876 Act assimilates the law of Scotland relating to the grant of licences to that of England, in so far as it provides that the grant of a new certificate shall not be operative unless it is confirmed by a licensing committee.

The 1877 Act makes a slight amendment on the 1876 Act.

The 1887 Act authorises the respective licensing authorities, except those for Edinburgh, Glasgow inclusive of 9 towns immediately adjoining Glasgow, Greenock, Leith, Aberdeen, Dundee, and Paisley, and any burgh town or populous place containing 50,000 inhabitants and upwards, to fix an hour for closing all licensed houses, not earlier than 10 o'clock nor later than 11 o'clock at night, and amends the various classes of certificate to permit of this being done.

The 1897 Act provides that no licence be granted for the sale of "sweets" by retail without first obtaining a certificate in the same way as certificates under the above-cited Acts. Certificates for the sale of sweets may be granted in either of the forms prescribed in Sched. (A) appended to the 1862 Act for public-houses or dealers or grocers. The definition of "sweets or made wines," as given in 52 & 53 Vict. c. 42, s. 28, is as follows: "Any liquor which is made from fruit and sugar or from fruit or sugar mixed with any other material, and which has undergone a process of fermentation in the manufacture thereof." Persons trafficking in "sweets" without obtaining a certificate render themselves liable in a penalty not exceeding ten pounds sterling, and in default of payment may be imprisoned for a period not exceeding two months.

In addition to the Licensing Acts 1828 to 1897, there are at least 52 other Acts which contain provisions directly affecting the sale by retail of exciseable liquors—41 of these are public general Statutes, and are as follows, namely:—

1. Tippling Act, 1751, 24 Geo. II. c. 40, s. 12, so far as not repealed.
2. Tippling Act, 1862, 25 & 26 Vict. c. 38, so far as not repealed.
3. Game Act, 1831, 1 & 2 Will. IV. c. 32, s. 18.
4. County Police Act, 1857, 20 & 21 Vict. c. 72, s. 24.
5. Innkeepers Act, 1863, 26 & 27 Vict. c. 41, whole.
6. Innkeepers Act, 1878, 41 & 42 Vict. c. 38, whole.
7. Public Health Act, 1897, 60 & 61 Vict. c. 38, s. 51.
8. Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112, s. 10.
9. Metalliferous Mines Act, 1872, 35 & 36 Vict. c. 77, ss. 9, 31.
10. Food and Drugs Act, 1875, 38 & 39 Vict. c. 63, ss. 2, 6.
11. Food and Drugs Amendment Act, 1879, 42 & 43 Vict. c. 30, s. 6.
12. Weights and Measures Act, 1878, 41 & 42 Vict. c. 49, ss. 19, 22, 24, 25, 26, 28, 29, 48.
13. Army Act, 1881, 44 & 45 Vict. c. 58, ss. 103 to 108, 110, 119, 174 Second Sched. parts 1 and 2.

14. Army (Annual) Act, 1897, 60 Vict. c. 3, s. 3, Schedule.
15. Wages Paying in Public Houses Act, 1883, 46 & 47 Vict. c. 31, whole.
16. Elections Corrupt Practices Act, 1883, 46 & 47 Vict. c. 51, ss. 20, 21, 38, 68.
17. Elections Corrupt Practices Act, 1890, 53 & 54 Vict. c. 55, ss. 2, 20, 21.
18. Coal Mines Act, 1887, 50 & 51 Vict. c. 58, ss. 16, 60.
19. Interpretation of Statutes Act, 1889, 52 & 53 Vict. c. 63, s. 33.
20. Burgh Police Act, 1892, 55 & 56 Vict. c. 55, ss. 38, 256, 380 to 382, 401, 440, 454, 465, 501, 510, 515, 516.
21. Shop Hours Act, 1892, 55 & 56 Vict. c. 62, ss. 3 to 6, 9, 10.
22. North Sea Fisheries Act, 1893, 56 & 57 Vict. c. 17, ss. 2 to 4, 5 Sched. Art. III.
23. Quarries Act, 1894, 57 & 58 Vict. c. 42, s. 2 (1).
24. Excise Duties Act, 1825, 6 Geo. IV. c. 81, part of s. 2, s. 11.
25. Theatres Act, 1835, 5 & 6 Will. IV. c. 39, s. 7.
26. Customs and Excise Duties Act, 1840, 3 & 4 Vict. c. 17, s. 1 (part).
27. Spirit Duties Act, 1860, 23 & 24 Vict. c. 129, s. 1.
28. Excise Table Beer Act, 1861, 24 & 25 Vict. c. 21, s. 3, part of Sched. (A).
29. Inland Revenue Act, 1861, 24 & 25 Vict. c. 91, ss. 6, 12.
30. Inland Revenue Act, 1863, 26 & 27 Vict. c. 33, s. 21.
31. Six Day Licences Act, 1872, 35 & 36 Vict. c. 94, s. 49.
32. Excise Duties Act, 1873, 36 & 37 Vict. c. 18, s. 4.
33. Early Closing Act, 1874, 37 & 38 Vict. c. 49, ss. 7 and 8.
34. Inland Revenue Act, 1880, 43 & 44 Vict. c. 20, ss. 2 (part), 40 to 45.
35. Spirits Act, 1880, 43 & 44 Vict. c. 24, ss. 96 to 113, 141, 142, 146 to 150, 153, 154: First Sched. parts 7 and 8, and Fourth Sched.
36. Passenger Vessels Act, 1882, 45 & 46 Vict. c. 66, whole.
37. Customs and Inland Revenue Act, 1885, 48 & 49 Vict. c. 51, ss. 4 and (2) of 8.
38. Revenue Act, 1889, 52 & 53 Vict. c. 42, ss. 26, 27, 28.
39. Customs and Inland Revenue Act, 1890, 53 Vict. c. 8, ss. 4, 6.
40. Inland Revenue Regulation Act, 1890, 53 & 54 Vict. c. 21, s. 11.
41. Finance Act, 1897, 60 & 61 Vict. c. 24, s. 7.

Eleven are local Acts, namely:—

1. Aberdeen Police and Waterworks Act, 1862, ss. 221 and 232.
2. Aberdeen Municipal Extension Act, 1871, ss. 21, 152.
3. Coatbridge Burgh Act, 1885, 48 & 49 Vict. c. 41, s. 51.
4. Dundee Police and Improvement Consolidation Act, 1882, ss. 156, 157, 225, 259, 261.
5. Dundee Extension and Improvement Act, 1892, s. 85.
6. Edinburgh Municipal and Police Act, 1879, ss. 107, 217, 282, 319.
7. Edinburgh Municipal and Police Extension Act, 1882, ss. 22 to 25.
8. Glasgow Police Act, 1866, ss. 116, 135, 150.
9. Glasgow Police Act, 1891, s. 32.
10. Glasgow Further Powers Act, 1892, s. 27.
11. Greenock Police Act, 1877, ss. 145, 146, 252, 414, 416.

Licensing Authority. — Justices of the peace for counties and magistrates of royal and parliamentary burghs are vested with the power in their respective jurisdictions of granting and renewing certificates to enable retailers of exciseable liquors to obtain the necessary excise licences (1828, ss. 2 to 8, and 1862, s. 1). Police burgh magistrates have no licensing powers (*Tennent*, 1 S. L. T. 522, 613).

Justices may divide County into Districts.—The justices of any county can divide a county into districts for considering and disposing of applications under the Acts, and, after notice, can alter or change any district or place of district meeting (1828, s. 5).

Justices may, in certain Cases, grant Certificates for Royal Burghs.—If in any royal burgh there shall not be a sufficient number of magistrates present who are qualified to grant certificates according to the directions of the Acts at any time when such certificates are appointed to be granted, it shall be lawful for the justices of the county to grant certificates for such royal burgh, at the same time and in the same manner as they are empowered to grant certificates for the county. Any magistrates of such burgh as are qualified can, in such case, act along with the justices in granting such certificates (1828, s. 6).

Magistrates may make Regulations regarding Applications.—The justices or magistrates respectively, assembled at any general or district meeting held for the purpose of granting or renewing certificates, are empowered to make such regulations and rules as they shall think fit, not being inconsistent with the provisions of the Acts, as to the manner of making such applications, as well as for ascertaining the character of the applicants, as to whether it be expedient to grant such certificates in the places in which they are sought to be obtained, and also as to the mode of proceeding in transferring certificates (1828, s. 11).

They may also cause a descriptive list of persons to whom certificates shall have been granted for the year next ensuing, with the premises to which such certificates apply, to be made up and printed in such form as they shall direct, for the use of themselves and others concerned in the execution of the Acts (1862, s. 10).

What disqualifies Justices or Magistrates under Acts.—No justice or magistrate who is a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, or who shall be in partnership with any person as a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, shall act as such justice or magistrate respectively in the execution of the Acts; nor shall any justice or magistrate act in the granting of any certificate when he shall be the proprietor or tenant of the house or premises for which such certificate shall be applied for; and everything done by a justice or magistrate respectively in any case in which he is so disqualified to act shall be null and void; and every justice or magistrate who shall knowingly or wilfully offend in any of the premises aforesaid shall forfeit and pay the sum of fifty pounds, to be recovered by any person who will prosecute for the same before the Sheriff of the county within six calendar months next after the offence has been committed (1828, s. 13).

Ld. Kincairney held that justices who are shareholders of railway companies which own hotels are not disqualified under the Acts. He also held that no disqualification attached to a justice who had been bankrupt, although he had not obtained a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part (*Greenhill* (action of reduction), Ct. of Sn. 27 March 1890, Dewar's *Liquor Laws*, 2nd ed., 96, p. 223). A magistrate who is trustee on a publican's estate is not thereby disqualified as a licensing magistrate (*Lundie* (action of reduction), 1890, 18 R. 60).

Licensing Meetings.—At meetings held for the disposal of applications for certificates it shall be lawful to grant certificates to such and so many

persons as the justices or magistrates then assembled, or the major part of them, shall think meet and convenient, provided always that all such meetings shall be held with open doors, that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open Court, if such party shall think fit to attend, and that there shall be at least two justices or magistrates respectively present at such meetings (1828, s. 7).

Such meetings are held half-yearly: the magistrates of burghs meet on the second Tuesday of April and the third Tuesday of October, and the justices within their several counties or districts on the third Tuesday of April and the last Tuesday of October, in each year. They are empowered to adjourn such meetings from time to time as they shall think fit, during the period of one month next after the day of their first meeting, but no longer (1862, s. 1). It is lawful for the licensing justices or magistrates, where they shall think it inexpedient to grant to any person a certificate in the form applied for, to grant him a certificate in any other of the forms contained in Sched. A of the 1862 Act, s. 2. Every certificate shall be in force for one whole year commencing at the term of Whitsunday, or for six months from Martinmas respectively, according to the period of the year at which such certificate is granted (1828, s. 9). Where a person holding a certificate applies for the renewal of his certificate, he need not attend in person at the meeting for granting and renewing certificates, unless he is required by the justices or magistrates to attend (1876, s. 15). It has been held in England that a majority of the justices present at a licensing meeting must vote in favour of an application for a certificate before it is granted (*Garton*, Queen's Bench, 27 April 1893, 57 J. P. 328). This question has not been settled in Scotland, but in the opinion of eminent counsel the judgment should be determined by the majority of those voting. This seems reasonable, because while a case is being heard justices and magistrates sometimes enter and leave the meeting, and it not infrequently happens that justices or magistrates are present who are disqualified from voting.

Judgment of licensing Court will not be disturbed by Supreme Court unless for excess of statutory jurisdiction (*Lundie*, 1890, 18 R. 60). A chairman of a licensing Court has no casting vote (*Maxwell* (action of reduction), Court of Session, 6 Mar. 1888, Dewar's *Liquor Laws*, 2nd ed., 82, p. 213). Licensing Court in absence of hotel-keeper, and without giving notice to attend, reduced hotel certificate to that of a public-house. Ld. Fraser held this quite competent (*Waterson* (action of reduction), 1888, Dewar's *Liquor Laws*, 2nd ed., 87, p. 216). Justices cannot license within Courts of parliamentary burghs (*Booth*, 1867, 5 Irv. 371).

Applications for Certificates, etc.—Applications for certificates or renewal of certificates require to be made according to form contained in the first part of Sched. (B) annexed to the 1862 Act (s. 8). Printed forms of application are obtainable from the clerk of the peace or town clerk at sixpence per copy, and when duly filled up and signed by the applicant or his agent, must be lodged with the clerk fourteen days at least before the general meeting for granting and renewing certificates (1862, s. 8). In an appeal case (*Frew*, H. C., 1897, 4 S. L. T. 471) it was held that the number of days within which a complaint should be brought was to be reckoned by days and not by hours, so the same principle should apply to time when mentioned by days in the Public Houses Acts.

A hotel-keeper who had not lodged his application for a renewal of his certificate in time, although granted a certificate in the lower Court, and

also on appeal at quarter sessions, had same suspended by Lord Ordinary (*M'Intyre*, 14 July 1876, Irons' *Manual*, p. 10).

In such circumstances the way usually adopted of getting over the difficulty is for the applicant to petition the Board of Inland Revenue for permission. If such a petition is recommended by the local magistrates, permission is generally obtained.

Certificates of Suitability of Premises and as to Character of Applicant.—The licensing authority is prohibited from entertaining an application for a certificate for a house not licensed until a report shall have been made and subscribed by a justice or magistrate of the jurisdiction, such justice or magistrate being entitled to grant certificates, stating that the premises are of suitable construction and accommodation for the purpose applied for, and accompanied with a certificate from a justice or magistrate as to the applicant's character and qualifications. These reports and certificates require to be given in the form, as near as may be, contained in the second part of the Sched. (B) annexed to the 1862 Act (s. 8). A certificate of character and qualification is not necessary with applications for renewal of certificates. A licensing Court cannot legally sign a minute embodying a resolution to license extended premises if and when they have been erected conform to the plans submitted (*Hannah and Others*, 1894, 1 S. L. T. 457).

Register of Applicants, etc.—The names and designations of all persons who make application for certificates require to be entered by the clerk in a book or register, which shall contain a record of the proceedings and of the manner in which the applications are disposed of; the cases of new applicants are not to be considered until all the other cases have been disposed of; and it is not lawful at any adjourned meeting to alter anything which was done at any previous meeting in granting or refusing (1828, s. 12). The form of register of applications is given in Schedule to 1853 Act.

The statutory direction that new applications are not to be considered until all the other cases have been disposed of is in many cases more honoured in the breach than in the observance. It has not been decided in any case in the Supreme Court that the adjournment or continuation of a new application is a disposal of it.

List of New Applicants, New Tenants or Occupants, and of Transferred Certificates to be advertised.—The clerk of peace or town clerk shall, at least ten days before the general meeting for the granting and renewing of certificates, make out and advertise, at least twice in one or more newspapers printed or generally circulated in the district, a complete list, in the form, as nearly as may be, set forth in Sched. (C) annexed to the 1862 Act, of all applications for certificates within their respective bounds for premises not at the time certificated, and of all applications by new tenants or occupants of premises at the time certificated, and also of all applications for renewal of certificates which have been transferred during the currency of the previous half-year (1862, s. 10).

In some licensing Courts applications for certificates are lodged by new tenants or occupants ten days before the licensing meetings in October, and such applications are entertained and disposed of. This seems to be an irregularity, because a certificate granted at the annual meeting in April runs to 15th May of the following year. If a change becomes necessary during the currency of a certificate, it ought to be transferred.

Objectors to the Granting of Certificates.—Any person, or the agent of any person, owning or occupying property in the neighbourhood of the house or premises in respect of which any certificate or renewal of any

certificate shall be applied for, may object to the granting or renewal of such certificate by lodging at any time, not less than five days before the general meeting of the justices or magistrates for the granting and renewal of certificates where such house or premises shall be situated, with the clerk of the peace or town clerk, as the case may be, a notice in writing to that effect, signed by such person or his agent, specifying the grounds of such objection, which objection shall be heard at the ensuing general meeting; and if such objection shall be considered of sufficient importance by the justices or magistrates in such general meeting, and shall be proved to their satisfaction, the said certificate shall not be granted or renewed; provided always that no such objection shall be entertained unless it shall be proved or admitted that the person so objecting, or his agent, did, at least five days before such general meeting, deliver or cause to be delivered to the person applying for such certificate a copy of the aforesaid notice, or did forward to him by post, with postage prepaid, or did leave for him a copy thereof, addressed to him at his place of abode mentioned in his application, or, in the case of an application for the renewal of any certificate, at the licensed premises for which the application is made; and it shall be lawful for the justices or magistrates respectively, in the event of their considering the allegations and objections against a renewal of a certificate contained in any such notice frivolous, or vexatious, or unauthorised, to find the person or agent, as the case may be, making the same, liable in such expenses as they shall deem proper, and the amount of the expenses so found due shall be recoverable in the sheriff's or justices' Small-Debt Court having jurisdiction in the district; and a certified copy of the aforesaid finding shall be sufficient evidence and authority for decerning for the amount thereof, with expenses (1862, s. 11). It shall be lawful for the justices or for the magistrates, at any general meeting for the granting and renewal of certificates, to hear and determine as at present, and without the notice required by sec. 11, any objections to be made verbally or in writing by any justice or magistrate, or by the procurator-fiscal, chief constable, or superintendent of police, against the granting or renewing of any certificate (1862, s. 12).

Confirmation of New Certificates.—In 1876 the Publicans Certificates Act was passed, having for its object the assimilating of the law of Scotland relating to the granting of licences to that of England. Since it came into force on 1 January 1877 all new certificates granted require to be confirmed in counties by the county licensing committee and in burghs by the joint committee for the burgh, before becoming operative. "A new certificate" means "a certificate granted by the competent authority for a licence for the sale of exciseable liquors to any person in respect of any premises which are not certificated at the time of the application for such grant, but shall not apply to the rebuilding of certificated premises which have been destroyed by fire, tempest, or other unforeseen and unavoidable calamity" (1876, s. 4). In the report of the Royal Commission on Grocers' Licences of 1878, the Commissioners, in par. 63, give it as their opinion that under the definition of "a new certificate" "the justices or magistrates might, without confirmation being required, convert every licensed grocer's shop within their jurisdiction into a public-house, or *vice versâ*, which was probably not the intention of the Act." In appeal case *Weir & Patrick*, H. C., 12 March 1897, S. L. T. 472, vol. 4, 342, the Court held that where a publican got a hotel certificate granted to him in place of a public-house certificate, it was "a new

certificate," and required confirmation. It is doubtful if the Court would hold confirmation necessary in a case where a hotel certificate was reduced to one for a public-house, or in the case of a public-house (porter and ale) certificate being extended so as to enable the holder to sell spirits as well as porter and ale.

Licensing and Joint Committees, Appointment, Duties, etc.—One or more county licensing committees require to be appointed by the justices from among themselves at the meeting of quarter sessions to be held in March of each year, or at any adjournment thereof, and they are directed to assign such area of jurisdiction for such committees as they may consider expedient (1876, s. 7 (1), and 1877, s. 2). Such a committee shall consist of not less than three nor more than twelve members, and a quorum shall be three members (1876, s. 7 (2 and 3)); a joint committee for a burgh shall consist of three justices and three magistrates, except where, by the constitution of the burgh, there are only two magistrates therein, in which case the joint committee shall consist of two justices and two magistrates (1876, s. 9 (1)). The justices on a joint committee shall be appointed by the county licensing committee, and they, as well as the magistrates for said joint committee, shall be appointed on the second Tuesday of November in each year (1876, s. 9 (3 and 4)). The senior magistrate of the burgh shall be chairman of the joint committee, and when there shall be an equality of votes he shall have a second vote (1876, s. 9 (8)). When the joint committee shall consist of six members the quorum shall be five, and where four it shall consist of three members (1876, s. 9 (7)).

The justices in quarter sessions assembled, and the magistrates of burghs, are empowered to make regulations with respect to the meetings of such committees. The application for confirmation of a new certificate requires to be made in the form given in the schedule (1) attached to the 1876 Act, and to be lodged, together with the certificate, with the clerk of the peace of the county within ten days after the granting of the certificate. Such committees can award costs to or against parties to the proceedings, except the procurator-fiscal in the public interest (1876, s. 10). The only persons who are entitled to appear before such committees and oppose the confirmation of a new certificate are the procurator-fiscal and any person who appeared before the justices or magistrates and opposed the grant of the new certificate (1876, s. 12). Justices or magistrates who are disqualified (1828, s. 13) are not to be appointed as members of such committees (1876, s. 11).

Table Beer Licences not to be granted without Certificate.—Table beer licences are not to be granted by the Inland Revenue unless justices' or magistrates' certificates are obtained under Acts (1876, s. 17).

Appeal as to Certificates.—If any justice of the peace, or proprietor or occupier of any house in respect whereof any certificate shall be applied for, shall be dissatisfied with any proceeding of any justices or magistrates assembled for granting certificates, whether in granting or refusing or otherwise disposing of any such applications, it shall be lawful for such justice of the peace, proprietor, or occupier to appeal therefrom to the next quarter sessions of the peace for the county; provided always that such appeal shall be lodged with the clerk of the peace within ten days after such proceeding, and provided such appellant, being a proprietor or occupier as aforesaid, shall find caution to abide such appeal and the expenses thereof, and shall give intimation of such appeal to the opposite party, and to the justices of whose proceeding he complains (1828, s. 14).

The justices in quarter sessions to whom an appeal shall be made from a deliverance granting or refusing any application for a certificate, may by themselves or any one or more of their number inspect the premises for which a certificate is applied, and review a report granted as to the premises by a justice or magistrate (1862, s. 8).

An appeal to quarter sessions is not allowed when a new certificate is granted (*Duncan*, Court of Session, 1 February 1878; Dewar's *Liquor Laws*, 2nd ed., 33, p. 187).

An appeal by a justice to quarter sessions from magistrates' licensing meeting was reduced on account of notice of appeal not having been given to magistrates. The justice who appeals cannot sit or vote as one of the Appeal Court in his own case. He does not require to find caution for expenses (*Proctor*, 1854, 17 D. 197).

In an appeal case before the High Court of Justiciary, where there was an equality of votes, the Lord Justice-Clerk, who was presiding according to custom, withdrew his vote, and the appeal was sustained. A similar course would be competent at the Court of Quarter Sessions, where the chairman has not by statute been granted the privilege of giving a casting vote (*Ross*, 1886, 1 White, 171).

Transfer of Certificates.—If any person duly authorised to keep a common inn, ale house, or victualling house, shall die before the expiration of the certificate to him or her in that behalf granted, it shall be lawful for any two or more of the justices of the peace or magistrates of the county or royal burgh respectively in which such house and premises are situated, to grant to the executors, representatives, or disponees of the person so dying, and who shall be possessed of such house or premises, a transfer of the certificate to keep and continue such house or premises as a common inn, ale house, or victualling house, as before such death, until the next general or district meeting to be held under the authority of the Act; and provided also, in like manner, that if any person so authorised, or the executors, representatives, or disponees of a person dying so authorised, and who, upon such death, shall have obtained such transfer or certificate as aforesaid, shall remove from or yield up the possession of the house and premises for which such certificate shall have been granted, it shall be lawful for two or more justices of the peace or magistrates respectively as aforesaid, sitting publicly in their ordinary place of meeting, to grant to any new tenant or occupier of such house and premises, upon such removal, a transfer of the certificate to keep such house and premises as a common inn, ale house, or victualling house, as before such removal, until the next general or district meeting to be held under the authority of the Act (1828, s. 19).

The form of transfer as provided by sec. 20 of the 1828 Act, which will be found in Sched. C appended to the Act, provides that the transfer certificate granted is to be in force only until the next general or district meeting to be held for granting certificates, but it was inferentially held in appeal (*M'Intyre*, 1876, 3 Coup. 319) that a person to whom a transfer certificate was granted in April was entitled to sell up to 15 May, the date to which the original certificate endured. The form also provides that the transfer certificate requires to be duly presented at the office of excise within days (as fixed by the justices or magistrates granting the same), otherwise it becomes null and void.

An ex-publican, who had in July 1887 got his certificate transferred to a person who at the October half-yearly licensing meeting failed to get a renewal of the transferred certificate, resumed selling, and was convicted of

shebeening in December, and the conviction was sustained (*Miller*, 1888, 1 White, 583).

A person who got public-house transfer on 11 August 1896 did not lodge same within specified time with excise, and it became null and void. He applied on 5 October for a renewal of the transferred certificate, and was refused. On 14 November the original holder resumed selling, and was convicted of shebeening. On appeal the conviction was sustained (*Campbell*, High Court, 1897, 4 S. L. T. 377).

A transfer of a deceased certificate-holder should be obtained speedily, otherwise the business is carried on virtually as a shebeen (*Cook* and *Mearns*, 1891, 29 S. L. R. 247).

A trustee on a bankrupt publican's estate was held entitled to delivery of permit-book and certificate (*Fraser's Trs.*, Court of Session, 1896, 4 S. L. T. 109).

Forms of Certificates, etc.—The forms of certificates are given in Sched. (A) of the 1862 Act, and are entitled as follows: "No. 1. Form of certificate for inns and hotels," "No. 2. Form of certificate for public-houses," and "No. 3. Form of certificate for dealers in exciseable liquors, and grocers and provision dealers trading in exciseable liquors." In granting these certificates the licensing justices or magistrates are empowered to grant authority to sell spirits, wine, and all other exciseable liquors narrated in the certificates, or to restrict the sale (1) to porter, ale, beer, cider, or perry, or (2) to wine, porter, ale, beer, cider, or perry. See forms of certificates and sec. 3 of 1862 Act.

Inn and Hotel Keeper's Certificate, Terms of.—Inn and hotel keepers are by the terms of their certificate prohibited from keeping open house or permitting or suffering drinking on their premises, or selling or giving out therefrom any liquors, with the exception of refreshments to travellers or to persons requiring to lodge in the said house or premises, before or after the hours specified in their certificates, and also on Sundays. Their certificates also contain the following conditions, viz., do not fraudulently adulterate or sell commodities, knowing them to have been fraudulently adulterated; and do not use, in selling the same, any weight or measure which is not of the legal imperial standard; and do not sell any groceries or other uncooked provisions in the said house or premises, to be consumed elsewhere; and do not knowingly permit any breach of the peace, or riotous or disorderly conduct, within the said house or premises; and do not knowingly permit or suffer men or women of notoriously bad fame, or girls or boys, to assemble and meet therein; and do not supply exciseable liquors to girls or boys apparently under fourteen years of age, or to persons who are in a state of intoxication; and do not permit or suffer any unlawful games therein; and do maintain good order and rule within his house and premises; and lastly, do not transgress or commit any breach of the conditions of any permission to sell on a public or special occasion within his own house or elsewhere. It is provided by sec. 37 of 25 & 26 Vict. c. 35, that the expression "inn and hotel" shall in towns and the suburbs thereof refer to a house containing at least four apartments set apart exclusively for the sleeping accommodation of travellers; and in rural districts and populous places not exceeding one thousand inhabitants according to the census last before taken, to a house containing at least two such apartments.

Public-house Certificate.—The public-house certificate, in addition to the conditions contained in the hotel-keeper's certificate, contains the following,

namely, do not receive or take in as the price or for the supply of exciseable liquors any wearing apparel, goods, or chattels; and, as regards the prohibition against permitting men or women of notoriously bad fame to assemble, the word "knowingly" which appears in the hotel-keeper's certificate is omitted from that of the publican.

The public-house certificate omits to state the date to which it is to endure. An objection to a conviction for breach of certificate on account of this omission was repelled by the Court (*M'Isaac*, 1864, 37 Jur. 92).

Grocer's Certificate.—The dealer or grocer's certificate prohibits him from trafficking or giving exciseable liquors to be drunk or consumed on his licensed premises. It contains nearly all the conditions to be found in the publican's certificate. The grocer or dealer is prohibited from opening his premises for business on Sunday, and from selling or giving out therefrom on that day any liquors, goods, or commodities. Grocers can keep their shops open for the sale of other commodities than exciseable liquors at all times, Sunday excepted.

Hours for Opening and Closing.—The hours specified in the certificates appended to the 1862 Act during which exciseable liquors can be lawfully retailed are between eight o'clock in the morning and eleven o'clock at night, but by the 1887 Act the licensing authority is authorised, except as regards Edinburgh, Glasgow including Crosshill, Kinning Park, Pollokshields, Pollokshields (East), Govan, Govan Hill, Hillhead, Maryhill, and Partick, Greenock, Leith, Aberdeen, Dundee, and Paisley, to fix any hour for closing not earlier than ten and not later than eleven o'clock. Sec. 4 of the last above-recited Act makes the requisite alterations on the forms of the various classes of certificates to give effect to this enactment. It is also provided by sec. 2 of the 1862 Act that in any particular locality within any county, district, or burgh, requiring other hours for opening and closing, it shall be lawful for the licensing authority to insert in the certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine or later than eleven of the clock for closing the same, as thought fit.

The magistrates of Rothesay were found to have exceeded their powers in appointing an hour for closing licensed houses in a district which was so extensive as to include all the licensed houses in the burgh (*Macbeth*, 1874, 1 R. (H. L.) 14).

Certificate entitles Holder to sell at Fairs, etc.—Sec. 8 of the 1828 Act provides that a certificate granted at the annual or half-yearly licensing meetings shall only entitle the person to whom it is granted to obtain an excise licence for the premises specified in the certificate; but nothing in the Act shall prohibit any person, who shall have obtained such certificate, from selling exciseable liquors in boats or vessels moored in rivers at any time, or in houses, booths, or other places at the time and within the limits of the ground, town, or place, in or upon which is holden any lawful fair, in the same parish with the house or premises for which any person shall have obtained a certificate as aforesaid, or in any parish immediately adjoining thereto.

Publicans of parish, or from an adjoining parish, can sell exciseable liquors at fairs (*Lamb*, 1894, 1 S. L. T. 576).

Certificates for Retail of Spirits or Wine shall include Right to sell Porter, etc.—Every certificate for the sale of spirits or wine includes the right to retail porter, ale, beer, cider, and perry. Justices or magistrates are not prevented from granting a certificate, in any of the forms in Sched. A annexed to the 1862 Act, for the sale by retail of wine, porter, ale,

beer, cider, or perry, or of porter, ale, beer, cider, or perry only (1862, s. 3).

No Certificate to be granted to Blacksmiths.—It shall not be lawful to grant to any blacksmith at his smithy, or at any house occupied by him in the immediate vicinity of the same, any certificate to sell excisable liquors (1853, s. 4).

Certificates granted contrary to the Acts are null and void (1862, s. 4).

Licences not to be granted without Certificate.—No licence for the retail of excisable liquors shall be granted by the Inland Revenue to any person who shall not produce a certificate granted in terms of the Acts, and every licence which shall be granted contrary to the terms of the Acts shall be void and null to all intents and purposes (1828, s. 18; 1862, s. 5).

Weights and Measures.—In addition to the provision contained in the certificates granted by the justices or magistrates for inns and hotels, public-houses, and for dealers in excisable liquors, and grocers and provision dealers trading in excisable liquors, whereby the persons to whom these are granted are prohibited from using, in selling, any weight or measure which is not of legal imperial standard, sec. 15 of the 1828 Act provides that every person licensed to sell excisable liquors by retail, to be drunk or consumed in his house or premises, shall sell or otherwise dispose of all such liquors by retail therein (except in quantities less than half a pint) by the gallon, quart, pint, or half pint measure, sized according to the standard, and shall, if required by any guest or customer purchasing such liquor, retail the same in a vessel sized according to such standard, and in default thereof he shall forfeit and pay for every such offence the illegal measure and a sum not exceeding forty shillings, to be recovered, with expenses, at the instance of any person who shall prosecute for the same, before the sheriff or justices of the peace, and such penalty shall be over and above all penalties to which the offender may be liable under any other Act.

It was held not to be a breach of certificate to use an unstamped glass measure (*Craig*, 1883, 20 S. L. R. 506).

A conviction against a publican for using an unstamped measure was quashed (*Ross*, 1886, 1 White, 171).

Special Permissions.—The chief magistrate, or, failing him, the two senior acting magistrates of any burgh, or any two justices of the peace of any county, are empowered to grant permission to keep houses, etc., open on special occasions during particular times. Such permissions require to be lodged with the chief constable of the district at least twenty-four hours before the commencement of the entertainment, and that officer must furnish the licence-holder to whom the permission is granted with a certified copy of same, which requires to be shown to any officer of police or constable requiring to see the same. The justices of the county or district and the magistrates of the burgh may, at the annual licensing Court in April, make such general regulations touching such permissions as they think fit, and such permissions shall be subject to such general regulations (1862, s. 6). Special permission can be granted to certificate-holder not certificated within the jurisdiction (*M'Donald*, 1868, 1 Coup. 105).

Penalties for Breach of Certificate, etc.—Holders of certificates are liable in the following penalties for breaches of certificate, viz. for first offence, £5, with the expenses of conviction, to be paid within fourteen days, or, failing payment, imprisonment for one calendar month, and the certificate may be forfeited; for second offence, £10, or two months' imprisonment, and certificate may be forfeited; and for a third offence, £20,

or four months' imprisonment, and certificate shall be declared to be forfeited. Penalties for breaches of certificate may be mitigated to the extent of one-fourth (1828, s. 21; 1862, s. 2). By sec. 6 of the Summary Jurisdiction (Scotland) Act, 1881, penalties may be reduced in all summary prosecutions under these Acts to any extent. Sec. 501 of the Burgh Police (Scotland) Act, 1892, which also confers powers of mitigation as regards penalties for statutory offences tried under its provisions, contains the following: "Provided always that nothing in this Act contained restricting the amount of fines or periods of imprisonments shall apply to or affect the prosecutions authorised, or the penalties enforceable, under the Licensing (Scotland) Acts, 1828 to 1887." A conviction for a second offence must be obtained within three years of the first, and the third within three years of the second (1828, s. 22).

Hotel-keepers.

Charges of Breach of Certificate, etc.—Decided Cases.

Bonâ fide Travellers.—It was held that the guard and engine-driver of a passing train were *bonâ fide* travellers (*Brunton*, 1878, 4 Coup. 1).

" " A conviction was quashed where persons represented that they had walked 3½ miles; and it was held that a statement made by one of two persons arriving at an inn, in the hearing of and uncontradicted by the other, should be held as a representation by both, neither being known to the innkeeper (*Hailstones*, High Court, 12 March 1880, Dewar's *Liquor Laws*, 2nd ed., 43, p. 191).

" " A conviction for supplying, on several occasions on a Sunday, persons who represented themselves as *bonâ fide* travellers was sustained in *M'Kay* (High Court, 28 May 1886, Dewar's *Liquor Laws*, 2nd ed., 69, p. 205).

" " A person was held not guilty although, in addition to supplying to be consumed on the premises, he supplied a bottle of whisky to be carried away (*Welsh*, 1886, 1 White, 125).

" " A conviction was quashed where the persons supplied had walked a distance of 2 or 3 miles (*Dickson*, 1886, 1 White, 282).

" " A person who had arrived at Lerwick between twelve and two o'clock on a Sunday morning, after an absence of seven months, went home and slept, and the same forenoon went to an hotel in Lerwick and represented himself to be a traveller, and was supplied with liquor. He was held not to be a *bonâ fide* traveller, and the hotel-keeper was held guilty of breach of certificate, his servant having supplied without making proper inquiry (*Galloway*, 1889, 2 White, 171).

" " A conviction was sustained for supplying forty or fifty harvesters on a Sunday without making inquiries as to whether they were *bonâ fide* travellers or not (*Main*, High Court, 2 November 1892, Dewar's *Liquor Laws*, 2nd ed., 115, p. 247).

Bonâ fide Travellers.—It was held not to be an offence to supply a *bonâ fide* traveller with liquor for himself and friends, although the latter were neither *bonâ fide* lodgers nor travellers (*Oliver*, 1896, 1 S. L. T. 407).

" " The English Acts do not permit sale of liquor during prohibited hours to *bonâ fide* travellers to be consumed off the premises (*Mounfield*, Q. B. D., Wright and Bruce, JJ., 18 January 1897, 4 S. L. T. p. 213).

" " The Court held that hotel-keeper had made sufficient inquiry by asking the party supplied if he was a traveller, whence and where he had come, and quashed conviction (*Brodie*, 1897, 5 S. L. T. 206).

Bonâ fide Lodgers.—Two gentlemen having been found consuming liquor between midnight and 2 A.M. who were not lodgers, acquittal approved of by Court (*Gemmill*, 1882, 20 S. L. R. 27).

" " Guest of, supplied with liquor, did not amount to breach of certificate (*Murray*, 1883, 20 S. L. R. 369).

" " Conviction sustained where two men who were not *bonâ fides* took up their quarters in hotel for night after visitation of police (*Colquhoun*, High Court, 2 June 1890, Dewar's *Liquor Laws*, 2nd ed., 97, p. 231).

" " Sale of liquors to, and to their *bonâ fide* guests, lawful (*Cope*, Q. B. D., Grantham and Wright, JJ., 4 November 1896, 4 S. L. T. p. 150).

Certificate forfeited on one conviction. Court held this justifiable (*M'Intyre*, 1876, 3 Coup. 298).

Not guilty of an offence for selling food furth of his licensed premises (*M'Kenzie*, 1895, 3 S. L. T. 189).

Not guilty of offence where servant on Sunday had supplied liquor to persons who were not *bonâ fide* travellers, against orders (*Greenhill*, 1885, 5 Coup. 602).

Conviction quashed, complaint being defective, no proof having been adduced as to previous conviction libelled, and penalty stated not being that authorised by statute (*Henderson*, 1893, Dewar's *Liquor Laws*, 2nd ed., 118, p. 250).

Not bound to provide accommodation to party in hotel for an indefinite period after reasonable notice to quit has been given (*Lamond*, Q. B. D., Wright and Bruce, JJ., 22 January 1897, 4 S. L. T. p. 218).

Hotel sign "Golden Lion" removed from one hotel to another—action of interdict unsuccessful (*Lennox*, Court of Session, 2nd Div., 22 May 1896, S. L. T. 17, vol. iv. p. 18).

Publicans.

Charges of Breach of Certificate.—Decided Cases.

Liability for Servants.—Liable for act of servant who supplied intoxicated persons in his absence, although he had instructed servant not to do so. In such cases not necessary

to prove that publican knew at the time that person was intoxicated (*Linton*, 1893, 30 S. L. R. 893).

Liability for Servants.—Not responsible for act of servant where he permitted riotous conduct (*Patrick*, 1894, 1 S. L. T. 479).

No offence committed although side-door open for cleaning purposes during prohibited hours (*Wood*, 1877, 3 Coup. 508).

Forfeiture of certificate on first offence not held to be oppressive (*Ritchie*, 1869, 1 Coup. 332).

Not breach of certificate to sell in partially burned premises (*Craig*, 1875, 3 Coup. 143).

Held to be breach of certificate, and not hawking, although liquor on Sunday handed to customer four hundred yards away from premises (*Muir*, H. C., 21 Nov. 1888, 2 White, 97).

Conviction for permitting breach of peace sustained (*Henderson*, 1889, Dewar's *Liquor Laws*, 94, p. 222).

Prostitutes permitted to assemble.—Conviction sustained (*Maxwell*, 1879, 4 Coup. 289).

" " Conviction quashed (*Kirton*, 1880, 4 Coup. 366).

Conviction for supplying liquor on Sunday to a driver who was alleged to be a friend, sustained (*Wilson*, 1883, Dewar's *Liquor Laws*, 55, p. 197).

Entertaining friends in licensed premises in which he resided, not breach of certificate (*Smith*, 1878, 4 Coup. 13).

In premises with a friend after hour for closing, not guilty of breach of certificate (*M'Gregor*, 1876, 3 Coup. 289).

Allowing persons served before closing hour to remain to consume liquor for a quarter of an hour, not guilty of breach of certificate (*M'Call*, 1878, 4 Coup. 43).

Parties found on licensed premises at twenty-five minutes after closing hour. Conviction sustained (*Turner*, 1889, Dewar's *Liquor Laws*, 91, p. 220).

Child apparently under fourteen, supplying—appeal against conviction dismissed—Court holding that breach of certificate would not be committed if child a messenger, but publican must satisfy himself as to this by inquiry, and that it is not incumbent on the prosecution to prove that the liquor supplied was for the child's own consumption (*Donaldson*, 1875, 3 Coup. 203).

Child apparently under fourteen supplied—conviction quashed, it having turned out that the child was *de facto* a messenger from adult, although publican had made no special inquiry on subject (*Graham*, 1874, 3 Coup. 366).

Game of dominoes for stakes in public-house not breach of certificate (*Hoggan*, 1889, 2 White, 282).

Constables harbouring on premises—conviction sustained in *Davidson*, 1884, Dewar's *Liquor Laws*, 59, p. 199; and quashed in *Greig*, 1877, 3 Coup. 382.

Intoxicated persons, supplying—conviction sustained, and held not necessary to prove that the publican knew that persons were in a state of intoxication when he supplied them (*Watson*, 1885, Dewar's *Liquor Laws*, 63, p. 202; *Linton*, 1893, 30 S. L. R. 893).

Intoxicated person and a sober man go into a public-house, the latter

orders and pays for liquor for both. This has been deemed selling to the former (*Scatchard*, 1888, 57 L. J. M. C. 41; Purves, *Scottish Licensing Laws*, 87).

Grocer or Dealer.

Charges of Breach of Certificate.—Decided Cases.

Child under fourteen supplied, as messenger, with liquor, which he and his companions drank—held not to be an offence (*Paterson*, 1892, 3 White, 232).

Conviction quashed where his assistant had supplied liquor from his master's shop to persons in the assistant's house (*Pirie*, 1881, Dewar's *Liquor Laws*, 2nd ed., 45, p. 193).

Grocer who held a wholesale licence convicted of shebeening by retailing, conviction quashed on account of want of specification (*Blaikie*, 1881, 18 S. L. R. 583).

Conviction quashed where sampling took place (*Lennox*, 1882, 5 Coup. 33).

Conviction sustained for supplying to be consumed on premises, although several objections to relevancy urged (*Haig*, 1883, Dewar's *Liquor Laws*, 56, p. 198).

Giving liquor to two fishermen to be consumed on premises as act of hospitality no offence (*Kay*, 1884, 5 Coup. 535).

Conviction quashed where liquor supplied as an act of hospitality (*M'Petrie*, 1885, 5 Coup. 616).

Brewer who held grocer's certificate got conviction quashed, his servants having on a Sunday given a number of persons liquor (*Sinclair*, H. C., 18 Feb. 1887, 1 White, 337).

Conviction where assistant in master's absence sold two glasses of whisky to be consumed on premises, sustained (*Philip*, 1893, Dewar's *Liquor Laws*, 120, p. 252).

Conviction for treating on premises a prospective customer to half-glass whisky, sustained (*M'Pherson*, 1892, 3 White, 236).

Conviction obtained at instance of Inland Revenue against a grocer for having in one of his shops for which he had no licence sold spirits, in contravention of the Excise Licences Act, 1825, as altered and amended by secs. 8 and 9 of the Licensing (Scotland) Act, 1853, quashed on the ground that the sections in latter Act had been repealed. In this case the order for the liquor was received in the unlicensed shop, and the order was conveyed to and executed from the licensed premises (*Morrison*, 1897, 5 S. L. T. 48).

Penalties for Shebeening.—The following penalties are incurred under 1828, s. 30, and 1862, s. 17, for selling exciseable liquors without a certificate, viz.: First offence, £7 with expenses, or six weeks' imprisonment; second, £15, or three months; and third, £30, or six months. 1853 s. 15, provides for immediate payment of fines in such cases, while 1862, s. 17, provides for the full penalties being imposed. It also provides that the penalty for a third offence be imposed in the case of every subsequent offence.

It was held in *Gray* (1889, 2 White, 290) that in cases of this description magistrates were bound to limit the period of imprisonment proportionally to the amount of penalty, in accordance with the provisions contained in sec. 6 of the Summary Jurisdiction (Scotland) Act, 1881. It is, however, contended that in burghs under the Burgh Police

(Scotland) Act, 1892, the magistrates are bound, in accordance with the provisions contained in 1862, s. 17, and sec. 501 of said Burgh Police Act, to impose the full penalties, and in default of payment, the full periods of imprisonment mentioned in 1828, s. 30.

Convictions for Shebeening.—Decided Cases—Conviction quashed where liquor sold at door of a shop—held this was hawking (*Hamilton*, 1879, 4 Coup. 244).

Conviction for contravening sec. 17 of 1862 Act, and where proof led of a kind referred to in sec. 19 without latter section being libelled—sustained (*Mann*, 1886, 1 White, 121).

Conviction against a publican's wife sustained although it was averred that police had illegally entered the dwelling-house without a warrant (*Johnston*, 1887, Dewar's *Liquor Laws*, 78, p. 211).

Conviction where a mitigated penalty had been imposed, sustained (*Linton*, 1887, 1 White, 410).

Conviction sustained where an ex-publican, who had in July 1887 transferred his certificate to a person who at the October licensing meeting failed to get a renewal of the transferred certificate, resumed selling (*Miller*, 1888, 1 White, 583).

Conviction of the brother-in-law of a hotel-keeper who, first, got into bad health and deputed him to conduct the business for him, and, second, got into embarrassed circumstances, having executed a trust deed in favour of a trustee for behoof of the creditors, the brother-in-law having continued to sell under the supervision of the trustee, quashed (*Wyllie*, 1889, 2 White, 269).

Conviction quashed on account of term of imprisonment being for a longer period than that effeiring to the fine imposed according to scale prescribed by sec. 6 of Summary Jurisdiction Act, 1881 (*Gray*, 1889, 2 White, 290).

Conviction sustained although a variety of objections stated, among others, that liquor sold by wife of accused in his absence—expenses being excessive, Court set aside that part of sentence (*Stewart*, 1891, 2 White, 627).

Conviction sustained where beer and stout supplied in a tent in a grass field at annual games in exchange for refreshment tickets (*Hutcheon*, 1892, 3 White, 119).

Conviction sustained although year of reign in Act prescribing penalty omitted, and although penalty exigible not stated in prayer of complaint (*Chisholm*, 1893, 3 White, 452),

Conviction sustained where purchaser of a public-house from trustee of bankrupt publican, who applied for a transfer and was refused, continued to carry on business (*Brunfaut*, 1893, 3 White, 500).

Conviction quashed for irrelevancy where it was stated in complaint that accused did, with W. G. and F. L., traffic (*Carr*, 1894, 1 S. L. T. 477).

Conviction quashed where party, who had been refused renewal of a transferred certificate, sold on excise permission while appeal to quarter sessions pending (*Sim*, H. C., 23 Jan. 1894, "*Scotsman*," 24 Jan. 1894).

Conviction sustained where publican, who had got his certificate transferred to a person who had failed to lodge same with excise within period mentioned in transfer, and who had subsequently been refused a renewal of the transferred certificate, resumed selling (*Campbell*, H. C., 7 Feb. 1897, 4 S. L. T. 377).

Conviction sustained although the magistrate did not grant a

separation of trial, and had omitted from the record that a bottle of beer had been produced, etc. (*Collison*, 1897, 4 S. L. T. 473).

Warrant may be granted to seize excisable liquors, kept for the purpose of being unlawfully trafficked in, in unlicensed premises.—Warrants can, after the personal examination on oath of a credible witness, be granted to search for and seize excisable liquors kept in premises for the purpose of being illegally trafficked in. Such warrants endure for one month, and empower a sergeant of police, or officers above that rank, named in the warrant, aided by constables, to seize excisable liquors if same be found exceeding one gallon, together with the vessel or vessels in which same contained; and the person occupying or using the premises where same found, shall be guilty of an offence, and on conviction shall incur the following penalties, viz., for a first offence £5 or thirty days, and for a second or subsequent offence £10 or sixty days, and the liquors and vessels shall be forfeited and sold without further warrant (1862, s. 20).

A magistrate who was sued for damages for having granted a warrant to search for excisable liquors kept for the purpose of being illegally trafficked in, without having examined a credible witness on oath as prescribed by Statute, was assoilzied (*Hagan*, 1887, Dewar's *Liquor Laws*, 2nd ed., 79, p. 212).

A bogus club keeper, who was convicted for an offence under this section, he having had a large quantity of liquor on his premises which had been seized under warrant by the police, appealed on various grounds, but chiefly on the ground that the premises were conducted as a legitimate club, was unsuccessful (*Nicoll*, 1888, Dewar's *Liquor Laws*, 2nd ed., 80, p. 212).

Conviction for contravention of this section quashed, complainer not having averred in his complaint that the liquors seized were kept for the purpose of being illegally trafficked in. The Court also held that proof of this at the trial was necessary (*Batchen*, 1892, 3 White, 111).

Warrant of search under this section can be lawfully granted by a justice or magistrate who is holder of a certificate under the Acts (*Costadasi*, 1894, 2 S. L. T. 200).

Proof of trafficking in any shebeen. Persons found drunk or drinking in shebeens.—In order to warrant the conviction of any person for shebeening, it shall be sufficient, in the absence of contrary evidence, to prove that some person other than the owner or occupant of the premises, shall at the time charged, have been found in the premises drunk or drinking, or having had drink supplied to him therein, and that such place or premises is or are by repute kept as a shebeen, or at the time charged contained drinking utensils and fittings usually found in houses licensed for the sale of excisable liquors; and every person found in any shebeen drunk or drinking shall thereby be guilty of an offence, and may at the time be taken into custody by any officer of police or constable, and detained in any police office, or station house, or other convenient place, and not later than in the course of the first lawful day after he shall be so taken into custody, shall be brought before a justice or magistrate, or if not so taken into custody, or if he shall have been liberated on bail or pledge, may be summoned to appear before a justice or magistrate, and on being convicted of such offence, shall forfeit and pay a penalty not exceeding ten shillings, and in default of immediate payment thereof, shall be imprisoned for a period not exceeding ten days (1862, s. 19).

Hawking excisable liquors.—Every person hawking spirits or other excisable liquors, shall be guilty of an offence and shall incur a penalty

not exceeding £10 or sixty days' imprisonment. Offenders may be apprehended by any constable, or, in the absence of a constable, by any person whomsoever (1862, s. 16).

A conviction for hawking was quashed in consequence of expenses having been illegally awarded (*Ross*, 1869, 1 Coup. 336).

Selling spirits at or near the door of a flesher's shop, held to be an act of hawking and not of shebeening (*Hamilton*, 1879, 4 Coup. 244).

Hotel-keeper convicted of hawking spirits, by supplying same to a man on Sunday on a public street (*Robertson*, 1883, Dewar's *Liquor Laws*, 2nd ed., 54, p. 197).

A conviction against a publican for breach of certificate, he having on Sunday supplied a customer with liquor about four hundred yards from his licensed premises, sustained, and judges held this not a case of hawking (*Muir*, 1888, 2 White, 97).

A hotel-keeper, who called at railway works at considerable distance from his hotel on a given day, solicited and got several orders for liquor from the workmen, and delivered same next day on the public road near the works, was convicted of hawking, but the Court quashed the conviction, holding that what was done did not amount to hawking (*Cameron*, 1896, 3 S. L. T. 416).

Interpretation of "Shebeen," "Trafficking," and "Hawking."—The interpretation of these terms is as follows:—

The word "shebeen" shall mean and include every house, shop, room, premises, or place in which spirits, wine, porter, ale, beer, cider, perry, or other exciseable liquors, are trafficked in by retail without a certificate and excise licence in that behalf.

The expression "trafficking" shall mean and include bartering, selling, dealing in, trading in, exposing, or offering for sale by retail.

The word "hawking" shall mean and include trafficking in or about the streets, highways, or other places, or in or from any boat or other vessel upon the water (1862, s. 37).

Grocers permitting consumption of excisable liquors in sheds, etc.—If any person licensed to sell by retail any exciseable liquors not to be consumed on the premises, shall permit drinking in a neighbouring house, shed, etc., with intent to evade the provisions of the Act, or shall give exciseable liquors to be sold or hawked on their account, to be deemed to be drinking on the premises and to be guilty of breach of certificate (1862 s. 15).

Grocers liable to shebeen penalties for supplying spirits gratuitously.—Every dealer in groceries or other provisions to be consumed elsewhere than on the premises, supplying, whether gratuitously or otherwise, spirits to be consumed on the premises, shall be deemed guilty of an offence, and shall for such offence forfeit and pay the penalties provided in the 30th sect. of the Act 9 Geo. IV. c. 58 (viz. £7 for a first offence or six weeks' imprisonment, £15 for a second offence or three months' imprisonment, and £30 for a third offence or six months' imprisonment). Any person who shall have been three times convicted of any offence against the Act 16 & 17 Vict. c. 67, shall be incapable of holding a licence for the sale of exciseable liquors in all time coming (1853, s. 15).

Drunk and incapable.—Constables are authorised to take into custody any person found in any street, thoroughfare, or public place, in a state of intoxication, and not under the care and protection of some suitable person, and such persons are guilty of an offence, to which a penalty of five shillings or twenty-four hours' imprisonment is attached (1862, s. 23).

Disorderly persons refusing to quit public-houses, etc.—A penalty not exceeding forty shillings, or in default of payment imprisonment not exceeding twenty days, is exigible for disorderly conduct in licensed premises and refusing to quit when requested, or at the time of closing prescribed by the Act, and constables are authorised and empowered to assist in expelling such disorderly persons refusing to quit at the hour of closing (1862, s. 21).

Malâ fide Travellers.—Persons falsely representing themselves to be travellers who succeed in inducing any inn and hotel keeper or servant to sell or give out to him exciseable liquors on any Sunday, or any other day during hours when the sale of liquors, excepting to lodgers or travellers, is prohibited by the certificate, shall be guilty of an offence, and on being convicted by the sheriff or any one justice of the peace or magistrate, shall forfeit and pay a penalty not exceeding five pounds, and in default of immediate payment shall be imprisoned for a period not exceeding thirty days (1862, s. 22).

Harbouring Constables while on duty.—Licensed persons, for the offence of harbouring constables, incur a penalty not exceeding five pounds, and in default of payment imprisonment not exceeding thirty days (1862, s. 24).

Prosecution of Offences, etc.—Cases to be tried Summarily.—All offences under the Acts may be tried and determined in a summary manner either before the sheriff, two justices, or a magistrate of any royal, parliamentary, or police burgh. Prosecutions may be proceeded with in absence, if proof adduced on oath that accused was duly cited (1862, s. 26).

Breaches of Certificate.—Any person may make complaint before a judge of the jurisdiction in which the accused resides, setting forth that he holds a certificate for the sale of exciseable liquors by retail under an excise licence, and setting forth the particular breach of the terms of the certificate complained of, and also whether it is the first, second, or third offence. On warrant to cite being granted, the accused must be served at least six free days before the diet of compearance. On the complaint being proved, either by the confession of the accused or by the testimony of one or more credible witnesses, or upon other legal evidence, the judge will pronounce judgment, and may convict the accused without written pleadings or record of evidence; he shall, if he sees cause, adjourn the diet. Warrant can be granted to cite witnesses, and to require them to produce any writings or entries as may be required. The form of warrant of imprisonment for recovery of penalties and expenses will be found under Sched. D. annexed to Act (1828, s. 23).

Procurator-Fiscal or other Person appointed shall prosecute. —Application of penalties and expenses.—Every person who shall commit any breach of certificate, or who shall in any other manner offend against the Acts, shall be prosecuted, and all penalties recovered, together with the expenses of prosecution and conviction at the instance of the procurator-fiscal, or of such other party as shall be specially appointed to prosecute such class of offences by the justices in general Quarter Sessions assembled, or the magistrates of the burgh, as the case may be. They are empowered to fix a salary or a reasonable rate of remuneration by fees for prosecutions and all other business under the Acts, to be paid annually to such procurator-fiscal or other party appointed to prosecute, out of the fund of the county out of which the expenses of criminal prosecutions are in use to be paid, and in burghs out of the police funds, or where there are no police funds,

out of the corporation funds of the burgh. All penalties and expenses of prosecutions and convictions incurred under and imposed by a judge of any burgh or place other than a royal or parliamentary burgh, shall, when recovered, be paid into the like fund of the county; and if adjudged by a judge of any royal or parliamentary burgh, be paid into the police or corporation funds of the burgh in which such penalties shall be imposed respectively (1862, s. 25).

Service of complaint in such cases.—Summonses for breach of certificate may be directed to the accused by the name in which such certificate shall have been granted, or by the name by which such person has been usually known, and the leaving a copy of the complaint and of the warrant for summoning such person, with citation annexed, subscribed by the officer, at the premises in which the offence shall have been committed, will be sufficient, or if admittance cannot be obtained, keyhole citation will suffice (1828, s. 24).

Warrant to apprehend may be granted in shebeen cases.—Instead of granting warrant to summon persons complained of for trafficking in excise-able liquors without having obtained a certificate, the judge, if he shall see fit, may grant warrant to apprehend the offender to answer to the charge (1862, s. 18).

Power to summon witnesses—punishment for refusing to attend, etc.—The judge is empowered, in any matter arising under the provisions of the Acts, to grant warrant to summon witnesses, havers, and to examine them on oath or solemn affirmation. Any person duly summoned as a witness at least twenty-four hours before the meeting or diet of Court, who shall refuse or neglect to appear, and who shall not make reasonable excuse as shall be admitted and allowed by the judge, when it shall be proved on oath that he was duly summoned, may be apprehended and committed to prison under the warrant of the judge till he finds security to appear and give evidence; and any person who shall so neglect and refuse, or who appearing shall refuse to be examined, shall be guilty of an offence—penalty five pounds, or in default of immediate payment, thirty days. For prevarication or wilfully concealing the truth, the judge may in open Court, without any formal complaint, and in a summary manner, sentence a witness to imprisonment for a period not exceeding sixty days, or to forfeit five pounds, and in default of immediate payment, to imprisonment for a period not exceeding thirty days. The sentence awarding such punishment shall set forth shortly the nature of the offence (1862, s. 27).

Offences may be tried in Police Courts.—The offences referred to in secs. 16, 19, 21, and 23 of 1862 Act, viz. (1) hawking exciseable liquors, (2) drunk or drinking in a shebeen, (3) disorderly and refusing to leave a licensed shop, house, or premises, and (4) drunk and incapable, can be tried in the same manner as police offences, at the instance of the procurator-fiscal or prosecutor before the judge presiding in any police court (1862, s. 30).

It is provided by s. 515 of the Burgh Police (Scotland) Act, 1892, that charges of breach of certificate in burghs which are under the jurisdiction of that Act, can be tried in the same manner as police offences before the judges presiding in police courts.

Persons prosecuted for shebeening may be convicted on the evidence of one or more credible witnesses, etc.—Persons prosecuted for shebeening may be convicted on their own confession or on the evidence of one or more credible witnesses, and all such prosecutions are subject to the same rules, regulations, and provisions as prosecutions for breaches of certificate in so far as the same are applicable thereto (1828, s. 31).

Warrant, etc., may be enforced in other counties. — Warrants, orders, interlocutors, judgments, sentences, and decrees of judges under Acts, shall be enforceable in other jurisdictions, with concurrence of a judge of the other jurisdiction being endorsed thereon, by any constable or officer of Court, and which concurrence all judges are authorised to grant (1862, s. 31).

Offences may be prosecuted at common law (1862, s. 29).

Nothing contained in the Acts shall prevent anything done which may be an offence under the Acts, but which might have been prosecuted and punished as an offence at common law, or under any other Act, from being so prosecuted (1862, s. 29).

Appeal to Quarter Sessions.—If any person shall consider himself aggrieved by any judgment, whether of conviction or absolvitor, given upon any complaint presented under the Acts, by any two or more justices, he can appeal to the next meeting of the justices at Quarter Sessions, provided that the appeal shall not be heard unless the appellant shall, within eight days next after the judgment, lodge his appeal with the justices' clerk, and shall find caution to pay such sums as shall be awarded, and shall give intimation by serving a copy of the appeal on the opposite party within said period of eight days (1828, s. 25).

Sentences and judgments not subject to review except as provided by Acts.— No warrant, sentence, order, decree, judgment, or decision made or given by quarter sessions, sheriff, justice or justices or magistrate, in any cause, prosecution, or complaint, or in any other matter under the authority of the Acts, shall be subject to reduction, suspension, or appeal, or any other form of review or stay of execution, on any ground or for any reason whatever, other than by this Act provided (1862, s. 34).

Relevancy of complaints and other points in decided cases.—Alternative charges alleged, while convictions cumulative, convictions sustained (*Scott*, 1872, 2 Coup. 218; *Neeson*, 1892, Dewar's *Liquor Laws*, 111, p. 243; *Gemmell*, 1897, 34 S. L. R. 424).

Alternative charges, while convictions cumulative, convictions quashed (*Duffus*, 1881, 18 S. L. R. 573; *Gerrard*, 1881, Dewar's *Liquor Laws*, 2nd ed., 49, p. 194; *Duncan*, 1888, 2 White, 104; *Kyle*, 1893, 1 Adam, 61).

Clerical error in sentence held to be fatal (*Clarkson*, 1871, 2 Coup. 125).

Complaint for breach of certificate which did not mention sections contravened, held irrelevant (*Buchanan*, 1896, 4 S. L. T. 158).

Complaint which charged hotel-keeper with breach of certificate by selling on Sunday, "or about that time," defective, and conviction quashed (*Paterson*, 1894, 1 S. L. T. 578).

Complaint which charged a publican with breach of certificate by selling liquor between 10 o'clock at night and 8 o'clock of the following morning, "or about that time," held irrelevant, and conviction quashed (*Davidson*, 1897, "*Glasgow Herald*," 9 June 1897).

When a prosecutor brings a complaint under a statute, he is required to pray for its statutory penalties (*Chisholm*, 1893, 3 White, 452).

Conviction sustained where hotel-keeper was charged on complaint with "keeping open house" after ten o'clock at night, although objections of irrelevancy and want of specification urged (*Donald*, 1890, Dewar's *Liquor Laws*, 95, p. 223).

Discrepancy between the principal complaint and the service copy held not to be sufficient to quash conviction for breach of certificate (*Cormack*, 1897, 34 S. L. R. 429).

Evidence of wife of person tried for breach of certificate properly refused (*Morrison*, 1887, 1 White, 369).

Expenses not awarded to prosecutor in case of conviction for shebeening not fatal to conviction (*Fitzsimmons*, 1861, 33 Sc. Jur. 655).

Indueiæ of six days necessary when citing a person for breach of certificate (*Paterson or Laird*, 1895, 3 S. L. T. 215).

In shebeen case fourth offence competently described in complaint as a third offence (*Bruee*, 1861, 34 Jur. 80).

Precognition—evidence of person who had taken—not sufficient to quash conviction, if the evidence of such person had not influenced mind of judge (*Morrison*, 1884, Dewar's *Liquor Laws*, 58, p. 199).

Previous convictions in cases of breach of certificate where evidence is led, ought to be proved before case closed (*Gordon*, 1891, 3 White, 251).

Prosecutor of Police Court and procurator-fiscal held to be synonymous (*M'Arthur*, 1864, 36 Sc. Jur. 310).

Prosecutor bound to give name of purchaser of liquor in complaint in case of contravention, when known (*Muir*, H. C., 21 Nov. 1888, 2 White, 97).

Time to pay fine not having been stated in sentence in case of conviction for breach of certificate, fatal to conviction (*Ritchie*, 1884, 5 Coup. 374).

Witnesses tutoring each other held not to have been fatal to conviction in a case of breach of certificate (*Campbell*, 1884, 5 Coup. 468).

Conviction for breach of certificate quashed on account of adjournment of diet not having been duly minuted (*Craig*, 1897, 5 S. L. T. 155).

Clerks.—In addition to what has already been noticed in regard to clerks and their duties, the following requires to be mentioned:—

Clerks render themselves liable in a penalty of £20 for unduly giving or refusing certificates (1828, s. 16). They are bound, under a penalty of £5, to send to the collector or supervisor of excise, within eight days of the granting of certificates, a list of those granted (1828, s. 17). They are authorised to make out duplicates of certificates when lawfully required, which shall be admitted as evidence (1828, s. 27).

It is their duty to record convictions for breach of certificate in the register, and to produce same at Licensing Court (1828, s. 28).

They require to certify the Commissioners of Excise of convictions obtained for breaches of certificate, and of forfeiture of certificates, under a penalty of £5 (1828, s. 29).

A penalty of £5 is exigible should a clerk demand or receive any greater or additional fee or any other reward for anything done under the Act, than is expressly authorised (1828, s. 34, and 1862, s. 32).

The fees exigible by clerks are enumerated in Sched. E annexed to 1862 Act, and similar fees are exigible under the 1876 Act, s. 14.

Chief officer of police—duties as to making detections and reporting offenders.—The chief officer of police is required without undue delay to report to the procurator-fiscal or other party directed to prosecute offenders, all offences committed against the Acts coming to his knowledge, and at all times to use the means within his control for the detection, and when necessary the apprehension, of all offenders (1862, s. 14).

Police powers of entry.—Officers of police of the rank of inspector or those holding a higher rank may enter and inspect all premises where food or drink of any kind is sold to be consumed on the premises, or in which they shall have reason to believe that exciseable liquors of any kind are being unlawfully trafficked in; provision is also made for any constable having an

authority in writing from any justice of the peace or magistrate, or from any chief constable, superintendent, lieutenant, or inspector of police, to enter and inspect any such premises at any time within eight days from the date of such writing as may be specially mentioned in such writing; and any person who shall refuse to admit, or shall not admit, such officers of police or constable shall incur a penalty of £10, and failing immediate payment shall be imprisoned for a period not exceeding sixty days; and it shall be lawful for any officer or constable at any time to enter and inspect any inn and hotel, or public-house; and also, where he shall have reason to believe that a breach of certificate is being committed, at any time to enter and inspect the premises of any grocer or provision dealer trading in exciseable liquors. Parties refusing to admit, not admitting, or offering obstruction to the admission of constables, render themselves liable in similar penalty to that above mentioned (1862, s. 13).

The police were refused admission to a room in a public-house in Bristol, temporarily used for a meeting by members of a friendly society. Court held, that under the circumstances, the refusal was justifiable, and quashed conviction which had been obtained against the publican (*Duncan*, [1897] 1 Q. B. 575).

Police to report Persons licensed from whose Premises Persons in a State of Intoxication have been seen frequently to issue, or against whom there is other Cause of Complaint.—It is the duty of the chief officer of police, on the first lawful day of the week, to send to the procurator-fiscal of the district or burgh a written report of the names of licensed persons from whose premises persons in a state of intoxication have been frequently seen to issue, and of the manner in which special permissions have been exercised, and such reports shall be brought by the procurator-fiscal under the consideration of the justices or magistrates at the first licensing Court; but it is also provided that within two days after such report has been lodged with the procurator-fiscal, notice in writing shall be sent by post, with postage prepaid, to such licensed person of his having been so reported on (1862, s. 14).

Six-Day and Early-Closing Licences.—By sec. 44 of the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), the provisions *re* the above in sec. 49 of the Licensing Act of 1872, and ss. 7 and 8 of the Licensing Act, 1874, are applied to Scotland.

Sec. 49 of the 1872 Act provides that where, on the occasion of an application for a new licence, or transfer, or renewal, the applicant at the time of his application applies to the licensing justices to insert in the licence a condition that the premises are to be closed during the whole of Sunday, the justices may do so. The holder of a six-day licence obtains from the Inland Revenue a licence upon payment of six-seventh parts of the duty which would otherwise be payable by him for a similar licence not limited to six days, "and if he sell any intoxicating liquor on Sunday he shall be deemed to be selling intoxicating liquor without a licence."

As public-houses are bound to be closed on Sundays, the above provision, in so far as the licensing authorities in Scotland are concerned, can only apply to inns and hotels. By sec. 10 of said Licensing Act, 1874, which applies to England and has not been extended to Scotland, the holders of six-day licences are entitled to supply exciseable liquors on Sundays to persons lodging in their houses. This privilege has not been extended even to inn and hotel keepers in Scotland.

By sec. 7 of the 1874 Act the licensing justices are, on application being made to them for this purpose at the usual licensing meetings, directed to insert an hour for closing one hour earlier than that named in the ordinary certificate. The holder of an early-closing licence is entitled to claim a licence from the Inland Revenue for six-sevenths of the duty on the ordinary licence.

Limitation of Actions.—Every action against any judge or officer on account of anything done in execution of the Acts 1828 to 1897 shall be commenced within two months after the cause of action or prosecution shall have arisen, and not afterwards (1862, s. 35).

Licking of Thumbs.—This was a symbol "anciently used in proof that a sale was perfected," and which, Erskine says (iii. 3. 5), was continued in his day "in bargains of lesser importance among the lower ranks of people—the parties licking and joining of thumbs. Decrees are yet extant in our records prior to the institution of the College of Justice, sustaining sales upon summonses of thumb-licking upon this medium, that the parties had licked thumbs upon finishing the bargain."

Liege poustie.—This term (supposed to be derived from *Legitima potestas*) signifies that state of health which entitled a person to dispose *mortis causa*, or otherwise, of his heritage without the deed being subject to challenge under the law of *deathbed* (Ersk. iii. 8. 95). See Deathbed.

Lien.—A lien may be defined in general terms as a right in one party to retain a debt, subject, or thing in which he has a legitimate interest, either of property or possession, until some debt or obligation, due to him by the party who is entitled to demand that debt, subject, or thing, is paid or performed. It is frequently spoken of as a right of retention. Although attempts have been made to distinguish the terms "lien" and "retention," it is probably impossible to frame any distinction which would bear the test of a reference to the language of the judges in the cases on the subject, where these words are often used as synonymous. Strictly speaking, it would seem that retention is the proper term in the law of Scotland, and that the word lien is a modern importation derived from a right, analogous to the Scottish right of retention, which is recognised in English law (see argument in *Harper*, 1791, Bell's *Oct. Cas.* 440). For the purpose of this article it would seem to be consistent with usage to reserve both the right to retain a debt, and the right to retain a subject held by an *ex facie* absolute title of property, for consideration under the article Retention, and to treat here the right of retention or lien over moveable property which is dependent on possession. In doing so there will be considered (1) the general nature and incidents of lien, and (2) certain particular liens involving specialties.

A right of lien, as thus limited, may be defined, in the words of Bell's *Principles* (s. 1410), as "a right to retain a subject legitimately in one's possession until a debt shall be paid, or an engagement performed, the *jus exigendi* of which is in the possessor." In the ordinary case a lien is founded on an implied condition in a mutual contract, and is distinguishable from a pledge in respect that it is the result of an implied, while

a pledge is the result of an express, contract. Lien, again, is a condition or counterpart of a contract under which the possession of a subject is obtained, and not a right necessarily flowing from the fact of possession alone. The mere fact that a man happens to be in possession of property belonging to his debtor gives him no right in security over that property, or excuse for refusing to deliver it (*Harper*, 1791, Bell's *Oct. Cas.* 440; *Lauric*, 1853, 15 D. 404; *National Bank*, 1858, 21 D. 79). A theory has been stated by Professor More (*Notes to Stair*, cxxxi), in an attempt to distinguish retention and lien, to the effect that the law of Scotland gives the possessor of a subject which another party has a right to demand from him, a title to retain that subject until all debts due to him by that other party are paid. According to this theory, lien is a counterpart of the diligence of arrestment or poinding, giving the possessor of goods belonging to his debtor a right in security over them similar to that which he might have acquired by the use of diligence had the goods in question been in the possession of a third party. But it may now be taken as settled that this theory is unsound, and that the mere fact of possession of a debtor's property does not give the possessor a security over it, even although the debtor may be bankrupt.

Lien and Hypothec.—A lien is a right over property in one's possession, and is thereby distinguished from a hypothec. The rights known as maritime lien indeed include securities without possession, but such liens are in reality hypothecs, and have already been considered under that heading.

Possession.—A lien, although, as above stated, it is not a necessary consequence of possession, yet it is dependent on possession, and expires with the loss of it (Bell's *Prin.* 1412). Possession, in this particular, involves both physical custody and a right to possess. The subject of a lien, however, need not be in the actual custody of the party claiming a lien over it, if it is held for him by an agent, such as a factor or warehouseman. Thus a law agent, on his employment being determined, may hand over papers to the new agent employed by his client, and yet preserve his lien over them (*Renny*, 1840, 2 D. 676, and 3 D. 1134). And a factor has been held entitled to a lien over a policy of insurance which was held for him by a policy-broker (*Gairdner*, 1858, 20 D. 565). On the other hand, the civil constructive possession obtained by a factor, to whom a bill of lading had been sent unindorsed, by paying part of the freight, has been held not to be sufficient to entitle him to claim a lien over the cargo for advances made as factor, in a case where both principal and factor were bankrupt, and the trustee in the sequestration of the former had stopped the goods *in transitu* (*Kinloch*, 1789, 3 T. R. 119, 783). Possession obtained wrongfully or accidentally will not found a lien. Thus a case where it was held that a party who had obtained possession of goods by informal diligence was entitled to keep them on the plea of lien has been disapproved (*Glendinning's Creds.*, 1745, Mor. 2573; see *Patten*, 1853, 15 D. 617). And when a lease was left accidentally at a solicitor's office, it was held that the solicitor could not maintain a lien over it for the account due by the client who had left it (*Lucas*, 1817, 7 Taun. 278). Again, a person may have the custody of a subject without having a right to the possession of it which will entitle him to a lien. Thus a mere servant may have the custody of a subject in the exercise of his duties, but cannot have a lien over it. A butler, for instance, cannot claim a lien over plate in security of his wages, or a clerk a lien over a deed which he is employed to write out (*Burns*,

1799, Hume, 29; *Gladstone*, 1896, 23 R. 783). But it may often be difficult to draw the line of distinction between a mere servant, who acts only as the hand of his master, and has no independent possession, and an employee to whom goods are intrusted, and who is in possession of them under the contract on which he is employed (see *Dickson*, 1855, 17 D. 1011).

Contracts inconsistent with Lien.—As a lien is an implied condition of a contract, it cannot exist if the contract under which possession of an article is obtained contains provisions inconsistent with a right to retain that article. An obvious illustration of this principle is the rule that a party obtaining possession of a subject as a means to the performance of an act which he has contracted to do, cannot refuse performance of that act on the plea of a lien over the subject (*Borthwick*, 1833, 12 S. 121; *Stewart*, 1770, Mor. App. *voce* "Compensation," No. 2). Thus a law agent who has received papers to produce in a certain cause, cannot refuse to produce them on the ground that he has a lien over them for his account (Bell, *Prin.* s. 1439). It may also be a condition, express or implied, of a contract that a subject is to be given up at a certain date, or on demand, and in that case there can be no lien. Thus the special confidence which is implied in the contract of deposit has been held to bar a depositary from claiming a lien over the deposit (*Mackenzie*, 1824, 3 S. 206). And where racehorses were left with a trainer under an arrangement whereby the owner received a right to race them whenever he liked, and to select the jockey, it was held that this arrangement was inconsistent with a right in the trainer to detain the horses, and his plea of lien for his charges was repelled (*Forth*, 1849, 13 Q. B. 680). In an American case a carriage-builder agreed to repair a physician's carriage, and to take payment in medical attendance. It was held that he had barred himself from claiming a lien over the carriage (*Morrell* (N. H.), 6 Atl. Rep. 602, cited in Jones on *Lien*, s. 748). On this principle also it is held in England that if a contract for the performance of services with respect to certain property fixes the date of payment at a time after that fixed for redelivery of the property, there can be no lien, even if the owner of the property is bankrupt at the date fixed for redelivery (*Crawshay*, 1820, 4 Barn. & Ald. 50; *Kirchner*, 1859, 12 Moo. P. C. C. 361; *Fisher*, 1875, 4 App. Ca. 1). Thus if a charter-party provides for the payment of a certain sum in lieu of freight, at a certain time after the delivery of the cargo, the captain cannot refuse delivery to the consignee or his representatives in bankruptcy, even, apparently, although a lien for freight is expressly provided (*Foster*, 1858, 28 L. J. Ex. 81). It would seem doubtful whether these cases would be followed in Scotland if the person demanding delivery were bankrupt.

Lien excluded by Express Security.—If a person, on obtaining possession of any subject under a contract, stipulates for an express security over it for a particular debt, the maxim *conventio vincit legem* applies, and his rights over it must be determined by his contract, and cannot be enlarged on a plea of lien. Thus if a subject is conveyed expressly in security of a particular debt, it cannot be retained, at least in a question with other creditors of the owner, to cover debts for which it was not impledged (*National Bank*, 1858, 21 D. 79). And in an English case, on appeal from a West Indian Court, where it was proved that by West Indian law the consignee of goods from a plantation had a lien over the plantation in security of bills accepted for the consignor, it was held that a consignee who had taken an express security had waived his right of lien (*Leith's Estate*, 1866,

L. R. 1 P. C. 296). In that case Ld. Westbury explained the law on the point in the following terms (p. 305): "Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of parties for security excludes lien, and limits their rights by the extent of the express contract that they have made, *Expressum facit cessare tacitum.*" An exception to this rule, however, exists in the case of those employments to which a general lien is conceded, when a lien may be held to exist even over a subject expressly pledged for a particular debt. Thus a banker may assert a lien for his general balance over securities lodged by his customer to cover a particular debt, if there was nothing in the contract directly negative of such a right (*Robertson's Tr.*, 1890, 18 R. 12; *National Bank*, 1895, 22 R. 740; *Jones*, 1858, John. 430. See Banker's Lien).

Possession must have been obtained before Bankruptcy.—The subject over which a lien is claimed must have been placed in the possession of the claimant before the bankruptcy of the person for whose debt the lien is claimed. On bankruptcy the estate passes to the trustee, and a person obtaining possession of part of that estate from the bankrupt could not maintain any right in security over it in a question with the truster (Bell, *Com.* ii. 89; *Dickson*, 1855, 17 D. 1011; *Meldrum's Trs.*, 1826, 5 S. 122). If, however, the trustee takes no objection to the lien, the bankrupt, on being retrocessed in his estates, cannot object to it. In a recent case a factor was employed to collect rents, and authorised to retain them to meet an advance he had made to the proprietor. He collected certain rents after an application for the sequestration of the proprietor had been made, and, applying them to meet his advances, made no claim in the sequestration. The trustee took no objection to this course. Ultimately the bankrupt, who had been discharged on a composition and retrocessed in his estate, claimed the amount of the rents collected from the factor, on the plea that the debt due to him had been extinguished by the sequestration, and that the factor had no right to retain rents which he had obtained after the bankruptcy. It was held that, whether the trustee could or could not have objected to the factor's claim of retention, the bankrupt had no title to do so (*Stevenson, Lauder, & Gilchrist*, 1896, 23 R. 496). It is a more difficult question whether a lien can be asserted over a subject which has been placed in the possession of a creditor within sixty days of the bankruptcy of the debtor, for any debt beyond a charge for work performed on the article over which the lien is asserted. It has been held that a bleacher, who had a lien over each parcel of goods sent to him for the balance of the bleaching account due by his customer, was entitled to retain goods sent within sixty days of the bankruptcy of the customer (*Anderson's Trs.*, 1871, 9 M. 718). But this decision proceeded on the ground that the goods in question were sent in the ordinary course of trade, and it is probable that if a debtor, within sixty days of his bankruptcy, should place part of his property in the possession of a creditor who was entitled to a general lien (for instance, his law agent), the transaction would be reducible under the Act 1696, c. 5, as a security for prior debts.

Special and General Lien.—Liens are usually classed as special and general. A special lien gives a party a right to retain a subject for a debt arising out of a particular contract; a general lien, a right to retain for a balance arising out of a particular course of employment.

Special Lien.—It is a general principle of the law of contracts involving

mutual obligations, that one party is not bound to fulfil his part of the contract unless the other is prepared to perform his (Stair, i. 10. 15; Bell, *Prin.* s. 71). Special lien is the result of the application of this rule to contracts for the performance of work or services. If a person is engaged to perform any labour or operation on a particular piece of property, the obligations of the parties to the contract are: on the one hand, to do the work and return the article; on the other hand, to pay for the work done. The workman is not bound to fulfil his contract by returning the article unless the employer is able to fulfil his contract by paying for the work done. In other words, the workman has a lien over the article in security of the debt due to him for his labour. This has always been recognised as a perfectly general rule in the law of Scotland, where the article over which the lien is claimed is that on, or in respect to, which the labour for which the debt arises has been bestowed (Stair, i. 18. 7; Ersk. iii. 4. 20; Bell, *Prin.* ss. 1411, 1419). English law restricts the lien to cases where the work in question has added to the value of the subject (Cross on *Lien*, p. 24; *Orchard*, 1850, 19 L. J. C. P. 303); but the English law of lien rests rather on custom of trade than on implied contract, and the question whether additional value has been conferred on the particular article is obviously irrelevant when lien is considered as an incident or counterpart of a mutual contract.

The particular cases in which it has been held that a special lien was established are merely illustrations of the general rule, that any person performing work or service on an article has a right of lien over it, if it has been placed in his possession. Thus a bleacher (*Harper*, 1791, Bell, *Oct. Cas.* 440; *Anderson's Trs.*, 1871, 9 M. 718); a miller (*Chase*, 1816, 5 M. 180); a storekeeper (*Laurie*, 1853, 15 D. 404); a shipowner (Bell, *Prin.* ss. 405 and 1423); a carrier (*Stevenson*, 1824, 3 S. 291); and a ship-carpenter (*Ross & Duncan*, 1885, 13 R. 185) have all been held to have liens over subjects on which they have exercised their respective trades, in security of their charge for their work. A special lien may also exist over an article placed in the hands of a workman, manufacturer, or professional man, as a means by which some work may be performed, even although no work is actually done on the thing itself. Such a right obviously results from the principle that a special lien is an incident of an executorial contract. But it is not admitted in England (Addison on *Contract*, 9th ed., p. 802); and was only recognised in Scotland with some difficulty. In one case it was asserted that a printer could not have a lien over stereotype plates which had been given to him to print from, because he had performed no work upon the plates themselves (*Brown*, 1844, 6 D. 1267). In later cases, however, this distinction has been abandoned, and the principle has been recognised that a man is entitled to a lien over a subject for a debt if the subject came into his possession in connection with the contract in which that debt was incurred. Thus a firm of accountants, who acted as debt collectors, were held to be entitled to a lien over the business books of a client, which had been placed in their hands to enable them to collect the debts, in pursuance of their professional account for doing so (*Meikle & Wilson*, 1880, 8 R. 69). In a later case this principle was applied to the case of a factor or land-steward, who was held entitled to a lien, in security of his salary and outlays, over papers relating to the estate which had been placed in his hands in the course of his professional duties (*Robertson*, 1887, 15 R. 67; *Lindsay*, 1883, Guthrie, *Sh. Ct. Ca.*, 2nd series, 498).

Special Lien for Claim of Damages.—In all these cases the debt for which

the lien was sustained arose directly out of the contract on which possession was given. A lien has also been sustained for damages for breach of the contract on which possession was given (*Moore's Carving Machine Co.*, 1896, 33 S. L. R. 613). A. was appointed by a company as sole agent in Scotland for the sale of a carving machine. He was supplied with a machine for exhibition purposes, and the company undertook to supply him with other machines at a fixed price, leaving him to make a profit by selling them at a higher price. In consequence of this contract A. incurred certain expenses in travelling and in fitting up the show machine. These expenses, according to the contract, the company was not liable for. The company however, failed, and the show machine was sold by a receiver for debenture-holders. A. claimed a lien over it for the expenses he had incurred, and his right to such a lien was sustained. Seeing that, if the provisions of the contract had been carried out according to their terms, he would have had to bear these expenses himself, it is clear that the debt for which the lien was sustained was of the nature of a claim of damages (*Moore's Carving Machine Co.*, 1896, 33 S. L. R. 613).

Liens of Salvor and Innkeeper.—The special liens of a salvor, for the expense and reward of salvage (*Otis*, 1862, 24 D. 419; 57 & 58 Vict. s. 544), and that of an innkeeper, over the luggage of his guest for his bill (see INNKEEPER), seem to be exceptional cases of lien, which rest rather on custom of trade than on any implied contract.

General Lien.—The phrase general lien is used to denote two rights of entirely different character. The right of general retention, *i.e.* the right to retain a subject held on a title of property subject to a personal obligation to convey it, is sometimes, but improperly, spoken of as a general lien. This right will be dealt with under the heading RETENTION. Apart from this, a general lien denotes a right to retain a subject, of which the possession has been obtained under a contract, in security of a balance due under previous contracts of a similar character. It rests on a footing entirely distinct from special lien. While it may easily be inferred that a person who has expended labour on a subject has a right to retain that subject until he is paid for his labour, it does not follow that he should have the right to retain it for labour of a similar character expended upon other articles and on former contracts of employment. Such a lien, it has been decided, cannot in the ordinary case be asserted (*Harper*, 1791, Bell, *Oct. Cas.* 440; *Stevenson*, 1824, 3 S. 291; *Laurie*, 1853, 15 D. 404; *Anderson's Trs.*, 1871, 9 M. 718). Thus in the leading case of *Harper* v. *Faulds* it was held that a bleacher could not retain goods sent to be bleached, in security of a bill granted for a balance arising out of a previous course of employment, and on the bankruptcy of the debtor. And a carrier or railway company has been held to have no right to retain goods for a balance due for goods previously carried, although he has a lien over each consignment for the charge for carrying it (*Scottish Central Rwy. Co.*, 1864, 2 M. 781; *Peebles*, 1875, 2 R. 346). The cases where a general lien has been sustained have been those where the claim was based on express contract, contract implied by advertisement, or usage of trade.

General Lien by Express Contract.—By express contract a party may subject goods belonging to him, but in the possession of a third party, to a general lien for all or any debts due by him to the possessor. This may be, in effect, a pledge. But usually the contract is that goods sent to have a certain operation performed upon them shall be subject to a lien for any balance due by the sender in that particular course of employment. Such an arrangement is good in a question with creditors, even if the particular

goods retained were sent within sixty days of the bankruptcy of the sender (*Anderson's Trs.*, 1871, 9 M. 718). A general lien of this character, however, cannot be set up by a party, such as a carrier, whose employment partakes of the nature of a public duty. Thus a notice by a railway company to the effect that goods carried by them were to be subject to a general lien for any balance that might be due to them, either by the owner or by the consignee, was held not to be "just or reasonable" within the meaning of sec. 7 of the Railway and Canal Traffic Act, 1854 (*Scottish Central Rwy. Co.*, 1864, 2 M. 781).

By Advertisement.—A general lien for a balance on a course of employment may also be raised by advertisement, provided that it can be proved that the person by whom the goods were sent had notice of it. This was decided in a case where the dyers of Manchester publicly advertised that they would not accept goods to be dyed except on the footing of a general lien for any balance that might be due by the customer for goods previously dyed. This was held to be sufficient to establish a general lien in a question with the creditors of a manufacturer who was proved to have had notice of the advertisement at the time when he sent the goods in question to be dyed (*Kirkman*, 1794, 6 T. R. 14). Similarly, a notice, sent with every parcel of goods returned, to the effect that all goods are received subject to a lien for the general balance, is sufficient (*Anderson's Trs.*, 1871, 9 M. 718).

Usage of Trade.—The ordinary case of general lien rests upon usage of trade. In certain trades and occupations it is well established that such a lien exists, and its limits, in each case, are fixed by decisions. Thus a factor, a banker, a broker, and a law agent are all entitled to liens for any balance due to them by the party employing them in these several capacities. In other trades, general liens, usually covering the balance on transactions of a particular year, have also been recognised. In each case the recognition of such a lien will depend upon proof of a usage in the particular trade, not confined to any particular locality, but generally followed throughout the country. Much weight would now be attached to the fact that the particular trade in question is entitled to a general lien in England; but this is not necessarily conclusive, as a particular usage may be well recognised in England, but unknown in Scotland (*Strong*, 1878, 5 R. 770; Smith, *Mere. Law*, 10th ed., p. 702). The Scottish decisions have recognised a general lien, *i.e.* a lien for the balance due in a particular year, in the case of bleachers (*Anderson's Trs.*, 1871, 9 M. 718), packers (*Strong*, 1878, 5 R. 770), and calico printers (*Mitchell*, 1894, 21 R. 600). Storekeepers (*Laurie*, 1853, 15 D. 404) and scourers (*Smith*, 1859, 22 D. 344) have been held to have no general lien, but in each case the decision proceeded on the ground that usage had not been proved. In England it has been held that packers (*Witt*, 1876, 2 Ch. D. 489), calico printers (*Weldon*, 1801, 3 Esp. 268), and wharfingers (*Moet*, 1878, 8 Ch. D. 372) have general liens, while dyers (*Bennett*, 1785, 2 Chitty, 455), fullers (*Rose*, 1818, 8 Taun. 499), and millers (*Ockenden*, 1754, 1 Atk. 234) have not.

Limits of General Lien.—The general lien recognised in these and similar trades covers only a balance due on trade operations, not debts arising from other sources (*Houghton*, 1803, 3 B. & P. 485). And where a man carries on two trades, in one of which a general lien is recognised, while in the other it is not, he cannot maintain his lien for debts incurred in the exercise of the trade in which the right of lien is not recognised. Nor can he retain goods sent to him in the latter capacity for a balance due to him in the trade in which he has a lien (*M'Call*, 1824, 2 Sh. App. 188; *Largue*, 1883,

10 R. 1229). In *M'Call* an agent employed to purchase goods for export was entitled to charge 3 per cent. on all transactions where he acted as a factor and became liable for the price, and 1 per cent. on transactions where he incurred no liability, and acted merely as a broker. He purchased goods for which he incurred no liability, and in respect of which he charged 1 per cent. The principal failed while these goods were still in the agent's hands, and the latter asserted a right of lien over them for a balance arising on transactions in which he had acted as a factor. The plea of lien was repelled, on the ground that the agent could not exercise a factor's lien over goods of which he had obtained possession in the capacity of a broker.

Lien in Question with True Owner of Goods.—A right of general lien is valid only against the party from whom the possession was obtained, his creditors, or parties deriving right from him, not against a party showing a superior right. In *Mitchell* v. *Heys* (1894, 21 R. 600), A. let on hire to a calico printer certain copper rollers, on an agreement that they should be marked with his name, and that, in the event of their being placed in the hands of any third party, the receipt should bear that they were "received from A." The calico printer sent his cloth, with the rollers, to be printed by B., to whom he represented that the rollers were his own property. On the bankruptcy of the printer it was held that B. was not entitled to a lien over the rollers for a balance on the account due by the bankrupt in a question with A. Again, where a broker lodged securities belonging to clients with a bank, and the evidence disclosed the fact that the bank knew these securities were not his own, it was held that they might nevertheless keep them in security of a debt for which they were expressly pledged, as they were entitled to assume that the broker had his client's authority so to pledge them, but that they could not retain them, on the plea of general lien, to cover the balance due on the broker's banking account, as they were not entitled to assume that he had any authority from his clients to subject them to a lien for his general account (*National Bank*, 1895, 22 R. 740). An innkeeper is an exception to this rule, and is entitled to a lien over articles brought to the inn by his guest, even although they were the property of third parties (see INNKEEPER).

Rights of Holder of Lien.—A factor has a general power to sell goods placed in his hands, or to pledge them, and thus to satisfy the debt covered by his lien. And an innkeeper has a statutory right to sell any property detained by him under his lien, on the observance of certain rules as to advertisement (41 & 42 Vict. c. 38; see INNKEEPER). With these exceptions, the right conferred by a lien is a right to retain the subject in security of a debt, and not to realise it, even although its retention occasions expense (*Thames Iron Works Co.*, 1860, 1 John. & H. 93). Thus a banker has no right, in the absence of express authority, to realise securities lodged with him by his customer and subject to his lien, and may be interdicted if he propose to do so (*Robertson's Tr.*, 1890, 18 R. 12, per Ld. M'Laren, p. 20). In the case of an ordinary commercial subject, authority to sell to satisfy the debt covered by the lien may be obtained by application to the Sheriff (*Gibson & Stewart*, 1876, 3 R. 328); but it is doubtful whether such a warrant would be granted in the case of subjects—for instance, title deeds—which are of value only as accessories of a right. A sale may be ordered by the Court at the instance of the owner and against the will of the holder of the lien, reserving to the latter a preference over the price (*Parker*, 1878, 5. R. 979).

Waiver of Lien.—A lien may be lost by giving up the possession on which it is founded (Bell, *Com.* ii. 89), that is, by returning the subject to

the owner. It is doubtful whether the principle of *North-Western Bank* v. *Poynter* (1894, 21 R. 513; rev. 22 R. H. L. 1), that a right of pledge may be maintained even although the subject pledged is restored to the pledgor, provided it is restored on a contract which makes the pledgor an agent for the pledgee, would be held to be applicable to a case of lien. Lien may be maintained although the subject is placed in the hands of a third party, as where goods are landed in a dock warehouse, under a stop for freight (Bell, *Prin.* s. 1424; *Renny*, 1840, 3 D. 1134); and a part of the goods subject to the lien may be given up to the owner without affecting the right of lien over the rest (*Bannatyne*, 15 November 1814, F. C.; *Gray*, 1851, 13 D. 963; rev. 2 Macq. 435). Thus it was held that a law agent who had a lien over the title deeds of two separate estates, might give up the titles of one of them without barring himself from asserting his lien in a question with creditors holding heritable securities over the other estate (*Gray, supra*).

The question whether a creditor waives his lien by taking a bill for his debt is not altogether free from difficulty; but it would seem that while taking a bill in the ordinary course of trade would not affect the lien (*Gairdner*, 1858, 20 D. 565; *Palmer*, 1880, 7 R. 651; *Anderson's Trs.*, 1871, 9 M. 718; *ex parte Willoughby*, 1881, 16 Ch. D. 604), a bill taken at an unusually distant date would infer waiver (*Hewison*, 1836, 2 Bing. N. C. 755; *Cowell*, 1809, 16 Ves. 275). Where an independent security, such as the acceptance of a third party, is given for the debt, the lien is not necessarily waived. Thus an innkeeper, who had accepted a security of doubtful value for his bill, was held to be entitled to a lien (*Angus*, 1883, 23 Ch. D. 330). In an early case in Scotland the same decision was arrived at in the case of a law agent (*Ayton*, 1705, Mor. 6710); but in a recent case in England it was held that where a solicitor, whose duty it is to advise his client as to his rights and liabilities, takes from his client a security for costs without explaining that he intends to preserve his lien, the *primâ facie* inference is that the lien is abandoned (*in re Taylor*, [1891] 1 Ch. 590).

Lien of Factor.—A factor or mercantile agent has a general lien for the balance due by his principal on factorial transactions, which entitles him to retain all funds or property of the principal which may come into his possession in the course of his employment as factor (Ersk. iii. 4. 21; Bell, *Prin.* s. 1445, *Com.* ii. 109). This lien has been explained on the ground that a factor usually pledges his own credit, or makes advances, on behalf of his principal, in reliance on consignments which he is in the course of receiving, or of goods which he holds from the principal for sale (Bell, *Com.* ii. 109; and see *Stephens*, 1735, Mor. 9140). It entitles the factor to retain goods purchased on behalf of the principal, or received from the principal for sale, bills, policies of insurance, or shipping documents, as well as all moneys belonging to the principal which have come into his possession as factor (*Stephens*, 1735, Mor. 9140; *Wilmot*, 1841, 3 D. 815; *Curtis*, 1794, Mor. 2589). This right may be exercised to secure the salary or commission due to the factor on present or past transactions (*Sibbald*, 1852, 15 D. 217); advances made on the principal's behalf (*Foxcroft*, 1760, 2 Burr. 931); guarantees undertaken for him (Bell, *Com.* ii. 112); or expenses incurred by the factor in connection with goods consigned (*Curtis*, 1826, 5 B. & C. 141). It cannot, however, be used to secure debts due by the principal before the employment commenced (*Houghton*, 1803, 3 B. & P. 485); the price of the goods supplied by the factor as an independent merchant (*Miller & Paterson*, 1852, 14 D. 955, per Ld. Cockburn); or a debt due to the factor on some other trade or vocation exercised by him (*M'Call & Co.*, 1824, 2 Sh. App. 188; *Dixon*, 1850, 10 C. B. 398; *Lawrie*, 1853, 15 D. 404).

To whom Lien competent.—The lien of a factor, though in England confined to an agent intrusted with the possession of goods for the purpose of sale (Smith, *Merc. Law*, 10th ed., p. 118; *Stevens*, 1882, 25 Ch. D. 31), has been allowed to a wider class in Scotland, and sustained in the case of a land-steward (*Pearson*, 1672, Mor. 2625; cf. *Stevenson, Lauder, & Gilchrist*, 1826, 23 R. 496), and of a firm of livery stable-keepers who acted as auctioneers, and were in the habit of making advances to persons placing horses in their hands (*Miller*, 1881, 8 R. 489). A sub-factor may have a lien for advances made on the faith of particular goods, or even for a general balance due by the factor, if he acted in ignorance of the existence of the principal (*Ede & Bond*, 15 May 1818, F. C.; *Mildred*, 1883, 8 App. Ca. 874).

Lien over Price of Goods.—The lien of a factor may extend not only over goods placed in his possession, but also over the price due by the purchaser for goods sold by him. This will be held if the price is payable to the factor, or if he obtains bills for it, blank indorsed, or if he has a general power to receive payment for goods sold (Bell, *Com.* ii. 111). The right operates by entitling the factor to claim the price from the purchaser, in preference to the trustee in the bankruptcy of the principal. But its waiver is inferred if the factor consent to a bill being drawn in favour of the principal (*Miller & Paterson*, 1852, 14 D. 955).

Excluded by Specific Appropriation.—A factor's lien is excluded by the specific appropriation of goods sent to him, that is, he is not entitled to disregard directions which form the conditions upon which he obtains possession of goods, and keep them to meet a general balance. Thus if goods are sent to a factor to be applied by him to the payment of particular creditors, he has no lien over them even although the diligence of general creditors, or the bankruptcy of the principal, interfere to prevent these directions from being carried out (*Walker*, 1795, 6 T. R. 258; Bell, *Com.* ii. 110). But bills drawn upon the factor in favour of a third party, and bearing, on the face of them, a reference to a particular cargo, do not infer a specific appropriation of the cargo to the payee of the bills, and the factor, if he has received the cargo, and the principal is bankrupt and indebted to him, is entitled to refuse to accept the bills, and maintain a right of lien over the cargo (*Brown, Shipley, & Co.*, 1884, 29 Ch. Div. 848).

Limits of Factor's Lien.—A factor is not entitled to stop goods *in transitu* in order to preserve his lien (*Kruger*, 1755, 1 Dickson, 269). Nor can he retain goods against a purchaser from him who has paid the price to the principal (Bell, *Prin.* 1447). Thus where a factor sold on a *del credere* commission and guaranteed the purchaser's bill for the price, and the purchaser failed, it was held that the factor could not retain the goods in a question with the purchaser's trustee in bankruptcy, after the principal had accepted a composition on the bill given for the price (*Stirling & Son*, 1823, 1 Sh. App. 389; see also *Scott & Neill*, 1883, 11 R. 316).

Vendor's Lien.—A new form of lien has been established by the Sale of Goods Act, 1893. Sec. 41 of that Act provides as follows: "(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: (*a*) where the goods have been sold without any stipulation as to credit; (*b*) where the goods have been sold on credit, but the term of credit has expired; (*c*) where the buyer has become insolvent. (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent, or trustee, or custodier for the buyer." This lien may be exercised notwithstanding part

delivery of the goods, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien (s. 42). The lien is lost by delivery of the goods to the carrier or other custodier for the purpose of transmission to the buyer, without reserving the right of disposal of the goods, or by the buyer or his agent obtaining lawful possession of the goods, or by waiver of the lien (s. 43 (1)). But it is not lost by the seller obtaining judgment or decree for the price of the goods (s. 43 (2)). The word lien is defined in the Act as, in Scotland, including right of retention (s. 62 (1)). The effect of the Act is, in this as in other particulars, to replace the common law of Scotland in regard to contracts of sale by the English law. At common law in Scotland the seller of goods had a right of retention over them, founded on the principle that, as the property in the goods did not pass to the purchaser until they were delivered to him, the seller was an undivested owner as long as the goods were in his possession (*M'Ewen*, 1847, 9 D. 434; affd. 1849, 6 Bell's App. 340: *Distillers' Co.*, 1889, 16 R. 479. See SALE; RETENTION). As under the provisions of the Sale of Goods Act the property in goods sold may now pass to the buyer before delivery, the common-law right of retention is in many cases inapplicable, and the right of lien introduced by the Act must be relied on. The incidents and limits of this lien will be dealt with under the subject of SALE, but it may here be pointed out that the rights of an unpaid seller under his lien are wider than those of the ordinary holder of a lien. A purchaser from him will obtain a valid title to the goods in a question with the buyer (s. 48 (2)), while, if the goods are of a perishable nature, he is entitled to resell them if the buyer, after notice of the intention to resell, does not pay or tender the price within a reasonable time (s. 48 (3)).

Lien of Trustee.—A trustee has a lien over the trust estate in security of any expenses he has been put to, or obligations he has incurred, on behalf of the trust. He is thereby entitled to retain the trust estate under his charge, even although all the trust purposes have been fulfilled, until he is indemnified for such expenses, or relieved from such obligations (Bell, *Prin.* s. 1998, *Com.* ii. 117; *Elliott's Trs.*, 1828, 6 S. 1058; *Brodie*, 1837, 15 S. 1195). But a trustee in a private trust for creditors is not entitled to retain the trust estate after a trustee in sequestration has been appointed (*Dall*, 1870, 8 M. 1006). And a trustee is not entitled to use his right of lien as a means of unnecessarily prolonging the trust after its purposes have been fulfilled, unless the obligations he has undertaken are reasonably likely to result in liability (*Henderson*, 1866, 4 M. 691). The lien covers expenses incurred on behalf of the trust, but not necessarily advances made by the trustee, unless the estate was *lucratus* thereby (*Brown*, 1896, 4 S. L. T. No. 69).

Where the trustee has allocated the estate among the various beneficiaries, but not actually distributed their respective shares, he cannot exercise his lien over the share allocated to one beneficiary for expenses incurred in relation to the estate allocated to any other (*Robinson*, 1880, 7 R. 694; rev. 1881, 8 R. H. L. 127). This is of importance where a trustee carries on a trade, or holds shares involving liability, for the benefit of one particular beneficiary. Thus where the share allocated to one beneficiary included shares in the City of Glasgow Bank, and the trustee remained on the register and incurred liability as a shareholder, it was held that his claim for reimbursement affected only the share of that particular beneficiary, and could not be asserted against the rest of the trust estate (*Robinson, supra*).

[Bell, *Prin.* ss. 1410 *seq.*, *Com.* ii. 87 *seq.*; Cross on *Lien*; Jones on *Lien*, vol i.; Gloag and Irvine, *Rights in Security*, chaps. x., xi.]

See Banker's Lien; Carrier; Innkeeper; Law Agent: Retention; Sale.

Lieutenant (Lord).—Early Acts refer to an officer called the Lieutenant or King's Lieutenant, who performed certain functions in counties, principally connected with the arrest of rebels and holding of "Weapon Shawinges" (1438, c. 3; 1481, c. 81; 1483, c. 89; 1489, c. 11). 1449, c. 10, of James II. is the first Statute where the lieutenant is referred to as Lord Lieutenant. 42 Geo. III. c. 91, which superseded the former Militia Acts, authorised His Majesty to appoint lieutenants of counties, stewartries, cities, and places mentioned in the Act. The lieutenants are authorised to represent the Crown for military purposes, and to raise and regulate the militia force. The Statute further empowered lieutenants to call out the militia yearly, to appoint deputy lieutenants, and also to appoint colonels and other officers for training the militia.

An annual Act is passed suspending the operation of this Statute, and the provisions which regulate lord lieutenants and deputy lieutenants are to be found in the Militia Act, 1882, ss. 29 to 36 (45 & 46 Vict. c. 49). Her Majesty is empowered to appoint lieutenants for counties (s. 1). The lieutenant appoints deputy lieutenants. Twenty duly-qualified persons in a county must be appointed deputy lieutenants; and if so many cannot be found qualified, then all the persons duly qualified. Her Majesty approves all appointments as deputy lieutenant, and by her order a lieutenant may be called upon to displace all or any of his deputy lieutenants. A return of all deputy lieutenants is made annually to Parliament. The commission of a deputy lieutenant is not vacated by the lieutenant who granted it ceasing to be a lieutenant (s. 30). In case of a lieutenant's inability to act, Her Majesty may authorise any three deputy lieutenants to act (s. 31). The lieutenant, with the approbation of Her Majesty, may appoint any deputy lieutenant of the county to act for him as vice-lieutenant during his absence or inability to act (s. 32).

Qualification of Deputy Lieutenant.—(*a*) He shall be a peer of the realm or the heir-apparent of such a peer, and have a place of residence within the county for which he is appointed; or

(*b*) He shall be in possession for his own benefit of an estate for the life of himself or another, or of some greater estate, in land in the United Kingdom, of the yearly value of not less than £200; or

(*c*) He shall be the heir-apparent of some person who is in possession for his own benefit of such an estate as above mentioned; or

(*d*) He shall be possessed or entitled, at law or in equity, in possession for his own benefit, for the life of himself or another, or for some greater interest, of or to a clear yearly income arising from personal estate within the United Kingdom of not less amount than the yearly value of an estate in land above mentioned; and the clear yearly income arising from any such personal estate shall be admitted in whole or in part of a qualification arising from the possession of an estate in land (s. 33). Penalties are imposed for acting as a deputy lieutenant without being duly qualified (s. 35).

It is the custom for lord lieutenants to recommend persons for the Commission of the Peace.

The lord lieutenant and his deputy lieutenant have no administrative duties in regard to the local government of a county, although prior to the Local Government Act, 1889, the lord lieutenant was *ex officio* a member of

the Police Committee (20 & 21 Vict. c. 72, s. 2), and of the local authority under the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74, ss. 68, 69).

Life, Presumption of.—The common law of Scotland presumes that a person who has been shown to have been once alive is still alive until he has reached the limit of human life (Stair, iv. 45. 17 (19); Ersk. iv. 2. 36; Bell, *Prin.* ss. 1640; Dickson on *Evid.* ss. 116 *et seq.*; per L. P. Inglis, *Williamson*, 1886, 14 R. 228; *Bruce*, 1871, 10 M. 130). The presumption applies in the case of a person who has disappeared or is not to be found, but not where death is alleged to have taken place at, or approximately at, a given date in this country, unless the fact is denied (*Burns* (Kames' report), 1753, Mor. 11670; Currie on *Executors*, 82). In a petition of service addressed to the Sheriff, the statement of the fact of the death is taken for fact where it is unchallenged. The presumption of life has been found strong enough to allow a factor *loco absentis* to oppose a petition of service on the ground that his principal was still alive (*Somerville*, 1818, 6 Pat. App. 393; 2 Bell, *Ill.* 316), but not strong enough to allow him to raise a reduction of a service alone (*Kennedy*, 1851, 13 D. 705). The limit of life is held to be the end of a hundred years (*D.* vii. i. 56; *Carstairs*, 1734, Mor. 11633; Bankt. 2. 6. 31, per Ld. Deas; *Bruce*, 1871, 10 M. 133, 44 Sc. Jur. 82). The presumption may be elided at common law at any time, or under the statutes after certain periods, by proof *prout de jure* establishing death, or a presumption of it. The Court when finding, in administering the common law, that death is proved or to be presumed, may or may not come to a finding of the date of death (*Garland*, 1841, 4 D. 1; *Rhind's Trs.*, 1873, 5 R. 527).

In 1881 the Presumption of Life Limitation (Scotland) Act, 1881, now repealed, was passed, which provided various periods, ranging from seven to twenty years, after which the different kinds of estate belonging to a person who had disappeared might be transferred to his heirs. Now, under Presumption of Life Limitation (Scotland) Act, 1891, the Court, on application being made to it, may find (s. 3), that a person who has disappeared for seven years has died on any date within the seven years which is established by the facts, or, failing the establishment of such a date, may find that the person is to be presumed to have died at the expiry of the seven years' disappearance. Sec. 4 enables the Court to authorise a *pro indiviso* proprietor to sell heritable estate, and grant a valid title to the purchaser, without the concurrence of an absent co-proprietor, after that co-proprietor has disappeared and been unheard of for seven years. Under sec. 8 the application of a next heir of entail, under sec. 21 of the Entail Act, 1882, for the appointment of a factor *loco absentis* to an absent heir in possession, with power to disentail, etc., may be made after the heir in possession has been absent from Scotland, or has disappeared for seven, instead of fourteen, years. The Act (s. 3) admits as an applicant for a finding of the death of an absent person (1) any person who is entitled to succeed to any estate, or entitled to the transmission of any estate on the occurrence of that event, or (2) a fiar of estate which is burdened with a liferent in favour of the absentee. It admits (s. 9) any number of persons as joint applicants, and admits the application of any person who has a limited right to the estate of the absent person, to the effect of having that right made effectual subject to the provisions of the Act. It also admits to the benefits of the finding any person who might have been an applicant for it. The judgment under sec. 3 of the

Act is a mere finding of death. There is no provision for finding that he died with or without issue, or married or unmarried (*Davidson*, 1895 (Ld. Low), S. L. T. iii. 162); it may be presumed, independently, however, that he so died (see case referred to in S. L. T. i. p. 66).

There is no provision for a warrant to the petitioner to make up title to any estate, nor for any declarator of the rights of the petitioner to any specified estate. All judgments granting prayer of petitions under secs. 1, 4, or 5 of the repealed Presumption of Life Act, 1881, are by sec. 5 made of the same effect as regards the persons whose disappearance formed the subject of these applications and as regards the estate, heritable and moveable affected thereby, as if they were judgments under the Act of 1891, finding that the absentee is proved or to be presumed to be dead.

No restriction is placed on the class of estate to which a right may be established in subsequent proceedings by means of a judgment of the Court that the absentee is dead (s. 12 (2)), save that it is not available in an action against an insurer on a policy of insurance on the life of an absentee (s. 11), nor to entitle any person to any intestate moveable succession of an absentee who was not a domiciled Scotsman at the date of his death (s. 3). Estate to which the Act applies need not have been vested in the absentee (s. 3). The right of property acquired in estate which has been transferred under the provisions of the Act is absolute, so that a valid onerous title to such estate may be granted by the acquirer at once in favour of a third party. But the right is resolutive in so far that the person who has disappeared, or a representative of his with a better title from him than the acquirer under the Act possesses, may reclaim the estate within a certain period from the acquirer under the Act, or from any person holding from him by a gratuitous title. And if the acquirer under the Act has transferred the estate for an onerous consideration, they may reclaim either the price or the value of it from him (ss. 6, 7.) On such a restitution of the estate the acquirer is liable to be called on to clear the estate of all incumbrances which did not affect it at the date of the judgment of the Court, but can claim, on the other hand, the value of all similar meliorations (s. 6). No claim can be made against him for income which has accrued on the estate before notice of the demand for restitution (s. 6). The period during which a claim for restitution of estate, to which a title may be made up by registration in a public register, can be made is thirteen years from the date on which a title has been so made up; and in the case of other estate it is thirteen years after possession has been obtained under provisions of the Act (s. 7). The operation of the Act does not affect the right of a third party who has a title preferable to that of the absentee. The jurisdiction of the Court of Session is privative when the total amount or value of the estate in Scotland exceeds £500. And it is apparently cumulative with that of the Sheriff Court of the county in which the greater part of the estate is situated when the sum does not exceed £500.

During the subsistence of the Presumption of Life Act, 1881, the Entail (Scotland) Act, 1882, was passed, introducing provisions (s. 14) for cases where the absentee is an heir of entail in possession, by which entailed estate may be disentailed and sold after he "shall have been absent from Scotland or shall have disappeared for a period of fourteen [*now* seven] years, and cannot be found." The same words as they occurred in the Presumption of Life Act, 1881, s. 1, were held in *Rainham* (1881, 9 R. 207) not to apply to a person who had never been in Scotland. By sec. 8 of the Presumption of Life Act, 1891, the period of fourteen years of this

section was altered to seven years. Sec. 14 of the Entail Act, as amended by sec. 8 of the Presumption of Life Act of 1891, provides also that if, within the period of the above-mentioned seven years' absence, a factor *loco absentis* shall have been appointed under the provisions of the Presumption of Life Limitation (Scotland) Act, 1891, or otherwise, it shall be lawful to the factor to apply for authority to feu, etc. The Act of 1891 does not provide for such an appointment.

The Merchant Shipping Act Amendment Act, 1862, s. 21, has introduced a presumption that a ship which has been missing for a year after leaving port is lost with all hands on board. The presumption is available only in the matter of the recovery of seamen's and apprentices' wages by the Board of Trade. The action is summary, and governed by the provisions of the Merchant Shipping Act, 1854, ss. 188, 189. And the wages recovered are dealt with according to the provisions of Part III. of the same Act of 1854.

[Stevenson, *Presumption of Life.*]

See SURVIVANCE IN COMMON CALAMITY—PRESUMPTION OF.

Life Insurance.—The subject of this article is dealt with under the following divisions:—I. Insurable Interest. II. The Policy. III. Representations and Warranties. IV. The Premium. V. Excepted Risks. VI. Assignation of Policies. VII. Settlement Policies. VIII. Policies as Securities for Debt. IX. Life Assurance Companies.

I. INSURABLE INTEREST.

The Gambling Act (14 Geo. III. c. 48) requires that the person to whom a policy is issued should have an insurable interest in the life insured. The Statute is in the following terms:

"I. Whereas it hath been found by experience that the making insurances on lives or other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming: for remedy whereof, be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal,and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act no insurance shall be made by any person or persons, bodies, politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering; and that every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.

"II. And be it further enacted, that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made or underwrote.

"III. And be it further enacted, that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

"IV. Provided always, that nothing herein contained shall extend, or be construed to extend, to insurances *bonâ fide* made by any person or persons

on ships, goods, or merchandises; but every such insurance shall be as valid and effectual in the law as if this Act had not been made."

As interpreted by the leading cases, the value of the interest referred to in the third section is to be taken at the time when the policy is effected, and not when the event insured against happens. Accordingly, the cessation of the insured's interest, subsequently to the issue of the policy, will not render the insurance void. Thus a creditor who has insured his debtor's life, in his own name and on his own behalf, by a policy valid at its inception, may recover the amount insured, not exceeding the original debt, although the debt has been discharged before the policy becomes a claim, and he may assign the policy to one who has no interest (*Dalby*, 1854, 15 C. B. 365; *Law*, 1855, 1 Kay & J. 223; *Connecticut Mutual Life Insurance Co.*, 1876, 94 U. S. 457). A life policy is not, therefore, a contract of indemnity, like a fire or marine policy, under which the insured is only entitled to recover the amount of his actual loss, and which can only be validly assigned to one who has an interest in the subject insured (see Fire Insurance). In neither case, however, can the parties by agreement dispense with proof of interest; and thus it is no answer to the plea of want of interest that the insurer was aware of the nature of the interest when the policy was issued, and agreed to regard it as sufficient (*Lucena*, 1802–1806, 3 Bos. & Pul. 75, per Chambre, J., 101; see, however, an opinion *contra* by Ld. Kincairney in *Turnbull*, 1896, 34 S. L. R. 146).

The interest required by the Statute is a pecuniary interest, and one which is capable of legal enforcement (*Halford*, 1830, 10 B. & C. 724; *Hebdon*, 1863, 3 B. & S. 579). It must therefore depend either on contract, or on the obligation of maintenance which the law in certain cases attaches to relationship.

In the first case the contract must establish between the person obtaining the insurance and the person whose life is insured, the relation of debtor and creditor, or of cautioner and principal debtor, or otherwise create a reasonable expectation of advantage or benefit from the continuance of the life (*Branford*, 1877, 25 W. R. 650).

Where the relation of debtor or creditor exists, it is not necessary, to sustain a policy for the benefit of the creditor on the debtor's life, that the debt should be of ascertainable amount, or should be immediately exigible. When the interest exists, but its value is not definitely ascertainable at the time the policy is effected, it will be held to have the value which the parties have put upon it in the policy, unless this value exceeds the actual extent of the assured's interest at any time. In the case of *Barnes* v. *The London, Edinburgh, and Glasgow Life Insurance Co.* (L. R. [1892] 1 Q. B. 864), the policy was in the name of the plaintiff upon the life of her step-sister, who was, both at the date of effecting the policy and at her death, a minor. The plaintiff had voluntarily undertaken to educate and maintain her step-sister, and had given a promise to that effect to the child's mother. The policy was held valid on the ground that the assured had an interest as creditor in the life insured, because she had a prospective claim to repayment of the sums she had expended on the child's behalf. The amount of these advances was necessarily uncertain when the policy was effected, but, on the principle stated, the policy was sustained for the sum insured. Had the assured been under a legal obligation to support her step-sister, the Court indicated that the policy would have been void, because no claim to repayment would in that case have arisen.

On the same principle, it has been decided in America that a partner has an insurable interest in the life of his co-partner, although such interest

is not definite or ascertained. The interest arises from the contract of partnership, the effect of which is to establish a joint obligation for the company's debts and a reasonable expectation of advantage and benefit from the services and credit of the co-partner, a benefit or advantage depending on the continuance of his life (*Connecticut Mutual Life Insurance Co.*, 1882, 108, U. S. 498). For a similar reason, a person who has acquired a right to a proportion of the earnings of another during a certain period, has an interest in the life of the latter, not the less insurable that at the time when the insurance is effected it cannot be valued or apportioned. Where a clerk or servant has a contract for service for a number of years at an annual salary, he has an insurable interest in the life of his employers (*Hebdon*, 1863, 3 B. & S. 576). Conversely, the life of a servant or agent, whose services may be a source of profit, is also insurable by his employer (*Turnbull*, 1896, 34 S. L. R. 145). In that case, the value of the interest does not depend on the amount paid as wages or salary, which would not be due if the employment were terminated by the death of either of the parties to the contract. It depends on the expectation of pecuniary advantage to the employer from the engagement, which would be frustrated by the death of the person employed.

A creditor who insures his debtor's life in his own name is, in general, on the same principle, entitled to cover future advances by his policy. In the case of loans upon reversions or on post-obit bonds, the interest on the loan is sometimes allowed to accumulate for a definite period, or until the expectancy is realised. In such cases the lender has an insurable interest in the borrower's survivance, to the extent not only of the original advance, but of the interest for the period agreed on, and the premiums of insurance (*Ulrich*, 1891, 24 Amer. Rep. 534). But if the debtor does not assign any contingent right in security, a policy on his life in the creditor's name, covering interest on the loan and premiums for a long period of years, would probably be held invalid under the Statute, because the creditor in that case would have no substantial interest in his debtor's life apart from the policy.

Where the value of the interest is ascertainable at the time the insurance is effected, the rule is that the policy will only be enforceable for that amount. Thus in *Branford* (1877, 25 W. R. 650), where a policy was taken out by one of two joint obligants under a bond, upon the life of his co-obligant, for the whole sum due, the policy was treated as effectual only to the extent of one half of that sum, on the ground that this represented the true value of the insured's interest in his co-debtor's life at the date of the policy. In other words, the interest was limited to the share due by the person whose life was insured, for which, in addition to his own share, the assured would become liable upon the death and insolvency of his co-obligant. In *Hebdon* (1863, 3 B. & S. 579) it was held, on the same principle, that an employee, under contract with his employer for a fixed period and at a fixed salary, had an insurable interest in his employer's life, but only to the extent of the capitalised value of the salary for the period in question.

As regards the interest arising from relationship, the principle is that, apart from a legal obligation to support, relationship does not confer an insurable interest. It has accordingly been held in England that a wife has an insurable interest in her husband's life, and a child in the life of its parent, but that a husband has no insurable interest in his wife's life, or a father in his children's (*Halford*, 1830, 10 B. & C. 724; *Worthington*, 1875, 1 Ch. D. 419; *Reed*, Peake's Additional Cases, 70: *Shilling*, 1858, 1 F.

& F. 116). In England a parent has no direct claim for maintenance against a child, and consequently has no insurable interest in his life; but the rule would seem to be otherwise in Scotland, where the law imposes an obligation of maintenance upon children. As regards the case of a wife, it seems to have been assumed in Scotland that the husband had an interest in her life sufficient to sustain a policy; but the question has never been the subject of direct decision (see *Wight*, 1849, 11 D. 459). By the law of Scotland, a husband is entitled to pecuniary compensation, apart from special damage, for the death of his wife, where the claim arises *ex delictu*, and there seems no reason why the loss by her death should not have a pecuniary value when the claim is founded upon contract (May on *Insurance*, 2nd ed., s. 104). In America near relationship, combined with actual dependence of the one party on the other for support, is held, apart from any legal claim, to give an insurable interest. Hence a sister actually supported by her brother was held to have an insurable interest in his life (*Ætna Insur. Co.*, 1876, 94 U. S. 561; *Currier*, 1885, 52 Am. R. 134, and note by reporter, 135; May on *Insurance*, 2nd ed., ss. 103–107).

It has already been pointed out that the Statute of Geo. III. does not apply to transactions with the policy subsequent to its issue. A policy, originally valid, may accordingly be assigned to one who has no interest in the life insured (*Ashley*, 1829, 3 Sim. 149). It is in this way possible in many cases to evade the Statute by getting persons to effect policies on their lives and then to sell them. Such transactions are, however, illegal, and the Courts will not sanction an assignment merely for the purpose of evading the Statute. It has accordingly been held in more than one case that a policy on the life of one person and expressed to be for his benefit, but really intended, *ab initio*, for the benefit of another, to whom it is immediately assigned, and by whom all the premiums are paid, is void (*M'Farlane*, 1886, 2 T. L. R. 755; *Wainewright*, 1835, 1 Moo. & R. 481).

Under the second section of the Act it has been held that a policy of insurance issued to a wife on her husband's life, but really intended for the benefit of the husband, was void by reason of the omission to insert his name as the person for whose use and benefit the policy was effected (*Evans*, 1869, 4 Q. B. 622; see also *Collett*, 1851, 9 Hare, 162; *Scott*, 1841, Longfield and Townsend's Irish Reports, 54; *Hodson*, 1857, 8 El. & Bl. 40).

II. The Policy.

The negotiations for a life policy begin with the proposal for insurance containing information as to the life which it is proposed to insure. This is usually supplemented by a reference to friends, and by a medical examination. The effect of these tranactions on the validity of the contract is considered under the head of *Representations and Warranties* (*infra*, p. 93).

Proposal.—Where a company accepts a proposal for life insurance, their acceptance is usually subject to the condition that the insurance shall not begin till the premium is paid. If the risk terminates by the death of the insured before tender of the premium, the company is not liable (*Sickness and Accident Assurance Association*, 1892, 19 R. 977). Nor is the agreement to insure regarded as concluded until tender of the premium, so that the company is not bound to issue a policy in implement of this agreement if, in the interval, the risk has materially altered. In *Canning* (1886, 16 Q. B. D. 727) a proposal for insurance had been accepted, but, before the proposer had signified his assent to the premium named, by tender or otherwise, he met with an accident which rendered his life less insurable. It was held

that the company were not bound to accept the premium or issue a policy. In such cases the proposer must be held to warrant his state of health, not merely at the date of the proposal, but up to the date when the agreement to insure becomes binding; and, even apart from a warranty, he is bound to disclose any change of circumstances which may effect the risk (*London Assur. Co.*, 1879, 11 Ch. D. 363). This rule is sometimes expressly made a condition of acceptance, as in *British Equitable Insur. Co.*, 1869, 38 L. J. Ch. 314.

If there is no express provision that the insurance is not to begin till the premium is paid, or till the policy is issued, or other suspensive condition, and if there is no term of the contract to which either party has not assented, an acceptance of a proposal for insurance, definite as to the risk and premium, would, it is thought, be held to constitute an agreement to undertake the risk as at the date of acceptance (*Eames*, 1876, 94 U. S. 621, 626 *et seq.*). Even in that case the insurers would not be bound if the risk had terminated by the death of the person whose life it was proposed to insure before the agreement came to be carried out, but the insurer would be bound if there was merely an alteration of the risk. The distinction is the same as that between the effect, on a contract of sale, of the total destruction of the subject-matter of the contract before the transfer is made, and its partial destruction or deterioration.

An acceptance of a proposal will also be binding on the company if the assured has assented to any conditions by which it is qualified, and if credit is given for the premium, either in accordance with the usual practice (*Sickness and Accident Assur. Assoc.*, 1892, 19 R. 977, per Ld. M'Laren, p. 987), or by delivery of the policy without requiring payment (*Kelly*, 1883, 1 C. & E. 47; *Southern Life Insur. Co.*, 1872, 24 Am. R. 344). Where a policy acknowledging receipt of the premium is prepared in terms of a proposal for insurance, and bears to be "signed, sealed, and delivered" as required by the company's deed of constitution, the mere fact that it remains in the custody of the company will not prevent its operating as a binding contract, when all its terms have been assented to by both parties (*Xenos*, 1867, L. R. 2 H. L. 296).

Any completed contract for the payment of a sum depending on a contingency connected with the duration of life, is a policy of life insurance under the definition in the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144, s. 7), and for the purposes of stamp duty (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 98). The stamp is *ad valorem* (s. 97). A penalty of £20 is imposed upon "every person" who receives, or takes credit for, any premium or consideration for any insurance other than a sea insurance, and does not within one month after receiving, or taking credit for, the premium or consideration, make out and execute a duly stamped policy of insurance (s. 100). Apart from this provision there is no statutory requirement that a contract of insurance, other than a sea insurance, should be in writing. See FIRE INSURANCE. But, except in the case of reinsurance, a policy is always issued.

The more important clauses and conditions of the policy are dealt with under the three subsequent heads, while the effect of the provision usually inserted in life policies, that the assured's claim shall be limited to the funds of the society, will be found noticed under head IX.

In the construction of the policy the rule is well established, that where there is ambiguity the meaning most favourable to the assured is to be preferred (*Standard Life Assur. Co.*, 1884, 11 R. (H. L.) 48, per Ld. Watson, 53, 54).

III. Representations and Warranties.

Duty of Disclosure.—The non-disclosure of any material fact by either of the parties to a policy of life insurance renders the contract voidable at the option of the other. The case of misrepresentation is *à fortiori* of concealment, and is a ground of rescission common to insurance and other mercantile contracts (*Menzies*, 1893, 20 R. (H. L.) 108, per Ld. Watson, 142; *Derry*, 1889, 14 App. Ca. 337, per Ld. Herschell, 359; *Davies*, 1878, 8 Ch. D. 469, per Fry, J., 474). The misrepresentation or concealment need not be fraudulent; it is sufficient if it is material, that is, if the party misled would not have entered into the contract at all, or would not have agreed to its essential terms if he had known the true state of the facts (*London Assur. Co.*, 1879, 11 Ch. D. 363; *Lindenau*, 1828, 8 B. & C. 586, per Bayley, J., 592; *Moens*, 1842, 10 M. & W. 147, per Baron Parke, 157; *Dalglish*, 1850, 2 M'N. & G. 231, per Baron Rolfe, 243). The question whether a misrepresentation is material is a question of fact which may be the subject of expert evidence (*London Assur. Co., supra*).

The right to rescind extends to the case of material error induced by the agent of either of the contracting parties, by misrepresentations or concealment, in the course of the negotiations. But the referees named by the insured, whether friends or medical attendant, are not his agents; nor where A. effects a policy on the life of X. is he responsible for statements made by X., unless he warrants their truth (*Wheelton*, 1858, 8 El. & Bl. 232).

Warranties.—These general rules are modified, in the case of life insurance policies, by the terms of the proposal and declaration, or of the policy. The proposal contains in writing the answers of the insured to inquiries by the company as to the insurability of the life, and this is usually accompanied by a declaration, signed by the insured, that his answers are true. The policy itself declares that the proposal and declaration shall be the basis of the contract, or incorporates them with the policy as part of the contract. The effect of either of these provisions is to make the answers of the insured warranties, and to exclude the question whether they are material (*Anderson*, 1853, 4 H. L. C. 484).

Construction of Warranties.—The only question, therefore, which remains open under such a condition is what is the subject-matter of the warranty, a question of construction of the question and answer, and of the relative declaration by the insured.

If the statement is made in the proposal, and is explicit and unqualified, the insured must be held to warrant its truth in point of fact. Thus in the case of the *Standard Life Assur. Co.* (1884, 11 R. (H. L.) 48, 9 App. Ca. 671), where the policy provided that the proposal and declaration should be the basis of the contract, and that the policy should be void if any answer given by the insured were untrue, the insured affirmed, in one of his answers, that he was temperate in his habits, and had always been so. It was held that the consideration whether the statement was made honestly by the insured, and was his *bonâ fide* belief, was irrelevant, and that the sole question was whether the statement was true in fact (see also *Duckett*, 1834, 2 C. & M. 348).

Warranty of Good Health.—The views expressed in the case of the *Standard Life Assurance Co.* seem to go the length of holding that where the insured states in the proposal that he is free from disease, or is in good health, the warranty applies to latent disease as well as to disease of which he may be conscious (9 App. Ca. 671, per Ld. Blackburn, 681, 682, and

per Ld. Watson, 690; but see per Ld. Fullerton in *Hutchison*, 1845, 7 D. 467, and *Grattan*, 1883, 44 Am. R. 372).

In the case of *Foster* (1873, 11 M. 351) the Court of Session adopted a less rigorous construction when the answer of the insured was given in reply to an inquiry, not in the proposal, but by the medical officer of the company. It was held that the terms of the answer, and the nature of the circumstances in which it was given, precluded the idea that the insured warranted her freedom from latent disease of which she was not aware.

Waiver of Information.—The duty of disclosure is not confined to matters which are the subject of specific inquiry in the proposal. It is not to be assumed that these are the only matters upon which the company desire information. In addition to fully answering what is asked, any material circumstance must be disclosed, which, from its special nature, has not suggested itself as a subject of inquiry. In most forms of proposal there is a general question to meet special cases of this kind, requiring the proposer to state any other facts, in addition to those as to which specific inquiry has been made, which may render his life, or the life proposed for insurance, more than usually hazardous.

If, however, the insured returns no answer to a written inquiry in the proposal, and the company accepts the proposal and issues a policy, it has been held in the Supreme Court of the United States that the company would be barred from challenging the contract on the ground of concealment (*Phœnix Life Insur. Co.*, 1886, 120 U. S. 183). But where the insured's answer to any question, while *ex facie* complete, is imperfect and misleading, the concealment is one the materiality of which cannot be disputed where the proposal and declaration are made the basis of the contract (*London Assur. Co.*, 1879, 11 Ch. D. 363).

Indisputable Policies.—Many modern policies are issued on the footing that they will not be challenged except on the ground of fraud. This is the effect of an express qualification in the declaration that the information given by the insured is true to the best of his knowledge and belief. Thus in *Wheelton* (1858, 8 El. & Bl. 232), a case of reinsurance, where the proposal by the company affecting the reinsurance referred, as regards certain of the inquiries, to the statements made by the life insured, and by the referees, in the original proposal to them, the declaration, signed on behalf of the company, contained the express qualification that the statements so incorporated were true to the best of their knowledge and belief. It was proved that in the statement by the life assured there were false and fraudulent averments, but it was held that the reinsurance could not be avoided by the falsity of these statements; the ground of the decision being (1) that the life insured was not the agent of the assured; and (2) that the declaration, qualified to an affirmation of belief, was not falsified unless it were shown that the person making it was aware of the fraud (contrast *Macdonald*, 1874, L. R. 9 Q. B. 328).

An affirmation of belief or opinion will, however, be deemed untrue, not only where the person making it is shown to have had actual knowledge of the facts, but also where he has made statements recklessly, without knowledge of their truth or falsehood (*Pawson*, 1778, Cowp. 785, per Ld. Mansfield, 788; *Derry*, 1889, 14 App. Ca. 337, per Ld. Herschell, 369).

In other cases, although a general warranty is given, certain of the answers are qualified by words limiting the particular statement to a statement of opinion or belief. Thus in the case of *Jones* (1857, 3 C. B. N. S. 65) the proposer stated, in answer to a question, "that he was not

aware" of any circumstance tending to shorten his life, or to render an insurance on his life more than usually hazardous,—a statement which, with the other answers in the proposal, was made the basis of the contract. It was held that the policy could not be avoided unless the information withheld related to a disorder which the assured not only knew of, but which he knew, or must have known, to be serious, and necessarily tending to shorten his life.

Another form of indisputable policy is one in which it is expressly agreed that the policy shall be void and the premiums forfeited if any of the statements in the proposal are false and fraudulent. On the principle of construction expressed by the maxim *expressio unius est exclusio alterius*, this is taken to mean that the policy is avoidable on the specified ground only, and not on any other ground (*Fowkes*, 1863, 3 B. & S. 917). This form of provision is not, however, so favourable to the assured as that just considered, where the policy is on the life of another, and the statements referred to are made by the life or the referees. False and fraudulent, when applied to certain statements, would appear to mean false and fraudulent on the part of the person making them, in the case supposed the life insured, and not the person to whom the policy is issued. On the other hand, if the policy is declared to be indisputable, the exception of fraud, whether expressed or implied, refers to fraud of the assured only, or of his agent to affect the insurance, and not to fraud of third parties, such as the referees or the life insured. At common law, as we have seen, the assured is not responsible for false statements by the life insured or by the referees, but he is responsible for innocent misstatements by himself, if actually material, or made by agreement the basis of the contract. On the latter account policies entirely unconditional are not so favourable to the assured as those expressly declared to be indisputable except for fraud, or containing provisions in other forms to the same effect.

Where the prospectus of a company contains a representation that all policies issued by the company shall be indisputable, except in the case of fraud, it has been held that the company cannot challenge a policy made on the faith of this representation or any other ground, even if the policy contain express provisions rendering it voidable for innocent misrepresentations (*Wood*, 1856, 11 Exch. 493; *Wheelton*, 1858, 8 El. & Bl. 232).

Ambiguous Provisions.—If the terms of the declaration and policy leave it doubtful whether an absolute warranty is intended, the construction most favourable to the insured will be adopted. Thus in *Fowkes* (1863, 3 B. & S. 917), the policy contained a proviso that it should be void and the premiums forfeited (1) if any statement in the declaration was untrue, and (2) if the assurance had been effected through any wilful misrepresentation, concealment, or false averment. The policy incorporated the declaration and proposal as part of the contract. The declaration contained the provision that "if it shall hereafter appear that *any fraudulent concealment or designedly untrue statement* shall be contained herein, the premiums paid shall be forfeited and the policy void." It was held that, taking the policy and declaration together, the assurance was not avoided by a statement false in fact, but not designedly untrue (see also *National Bank*, 1877, 95 U. S. 673; *Fitch*, 1875, 17 Am. R. 372).

Personal Bar.—The right to avoid a policy of insurance on the ground of concealment or misrepresentation is subject to certain limitations founded on the doctrines of personal bar and ageney. Thus a failure on the part of the assured to communicate facts which the agent of the company, making out and receiving the proposal for insurance, knows or ought to

know, will not avoid the insurance. Nor can the insurer found upon a misrepresentation, or even a breach of warranty, as a ground of rescission, if his agent knew when the policy was issued the true state of the facts, or if, in knowledge of the facts, the company has, by its actings, treated the contract as subsisting (*Cruickshank*, 1895, 23 R. 147; *Bawden*, 1892, 2 Q. B. 534; *Wing*, 1854, 5 De G. M. & G. 265; *Donnison*, 1897, 24 R. 681).

But a mere suspicion on the part of the company that fraud has been used to induce the contract, or that one of the conditions of the contract has been broken, does not in general impose on the company an immediate duty to investigate and challenge (*Scottish Equitable Life Assur. Soc.*, 1877, 4 R. 1076, 1081; and note 17 Am. St. R. 247).

The fact that a policy is in the hands of an assignee is not a defence to a plea that it was obtained by misrepresentation or concealment by the original holder. Any ground for rescission pleadable against the original holder is pleadable against the assignee (*Scottish Equitable Life Assur. Soc.*, *supra*). But if the company consent to the assignment, or receive a notice of assignment without objection, this will amount to a waiver of any right of challenge known to the company at the date of the assignment (*Hale*, 1855, 64 Am. D. 370).

IV. The Premium.

Condition as to Time.—When the insurance is conditioned on the payment by a fixed date of the premiums, the condition is strictly enforced (*Phœnix*, 1860, 8 H. L. C. 745; *Benton*, 1897, 24 R. 908). It is not an excuse that the assured was prevented by sickness or by death from paying the premium in time. The necessity for strict compliance with this condition may, however, be waived by the company either expressly, or by such acts or conduct on the part of its responsible officials as justify the assured in assuming that strict compliance will not be required (*Eggleston*, 1877, 96 U. S. 572, 579: *Union Central*, 1878, 31 Am. R. 555). Nor will the forfeiture be incurred if the delay in payment is due to the act or omission of the company. When, for instance, a company is in the habit of giving notice that renewal premiums are due, policy-holders may be justified in assuming that such notice will be given, and their policies not invalidated, in the absence of notice, by failure to pay the premium within the term fixed in the policy (*Eggleston*, *supra*). On the same principle, if the assured has agreed with the company that the annual share of the profits or dividends to which he is entitled shall be deducted from the annual premium, and if the usual practice of the company is to give notice to the assured of the balance of the premium due after the profits have been deducted, the company cannot avail themselves of a forfeiture for non-payment of the premium within the time stipulated in the policy if they have failed to give the usual notice, and have returned no answer to a request for information by the assured as to the amount due until after the time for payment has elapsed (*Meyer*, 1878, 29 Am. R. 200; *Eddy*, 1888, 23 Am. St. R. 17, note by reporter). But the mere fact that the company has not given notice that the premium is due is not sufficient to imply a waiver of the condition. There must be a positive representation that the premium has been paid, or some promise, actual or implied from a course of dealing, that notice will be given. In the case of *Simpson* (1857, 2 C. B., N. S. 257) the company intentionally refrained from giving notice to the executors of the assured that the last premium due before his death had not been paid. This information was only communicated after the days of grace allowed for the payment of the

premium had expired, within which period the assured had died. The Court held that the company were not precluded, by their failure to give the information in question, from pleading non-payment of the premium within the stipulated time, and from repudiating liability upon the policy.

In order to prevent the assured founding upon a uniform practice to give notice, it is usual for insurance companies, in intimating that a renewal premium is about to fall due, to state that the company is not bound to give such intimation, and that the want of it is not to be taken as an excuse for non-payment.

Powers of Agents.—In the case of industrial offices payment of the premiums is usually made to local agents; but such agents are not presumed to have any authority to waive any forfeiture in the policy, or to receive premiums after a forfeiture has been incurred. The assured is not entitled to rely upon any undertaking given by the agent on the part of the company, unless he is satisfied that the agent has authority to bind the company. Such authority may be shown either to be contained in the written instructions to the agent, or it may be implied from the fact that the agent is in practice allowed by the company to exercise it (*Montreal Assur. Co.*, 1859, 13 Moo. P. C. 119–124; *Union Central Life Insur. Co.*, 1878, 31 Am. R. 555; *Norton*, 1877, 96 U. S. 234). In this country the agent's authority is not presumed to include a power of entering into contracts on behalf of the company, or of binding the company by receipt of a premium when it is overdue (*Acey*, 1840, 7 M. & W. 151; *Ward*, 1856, 17 C. B. 644). If such authority is averred by the assured against the company, the onus of proof is upon him (*Linford*, 1864, 34 Beav. 291; *Barker*, 1833, 6 W. S. 323; *Mowry*, 1875, 96 U. S. 544).

In the cases of *Acey* and *Ward* the actings of the agent were held to be outwith the scope of his authority, and the company were accordingly not bound. But the result will be different if what is done by the agent is within the scope of his duties. Thus in *Wing* (1854, 5 De G. M. & G. 265) the policy contained a condition that if the assured went beyond the limits of Europe without the licence of the directors, the policy should become void. The life insured had, in breach of this condition, gone to reside in Canada, but it was proved that this fact had been communicated by the assignee of the policy to the agent of the company authorised to receive the premiums, and that, subsequently to this communication, premiums had been accepted by the agent from the assignee. It was held that the breach of condition could not be pleaded by the company; that it was the duty of the agent to have communicated to the head office the circumstances under which the premium had been paid to and accepted by him, and that his failure to forward this information could not be allowed to prejudice the assured. The company were held to be aware of what was communicated to their agent, and in that knowledge to have accepted the premium, and thereby to have elected to treat the contract as binding. On the same principle, an insurance company will be held to be aware that an overdue premium handed to their agent has not been paid in time, and if subsequently they receive the premium next due, or do other acts which would imply a waiver of the forfeiture, if done in knowledge that the forfeiture had been incurred, the company will be precluded from saying that they were ignorant of what their agent knew, although he may have neglected his duty in not communicating the facts to them.

A local agent who is authorised to receive premiums when due, but who has no authority to contract on behalf of the company, or to alter or change any condition of the policy, or to waive any forfeiture, cannot bind the

company by accepting less than the whole of a premium, unless the company homologates his act and receives the premium when forwarded; and the custom of the company to charge the advance premium to the agent on issuing a policy is not a payment, unless so understood between the agent and the insured—that is to say, unless the agent has undertaken to advance the premium for the assured (*Brown*, 1879, 47 Am. R. 205).

According to the rule laid down in England, an agent, like any third party, may advance the premiums at the request of all the parties interested in the policy, and by doing so acquire a lien upon the policy (*in re Leslie*, 1883, 23 Ch. D. 552; *Falcke*, 1886, 34 Ch. D. 234). In Scotland it is thought that a bond upon the policy would be necessary to give a lien.

Days of Grace.—It is usual to allow a certain period, after the date of payment fixed in the policy, as days of grace within which the premium may be paid. The forms of this provision differ in different policies, but there would seem to be only two possible constructions. The effect of the provision is either to keep the insurance in force during the days of grace, or merely to provide that the policy may be renewed during the days of grace for another period, upon the same conditions as before, and without further examination as to health. The first form of condition usually expressly provides that the premium may be paid during the days of grace, and that the insurance shall continue in force till their expiry. Under this condition the insurance runs on from one period to the next without any break, if the premium be paid within the specified period, and the company would be liable, although the insured died within the days of grace before tender of the premium.

The other form of condition is usually expressed negatively, and provides that the policy shall be void if the premiums for renewal are not paid within the specified period. Under such a condition, the premium must be paid, not only within the days of grace, but also within the lifetime of the person whose life is insured, so that if the life fall within the days of grace, before the premium is paid or tendered, the insurers are not afterwards obliged to receive it, or to pay the sum in the policy under deduction of the premium (*Want*, 1810, 12 East, 183). The same principle applies as in the case of the original contract; it is a mere agreement to renew, which cannot be enforced if, when it comes to be fulfilled, there is no longer a life in existence to insure (*Sickness and Accident Assur. Assoc.*, 1892, 19 R. 977). The effect of the condition is not to continue the insurance in force, but to give the insured the right of renewing the policy within the period specified, although his life has become less insurable (*Pritchard*, 1858, 3 C. B., N. S. 622, opinion of Willes, J., 642). It may, however, be doubted if any insurance company—in this country at least—continues to have a policy condition of this kind.

Most policies, besides providing for days of grace, contain a further condition that if the assured fails to pay the renewal premium within the days of grace, the policy may be revived within a certain further period, on satisfactory proof of the health of the assured, and on payment of a certain fine. If the company, without making any inquiries as to the health of the assured, renew the policy, in ignorance of the fact that the assured is dead, they are not bound, because the renewal, like the original policy, presumes the existence of a living person as the subject of the insurance (*Pritchard*, *supra*).

It is usually provided in modern policies that a failure to pay the renewal premiums within the days of grace, or the further period provided in the condition just dealt with, shall not forfeit all benefit under the policy.

These concessions either take the form that the policy will be renewed, on proof that the assured's state of health is not impaired, and on payment with interest of overdue premiums, or that the surrender value of the policy will be paid or applied, if sufficient for that purpose, to the payment of the overdue premiums, such payment to become a first charge upon the proceeds of the policy. Sometimes the surrender value is defined, as for instance when the engagement is to pay such proportion of the sum insured by the lapsed policy as the premiums paid bear to the total premiums due on the policy.

These conditions are sometimes merely permissive, and are taken verbatim from the articles of association or deed of settlement of the company, and are merely inserted for the information of the assured. In other cases they take the form of an obligation binding on the company, which the insured could enforce. By a Statute of New York State, it is declared illegal for any insurance company to forfeit a policy on which premiums have been paid, for failure to pay subsequent premiums, without giving the insured the surrender value of his policy.

V. Excepted Risks.

Residence.—Certain risks are excepted from most life policies, either in respect of local limits for the residence of the life insured, or of his occupation, or of the cause of his death. Under the first of these exceptions it is provided that the insurance shall be either suspended or avoided if the insured shall reside or travel within the limits specified. When this provision creates a forfeiture, it will be strictly enforced, and a residence, however short or whatever its cause, will avoid the policy (*Beacon Life and Fire Assur. Co.*, 1862, 1 Moo. P. C., N. S. 73, per Ld. Chelmsford, p. 100). It is usually provided, however, that this restriction may be removed upon payment of an extra premium, and, if the policy has been assigned, that it shall not be avoided, if the assignee, as soon as he becomes aware that the condition has been transgressed, informs the office of the fact, and pays the extra premium which may be demanded.

Occupation.—Among prescribed occupations are military service, seafaring, the preventive service, gold searching, and the liquor traffic. Policies generally give express intimation that these occupations may be engaged in without avoiding the policy if licence is obtained from the directors, and an extra premium paid. Military service implies that the assured shall be subject to military law, and a mere clerk or servant attached to the War Office or to the Army is not a military servant in the sense of the exception.

Cause of Death.—In regard to the third class of exceptions, those depending on the cause of death, the provision usually is that if the assured shall commit suicide, or die by duelling or by the hand of justice, the policy shall be void. It has been held that the expressions "suicide," "self-destruction," or "dying by his own hand," in a clause excepting risks from a policy, have the same meaning, but none of these expressions are construed as including every possible case in which a man takes his own life. When, for instance, he takes his life during delirium or during an epileptic fit, or when he is under an insane delusion as to the instrument which he has in his hands, and supposes it to be something harmless. In construing any of the expressions, the English rule is that the exception applies when the person dying by his own hand is aware of the physical consequences of his act, although his reason may be so impaired that he is not aware of its moral consequences. In other words, the condition applies when the insured takes his life voluntarily, although at the time he may be of unsound mind. If,

on the other hand, the unsoundness of mind is such as to confuse the senses, or to produce a state in which voluntary action is impossible, the condition does not apply. This construction is established in two leading cases (*Borradaile*, 1843, 5 Man. & G. 639; *Schwabe*, 1845, 2 C. & K. 134; 3 C. B. 437).

The rule that if the assured does not do the act which occasions his death voluntarily, but through confusion of the senses, the exception will not apply, is laid down in *Stormont* (1858, 1 F. & F. 22).

In America a different rule of interpretation is adopted. If the insured kills himself when insane, the act is not regarded as a case of "suicide," or "self-destruction," or "dying by his own hand," within the meaning of these words in a clause excepting risks from a policy, even if the assured understood and intended the physical act by which life was destroyed (*Connecticut Life Insur. Co.*, 1893, 150 U. S. 468).

On the principle of the cases decided in this country on the exception of suicide, it would seem that the exception of death by the hand of justice would include a case when the insured was innocent of the crime for which he suffered, and it would exclude a case where he was executed by accident, or where he was mistaken for someone else.

VI. Assignation of Policies.

Policies of Assurance Act, 1867.—The assignation of policies of life insurance is regulated by the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144). The Act provides as follows:—

"1. Any person or corporation now being or hereafter becoming entitled, by assignment or other derivative title, to a policy of Life Assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys.

"2. In any action on a policy of life assurance, a defence on equitable grounds, or a reply to such defence on similar grounds, may be respectively pleaded and relied upon in the same manner and to the same extent as in any other personal action.

"3. No assignment made after the passing of this Act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or in case they have two or more principal places of business, then at some one of such principal places of business, either in England, or Scotland, or Ireland; and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed.

"4. Every assurance company shall, on every policy issued by them after the thirtieth day of September, one thousand eight hundred and sixty-seven, specify their principal place or principal places of business at which notice of assignment may be given in pursuance of this Act.

"5. Any such assignment may be made either by endorsement on the

policy or by a separate instrument in the words or to the effect set forth in the schedule hereto, such endorsement or separate instrument being duly stamped.

"6. Every assurance company to whom notice shall have been duly given of the assignment of any policy under which they are liable shall, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment in each case of a fee not exceeding five shillings, deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal of the assurance company whose acknowledgment the same purports to be, shall be conclusive evidence as against such assurance company of their having duly received the notice to which such acknowledgment relates.

"7. In the construction and for the purposes of this Act the expression "policy of life assurance," or "policy," shall mean any instrument by which the payment of moneys, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured; and the expression "assurance company" shall mean and include every corporation, association, society, or company now or hereafter carrying on the business of assuring lives or survivorships, either alone or in conjunction with any other object or objects.

"8. Provided always, that this Act shall not apply to any policy of assurance granted or to be granted or to any contract for a payment on death, entered into or to be entered into in pursuance of the provisions of Acts 16 & 17 Vict. c. 45, and 27 & 28 Vict. c. 43, or either of these Acts, or to any engagement for payment on death by any friendly society.

"9. For all purposes this Act may be cited as 'The Policies of Assurance Act, 1867.'"

The question of the right to a policy of life insurance on assignment may obviously arise between different parties: between the assignor and the assignee; between different assignees; between the assignee and an arrester or a trustee in sequestration; or, lastly, between the assignee and the insurance company. It is to the last case—the conditions under which an assignee has a right to demand payment from the company on his own receipt and to sue upon the policy in his own name—that the above statutory provisions are applicable (*Newman*, 1885, 28 Ch. D. 674, 680).

1. *Assignment must be in Writing.*—For an assignment to have this effect there are four conditions requisite. The first requisite is that the assignment should be in writing, either separate or endorsed on the policy (s. 3). In England deposit of the policy, in consideration of an immediate advance, constitutes an equitable mortgage, and, like the Scottish written assignment, gives the assignee a valid right as against the assignor and his representatives, although in both countries intimation of the assignment is necessary to the completion of a valid title in a question with other assignees.

In Scotland an obligation or debt, such as a policy of insurance, cannot be assigned by a transfer of the document of title. In the *United Kingdom Life Assurance Company* v. *Dixon* (1838, 16 Shaw, 1277) it was held that a deposit of a policy conferred no right upon the holder, or those claiming through him, to the contents of the policy, in competition with an executor of the assignor who had made up a title by confirmation.

In England, although the deposit of a policy gives a valid right against

the assignor, it does not give the assignee any right, under the Act of 1867, to sue in his own name or to discharge the company, even if the conditions as to notice of the assignment required by that Act are fulfilled. The company are therefore not bound, and are not in safety, to pay to one who holds as a mere depositary, and has no written title, even if they have no notice of other claims, and no representatives of the assured have made up a title. In such a case an application to the Court is necessary to secure for the company a valid discharge, unless the representatives of the assured make up a title and concur in the discharge by the holder of the policy. The necessity for an application to the Court, therefore, arises when the representatives have no interest to make up a title and refuse to do so. In that case the costs of the necessary proceedings to obtain a valid discharge must be paid by the holder of the policy. Nor is the company liable for interest upon the sum due under the policy till the date of the decree authorising them to pay. It is only when a debtor is in default in not paying at a certain date that he is liable in interest. He is not in default until the person claiming payment is in a position to give him a valid discharge. These rules were laid down in the cases of *Crossley* (1876, 4 Ch. D. 421) and *Webster* (1880, 15 Ch. D. 169).

2. *Right to grant Discharge.*—The second requisite is that the title under which the assignee holds should, either expressly or by implication, give him power to discharge the company on payment to him of the sum due in the policy (s. 1; *Tench*, 1886, 18 L. R. Ir. 45). If the assignment is absolute, such a power is implied; and in England, by Statute, where a mortgage is in writing, and subsequent to the Conveyancing Act of 1881, a clause to this effect is also implied; but this provision does not extend to Scotland, and therefore it is advisable that the clause should be expressed in Scottish assignations in security (44 & 45 Vict. c. 41, s. 22; Bell, *Lectures on Conveyancing*, vol. i. p. 331).

By the English Conveyancing Act, 1881, a trustee's discharge is also made sufficient (44 & 45 Vict. c. 41, s. 36), and by the Trusts (Scotland) Act, 1867 (30 & 31 Vict. c. 97, s. 2), trustees falling within the provisions of the Act are empowered, *inter alia*, "to uplift, discharge, or assign debts due to the trust estate," unless such acts are at variance with the terms or purposes of the trust.

The English Conveyancing Act of 1881 also authorises a mortgagee to sell the security in the same way as if the mortgage deed contained a power of sale, provided a contrary intention is not expressed (44 & 45 Vict. c. 41, s. 19). This provision only applies to mortgages by deed, and subsequent in date to the commencement of the Act. In Scotland there is no statutory power of sale, and the right either to sell or surrender the policy must be conferred by the mortgage deed. In the case of trusts, the Act of 1867 authorises the trustee to apply to the Court for power to sell when such power is not conferred by the terms of the trust (30 & 31 Vict. c. 97, s. 3). Where these Statutes do not apply, and where no special mandate to sell or surrender is conferred by the deed creating the trust or mortgage, the discharge, to be valid, must be concurred in by all the parties interested. Sometimes this authority is conferred by a condition in the policy itself. Such a condition provides that "the holder of the policy as mortgagee or trustee may (unless to the knowledge of the company he is prohibited from doing so by the terms of his mortgage or trust) surrender the policy to the company for cash or any other consideration, and such surrender, so made, shall effectually discharge the company from liability under the policy after the date of such surrender."

3. *Intimation.* — The third requisite of a complete title in the assignee is that notice of the assignment should be given in writing to the head office of the company (s. 3). Almost no change is made by this section upon the law of Scotland; notice of the assignment of a debt always required to be given to the debtor or holder of the fund assigned, and the priority of claims by different assignees upon the fund depended upon the date of notice. But prior to the Act, notice might have been given in various ways; now, the method prescribed by Statute must be followed where the question is one with the insurance company. There is no decision on the question what constitutes "written notice of the date and purport of the assignment," but it is thought that intimation in one or other of the methods prescribed by the Transmission of Moveable Property (Scotland) Act, 1862 (25 & 26 Vict. c. 85, s. 2), would fall within these terms. Under that Act, which is expressly made applicable to the assignation of policies of assurance issued by Scottish companies, intimation may be given by the transmission to the company of a certified copy of the assignation. The company would thus receive intimation in writing of the date and purport of assignation, which is all that is required by the Act of 1867.

Sect. 6 of the Act provides that the company shall duly acknowledge notice of an assignment.

It has been held that verbal notice of an assignment is not sufficient to give a claim against the company in competition with that of an assignee who had given written notice in terms of the Act (*in re Young*, 1890, 25 L. R. Ir. 372, 386). The company is entitled to disregard the verbal notice, and pay to the assignee who has fulfilled the conditions required to complete his title and give a valid discharge. On the other hand, when the company have a written notice of a prior incumbrance, they are not bound or entitled to pay to a subsequent assignee from the assured, although no claim is made by the first assignee. The claimants under the second assignment are bound to show that the prior incumbrance has been satisfied or discharged. A mortgagee giving notice in terms of the Act is entitled to sue in his own name, and therefore the company would not be safe in paying to a subsequent assignee. Nor is the company bound to find out the state of the prior incumbrance. The expense of making his title clear, by showing that the prior incumbrance has been discharged, must be borne by the claimant (*in re Haycock's Policy*, 1876, 1 Ch. D. 611).

The provision as to priority of notice in the third section only applies in regard to questions with the company. Questions of priority between assignees and questions of competition of diligence are determined by the common law. Hence when a first incumbrancer on a policy had failed to give notice in terms of the Act, it was held that a second incumbrancer, who knew of the first incumbrance, could not, in a question with the prior incumbrancer, acquire a preference by giving written notice to the company (*Newman*, 1885, 28 Ch. D. 674, 680).

Confirmation of a trustee in a sequestration operates as an intimated assignation of all debts due to the bankrupt (Bankruptcy Act, 1856, 19 & 20 Vict. c. 79, s. 102), and therefore an insurance company is not in safety in paying to an assignee of the bankrupt in terms of a notice subsequent to the trustee's confirmation. A different rule prevails in England under the present English Bankruptcy Act (1883, 46 & 47 Vict. c. 52, ss. 20, 43, 44, 54; *Palmer*, 1881, 18 Ch. D. 381). But in Scotland the company must ascertain, before paying under an intimated assignment, whether the assignor is bankrupt.

4. *Stamp.*—In the fourth place it is requisite that the assignment should be properly stamped. The Stamp Act, 1891 (54 & 55 Vict. c. 39, s. 118), provides:—(1) No assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless such assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped.

(2) If any payment shall be made in contravention of this section, the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to Her Majesty from the person by whom such payment is made (see Alpe's *Law of Stamp Duties*, 1896, p. 216). The proper stamp depends on the purpose of the assignment—whether it is on sale, in security, or contains a declaration of trust. In these three cases a different stamp is required.

The company is bound to see not only that the last assignment, in respect of which the claim is made, is stamped, but that all intermediate assignments, forming the chain of the assignee's title, are duly stamped. Of course if a prior mortgage of the policy has been discharged, so that it does not form a link in the assignee's title, it would not be necessary, in a question with that assignee, that it should be stamped.

VII. Settlement Policies.

Trust created by Policy.—A trust may be declared in a life policy by making it payable to A. as trustee for the purposes set forth. Such a trust is not, at common law, effectual against creditors unless the policy is delivered to the trustee (*Jarvie's Trs.*, 1887, 14 R. 411); but a destination to trustees named in the policy will be given effect to in a competition with the executor of the assured, even if the policy is not intimated to the trustees (*Dickie's Trs.*, 1892, 29 S. L. R. 908). Special provision is made in regard to such policies by the Married Women's Policies of Assurance (Scotland) Act, 1880 (43 & 44 Vict. c. 26), where the policy is effected (1) by a wife for her separate use, or (2) by a husband for the benefit of his wife or children.

The Act provides:—1. *Married Woman may effect Policy of Assurance for her Separate Use.*—A married woman may effect a policy of assurance, on her own life or on the life of her husband, for her separate use; and the same and all benefit thereof, if expressed to be for her separate use, shall, immediately on being so effected, vest in her, and shall be payable to her, and her heirs, executors, and assignees, excluding the *jus mariti* and right of administration of her husband, and shall be assignable by her either *inter vivos* or *mortis causa* without consent of her husband; and the contract in such policy shall be as valid and effectual as if made with an unmarried woman.

2. *Policy of Assurance may be effected in Trust for Wife and Children.*—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 of 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 so 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; and the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office: 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 upon 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.

3. *Application and Short Title of Act.*—This Act shall apply only to Scotland, and may be cited as the Married Women's Policies of Assurance (Scotland) Act, 1880.

Under sec. 1 a wife is enabled to effect a policy without her husband's consent, and to deal with it as her separate estate exclusive of the husband's *jus mariti* or right of administration.

If the husband pays the premiums, would the Act afford protection against his creditors? The consideration that the Act was passed before the *jus mariti* was abolished, and that the privilege conferred by the section is not confined to married women holding separate estate, would seem to point to an affirmative answer.

Under sec. 2 a policy effected for the benefit of the wife or children of the assured is made equivalent to a delivered trust, and is protected against attack on the ground that it is a donation to the wife, or on the ground of insolvency, except to the limited extent provided in the proviso of the section (see *Galloway*, 1861, 22 D. 1211, 4 Macq. 267; *Smith*, 1869, 7 M. 863; *Thomson's Trs.*, 1879, 6 R. 1227).

To whom Policy may be Issued.—The Act extends to foreigners (*Schumann*, 1886, 13 R. 678). It has been held that the words "any married man" include a widower, and that a policy effected for the benefit of his children by a widower is an effectual trust under the Act (*Kennedy's Trs.*, 1895, 23 R. 146). A policy effected by an unmarried man for the benefit of a future wife or children would probably be held on marriage to fall within the Act. If a policy issued to an unmarried man on his own life is exchanged on marriage for a policy under the Statute, it is thought that it would not be a valid objection on the part of his creditors that credit had been given by the company, in effecting the new policy, for past premiums (cf. *Holt*, 1876, 2 Ch. D. 266).

Who may be Beneficiaries.—Similarly, it would seem that the benefit of the Act may be extended to a future second wife, and the issue by her; but if the policy is effected by a married man "for the benefit of his wife," his wife at the time will be meant (see *re Seyton*, 1887, 34 Ch. D. 511). To include a future wife, such words as "any surviving wife" would have to be used.

The fact that the destination in the policy includes a destination-over, in the event of the failure of the wife and children of the assured, does not deprive the latter of the benefit of the Statute (*Dickie's Trs.*, 1892, 29 S. L. R. 908). On the same principle, it would seem that an endowment policy, *i.e.* a policy payable on the death of the assured, or on his attaining a specified age, would, until the assured reaches the age specified, be an effectual trust under the Act for his wife and children.

Dealings with Policy during its Currency.—Just as in the case of ordinary policies, it may become necessary to realise the fund created by

policies under the Act during their currency. The Act imposes no obligation upon the assured to pay the premiums of insurance, and he may become unable to do so by change of circumstances. Should realisation become necessary, three possible courses would seem to be available to preserve the trust fund. The policy may either be surrendered for cash, or for a paid-up policy of less value, or money may be borrowed on the security of the policy to meet the premiums still due. In regard to the first of these courses, it has been held that the company is entitled to grant a surrender for cash upon the joint receipt of all the beneficiaries, including the assured himself, who has the reversionary interest, and of the trustee, who may either be the insured or a trustee specially appointed in terms of the Act. This was decided in a case where the insurance was effected by a husband on his own life, for the benefit of his wife as sole beneficiary, and when both the husband and wife concurred in the receipt for the surrender value (*Schumann*, 1886, 13 R. 678). In the same case, Ld. Shand expressed the opinion that the words of the section, "and the receipt of such trustee for the sums secured by the policy or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the insurance office," were intended, *inter alia*, to meet the case of a surrender before maturity of the policy for cash, and that the receipt of the husband as trustee would have been itself a sufficient discharge without the concurrence of the wife, provided the insurance office had no notice of a contemplated breach of trust. It may, however, be doubted whether the Act contemplated a surrender of the policy for cash to the assured himself as trustee, because he occupies the position both of a trustee and of a truster with a reversionary right in the event of the objects of the trust becoming incapable of being carried out (*Clearer*, [1892] 1 Q. B. 147, 154). For these reasons it seems advisable, if it is necessary to realise the fund for the immediate use of the beneficiaries, that the company should require that an independent trustee should be appointed to administer the trust in accordance with the purposes expressed in the policy. Otherwise the second course should be adopted, and the surrender, if made to the insured himself, should take the form of a surrender for a paid-up policy, subject to the original trust (*Schultze*, 1887, 56 L. J. Ch. 356).

As regards the third method suggested, the rule has been laid down in England that a trustee may advance the premiums of insurance and so acquire a lien upon the policy, or he may borrow money for this purpose and transfer his lien to the lender. The lender will also acquire a lien if he advances money for this purpose at the request of all the beneficiaries (*re Leslie*, 1883, 23 Ch. D. 552; *Faleke*, 1886, 34 Ch. D. 234; *Borthwick*, 1864, 2 M. 595). An insurance company would therefore be entitled, if such a course were thought more advisable than surrender, to advance the premiums still due on the security of the policy at the request of the trustee. If there is no independent trustee other than the husband, the safer course would be to obtain the concurrence of all the beneficiaries.

Fraud on Creditors.—Under the proviso of sec. 2 it has been held that if the premiums on a policy on the husband's life are paid by the wife, the creditors of the husband cannot claim repayment of them (*Holt*, 1876, 2 Ch. D. 266).

To whom Proceeds Payable.—Payment of the policy should only be made to the trustees duly appointed, or, failing such appointment, to the executors of the assured. The trustees must be appointed with special reference to the policy; a general nomination of trustees in a settlement is not sufficient. The funds fall to be administered by the executors of the assured in prefer-

ence to testamentary trustees (*Kennedy*, 1895, 33 S. L. R. 89). In no case should the payment be made to the beneficiaries directly, as the trustee, or the executor if there is no trustee, may have claims on the policy—for expenses or charges connected with the trust, or may have notice of assignments of, or charges on, the interests of the beneficiaries.

Division among Beneficiaries.—Sec. 2 provides that the trust shall be "*for the purpose or purposes so expressed*," *i.e.* expressed on the face of the policy. It is therefore necessary that the purposes of the trust shall be specifically set forth in the policy itself, and not by reference to any separate deed. In order to do this properly, the trust should state the respective rights of the wife and children in the fund provided. If the trust is expressed to be for the benefit of wife and children, it has been held in England (after some conflict of decision, and only by Courts of first instance) that the fund is to be equally distributed among the wife and children, each taking an equal share (*re Seyton*, 1887, 34 Ch. D. 511; *re Davies' Policy Trust*, [1892] 1 Ch. 90). The same rule was stated by Ld. M'Laren in the Outer House in *Jarvie's Trs.* (1887, 14 R. 411). In the Inner House Ld. Pres. Inglis observed that the expression was ambiguous, and should not be left by itself as a final expression of intention (14 R. 416).

A more usual provision is to give the wife a liferent of the fund, and the children equal shares in the fee at her death. The provisions in favour of the children may be declared not to vest until majority or marriage.

In the event of any of the children dying before their shares became payable, their children would, under the usual condition *si sine liberis decesserit*, be entitled to the parent's share; but grandchildren could not be expressly included in the trust. A power of apportionment among the children might also be reserved in favour of the husband or wife, but the policy should declare how the fund is to be distributed failing the exercise of the power. If the purposes of the trust fail, the proceeds of the policy become the property of the assured and his representatives, in virtue of the assured's reversionary right as truster (*Cleaver*, [1892] 1 Q. B. 147, 154).

VIII. Life Policies as Securities for Debt.

Policies in the Creditor's Name.—Instead of taking an assignment of a policy from his debtor, a creditor may secure himself by taking out a policy on his debtor's life in his own name, the debtor being bound to pay the premiums. Where this is the nature of the arrangement, it will be presumed that the policy is held by the creditor in security merely, and he will be bound to assign it to the debtor on payment of the debt, or to account to his representatives for the proceeds beyond the principal, interest, and premiums which may be due to him (*Lindsay*, 1851, 13 D. 718).

On the other hand, a policy effected by a creditor in his own name upon his debtor's life without any agreement that the debtor should pay the premiums, belongs absolutely to the creditor (*Stevenson*, 1846, 8 D. 872, 880; *Bruce*, 1869, L. R. 5 Ch. 32). There appears to be no reason why the policy itself should not specify the limitation upon the right of the person in whose name the policy is taken, if he holds it merely in security.

The disadvantage of a security in the form of a policy upon the debtor's life in the name of the creditor is that, when effected, it has no immediate value, and that the creditor has to rely upon the debtor's personal obligation for the premiums. To obviate this it used to be a common practice for the borrower to grant an annuity on his life to the lender sufficient to pay the interest on the loan and the premiums of insurance. The form of deed usually adopted was a bond of redeemable annuity, secured on land

which contained a provision that the annuity might be redeemed, due notice being given, on repayment of a sum equal to the original advance, with a proportion of the annuity up to the date of repayment. In the event of this power not being exercised by the grantor, repayment of the principal was secured by the policy of insurance on his life. The bond of annuity, if properly drawn in the grantor's interest, contained a provision that on redemption of the annuity the policy should also be conveyed to him. The deeds contained no obligation upon the grantor of the annuity to repay the advance, and in this respect the transaction differed from a loan. At the same time, the tendency in Scotland was to regard the grant as a pledge of the annuity in security of the interest and premiums of insurance, and of the policy in security of the principal sum, and not as a sale with a power of repurchase. When this is the true effect of the transaction, it is immaterial whether the right of redemption is or is not expressly reserved in the deeds, or whether the policy is assigned to the lender or taken in his name. The law presumes that in a pledge the pledgor has a right to redeem, and will imply such a stipulation if not expressed (*Marquess of Queensberry*, 1839, 1 D. 1203; *Shand*, 1859, 21 D. 878).

On the other hand, the tendency in England has been to regard the transaction as a sale of the annuity with a power of repurchase, and to hold that the grantor has no right or interest, apart from special stipulation, in a policy upon his life obtained by the purchaser of the annuity in his own name. This was held, although by the terms of the deed of sale the grantor agreed to pay the extra premiums required in the event of his residing abroad (*Knox*, 1870, 5 Ch. 515; *Preston*, 1879, 12 Ch. D. 760, 769). There is, however, it is thought, no difference in the principle of these decisions; they depend on the view taken of the effect of the transactions; and in Scotland as well as in England the grantor of the annuity would be held to have no interest in a policy on his life obtained by the grantee, if the circumstances were such as to show that a sale and not a pledge was contemplated.

Although these forms of security are now practically obsolete, the principles they lay down are still applicable, and have recently been applied in a case where the advance was made upon a *post-obit* bond. Under this form of security, in which a reversion contingent on survivance is mortgaged to the lender, it is usual for the lender to insure his debtor's survivance, so as to provide an indemnity against the event of his never becoming entitled to the reversion. Such a policy is usually taken in the creditor's name, and the reversion is burdened with payment of a fixed sum or reversionary charge calculated as the equivalent of the capital, interest, and premiums on the insurance. If the policy belongs to the debtor, and is merely pledged in security, he is, on the principle already explained, entitled to a reconveyance if the debt is paid during the currency of the policy, or his representatives at his death are entitled to the surplus of the proceeds, if any, after the creditor's claim is satisfied. But if the creditor takes out the policy without any arrangement with the debtor, paying the premiums himself, he is entitled to the proceeds of the policy whether the debt is paid or not, and on the predecease of the debtor is not bound to account for the proceeds to his representatives.

If the transaction is properly a mortgage, then the right to redeem the subject pledged, on payment of the debt, is, as we have seen, an essential condition of the contract, and will be implied if not expressed. By an extension

of the same principle, an express provision in the mortgage deed by which the debtor abandons his right to redeem the security, or by which his right to redeem is limited in point of time, will not be given effect to. In other words, a contract of pledge implies the right to redeem the pledge on payment of the debt and interest, and it is incompetent for parties to agree (except under the Pawnbroking Acts) that the right to redeem shall be forfeited after a given period (*Salt*, [1892] App. Ca. 1). The same principle seems to be recognised in Scotland (Morrison's *Dict.*, *voce* "Irritancy"; *Thomson*, 1844, 6 D. 1106; *Smith*, 1874, 6 R. 794).

The judgment against the company in the case of *Salt* went mainly on the ground that the deeds by which the *post-obit* security was created, provided that the debtor should be liable for premiums of insurance, and that the debt should be deemed discharged by payment under the policy. These conditions were held, by the majority of the Court, to be incompatible with the theory that the policy was taken out solely for behoof of the creditors, and to point to the conclusion that it was held by them as a pledge, and as the property of their debtor. It was pointed out that if the lenders wished to reserve to themselves the exclusive interest in the policy, they ought to effect it without any arrangement with the debtor; neither taking him bound for the premiums, nor entitled to a release from the debt if the policy becomes payable.

If an insurance company advance money to the holder of a policy, they have, apart from any assignment or deposit, a prospective right of retention upon the sum due under the policy, a right which would appear to be available against a claim by an assignee of the policy, acquiring a right subsequently to the advance. If during the currency of the policy the insured becomes bankrupt, the company is entitled to rank on his estate as a secured creditor, in virtue of its prospective right of retention (*Borthwick*, 1864, 2 M. 595).

IX. Life Assurance Companies.

It is not proposed in this article to deal with the formation, general constitution, winding up, or amalgamation of life assurance companies, but to confine the discussion to the relation between assurance companies or societies and their policy-holders. The special Acts dealing with the subjects first mentioned are: The Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61): The Life Assurance Companies Act, 1871 (34 & 35 Vict. c. 58); and The Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), which are properly dealt with in connection with the general statutory enactments in regard to companies (Buckley, *The Companies Acts*, 7th ed., pp. 714 *et seq.*).

In relation to the rights and liabilities of policy-holders, life assurance companies properly fall into three divisions: Proprietary companies, consisting of shareholders only; companies partly mutual, whose members include assurance members as well as shareholders; and lastly, purely mutual societies, consisting solely of assurance members.

Proprietary Companies.—In a proprietary company the policy-holders are simply creditors of the company, but, in general, by the terms of the policy, their claim is limited to the funds of the company. The effect of this provision is to exclude personal liability on the part of the shareholders. The remedy available to the assured is only against the company as a corporate body. He has a right to insist that the company should make its funds available by realising its assets and by calling up any contributions to the funds which the company is entitled by the deed of constitution to require

from its members, but he has no direct right to proceed against the members. It is thus immaterial, in a question with the policy-holders who have accepted policies in these terms, whether the company is limited by shares or by guarantee, or whether its constitution depends merely on a deed of settlement, and the general liability of the shareholders is unlimited (*Lethbridge*, 1872, L. R. 13 Eq. 547; *Accidental Death Ins. Co.*, 1878, 7 Ch. D. 568; *Great Britain Mutual Soc.*, 1880, 16 Ch. D. 246; The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38 (6)).

The position of policy-holders is not affected by their being entitled to participate in profits. Such participation does not imply that they are partners, or incur the responsibility of partners (*English and Irish Church and University Society*, 1863, 1 H. & M. 85; *Cox*, 1860, 8 H. L. Ca. 268; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2). The true test of partnership lies not in the fact that the alleged partner is entitled to a share of profits, but that he has given a mandate or authority to a particular person or set of persons to carry on a business or trade on his behalf. Such an agency implies a right in the partner to a voice in the management of the business carried on, and a claim to have the profits accounted for to him, and his due share allotted. But a participating policy-holder has, as a rule, no right to any part in the management of the company's affairs, and his right to profits is merely a right to take such profits as the directors may assign to him. They are in no proper sense his agents in carrying on the business of insurance any more than the directors of a bank are agents for the depositors, and he has no right to demand an accounting from the company if dissatisfied with his share of the profits.

Companies Partly Mutual.—When, however, the holders of participating policies agree to become members by the terms of their proposals and policies, and are declared by the constitution of the society to be members, there is no room for any presumption of law. They are undoubtedly partners, and under the terms of sec. 23 of the Companies Act of 1862 they are liable to be placed upon the list of contributories (*Winstone's* case, 1879, 12 Ch. D. 239). The position of assurance members is, however, in two respects different from that of shareholders. In the first place, an assurance member may at any time terminate his membership by allowing his policy to drop; and, secondly, he undertakes no liability to contribute to the capital or funds of the company, either in the way of calls or of premiums. The holder of a policy does not, in general, enter into any contract to pay premiums. The payment of premiums is merely a condition which must be fulfilled by the assured before he can claim any benefit under the policy; it is not an obligation which the company can enforce. It therefore follows that, as regards policy-holders and annuitants who are not members, and who have contracted with the company on the footing that the funds are alone to be liable, assurance members incur no liability whatever (*re The Kent Mutual Assurance Society*, 1871, Albert Arbitration, 16 Sol. J. 65; *Lethbridge*, 1872, L. R. 13 Eq. 547). In the second place, assurance members in a company consisting both of shareholders and assurance members cannot be called on to contribute to the general debts of the company along with the shareholders. The assurance members are, as we have seen, not bound to contribute any of the capital, and it follows that their liability, if any, for the debts of the company is a secondary liability, and can only emerge after the shareholders have paid up the calls for which they are liable (*Strachan's* case, 1872, Albert Arbitration, 16 Sol. J. 572; *re Albion Life Assurance Society*, 1880, 16 Ch. D. 83). Thus the only liability which can attach to an assurance member in a company in which there are also

shareholders is that they may be called on as contributors, after the shareholders are exhausted, to make good the claims of outside creditors who have not limited their remedy, by the terms of their contract, to the funds of the society.

Purely Mutual Societies.—A mutual life society which confines its transactions within its own body is not a company within the definition of the Companies Act, 1862, and a winding-up order would not be competent under that Act; but the society could be wound up under the Life Assurance Companies Act, 1870, which contains a definition of the term "company" sufficiently wide to include a mutual company (*Great Britain Life Assurance Society*, 1882, 16 Ch. D. 246, 19 Ch. D. 39, 20 Ch. D. 351).

The *Great Britain Life Assurance Society* consisted of assurance members only, these being defined to be persons who should effect assurances with the society, some of the members holding participating and others non-participating policies. The society was established by deed of settlement in 1844, but it was not registered under the Act of that year or under the Companies Act of 1862. In 1880 the society became insolvent, and applications were in the first instance made for a winding-up order, but afterwards for the approval by the Court of a scheme for the reduction of the amount of the contracts of the society, in terms of sec. 22 of the Life Assurance Companies Act, 1870. The latter course was that ultimately adopted, and a scheme was sanctioned under which the different classes of policy-holders and of annuitants were treated on the same footing. The only interests involved in the case were those of members, and had the company been wound up, all that could have been done was to distribute the funds among the members in proportion to the value of their claims (per Ld. J. James, 16 Ch. D. 255; see also *Smith*, 1880, 15 Ch. D. 247).

The right of a member in a mutual society is thus a right to participate in a fund, and not a right as creditor to have the sum assured to him made good by the other members. A mutual life society thus differs essentially from a mutual marine society, where the members undertake to contribute whatever may be necessary to meet the loss sustained by any one of their number. A mutual marine society has been held to be a company under the Companies Act, 1862, while, as indicated above, a mutual life society does not fall within the definition (*re Padstow Association*, 1882, 20 Ch. D. 137; *Great Britain Life Assurance Society, supra*). Such a society is not an association for the acquisition of gain, and accordingly it has been held that in a mutual life society no part of the premiums received from the members is liable to be charged with income tax as profits or gains made by the society. The surplus of the premiums which are returned to the members under the name of profits are not made in carrying on any trade or business with the public, but are simply the excess of the contributions made by the members over what is necessary to secure the benefits payable out of the common fund. On the other hand, it has been held, as regards the obligation to pay income tax, that a mutual society which does business with the outside public by issuing policies or granting annuities to persons who are not members is in the same position as any other company (*New York Life Insurance Company*, 1889, L. R. 14 App. Ca. 381; *Last*, 1885, L. R. 10 App. Ca. 438).

From the views expressed in the first of these cases (per Ld. Watson, p. 393) it seems to follow that the members of a mutual society are liable to policy-holders and to annuitants who are not members to the same extent as the shareholders in a proprietary company, with this exception,

that they do not undertake to make any contribution in the nature of calls to the funds of the society. This means an exclusion of liability as regards the large class of creditors who hold policies giving them no claim except against the funds. Even as regards such creditors, however, it would follow from their position as partners, that the claims of assurance members upon their policies would be postponed, in the distribution of the funds, to the claims of policy-holders and annuitants who were not members.

Liferent and Fee.—The right to enjoy a subject and its fruits during life without wasting its substance, corresponding to the Roman *usufructus*, is termed the "liferent," the fuller right of unlimited property, the "fee," of a subject. The latter is the proper and legitimate use of the term "fee." But the rights of fee and liferent are commonly spoken of as existing simultaneously in different persons over the same property, the "liferenter" being the person entitled to the use of the subject and its fruits, the "fiar" he whose property is burdened with the life. The right of the latter in this distinction is a limited one, comprising only certain rights over the subject during the subsistence of the liferent, and the reversionary right to its complete enjoyment after the liferent has expired.

Liferents are usually distinguished as legal and conventional. The legal liferents are those of TERCE and COURTESY (*q.v.*). Conventional liferents are of two kinds, either newly-created rights, which are termed liferents by *constitution*, or those created by conveyance of land or other heritable subjects to one in fee, reserving to the granter the liferent use of such subjects—these are termed liferents by *reservation*.

The essence of a liferent is that the subjects should be used *salva rerum substantia*. Only such subjects can therefore properly be liferented as are not consumed by use, the right of the liferenter extending to the fruits of the subjects. Thus the proper subjects for a liferent are only heritable subjects and sums of money, the fruits of the latter being the interest on the capital sum. A liferent, however, is admitted over certain other moveable subjects, especially when given as a supplement to the heritable subject on which they are used, such as furniture in a house or the implements and stabling of a farm (see *infra*).

Constitution of Liferent.—A liferent by reservation is made by a conveyance by one in whom the fee is under reservation of his liferent. If the conveyance is by one who is infeft, the liferent depends upon the granter's original infeftment, and remains a real right, the conveyance of the fee being a limitation upon it. If the conveyance is by one who has merely a personal right, he must make that right a real one in order to enjoy the privileges which are given to a liferenter by reservation. For this right is looked upon as more nearly akin to one of fee than that of the simple liferenter, and certain rights over the subject are allowed to the reserved liferenter which are not open to the latter. A liferent by constitution is made by a conveyance, whether in a marriage settlement, disposition, or other deed, of an estate to one in liferent and to another in fee, or to several in conjunct fee and liferent. It requires infeftment of the liferenter to make this right a real one (*Hardie*, 1864, 2 M. 746, 36 Jur. 338). The liferent right of a conjunct fiar, though a right by constitution, is considered to be more of the nature of a fee than that of the ordinary liferent. The conjunct fiar is accordingly allowed the fuller rights of a liferenter by reservation (Ersk. ii. 9. 41, 42; Stair, ii. 6. 11; Bell, *Prin.* 1040, 1041).

The creation of successive liferents over the same property has been

made illegal in respect of heritable estate by the terms of the Rutherfurd Act, 11 & 12 Vict. c. 36, s. 48, and in respect of moveables by those of the Entail Amendment Act, 1868 (31 & 32 Vict. c. 84, s. 17). The former provides that after 14 August 1848, "it shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a person in life at the date of such grant; and where any land or estate in Scotland shall, by virtue of any deed dated on or after 1 August 1848, be held in liferent by a party of full age born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deeds, or by which the same or the interest of such party under them may be qualified, and such party shall be taken to be the fee-simple proprietor of such estate." The Entail Amendment Act (*supra*) has extended to moveable estate practically the same provisions as the above. "It shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland only in favour of a person alive and of full age at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act . . . be held by a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party." The date of a testamentary or *mortis causa* deed is taken for the purposes of the Act as at the death of the granter, and the dissolution of the marriage as that of a marriage settlement (*ib.* s. 17). (See Bell, *Prin.* 1037–1041, 1707, 1951.)

I. Rights of the Liferenter.

The general rule is that the liferenter has possession of the subject liferented, and takes all its fruits, natural, civil, and industrial, under the limitation that the substance of the property shall not be consumed. He is entitled to take advantage of any increase in value which the property may have acquired between the date of the vesting of the right and the date of his possession (*Campbell*, 1666, Mor. 8241; *Mitchell*, 1733, Mor. 8275; *Malcolm*, 1823, 2 S. 514 (453)), and, conversely, must suffer for any decrease in its value.

An exception to this rule has been made where, before the commencement of a liferent, a third party purchasing the estate so burdened has *bonâ fide* enhanced its value for his own benefit. In such a case the liferenter may either take the annual value of the estate as it stood before the melioration, or possess the whole subject "subject to the annual interest of the melioration" (*Laird*, 1807, Mor. "Liferenter," No. 7; *Hacket*, 1672, Mor. 13412. See Bell, *Prin.* 1042; Rankine on *Landownership*, 3rd ed., pp. 634–685).

With regard to what are the proper fruits of heritable subjects, several questions have arisen between fiar and liferenter. The most important of these are in regard to (1) timber; (2) minerals; (3) rights of superiority.

1. *Timber.*—Growing trees are considered *partes soli*, and as such are not available to the liferenter. He may not cut ripe timber even where it has been planted by himself (*Manswell*, 1683, Mor. 2253, 4 B. S. 138; *E. of Dunfermline*, 1683, Mor. 8244; *Gray*, 1789, Mor. 8250). But exception has been made to this rule in the case of coppice wood, which is cut at regular intervals and allowed to grow again from the root. At one time this exception was only considered to extend, in the case of liferenters by constitution, to wood laid out in "haggs" or divisions for cutting, one division being cut annually, but the law is now settled that the liferenter may cut coppice wood which arrives at maturity during his liferent: he may not, however, anticipate the period of cutting (*Dickson*, 1823, 2 S. 152;

Tait, 1825, 4 S. 247; *Macalister*, 1851, 13 D. 1239). Grown timber is only available to the liferenter for the purposes of up-keep of the estate and repair of buildings, notice being given to the fiar before cutting (*Stanfield*, 1680, Mor. 8244; *E. of Dunfermline, Dickson, Macalister, supra*), unless there be a special provision to the contrary in the liferenter's right (*Dugwall*, 1833, 12 S. 216). Ordinary windfalls go to the liferenter, but extraordinary windfalls are treated as grown timber. With these exceptions, the fiar has the property and administration of the timber. He will not, however, be entitled to cut down timber so as to impair the amenity, shelter, or comfort of the liferenter's dwelling (*Dickson, supra*; *Tait*, 1825, 4 S. 247). Thinning of the woods is included in such administration, and the proceeds belong to the fiar, but the liferenter is entitled to timeous notice of operations on the woods, in order that he may protect his rights (*Duchess of Hamilton*, 1723, Rob. 443; *Tait, supra*. See Ersk. ii. 9. 58; Bell, *Prin.* 1046; Rankine, *supra*, 636; Rankine on *Leases*, 2nd ed., 78).

2. *Minerals.*—Much more are minerals, such as coal, lime, etc., *partes soli*, and generally a liferenter by constitution is entitled to the use of no more than is required for his actual enjoyment of the property (*Lamington*, 1682, Mor. 8240; *Preston*, 1677, Mor. 8242; *Swinton*, 1 Feb. 1814, F. C.; *Dickson*, 1823, 2 S. 152). A liferenter by reservation, or conjunct fiar, where minerals have been worked before the commencement of the liferent, has been found entitled to the profits of such working (*Eiston*, 1831, 9 S. 716). Exceptions to the above rule have been made where in the deed constituting the liferent the testator has been considered to express an intention of conferring a wider right. A bequest of "all" the testator's lands and heritages in a *mortis causa* general disposition and conveyance to one in liferent and another in fee, has been held to entitle the liferenter to the proceeds of a 999 years' mineral lease (*Waddell*, 21 Jan. 1812, F. C.). A conveyance of the liferent of the *universitas* of an estate has been held to carry to the liferenter the income derived from a clayfield (*Guild*, 1872, 10 M. 911), and the rents of a coalfield similarly conveyed, and where there was no immediate danger of exhaustion, have been treated in like manner (*Wardlaw*, 1875, 2 R. 368). But where a proprietor conveyed the *universitas* of an estate, including mineral leases which had only five years to run, to trustees, with a direction to pay the free annual income of the residue of his estate to his widow, and to invest the residue for certain purposes, it was held that the profits of the mineral leases were not annual income, but only part of the residue, the interest on which was to be paid to the widow (*Fergusson*, 1877, 4 R. 532). Somewhat similar circumstances were considered in a recent case, where a majority of judges held that the intention was to treat proceeds of mineral workings as annual income (*Strain*, 1893, 20 R. 1025). A widow to whom was conveyed in liferent "the whole annual produce and rents of the residue and remainder" of her husband's estates, "heritable and moveable," was found to have no title to the profits of workings opened after her husband's death (*Campbell*, 1882, 9 R. 725; affd. 10 R. H. L. 65, 8 App. Ca. 641). A bequest by the husband of the "free annual proceeds of my estate and the minerals therein" to the wife in liferent, was held to give the widow right to carry on workings abandoned as unprofitable during the testator's life (*Baillie's Trs.*, 1891, 19 R. 220. See Ersk. ii. 9. 57; Bell, *Prin.* 1042; Rankine, 638).

3. *Rights of Superiority and Title Deeds.*—Where the liferent is one of the superiority or *dominium directum* of an estate, the liferenter, whether by constitution or by reservation, has a right to the feu-duties and ground-annuals as the civil fruits of the subject. As regards the entry of heirs and singular successors, and the right to casualties, the following differences

exist: The liferenter by reservation, or conjunct fiar, has the right to enter heirs and singular successors (*Clark*, 1596, Mor. 8251; *Crawfordjohn*, 1611, Mor. 8252). This right has been confined by 37 & 38 Vict. c. 94, s. 4 (1), to the privilege of granting charters of novodamus, writs of clare constat and writs of acknowledgment. But the more important right to the casualties of superiority or to a *grassum* under a contract of ground-annual still remains to liferenters by reservation and conjunct fiars. In the case of superiority estates held by liferenters by constitution, these rights go to the fiar (*Ewing*, 1872, 10 M. 678). A liferenter by reservation or conjunct fiar has a right to the custody of the title deeds, a right which the liferenter by reservation has not, under the obligation of making them forthcoming to the other party when necessary (*Dickson*, 1823, 2 S. 152; *Wallace*, 1831, 10 S. 164. See Ersk. ii. 9. 42; Bankt. ii. 6. 6; Bell, *Prin.* 1040, 1048; Rankine, p. 635).

As the liferenter's right is limited to the term of his own life, he cannot grant a lease valid beyond that period, unless with the consent of the fiar, or where special powers in this respect are given (Ersk. ii. 9. 57; Bell, *Prin.* 1057; *Fraser*, 1794, Mor. 8256). A liferenter of superiority by reservation cannot grant a feu to be valid beyond the term of the liferent; and the concurrence of the fiar will not give validity to such a feu-right unless the fiar is infeft, except in so far as the fiar and his heirs are barred *personali exceptione* (*Redfern*, 7 Mar. 1816, F. C.).

II. Liabilities of Liferenter.

(1) *For Taxes, Burdens, etc.*—"Liferenters as they are entitled to the profits, so must they bear the burdens attending the subject liferented" (Ersk. iii. 9. 6), such as public taxes, feu-duties, minister's stipend, etc., annually due from the lands (*Sanford*, 1686, Mor. 13070; *Lady Elsh-sheels*, 1688, *ib.*; *Lumsden*, 1704, Mor. 13072), unless these are specially excepted by the terms of the grant (*Lady Elsh-sheels, supra*). The expense of rebuilding a manse, or repairing a manse and parish church, has been held to be a burden on the fiar and not on the liferenter, as these are not of the nature of annual expenditure, but rather burdens on the capital of the estate (*Minister of Norcham*, 1679, Mor. 8499; *Lady Anstruther*, 1823, 2 S. 306). These rules are subject to exception where there is a different intention expressed by the terms of the deed constituting the liferent (see *Clark*, 1871, 9 M. 435; *Rodgers*, 1875, 2 R. 294; *Kinloch*, 1880, 7 R. 596).

The liferenter is not liable for the debts of the disponer, these being properly a burden on the fee, where the fee is sufficient to discharge them (*Stewart*, 1792, Bell's *Oct. Cas.* 220, per Ld. Braefield). He is liable for the interest on heritable debts due from the lands during the term of his liferent (*Lady Forbes*, 1865, 2 Pat. 84). But if the liferenter is expressly burdened with debts, he will be liable to the extent that he is *lucratus* under the deed (*Waddell*, 1818, 6 Dow, 279, 6 Pat. 374).

(2) *For Up-keep, etc.*—The liferenter is bound to keep the subjects possessed in proper repair (*Cunningham*, 1733, Mor. 8275; *Borthwick*, 1696, Mor. 8245), and for this purpose he is entitled to use minerals, as lime, etc., or timber on the estate. He will only be answerable for deterioration arising from his own neglect. In proving neglect by the liferenter the condition of the subjects at the beginning of the liferent must be ascertained, not that during the prescriptive period (see *Cunningham, supra*). Should the subjects be destroyed in whole or in part by *vis major*, such as fire or flood, neither liferenter nor fiar is bound to replace or repair them. But it would appear that either is entitled to do so, with a claim of relief against the

other according to their respective interests. If the liferenter rebuild or repair, he will be entitled to compensation from the fiar taking the benefit to the extent that the latter is *lucratus*, or the fee may be burdened with the principal sum, but not with the interest, during the liferent (*Haliday*, 1706, Mor. 13419; *Scot*, 1755, Mor. 8278; cf. *Nelson*, 1874, 1 R. 1093, per Ld. Pres. Inglis, at p. 1099). Should the fiar rebuild or repair, he has the right to charge the interest on the cost against the liferenter who takes the benefit (Bell, *Prin.* 1060; Rankine, *supra*, pp. 650, 651).

A liferenter's improvements are presumed to be made for his own benefit. But this presumption may be rebutted by circumstances (*Morrisons*, 1886, 13 R. 1156).

The remedy available to the fiar for enforcing the observance of these rules by the liferenter is a demand for caution *cautio usufructuaria*. Provisions for enforcing such caution were inserted in the Acts of 1491, c. 25; 1535, c. 15; and 1549, c. 226, but by modern decisions caution will not be required unless on reasonable cause shown that there is danger of the liferenter wasting or neglecting the subjects (*Ralston*, 1803, Hume, 293). Should the subjects liferented suffer damage, the fiar for the time is not entitled to recompense, as such damage is due to the holder of the fee at the termination of the liferent.

The Act of 1491 above cited dealt in the main with ward-holding, and a provision requiring caution of conjunct fiars and liferenters was inserted. A further provision of the same Act, that an heir with no other means of sustenance must be allowed aliment out of the estate, was extended by a series of decisions to the case of fiar and liferenter (Mor. *sub voce* "Aliment," 381–409; *Macfarlane*, 1825, 4 S. 158). But the doctrine has been discredited by Sir Geo. Mackenzie in observations on the Statute (obs. 101), and the opinions of the House of Lords in the case of *Maule* (1825, 1 W. & S. 266), and is probably no longer sound law (*Macfarlane*, 1825, 4 S. 158. See Ersk. ii. 9. 59, 60; Bell, *Prin.* 1062–4; Rankine, 649–653).

III. Termination of Liferent, and Questions arising at Termination.

As a liferent is entirely personal to the liferenter, it follows that the right itself cannot be transferred to another. That is to say, that though the liferent may be assigned, this is in fact only an assignation to the rents of the subjects liferented during the life of the liferenter. A liferent can only end (1) by the death of the liferenter, (2) by consolidation of the estates of fee and liferent, or (3) by renunciation by the liferenter (see Bell, *Prin.* 1066, and cases there; see also *Anandale*, 1847, 9 D. 1261; *Martin*, 1861, 23 D. 705). Questions have arisen as to the relative rights of the liferenters, executors, and of the fiar to the fruits of the subjects at the termination of the liferent. The main rule of decision has been stated thus: that that part of the rents to which liferenter had proper right before his death falls to his executors; the residue, as never having been *in bonis* of the deceased, must be accounted part of the lands, and so devolves upon the fiar (Ersk. ii. 9. 64). Thus if the natural spontaneous fruits of the soil, such as natural grass or woods, where the latter are under the liferenter's control (see *supra*), go to the liferenter as far as they have been separated from the soil and passed *in bonis* to him at the date of his death. Should his representatives continue to acquire such fruits, they will be liable to a claim from the fiar. Industrial fruits of the soil, such as grain crops, etc., follow the rule *messes sementem sequiter*, and such fruits, even though not separated, will remain the property of the fiar, his representatives being allowed to win them without liability to the fiar for rent (Ersk. ii. 9. 65; *Guthrie*, 1671,

Mor. 15891; *Cockburn*, 1748, Mor. 15911; Elch. "Liferenter," 5; *Tweedale*, 19 Nov. 1816, F. C.).

The right to all other civil and industrial fruits may now be said to vest *de die in diem*. At common law a difference exists between the fruits of mines, fishings, saltworks, and the like, whose profits are the result of daily labour, and the rents derived from lands, mills, and houses. The former, with the rents of premises let for industrial enterprise, have always been held to vest *de die in diem*. As to the former, by the common law the liferenter is only entitled to the rents legally due at the terms which he has survived. Thus if he survive the term of Whitsunday, his executors are entitled to the rents for the first half-year from Martinmas to Whitsunday legally due at that term, but he acquires no right for the rents for the second half-year unless he survives the term of Martinmas, when they fall due. No exception is made to this rule where the rents are conventionally postponed, the rights to these vesting at the legal terms, but "forehand" rents are held to vest at the conventional terms (Ersk. ii. 9. 64–66; Bell, *Prin.* 1047; Ersk. *supra*, 643, and cases there cited). This rule of the common law has been substantially altered by the provisions of the Apportionment Acts (*q.v.*) The first Act, 4 & 5 Will. IV. c. 22, passed in the year 1834, was an English Act and its phraseology entirely English; its provisions were held applicable to Scotland. It gave to the executors of persons having a limited interest in reserved rents or rent charges the right to such rents up to the date of the predecessor's death. This provision only extended to rents payable "under any instrument in writing that shall be executed" after its date (s. 2).

The wider Act of 1870, 33 & 34 Vict. c. 35, has practically superseded the common-law rule and the above-mentioned Statute. Its main provisions, as far as touching the subject in hand, are as follows: It provides that after the passing of the Act, all rents (including all periodical payments or renderings in lieu of or of the nature of rent), annuities, dividends, and other periodical payments in the nature of income, whether reserved or made payable under an instrument or otherwise, shall, like the interest on money lent, be considered as accruing from day to day, and be apportionable in time accordingly (s. 2). Such apportioned part is payable or recoverable at the date when the entire payment of which it is a portion became due or payable, or would have done so but for the determination of the interest (s. 3). And the person entitled to the apportioned part under this section is to have the same rights and remedies for its recovery as he would have had for the recovery of the whole when payable, if entitled thereto (*ib.*). In the case of rents reserved out of or charged on lands or hereditaments of any tenure, these remedies are available not against those primarily liable to pay such rents, but against the heir or other person who, but for the apportionment, would have been entitled to draw the "entire continuing rent." Such heir or other person being entitled to draw the rents in the first instance. Sec. 7 excludes cases where it is expressly stipulated that on apportionment shall take place (33 & 34 Vict. c. 35).

It will be seen that the effect of this Statute is to alter the law entirely as regards the "broken term." It gives the liferenter right to a part of the rents of that term corresponding to the proportion of it which he has survived. The common law remains unchanged as regards the rents due at the full terms survived.

Liferent in Moveables.—The proper moveable subjects for a liferent are sums of money, where the fruits enjoyed by the liferenter are the interests

on capital sums. The liferenter has, further, a certain power of dealing with the capital itself, to uplift and reinvest, on due security being given to the fiar (*Kinross*, 1661, Mor. 8262, 2 *Ill.* 141; *Salton*, 1697, 4 Bro. Supp. 377; *Fleming*, 1661, Mor. 8256; *Jordan*, 1680, Mor. 8264; *Malcolm*, 1731, Mor. 8266). Certain questions have arisen as to the liferenter's rights to extraordinary payments, such as a bonus; and a limited fiar has been held entitled to receive such payment, a liferenter only entitled to the interest upon the sum during life (see *Rollo*, 1 Dec. 1801, F. C.; Mor. "Liferenter," App. 1; rev. 1803, 4 Pat. 521; *Cumming*, 26 Feb. 1824, 2 S. 743; see *sub voce* "Bonus"). A liferenter whose name appeared on the register of a joint-stock company along with that of the fiar, was held to be a member of the company, and as such liable *in solidum* for calls (*Wishart & Dalziel*, 1879, 6 R. 823).

The right to a proportion of dividends, etc., at the termination of a life interest is now secured by the Apportionment Acts (see *supra*).

In a liferent of furniture the liferenter is not responsible for deterioration by ordinary tear and wear, and will not have to replace articles which are worn out (see *sub voce* FURNITURE).

In the case of the implements and stocking of a farm given in liferent, the liferentrix was held bound to leave at the end of her occupation implements, etc., of substantially same description, value, and extent as at its commencement (*Rodger*, 1867, 5 M. 1078, 1081).

A general clause in a marriage settlement conveying acquirenda to trustees will not include a liferent interest in moveables (*Boyd*, 1871, 4 R. 1084; *Young*, 1885, 12 R. 960; *Neilson*, 1897, 24 S. L. R. 865).

[See generally, Ersk. *Inst.* ii. 9. 40–68; Stair, ii. tit. 3, s. 74; tit. 6; iii. tit. 1. 16; Bell, *Com.* 152; Bankt. i. 657; Bell, *Prin.* 1037–1070, 1951; Rankine on *Landownership*, 3rd ed., 629–654; Rankine on *Leases*, 2nd ed., 76–79; Bell on *Leases*, i. 186; Hunter on *Landlord and Tenant*, i. 124–129; Craigie, *Manual of Conveyancing, Moveable Rights*, 2nd ed., p. 435.]

In considering grants of liferent and fee in testamentary deeds, marriage contracts, etc., a long series of decided cases have laid down certain rules of interpretation, according to the relationship of the grantee's *inter se* or to the granters of such deeds.

I. In Destinations to Strangers.

The bequest of an estate simply, in the absence of any limiting words, will give a right of fee. Where the conveyance is to two or more, "jointly," or in "conjunct fee," gives each a *pro indiviso* share, the property not suffering division. A destination in conjunct fee and liferent to A. and B., or to A. and B. and their heirs, gives each a *pro indiviso* right to the fee of his share, transmitting such right to his heirs, but the survivor will enjoy the liferent of the predeceaser's share. If the destination is to parties jointly and to the survivor, or to the survivor and his heirs, then the fee of the whole on the death of the one passes to the survivor; the expression "to A. and B. and the survivor and *their* heirs" has been held to have the same effect, "their heirs" in such a destination being equivalent to "the heirs of the survivor" (*Bisset*, Mor. "Deathbed," App. 2). Where parties are given a joint liferent and the fee destined to one and his heirs, the latter has the fee burdened with the other's *pro indiviso* right to the liferent of one-half. A conditional right to the fee may be given by a destination such as to "A. and B. in conjunct fee and liferent, and to B., should he survive, in fee." Here B., on survival, will become fiar of the whole. Should he not survive, the destination will be treated without regard to the latter clause in the destination, according to the rules above stated. (See CONJUNCT RIGHTS.)

II. Destinations to Parent and Child.

The leading rule in destinations of this class is that a destination to the parent or parents in liferent and to the children unborn or unnamed in fee will give the fee, and not a mere liferent, to the parent (*Frog's Crs.*, 1735, Mor. 4262; *Lindsay*, 1667, Mor. "Fiar," App. 2; *Williamson*, 1828, 6 S. 1035; *M'Clymont's Exrs.*, 1895, 22 R. 411). The origin of this rule appears to be in the aversion of Scots lawyers to allow the fee of a property to be *in pendenti* (*Newlands*, *infra*; *Frog*, *supra*; *Ferguson's Trs.*, 1862, 22 D. 1442, per Ld. Pres. Wood, at p. 1456); but the rule which, in these circumstances, gives the parent a fee even though only a liferent is expressed, has now been extended to all cases, whether of heritable property or moveables (*Mein*, *infra*; M'Laren, *Wills*, 3rd ed., pp. 609, 610). It applies whether or not all the children are alive when the provision comes into operation (*Porterfield*, 1719, Mor. 4277; *M'Donald*, 1831, 9 S. 269; *Ferguson's Trs.*, 1860, *supra*), and whether the destination be to the whole children or only to one, as the heir of the marriage (*Dewar*, 1825, 1 W. & S. 161). But this rule is excluded where, though the destination be to children *nascituri*, or unnamed, the granter has otherwise given a clear indication that the parent's right is to be one of liferent only. Such a limitation is most generally imposed by the addition of the word "allennerly," or "only," to the liferent grant (*Newlands*, 1794, Mor. 4289 (and cases in Mor.); *Harrey*, 26 May 1815, F. C.; *Miller*, 1833, 12 S. 31).

In such cases the right of each child to the fee vests at birth, the parent being considered the "fiduciary fiar" or trustee for the children to be born (*Dundas*, 1823, 2 S. 145; *Douglas*, 1870, 8 M. 374). Other indications of the intention to limit the parent's right in such circumstances to one of bare liferent have been found in an exclusion of the parent's creditors (*Douglas*, 1811, Hume, 173), a gift of liferent to the parent and "property" (*Scott*, 1826, 4 S. 454; affd. 2 W. & S. 550), or principal sum (*Dawson*, 1877, 4 R. 597), to the children, in a direction to the father to apportion the fee amongst his children (*Rait*, 1892, 19 R. 687), and in a liferent declared to be "alimentary," coupled with a power of division amongst the children, or other limitation (*Gerran*, 1781, Mor. 4402; *Kennedy*, 1826, 3 S. 554). But a liferent to the parent "during all the days of his life" was held to have no such restrictive force (*Lindsay*, 1807, Mor. "Fiar," App. 1). The rule only applies in the case of a parent and his own children. Thus the destination to A. in liferent and to the children of B. in fee will carry only a life-interest to A. (*Spence*, 1829, 3 W. & S. 380; *Ramsay*, 1854, 16 D. 764).

Again, a limitation of the parent's right to one of liferent only is often made by the interposition of a trust. Where a "continuing trust" has been instituted, as where the trustees are directed to "hold" the property and administer it for the benefit of various parties in fee and liferent, the right will be effectually limited (*Mein*, 1827, 5 S. 779; affd. 4 W. & S. 22; *Ewan*, 1828, 6 S. 1125; *Ross*, 1847, 9 D. 1327; *Hutchison*, 1853, 15 D. 570; *Mackie*, 1884, 11 R. H. L. 10). But where the direction is simply to "pay over" "or convey," or the trustees are appointed merely for the purpose of transferring the property, the rules of direct conveyance to parent and child will be applied, and the grant interpreted accordingly (*Robertson*, 1806, Mor. "Fiar Absolute," App. 2; *Hutton*, 1847, 9 D. 639; *Ferguson's Trs.*, 1862, 22 D. 1442; *Gibson's Trs.*, 1877, 4 R. 1038; *Beveridges*, 1878, 5 R. 1116).

Where the destination is to the parent in liferent and to the child or children *nominatim* in fee, the right of the parent is considered one of liferent only, whether it flow from the parent himself or from a stranger

(*M'Intosh*, 28 Jan. 1812, F. C.). But where a parent has conveyed the fee to a child under reservation of his own liferent, with an absolute power of disposal in the parent, the right of the latter will be held to be one of fee, and that even where the liferent is limited by the word "allennerly" (*Cumming*, 1756, Mor. 4268, 5 S. 843; *Baillie*, 23 Feb. 1809, F. C.; *Dickson*, 1780, Mor. 4269).

The rule here stated applies to cases either where the child or children are all called *nominatim*, or where the fee is given to one or more *nominatim*, and others *nascituri*. In the latter case ordinarily the fee vests at once in the child named, with a fiduciary fee in him for those to be born, the latter taking as institutes, not as substitutes (*Dykes*, 3 June 1813, F. C.). But where the provisions of the deed, by a survivor clause or similar provision, postpone the identification of the fiars, the fiduciary fee will be in the parent, not in the children named (see *M'Gowan*, 1862, 1 M. 141; *M'Gowan*, 1864, 2 M. 493; *Snell*, 1872, 10 M. 745).

In conveyances by the father to the children, the parent is considered to reserve the liferent to himself, even where this is not definitely stated, unless there is a clear intention to the contrary (*Wilson*, 1825, 3 S. 430).

In several recent cases questions of the effect of a conveyance to a daughter in liferent only and to her children *nascituri* in fee have been discussed, and the Court has read from the wording of the grant an intention that the fee shall vest in the daughter, subject to defeasance in the case of children being born (*Lindsay*, 1880, 8 R. 281; *Dalgleish*, 1889, 16 R. 559; *Logan*, 1890, 17 R. 425; see VESTING, subject to defeasance).

Where only the liferent of a subject has been disposed of in a conveyance by a father to his daughters *nominatim*, and trustees appointed to see the provisions of the settlement carried into effect, no mention being made of the fee *per expressum*, the daughters were held liferenters only, each of a half of the estate, the fee of each half falling on the liferenter's death into the testator's intestate succession (*Spink's Exrs.*, 1894, 21 R. 551).

A somewhat similar case, though not between parent and child, may here be mentioned, where a gift of the liferent of a property by a brother to his two sisters, with no mention of the fee *per expressum*, but with a power to the trustees to purchase an annuity with the capital sum, was held, owing to this power, to give the fee to the two sisters (*Lawson's Trs.*, 1890, 17 R. 1167).

III. DESTINATIONS TO HUSBAND AND WIFE.

In a conjunct destination to husband and wife the most general rule gives the fee, in absence of any other indication, to the husband, *propter eminentiam masculini sexus*. So in a destination merely to "husband and wife" or to them in conjunct fee, or conjunct fee and liferent, the husband will be held fiar; the wife will have a right to the liferent should she survive (see Stair, ii. 6. 10; Ersk. iii. 8. 46; Bankt. 3516; Bell, *Com.* i. 56). This presumption is overridden by other deciding considerations. Such considerations are:

(1) *The Spouse from whom or from whose Friends the Property came.*— The fee of the property will be considered to remain with the spouse from whom the subjects originally came. Thus if the property came from the wife or from her side of the house, and is destined to her and her husband in a conjunct destination, the wife will be held to be fiar, the husband's right being limited to one of liferent (*Blair*, 5 B. S. 335; *Myles*, 1857, 19 D. 408; *Smith Cunningham*, 1869, 7 M. 689; *Brough*, 1887, 14 R. 858). But this consideration will not have effect where the other spouse has obtained conveyance of the property for some onerous consideration. Thus if the husband has bought the property, he will be fiar (*Fisher*, 1844, 7 D.

129). Again, if the property forms part of the wife's tocher, the fee will be in the husband (*Bruce Henderson*, 1790, Mor. 4215; *Graham*, 1639, Mor. 4226; *Gairns*, 1671, Mor. 4230), unless the contrary intention is clearly expressed (*Cameron, infra*).

(2) *The Spouse whose Heirs are favoured.*—Where the property has come from one other than the spouses, the fact that the heirs of one or other are more favoured in the destination is a circumstance that has weight in considering where the fee falls; and for this purpose the heirs called directly after the heirs of the marriage are taken, not, as formerly, those last in the destination (*Ramsay*, 1612, Mor. 4226; *Earnslaw*, 1705, Mor. 4223; affd. Rob. 99; *Edgar*, 1727, Mor. 4202; *Murray*, 1739, 1 Pat. 251; *Myles, supra*; *Cameron*, 15 S. 1205; *Smith Cunningham, supra*).

(3) *Fee where Power of disposal.*—Where either spouse has an *absolute* power of disposal, his or her right will be one of fee, and a conjunct liferent coupled with such a power is treated as a right of fee (*Dunfermline*, 1676, Mor. 4244, Bro. Supp. 468; *Fead*, 1709, Mor. 4240; *Ferguson's Trs.*, 10 M. 54). In considering this rule it is important to distinguish between an absolute power of disposal and a mere faculty. The power must be absolute, and the party to whom it is granted *sui juris* (*Boustead*, 1879, 7 R. 139; *Pursell*, 3 M. H. L. 59, and cases cited Bell, *Prin.* s. 1714).

Where a conveyance has been made to spouses in conjunct fee and liferent, it will depend on the circumstances of each case whether the right in the spouses is one of fee or of liferent. Where it is the intention that only a liferent shall pass, as where the right is declared to be for liferent use "only," or "allennerly," this intention will be given effect to (*Pringle*, 1714, Mor. 4261; *Watherstone*, 1801, Mor. 4297; *Rollo*, 1832, 1 S. 132; *M'Gowan*, 1862, 2 M. 943; *Bryson*, 1893, 20 R. 986). As a rule, where the property is given in a conjunct destination for the liferent allennerly of one parent, the other will be presumed to be fiar (*Gordon*, 23 Feb. 1815, F. C.; *Martin*, 1864, 3 M. 326). But a destination by a wife of her property to the spouses in liferent only and to the children in fee will not divest the wife of the fee where there are no children of the marriage (*Reid*, 1827, 6 S. 198). A conveyance by one spouse to the other in liferent and to the children in fee leaves the granter undivested (*Turnbulls*, 1822, 2 S. 1; *Findlay*, 1849, 12 D. 325).

A destination in "conjunct liferent" is interpreted to give a right of fee where otherwise the fee would be *in pendenti*, as where it is destined to children *nascituri*, or to the survivor and their heirs (*Thomsons*, 1681, Mor. 4258; *Sivright*, 1824, 2 S. 643; *M'Gregor*, 1831, 9 S. 675; affd. 1838, 1 S. & M'L. 441). A destination in conjunct fee and liferent will carry the fee to the parent even where the further destination is to a son *nominatim* in fee (*Fisher*, 1844, 7 D. 129).

Destinations to Spouses and their Heirs.—Where a destination is to spouses in conjunct fee, or in conjunct fee and liferent, and to the survivor and the heirs of the survivor, then the fee will be in the survivor, his other heirs having merely a *spes successionis* (*Boyd*, 1749, Mor. 4205, 5 Bro. Supp. 777). A conjunct destination to spouses "and to the survivor and their heirs" is held to have the same effect, the expression "their heirs" being held equivalent to the "heirs of the survivor" (*Fergusson*, 1739, Mor. 4202; *Riddells*, 1749, Mor. 4203; *Boyd*, 1749, Mor. 4205; *Burrows*, 1842, 4 D. 1484).

But a destination to spouses "in conjunct fee," or "in conjunct fee and liferent, and the survivor and to the heirs of the marriage in fee," will not give a fee to the survivor where it was not already in that spouse during the marriage (*Neilson*, 1732, 1 Pat. 56; *Mackellar*, 1840, 3 D. 172,

Ross' *L. C.* 741; *Madden*, 1842, 4 D. 749), and the same rule holds where the destination is to a child *nominatim* (*Fisher, supra*), the survivor, if not liar during the marriage, taking the liferent only.

In conjunct destinations to spouses the husband will be held the liferenter, even where the fee is in the wife (*Thom*, 1852, 14 D. 862).

See CONJUNCT RIGHTS.

In considering the nature of a liferenter's interest under a trust settlement or marriage contract, some modification must be understood of the rules as to a liferenter's powers, etc., laid down above. Where the directions to the trustees do not amount to a direction to convey the subjects in liferent, the beneficiary's right is rather a "life-interest," and he must allow the administration of the subjects to remain with the truster, he himself being entitled only to receive their annual income (see *Kerr's Trustees*, 1868, 6 M. 627).

[See generally, Stair, ii. 3. 41, ii. 6. 10; Ersk. iii. 8. 35, 36; Bell, *Com.* i. 54; Bankt. i. 575, ii. 337; Bell, *Prin.* 1709 *et seq.*, 1953 *et seq.*; Fraser, *H. & W.* 1427–55; M'Laren on *Wills*, 606–22, 628–30; Craigie, *Herit. Rights*, 2nd ed., 172 *et seq.*] See also *sub voce* CONJUNCT RIGHTS; VESTING.

Liferent Escheat.—See ESCHEAT.

Light, Servitude of.—Our law, following the Roman 15. 17. *D.* (8. 2), recognises the servitude *non officiendi luminibus vel prospectui*, which limits the absolute right of the owner of the servient tenement by restraining him from using his property in any way which will obstruct the light, or view, of the dominant tenement (Stair, ii. 7. 9; Ersk. ii. 9. 10; Bell, *Prin.* 1005, 1006; Rankine, *Landownership*, 401 *et seq.*). The servitudes of light and prospect are not necessarily combined, and a servitude of light does not imply one of prospect (*Ogilvie*, 1678, Mor. 14534). In this case it was held that even in the country an ell's distance was sufficient to leave clear for light. The owner of the dominant tenement is entitled to object to any operations by the owner of the servient which appreciably and permanently interfere with his light, but not if the interference is slight and temporary (*M'Neill*, 1870, 8 M. 520; *Russell*, 1882, 9 R. 660, per Ld. Shand). Instead of being bound to afford light, or prospect, the owner of the servient tenement is sometimes restrained from obtaining light by striking out windows, or a particular sort of window, which may interfere with the privacy or amenity of the dominant tenement (Stair, Ersk., etc., *ut supra*; *Craig*, 1861, 24 D. 20).

This servitude, being negative, can be constituted only by grant. The deed must clearly indicate an intention to create a permanent right, but need not be formal, or enter the record (*Cowan*, 1872, 10 M. 735; *Baird*, 1829, 7 S. 766; rev. 6 W. & S. 127; 1836, 14 S. 528; *Boswall*, 1848, 10 D. 888; affd. 6 Bell's App. 427). For circumstances in which a servitude of prospect was held not to have been created, see *Blackwood* (1825, 4 S. 26). Express permission given to an adjoining proprietor to strike out windows seems to confer on him a servitude of light (*Forbes*, 1724, Mor. 14505), but not mere acquiescence, though he have enjoyed the privilege for a hundred years (*Dundas*, 1886, 13 R. 759), or approval of a plan showing windows (*King*, 1896, 24 R. 81); and this is the case even when acquiescence has been expressed in writing (*Morris*, 1830, 8 S. 564). Where lands, including the *solum* of a lane from which adjoining build-

ings received light, were feued, under reservation to the adjoining feuars "of their right of access to the lane, and the whole rights and privileges which they at present possess in connection with the subjects disponed," a servitude of light was held to have been created (*Commissioners of Argyll*, 1885, 12 R. 1255). In *Heron* (1880, 8 R. 155) a servitude of light might seem to have been constituted by implication, but the case was decided on a principle of the law of tenement (*Dundas, supra*).

A servitude of light may be combined with one *non ædificandi* (*Cleland*, 1839, Mor. 14506); but specific restrictions on building, though stated to be for the perservation of light, do not constitute a servitude of light in the proper sense of that term. Where there is a servitude of light the servient proprietor may build as he pleases, provided he does not interfere with the light of the dominant tenement. Where there is a "restriction on building for the preservation of light" he may, and may only, build subject to that restriction, whether he interferes with his neighbour's light or not (*Greenhill*, 1825, 4 S. 160; *Malloch*, 1872, 10 M. 774; *Craig, supra*; *Taylor's Trustees*, 1896, 23 R. 995). When not specially restrained by servitude, or otherwise, a proprietor may so use his property as to completely exclude the light from an adjoining tenement (*Glassford*, 1808, Mor. App. "Property," No. 7; *Simson*, 1649, 1 Bro. Supp. 396; *King, ut supra*). There is in Scotland no exception in favour of "ancient lights." In England they are protected both by common law and statute from the operation of this rule (Goddard, *Law of Easements*, 458; 2 & 3 Will. IV. c. 71, s. 3). This servitude may be extinguished in the same way as other negative servitudes (Rankine, *Landownership*, 385 *et seq.*). Abandonment may be inferred from acquiescence by the dominant proprietor in operations which contravene the servitude (*Muirhead*, 1864, 2 D. 420).

See SERVITUDES (NEGATIVE); BUILDING RESTRICTIONS.

Limitation.—See PRESCRIPTION.

Limited Liability.—See JOINT STOCK COMPANIES.

Lining, Brieve of.—See BRIEVE; DEAN OF GUILD.

Liquidator.—See JOINT STOCK COMPANIES.

Lis alibi pendens.—"There is always an equitable power and duty of control in each tribunal to see that there is not, on the whole, an improper or oppressive accumulation of litigation or diligence" (per Ld. Neaves in *Cochrane*, 1857, 20 D. 178). Accordingly, if the question raised in an action is already at issue in a prior suit depending before another Court of competent jurisdiction, the second action may be sisted or dismissed on the plea of *lis alibi pendens*. The plea must be stated *in limine*, and may be waived by implication, *e.g.* by minute prorogating the jurisdiction (*M'Kinlay*, 1850, 12 S. 926). To found the plea, the earlier action must be regular, and must truly raise the same questions as those litigated in the second action (*Mays. of Kilrenny*, 1828, 6 S. 624; *Butchard*, 1828, 7 S. 203). Thus a supplementary summons, making new claims in addition to those

raised in a prior action, does not ground the plea (*Roy*, 1868, 6 M. 422). A multiplepoinding for the distribution of a trust fund and exoneration of the trustee was held not to entitle him to object, on the ground of *lis alibi*, to an ordinary petitory action at the instance of a legatee, directed against him as trustee and also as an individual (*M'Kinlay, supra*). But a creditor who raises an ordinary action upon a bill cannot at the same time proceed by summary diligence upon it (*Denoran*, 1845, 7 D. 378; but see *Kellie*, 1827, 6 S. 258). The plea does not apply to counter declarators, on the ground that the defender of the first action is not bound to wait the pleasure of the pursuer in proceeding with it (*Howden*, 1864, 2 M. 637; *Wishart*, 1897, 5 S. L. T. 115). Where two cases raising precisely the same question were called before two Lords Ordinary on the same day, the one first served was held to have the preference, and the other was dismissed on the plea of *lis alibi* (*Lowe's Trs.*, 1893, 1 S. L. T. 25). The *lis alibi* must be between the same parties, or parties representing the same interest. A supplementary summons for the purpose of calling new defenders does not raise the plea (*Thomson's Trs.*, 1863, 2 M. 114).

To found the plea, the prior suit must be pending. An action begins to depend as soon as the summons is executed, although not called (*Aitken*, 1863, 1 M. 1038; *Kennedy*, 1876, 3 R. 813), and it continues to depend until the final decree for taxed expenses is pronounced (*Allan*, 1894, 21 R. 866). It does not cease to depend because it has fallen asleep (*Denoran, supra*). To obviate the plea, the prior action should be abandoned before the second action is brought, or, at all events, before the plea falls to be disposed of (*M'Aulay*, 1875, 1 R. 307; but see *Porteous*, 1891, 27 S. L. R. 21). Abandonment should be formal (see ABANDONING AN ACTION), but it is sufficient that it is intimated in the summons (*Laidlaw*, 1834, 12 S. 538) or condescendence (*M'Aulay, supra*) of the second action, and even a letter intimating abandonment has been held sufficient (*Gracie*, 1846, 19 Sc. Jur. 60).

The *lis alibi* must be in a competent Court, *e.g.* the Sheriff Court (*Mags. of Arbroath*, 1883, 10 R. 767; *Nivison*, 1883, 11 R. 182). When the earlier action is in an inferior Court, the plea will not be obviated by bringing it to the Court of Session on an appeal *ob contingentiam* (*Greig*, 1835, 13 S. 635). The plea will not exclude an action when the *lis alibi* is in a foreign Court (*Innerarity & Co.*, 1840, 2 D. 813). England and Ireland were formerly regarded as foreign countries for this purpose (*Ranken*, 1840, 2 D. 717); but it is thought that since the Judgments Extension Acts the dependence of a suit in any Court of the United Kingdom will exclude action in Scotland upon the same grounds.

[Mackay, *Manual*, 225; Shand, *Pract.* i. 200; Ersk. iv. 1. 64, note; More, *Stair*, Note A, p. 11.]

Literal Contract.—See OBLIGATIONS IN ROMAN LAW; EXCEPTIO NON NUMERATÆ PECUNIÆ.

Litigiosity has been defined as an implied prohibition of alienation to the disappointment of an action or of diligence, the direct object of which is to attain the possession or acquire the property of a particular subject (2 Bell, *Com.* 144). The effect of it is that when such action or diligence has been begun, and the necessary steps are taken to ensure publication, a purchaser is compelled to take the estate as it stands in the person of the seller, and is bound by the decree to be pronounced in the action, or subject

to the diligence then in dependence. The defender or debtor cannot by any alienation, after litigiosity has commenced, defeat the action or diligence which has been instituted against him, although litigiosity is not always necessary to bring about the same result (*Marshall*, 1895, 22 R. 954, 23 R. H. L. 55). The doctrine is based upon the maxim *Pendente lite nihil innovandum*. Litigiosity in real actions for recovering the property or possession of lands did not require, according to our older practice, any registration in order to constitute it effectually. It arose as soon as the action or diligence had proceeded "so far as to be open to public observation" (2 Bell, *Com.* 144). The point of time at which the lands became litigious was not precisely defined; the mere citation of the debtor was not in itself sufficient (*Morrison*, 1787, Mor. 8335); but it was generally assumed that it arose as soon as the action was called in Court. It is now, however, provided by statute (Titles to Land Consolidation (Scotland) Act, 1868, s. 159) that it shall be competent to register in the General Register of Inhibitions a notice of any signeted summons of reduction of any conveyance or deed of or relating to lands, and in the Register of Adjudications a notice of any signeted summons of adjudication, or of constitution and adjudication combined, for debt, or in security, or in implement, in the form of Sched. RR of the Statute; and it is declared that no summons of reduction, constitution, adjudication, or constitution and adjudication combined, shall have any effect in rendering litigious the lands to which such summons relates, except from and after the date of the registration of the notice. In the same way lands may be rendered litigious, in cases where inhibition is competent, by registering a notice of inhibition, whether contained in a summons before the Court of Session or in separate letters, in the General Register of Inhibitions, provided the inhibition and execution are duly registered in the same register not later than twenty-one days from the date of the registration of the notice (s. 155).

Litigiosity, even when completed, strikes only against voluntary deeds, and does not affect such as are granted in fulfilment of previous obligations. Where there is undue delay in prosecuting the action or diligence, the *nexus* created by litigiosity may be destroyed.

Litigiosity used formerly to arise after the institution of a process of ranking and sale; but as that process has been superseded by the Bankruptcy Statutes, it is unnecessary to consider its effects (see 2 Bell, *Com.* 146).

For an exposition of the old law, see Stair, iii. 1. 18; Bankt. iii. 41; Ersk. ii. 11. 7; ii. 12. 16, 41, 65; iii. 6. 11; 2 Bell, *Com.* 144, 185; Shand, *Pract.* 276, 604, 692; Kames, *Eluc.* 121, *Equity* 307, 395.

See Adjudication; Bankruptcy; Inhibition; Search of Incumbrances.

Litis-contestation, in Roman law, denoted the point of time in the development of an action, at which the issue to be tried was definitely determined. The name *litis contestatio* is due to the practice, under the ancient system of *legis actiones*, for both parties, at the close of the preliminary formal proceedings, to address a solemn appeal to witnesses (*contestari*) to take note that the preliminary formalities had been complied with, so that, if any dispute subsequently arose as to their valid performance, evidence might be forthcoming (cp. *Ulpian Reg.* 20. 9; *Dig.* 28. 1. 20). Under the formulary system the term was retained to mark the point at which an action passed from *prator* to *judex*. The proceedings *in jure* during this period ended in the drawing up of a *formula*, and the delivery of this *formula* to the *judex* constituted the moment of *litis contestatio* (Gaius, iii. 180; iv. 114). During the latest period of the law, when the

prætor or other judicial functionary no longer delegated the cause to a *judex* but heard and determined it himself, *litis contestatio* denoted the summary statement of his case before the judge by the pursuer, and the similarly summary statement of his defence by the defender. "*Litis contestatio* is the moment at which the judge begins to hear the narrative of the cause of action" (*Cod.* 3. 9. 1).

Certain important effects followed on *litis contestatio*. For instance, in the classical law, it operated novation, extinguishing the old, and generating a new, obligation. In other words, from that moment the legal relation of the parties underwent a formal transformation, a new quasi-contractual relation taking the place of the previous relation. As a consequence, the right of action was extinguished either *ipso jure* or *ope exceptionis* by means of the *exceptio rei in judicium deductæ* (Gaius, iv. 106). Any subsequent action was barred by the maxim, *De eadem re ne bis sit actio* (Quint. 7. 6. 1). Under Justinian, *litis contestatio* lost half of its former effect; for, while it retained the function of setting up a new obligation, it ceased to operate the extinction of the former obligation. *Litis contestatio*, further, had the effect of interrupting the running of prescription, and of rendering a right of action transmissible, which was formerly not transmissible. Penal actions, for example, did not transmit against the heir of the defender, but when once *litis contestatio* had taken place, they were capable of such transmission. Again, *litis contestatio* had the effect of converting the subject of litigation into a *res litigiosa*, and thereby rendering its alienation by the pursuer or defender unlawful.

In Scots law, litis-contestation denotes the point in the process when the parties join issue in the cause and consent to abide by its event. By the earlier practice, it was constituted by granting a warrant, which was called an act of litis-contestation, for the proof of such facts as the judge determined to be relevant. Later, the practice grew up of granting a proof before ascertaining the relevancy. Litis-contestation is now constituted by lodging defences (Act 1672, c. 16, s. 19). Before this stage, a party, though he has appeared by counsel, may withdraw and allow decree in absence to pass (*Macturk*, 1830, 8 S. 995); after this stage, the defender cannot simply pass from his appearance in the cause, and, therefore, every decree pronounced therein is held to be a decree *in foro*. Litis-contestation has various other effects, arising from the judicial contract implied in it. Thus an action which is penal and which consequently would, in the ordinary case, fall by the death of the defender, becomes after litis-contestation transmissible against heirs (Ersk. iv. 1. 70).

[Stair, iv. 39; Ersk. iv. 1. 69, 70; Shand, *Practice*, ii. 542; Mackay, *Manual*, chap. 28. 20; Ld. Kames, *Elucidations*, art. 22, "Litis-contestation."]

Loading.—See Charter Party.

Loan.—Loan may be defined as a real, or consensual-real, contract, "by which the owner of a thing gives for the temporary accommodation of another the use of services derivable from it" (Bell, *Prin.* s. 194).

Writing is not essential to the constitution of the contract, which is completed by interchange of consent, followed by delivery of the thing lent. No question, therefore, of *locus pœnitentiæ* can arise in regard to loan, for there must always be *rei interventus*. "I confess I do not see how any question as to the statutory solemnities can arise under the contract of loan.

. . . Having borrowed money, you cannot—money having passed—resile from your contract; or if you do resile you can only do so on the footing of restoring matters, which just means repayment of the money" (*Bryan*, 1892, 19 R. 490, per Ld. Kyllachy, 493).

There are two sorts of loan, corresponding to a well-marked distinction in the nature of the thing lent.

(1) COMMODATE (*q.v.*) is a contract by which "the use of anything is freely given to be restored the same without deterioration" (Stair, i. 11. 8). The property of an article thus lent (*e.g.* a horse or a picture) remains in the lender, upon whom the loss consequently falls in the event of its suffering deterioration or destruction, agreeably to the maxim, *res unaquæque perit suo domino*. There is an *onus*, however, upon the borrower, who is bound to restore the *ipsum corpus* of the loan, to prove that he exercised reasonable care in the use he made of the article (*Bain*, 1888, 16 R. 186). If the loan be not gratuitous, the contract is not commodate, but location. There is a variety of commodate called PRECARIUM (*q.v.*), where the use of the thing lent may be recalled at the lender's pleasure; but in commodate proper there is a term, either express or implied, at which the article must be restored.

(2) *Mutuum*, on the other hand, is a contract by which "one gives and transfers a fungible to another without hire, for use by consumption, on an engagement to restore as much of the same thing at the stipulated term" (Bell, *Prin.* s. 200). The article lent is something (*e.g.* corn, wine, money) which cannot be used without its extinction or its alienation Hence the property passes to the borrower, upon whom the loss of the article, if loss takes place, falls, and whose obligation is satisfied if at the period agreed on he restores an equal amount and an equal quality of the commodity to what he borrowed. The lender is subjected to no counter-obligation, and thus the only action which the contract produces "is pointed against the borrower, that he may restore as much in quantity and quality as he borrowed, together with the damage the lender may have suffered through default of due performance" (Ersk. *Prin.* iii. 1. 7). When money is the subject of the contract, the borrower is not bound to pay back its intrinsic value (though such was the old rule of Scots law; cf. Act 1467, c. 19), but only the value stamped upon it by public authority (see Ersk. *Inst.* iii. 1. 18; and 33 Vict. c. 10, s. 6). FUNGIBLES (*q.v.*) alone—*i.e.* things which can be estimated by weight, number, or measure—are, as a rule, the subject of *mutuum*; but in one peculiar species of the contract, viz. STEELBOW (*q.v.*), things not of their own nature fungible are held and dealt with as such.

The commonest form of loan is that of money for a conventional rate of interest; and though such a contract is, strictly speaking, more properly "location of the use of the fungible" (for "we allow no profit *in mutuo*," as Ld. Stair says, i. 11. 6), it possesses otherwise the characteristics of *mutuum*, and is discussed by the institutional writers under that head.

At an early period of our jurisprudence there prevailed a general rule that INTEREST (*q.v.*), if not expressly stipulated for, was not to be presumed to be due, but in later times, says Mr. Bell (*Com.*, 7th ed., i. 692), "the exceptions introduced have been so numerous that were a rule now to be laid down, it would be more correct, reversing the proposition of the ancient law, to say that interest is due in all cases where money is lent, or where the use of it is taken or retained; unless, from the circumstances of the case, there is ground in equity to hold that interest was not meant to be demanded"; and he adds, in his enumeration of the various contracts in which an obligation to pay interest is implied, that "the doctrine is gradually

extending so as to recognise a claim of interest in all cases of loan and debt in which one enjoys the use of money belonging to another." The principle thus enunciated was given effect to in the case of *Garthland's Trs.* (26 May 1820, F. C.), and has since been more than once affirmed. There thus arises out of the fact that money has been advanced in loan, not merely an obligation on the party who has borrowed instantly to repay the sum, but also "another obligation that so long as the sum remains unpaid the party shall pay legal interest. These are the obligations which result in law from the loan" (*Thomson*, 1861, 23 D. 693, per Ld. J.-C. Inglis, 701; see also *Cuninghame*, 1868, 6 M. 890; and *Forbes*, 1869, 8 M. 85).

The rate of interest due by implication on loans and other debts has hitherto been generally taken to be five per cent., being the highest rate of interest allowed by the USURY LAWS (*q.v.*), repealed by 17 & 18 Vict. c. 90; but there is no absolute or statutory rule on the subject, though the practice has been almost invariable; and "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" (*Ross*, 1896, 23 R. 802, per Ld. M'Laren, 806).

The great majority of questions which have come before the Court on the subject of loan have arisen in connection with the manner, not in which the contract may be constituted, which has been already dealt with, but in which the contract may be proved.

Although, as has been said, writing is not necessary to the constitution of loan, it is a well-established rule that while many contracts of commodate, or even of *mutuum*, may be proved *prout de jure*, parole evidence is not sufficient, and therefore not admissible, to prove loan of money. Proof of the contract is therefore confined to the writ or oath of the alleged borrower (Stair, iv. 2. 4; Ersk. *Inst.* iv. 2. 20; Bell, *Prin.* s. 2257; Dickson on *Evidence*, s. 562; *Tarbet*, 1803, Hume, 500; *Hamilton*, 1825, 1 W. & S. 35; *M'Master*, 1829, 7 S. 337; *Birnie's Assignees*, 1842, 4 D. 366; *Welsh's Trs.*, 1885, 12 R. 851). This rule has never been seriously questioned; it is tacitly assumed in all the cases which turn on the proof of loan; it was declared by Ld. Pres. Inglis in *Haldane* (1872, 10 M. 537, at p. 539) to be "a strict rule, and to be strictly and literally enforced"; and it was reaffirmed, though with manifest reluctance on the part of several of the judges, in the case of *Paterson* (1897, 35 S. L. R. 150). An exception is indeed admitted in the case of loans not exceeding £100 Scots (£8, 6s. 8d.), in the proof of which parole evidence is competent (*Hammermen of Glasgow*, 1628, Mor. 12408; *Thallane*, 1673, Mor. 12585; *Annand's Trs.*, 1869, 7 M. 526). But even in such cases there may be circumstances which infer that parole evidence is not admissible (*Annand's Trs., ut supra*, per Ld. Deas, p. 529); and where the sum sued for, though within the limit, is the balance of a larger sum, or where, though it embraces a number of items, each of which is within the limit, it exceeds that limit itself, the general principle holds good (*Clark*, 1836, 14 S. 966; *Annand's Trs., ut supra*).

Proof by oath of party has been said to be "a reference and appeal to conscience peculiar to this country" (per Ld. Young in *Paterson, ut supra*). The crucial question for the Court to determine, when such reference has been made, is, *quid juratum est?* But it is unnecessary here to refer to the decisions as to the import of party's oath, turning as they do upon the particular terms of the oath in each case. The general rules of interpretation are in no wise different as regards loan from what they are as regards other classes of cases in which proof is limited to the defender's OATH ON REFERENCE (*q.v.*).

Confining our attention, then, to the writ of the alleged borrower, we are

confronted with the difficulty: Assuming that the subject-matter in dispute is not *in re mercatoriâ* (if it is, no such question arises), is it necessary that the writ of the borrower, relied upon by the pursuer as evidence of the contract of loan, should be either tested or holograph, in terms of the various Statutes regulating the authentication of writs (Acts 1540, c. 117; 1579, c. 80; and 1681, c. 5)? Or, will an improbative writing suffice? On this point there appears to be, at first sight at all events, a conflict of authority.

There is, perhaps, no decision or expression of opinion in favour of the stricter view so direct or unambiguous as Ld. Deas' *dictum* in *Smith* (1869, 8 M. 239, at p. 241): "In order to prove a loan of money, a writing, not being a bill properly stamped, must, if not tested, be holograph of the borrower, and signed by him. The law admits of an exception *in re mercatoriâ*, but I know of no other." Several of the earlier cases, however, lend considerable countenance to the proposition. In *Stewart* (12 December 1815, F. C.) the writ was as follows: "I, Alexander Syme, vintner in Inver, acknowledge that I am due Charles Stewart £130 sterling, for which I will pay the said Charles Stewart on the 6th or 9th June 1813. Signed Alexander Syme. Dunkeld, April 6, 1813." The document was neither holograph nor tested. In an action raised by Stewart, the holder of the writ, against the representatives of Syme, the granter, Ld. Pitmilly, Ordinary, found, *inter alia*, that the written document "is destitute of the legal solemnities, and not actionable," and the Court adhered. In *Alexander* (1830, 8 S. 602) a claimant in a multiplepoinding, in order to instruct that a sum of money had been advanced by him to his son, founded on a document, neither holograph nor tested, but signed by the son, in which the latter acknowledged to have borrowed from his father the sum in question, "for which sum I oblige myself to pay interest." This document was rejected as evidence of the loan, being, in Ld. Balgray's words, "just an improbative bond." In *Jones* (1835, 13 S. 838) three co-obligants subscribed a document, which was holograph of one of them, acknowledging receipt of a sum of money, and undertaking to repay the same. In an action raised against one of the three, the defender pleaded that the document was neither holograph of him nor tested, and the Court assoilzied him on that ground, Ld.-Pres. Hope remarking, "It may seem hard that a man's signature, when adhibited, should not be always obligatory, but the point is so fixed." Other cases which may be cited in support of the same contention are: *Hamilton's Exrs.*, 1858, 21 D. 51, per Ld. Curriehill, 60; *Brodie*, 1870, 6 M. 461; *Purvis*, 1869, 7 M. 764; *M'Adie*, 1883, 10 R. 741; *Dunn's Tr.*, 1896, 23 R. 621.

In support of the opposite contention, that a writ founded upon *in modum probationis* need not be probative, it might be urged that in *Clark* v. *Ross* (1779, Mor. 16942) a letter neither holograph nor tested was found obligatory because the subscription of the defender was acknowledged; that a similar result was arrived at in *Fraser* (1857, 20 D. 115) and in *Laidlaw* (1886, 13 R. 724), and that in *Haldane* (1872, 10 M. 537) the sufficiency and not the competency of the writ produced in evidence was the *de quo quæritur*. The case, however, in which the point was most clearly decided is that of *Bryan* (1892, 19 R. 490). There the wife of the partner of a mercantile firm lent her husband, as for his firm, the sum of £100, in return for which she received the following acknowledgment: "Received from Mrs. J. W. F. Bryan, by the hands of Mr. J. W. F. Bryan, the sum of £100 on temporary loan, for which we are obliged. pp. Butters Bros., John Gibson." This document was in the handwriting of a clerk of the firm, and was signed by the firm's cashier. In an action by the wife against the firm for repayment of the loan, it appeared from a proof that the cashier had authority to grant

the acknowledgment in question; and it was held that the loan was sufficiently instructed.

The question as to the admissibility of improbative writs as evidence of loan has now been authoritatively settled by a judgment of the whole Court (dissenting Lds. Young and Adam), and the decision in *Bryan, ut supra,* has been in terms approved (*Paterson,* 1897, 35 S. L. R. 150). The facts in the case of *Paterson* were as follows: A mother wrote to her son A., requesting him to uplift and pay to another son, B., the sum of £400 belonging to her. Upon the back of this letter A. took the following receipt, signed, but not written, by B.: "Received the sum of £400 sterling, and I agree to assign a bond for same in favour of Mrs. Paterson [the lender] as arranged." There was also a letter from B. to the lender enclosing a draft for a sum of money composed of various items, including "interest for one year on the loan." After B.'s death the mother raised an action against his heir and his executrix for repayment of the loan, and produced the documents referred to. The grounds of judgment may be summarised as follows: A distinction must be drawn at the outset between writings which express obligations and writings which merely record facts. It is only to the former class that the authentication Statutes apply. The scope of those Statutes "is confined to those writings by which a person becomes directly bound, and which form the substantive *vincula* upon which action may be raised. They have no application to a document which is used merely as evidence of a fact. They do not mean that every piece of written evidence must be probative under the Statute" (*Thoms,* 1867, 6 M. 174, per Ld. Benholme, 176; cf. *Neilson's Trs.,* 1883, 11 R. 119, per Ld. Young). "The facts recorded may be of importance; they may include express verbal agreements, or facts and circumstances inferring agreements; and they may thus or otherwise involve obligations—obligations arising *ex contractu* or *ex delicto.* But such writings are not written contracts or written obligations. They cannot form a substantive ground of action. *They are only pieces of evidence*" (per Ld. Kyllachy). An acknowledgment of money received in loan, though neither holograph nor tested, is accordingly admissible in evidence; though an improbative written obligation must be held *pro non scripto,* not merely as a ground of action, but also as a piece of evidence. To hold the opposite would be to place loan in a position isolated from all the other contracts of which proof is restricted to writ or oath, *e.g.* contracts relating to heritage where there has been *rei interventus,* obligations of relief granted by one co-acceptor of a bill to another, donation, trust, proof of constitution and resting-owing of a debt under the short prescriptions, etc. In short, "if loan requires to be proved by probative writing, it is the only contract (not requiring to be constituted *scripto*) in which such restriction exists" (per Ld. Kyllachy). For these reasons the Court found that the proof of the loan must be by writ or oath, but that such writ need not be holograph or tested; and remitted to the Sheriff to allow to the pursuer a proof of her averments *habili modo,*[1] and to the defenders a conjunct probation. It may be added that in *Paterson* Ld. Kyllachy expressed an opinion *obiter,* from which Ld. Young, adhering to the view indicated by him in *Neilson's Trs., ut supra,* dissented, that an I. O. U., being really a short form of written obligation, falls within the class of writings which must be either holograph or tested.

The degree to which parole evidence may be admitted to fortify what

[1] The Lord President (Robertson) observed that an allowance of proof "*habili modo*" "has a recognised meaning in our practice, and is a serviceable way of pointing out that the allowance of proof does not imply that all the facts disclosed on record may competently be proved by parole."

written evidence there may be (where there is no written, there can of course be no parole, evidence) is not very clearly defined. Parole evidence is unquestionably admissible to prove the genuineness of a holograph document or of a signature to a writ not holograph: it was admitted in *Bryan, ut supra,* to prove that the person who bore to sign the acknowledgment *per procurationem* of the firm had really authority to do so (cf. *Woodrow*, 1861, 24 D. 31); it is admissible to prove the date of a holograph writ, which does not prove its own date (*Parris*, 1869, 7 M. 864); and other matters may also be proved by parole, *e.g.* whether the document relied on was granted by a bankrupt in fraud of creditors (*Williamson*, 1882, 9 R. 859, explained per Ld. Kinnear in *Dunn's Tr., ut inf.*). But if the documents are insufficient to prove the alleged loan, they will not be sufficient to let in parole evidence. This is clearly decided by the judgment of the majority of the Court in *Haldane* (1872, 10 M. 537), and is reiterated by Ld. Kinnear in the following passage: "The rule is that loans cannot be proved except by the writ of the borrower. It is quite consistent with the rule to admit parole evidence of facts extrinsic to the writing, in order to prove that it is in truth and in law the borrower's writ. It may be necessary, and it is perfectly competent, to prove handwriting or to prove delivery, or, it may be, to prove the authority of an agent. There may be other purposes which might be figured similar to these. But parole evidence is not admissible except for the purpose of enabling the creditor to prove the loan, not by the parole evidence itself, but by his debtor's writ. It cannot be admitted to prove the essential facts which go to constitute loan without violating the rule of law" (*Dunn's Tr.*, 1896, 23 R. 621, at p. 633).

With regard to the sufficiency of any writing to prove loan, it has been held in a long series of cases that "where a document or writing, admitting the receipt of money, is given to the party advancing the amount by the party who receives it, it will be presumed that an obligation to repay is thereby constituted, unless the party who has received the money shall establish that it was paid to extinguish some counter obligation, or to satisfy some other demand which he had against the advancer" (per Ld. Cowan in *Haldane*, 1872, 10 M. 537, at 543). The two leading cases on the point are *Ross* v. *Fidler*, 24 November 1809, F. C., and *Thomson*, 1861, 23 D. 693; and other cases bearing thereupon are: *Ogilvie*, 1703, Mor. 11510; *Donaldson*, 1711, Mor. 11511; *Allan*, 1837, 15 S. 1130; *Martin*, 1850, 12 D. 960; *Fraser*, 1857, 20 D. 115; and *Gow's Exrs.*, 1866, 4 M. 578. It is to be noted that delivery of the acknowledgment by the debtor to the creditor is essential. "I am not aware of any case where a document not in the hands of the lender was held to prove a loan. It is its being in the hands of the lender that gives point and meaning to the document" (per Ld. Pres. Inglis in *Haldane, ut supra*, p. 541). "The doctrine so repeatedly laid down is that he who gives another a document acknowledging the receipt of money, without qualification or explanation, as a chirographum to be preserved against him, infers an obligation to repay, and this obligation arises not so much from the document itself as from its possession by the other party. This is the case of *Ross* and a whole series of decisions" (per Ld. Neaves in *Duncan*, 1873, 11 M. 254, p. 259). A written acknowledgment of the receipt of money must always, of course, be taken subject to any qualification which it contains (*Duncan, ut supra*); and where the letter brought forward as evidence of the loan is part of a correspondence, it is competent to take into account the correspondence as a whole. Nay, the

failure to produce part of that correspondence may displace the usual presumption *in dubio* in favour of an obligation to repay (*M'Keen*, 1864, 2 M. 392).

A bank cheque drawn in favour of the alleged borrower and indorsed by him, but in possession of the bank, not of the lender, will not instruct loan (*Haldane, ut supra*). But if the alleged loan be one of a series of transactions between the parties, an entry in the creditor's books against the debtor will be sufficiently vouched by a cheque (*Robb*, 1884, 11 R. 881). An entry in a depositor's pass-book with a savings bank of a payment made to a third party, who affixed his signature to the entry, has been held to establish loan (*Fraser*, 1857, 20 D. 115). The mere indorsation of a deposit receipt will not infer loan (*Nimmo*, 1873, 11 M. 446), yet, fortified by a copy of a letter from the debtor's agent to the debtor, has been found to be sufficient (*Laidlaw*, 1886, 13 R. 724). The case of *Laidlaw*, indeed, seems to go farther in the latitude of proof allowed than any of its predecessors; the Ld. J.-Cl. Moncreiff expressing the opinion that writ of the authorised agent of the debtor was equivalent to the debtor's own. Other cases in which the writing relied on has been held sufficient are: *Robertson*, 1858, 20 D. 371, and *Christie's Trs.*, 1870, 8 M. 461. Cases where the proof has been held to be insufficient are: *Rutherford's Exrs.*, 1861, 23 D. 1276; *Woodrow*, 1861, 24 D. 31; *Butchart*, 1863, 1 M. 1123.

When, either by writing or by reference to his oath, receipt of the money by the alleged debtor has been proved, the *onus* lies upon him of proving that the money was received upon some other footing than that of loan, *e.g.* by way of DONATION (*q.v.*) or in extinction of a claim upon the alleged creditor. He will be allowed to prove this *habili modo*, but it seems not quite settled whether that means that his proof will be limited to the writ or oath of his opponent. As regards donation, at all events, the law has undergone a change during the last forty years, as Ld. Trayner pointed out in *Paterson, ut supra*, and there seems to be now no doubt that donation may be competently proved by parole (*Wright's Exrs.*, 1880, 7 R. 535). From the tenor of their Lordships' opinions in *Paterson*, it seems highly improbable that in future the rule applied by the Court will become more stringent.

For particular aspects of the contract of loan, see BANK; BILLS OF EXCHANGE; BOND; BOND AND DISPOSITION IN SECURITY.

[See Stair, i. 11, iv. 43. 4; Ersk. *Inst.* iii. 1. 18–25, iv. 2. 20; *Prin.* iii. 1. 7–9, iii. 3. 30; Bell, *Prin.* s. 32 (*n*), 194–202A, 2257: Bankt. i. 354; Bell, *Com.* i. 275; Ross, *Lect.* i. 67; Dickson on *Evidence*, s. 592; Kirkpatrick, *Digest*, s. 143; Addison on *Contracts*, 346.]

Loaning.—A loaning is a drove road constituted for the benefit of one or more definite neighbouring farms, accompanied by a right of pasturing in transit (*Chatto*, 1790, Hume, 734; *Reid*, 1891, 18 R. 744, 28 S. L. R. 511; Rankine, *Landownership*, 3rd ed., 394). See ACTUS; ITER.

Lobsters.—See FISHINGS.

Local Government Board for Scotland.—The Local Government Board for Scotland was created by the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58, s. 3). It succeeded to the

powers and duties of the Board of Supervision (*q.v.*), abolished by the same section, and all references in Acts of Parliament, contracts, deeds, etc., to the Board of Supervision are to be construed as references to the Local Government Board for Scotland (s. 7).

I. Constitution, Officers, etc.

The Board consists of three *ex officio* members and three appointed by the Crown. The former are the Secretary for Scotland, who is President, the Solicitor-General for Scotland, and the Under Secretary for Scotland. The appointed members (salaried) are the vice-president, a member of the Faculty of Advocates of not less than seven years' standing, and a registered medical practitioner having the prescribed qualification in public health (s. 4). The last-named is debarred from private practice.

The office of the Board, at which its ordinary business is transacted, is in Edinburgh (8 & 9 Vict. c. 83, s. 5).

Sec. 5 of the Act of 1894 contains provisions as to the seal, style, acts, orders, and rules of the Board. Sec. 6 transfers to it the secretary and officers of the Board of Supervision, and empowers the appointment of additional officers (see also 8 & 9 Vict. c. 83, s. 14; 19 & 20 Vict. c. 117; and 60 & 61 Vict. c. 38, s. 11).

The Board is required to make an annual report to the Secretary for Scotland (8 & 9 Vict. c. 83, s. 8). It is understood that the Board is also intrusted with the arrangement and publication of the annual Local Taxation Returns made to the Secretary for Scotland under 44 & 45 Vict. c. 6.

II. Powers and Duties.

These may be described generally as consisting in the supervision of (1) the election and the work of parish councils, and (2) the work of the local sanitary authorities.

1. *Parish Councils.*—(1) *Election and General Business.*—The Local Government Board was intrusted with the duty of bringing the Act of 1894 into operation, whereby parish councils were elected in place of the former parochial boards, and it is required to exercise continued supervision over the working of the Act. Its approval is required in fixing or altering the number of councillors (s. 9), and every division of a parish into wards must be reported to the Board (s. 13). The Board orders the election of additional members of a landward committee where the number of rural councillors in a parish is less than five (s. 23). It determines questions that arise as to the duties of county and town councils in arranging for the election of parish councils, and, where necessary, apportions the expenses of elections among the authorities concerned (ss. 14, 15). If there is no election, or an insufficient election, the Board takes the necessary remedial measures.

The Board's approval is required to any rearrangement of the powers and duties of medical officers transferred by the Act from parochial boards to parish councils. An inspector of poor so transferred, if aggrieved by any redistribution of duties, may appeal to the Board (s. 51).

The Board makes rules as to the manner in which parish councils are to keep accounts, and publish them, and make payments (ss. 35, 30). It also appoints auditors, makes rules for audit, and decides on surcharges (s. 36).

(2) *Parish Trusts.*—In the case of parish trusts, the Board exercises supervision as to the expediency of the parish council appointing trustees, and as to the number of such trustees. It also prescribes the method of

keeping and publishing the accounts of any property held as a parish trust, including kirkyards transferred to the parish council (s. 30).

(3) *Acquisition and Alienation of Land.*—The Board's consent is required to the sale or exchange by parish councils of heritable property transferred by the Act from parochial boards (s. 48). When a rural parish council or a landward committee desires to acquire land, and cannot do so by agreement, the Board's confirmation is required of any order taking land compulsorily. The details as to notices, public inquiries, arbitration, etc., are contained in sec. 25 of the Act of 1894. Land so acquired cannot be sold, exchanged, or let for longer than a year without the Board's consent (s. 24 (2)). The Board exercises similar functions, under sec. 26, when a parish council desires to lease land compulsorily for allotments or common pasture.

(4) *Relief of the Poor.*—The supervision of parish councils in administering poor relief is the most important branch of the Board's work, the leading enactment being the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83).

The Board is vested with general powers of inquiry into the management of the poor, having power to call for returns, to examine persons on oath, and to call for documents (s. 9). It may authorise special inquiries to be made by one of its members, or by a commissioner (ss. 10, 11, and 19 & 20 Vict. c. 117). The Board may allow expenses to witnesses, and penalties are incurred by disobedience to its summons or order (ss. 12, 13). Any member of the Board, or the secretary, or a servant of the Board duly authorised, may attend meetings of parish councils (s. 15). Its approval is required to any alteration of the dates of the statutory meetings for revising the roll of paupers (s. 30). It has special duties in enforcing the removal of lunatic paupers to asylums (s. 59). The Board fixes the form of notices (s. 90), and may require returns from parish councils as to funds vested in them by gift, mortification, or bequest for the poor (s. 53). The Board's powers of combining parishes for poor law purposes (s. 16), and of dissolving such combinations (24 & 25 Vict. c. 18), still exist, and may be exercised. But they are practically superseded by the powers now conferred on the Secretary for Scotland for altering parish areas (57 & 58 Vict. c. 58, s. 46).

The inspector of poor in each parish is in fact as much the servant of the Board as of the parish council. His appointment and remuneration require the Board's approval (8 & 9 Vict. c. 83, s. 32). He must obey the Board's instructions (s. 55), and the Board may suspend or dismiss him for neglect of duty or incompetency (s. 56). The practical effect of these provisions is that he can be removed from office only by the Board (per Lord President in the *Dull* case, 1855, 17 D. 827, and per Ld. Shand, Ordinary, in *Clark*, 1873, 1 R. 261). For instance, a parish council is not entitled to dismiss an inspector indirectly, without the Board's consent, by reducing his salary (*Old Monkland* case, 1880, 7 R. 469). See Guthrie Smith, *Poor Law*, 3rd ed., pp. 77 *et seq.*

A resolution by a parish council to raise the poor funds by assessment must be reported to the Board, and cannot be rescinded without the Board's consent (s. 33). The question of classification of lands, etc. (which formerly required the Board's approval), is now of no importance (59 & 60 Vict. c. 37, s. 5).

The Board's approval is required to the erection of poorhouses by parishes singly or in combination, to the withdrawal of any parish from the combination, to the plans of the building, to the regulations for its management, and to the rates to be charged to outside parishes (ss. 60, 61, 63, 64,

65). The Board has the power of removing the poorhouse medical officer for incompetency or neglect (s. 66).

The Board has exclusive jurisdiction in all complaints by paupers of inadequate relief (ss. 74, 75; *Keith*, 1866, 4 M. 1025).

Where a parish council refuses to comply with the Board's instructions, the Board may proceed by summary petition in the Court of Session (s. 87), even although the petition may in substance amount to a reduction and interdict (*Glasgow* case, 1850, 12 D. 627). The Court will not review the merits of the Board's decision (*Clark*, 1873, 1 R. 261).

(5) *Vaccination.*—In the administration of the Vaccination (Scotland) Act, 1863 (26 & 27 Vict c. 108), the Board makes regulations to which parish councils must conform, and it has the same power of enforcing these as under the Poor Law Act. It may also perform at its own hand any duty which the parish council is neglecting.

2. *Local Sanitary Authorities.*—In sanitary matters the Board has powers of supervision and control over town councils, police commissioners, and district committees.

(1) *Under the Public Health (Scotland) Act*, 1897 (60 & 61 Vict. c. 38).—The Board is declared to be the central authority for the execution of the Act (s. 5), and its general powers of inquiry and investigation (ss. 6–10) are almost identical in terms with those conferred on it by secs. 9–13 of the Poor Law (Scotland) Act, 1845. Sec. 15 (along with 52 & 53 Vict. c. 50, s. 54) places the medical officers of health and the sanitary inspectors appointed by local authorities (and by county councils) in much the same relation to the Board as inspectors of poor. The Board may require returns from registrars of births, etc. (s. 15). Its confirmation is required of any order regulating an offensive business, and an appeal lies to it against such proposed order, and against a refusal of a knacker's licence (ss. 32, 33). The Board may deal with nuisances created by a local authority (s. 37). It may require local authorities to provide premises, etc., for disinfecting (s. 46), and, singly or in combination, to provide hospitals, of which the site and plans require the Board's approval (s. 66). Such approval may be conditional (*Magistrates of Edinburgh*, 1896, 23 R. 383). It may require local authorities to make bye-laws as to lodging-houses (s. 72). The Board has large general powers to make regulations to prevent the spread of epidemics (ss. 78–88). It decides on all objections by parties affected by any proposed sewer (ss. 105, 106), and its approval is required to the construction of any outfall-sewer beyond the district of the local authority (s. 28). The Board's sanction is required where local authorities desire to combine as to sewerage (s. 121) or waterworks (s. 130), and its recommendation is necessary to obtaining loans from the Public Works Loan Commissioners (s. 142). The Board may constitute port sanitary authorities and arrange for their proceedings (ss. 172–175). It controls local authorities in the acquisition and alienation of lands, and may authorise the compulsory taking of land, subject to appeal to Parliament (ss. 144, 145). The Board's confirmation is required to bye-laws made under the Act (s. 185); and to bye-laws under the Burgh Police Act, 1892 (s. 318), relating to sanitary matters; and also to bye-laws made for special districts formed under 57 & 58 Vict. c. 58, s. 44. Penalties are exigible for violating its directions and regulations (s. 163). It is not liable for the irregularities of its officers (s. 166). The Board has power to enforce the Act by summary petition to the Sheriff (s. 146) or to the Court of Session (s. 147). Mere failure to deal with a nuisance of which the local authority

knows will justify the Board in presenting a summary petition to the Court of Session for an order to execute the necessary works (*Montrose* case, 1872, 11 M. 170; *Lochmaben* case, 1893, 20 R. 434). The Court will allow the local authority reasonable time to remedy the nuisance (*ib.*); but when the local authority has been induced to act only after the presentation of the petition, the Board will be entitled to expenses (*Pittenweem* case, 1874, 1 R. 1124). But what the Board requires must be clearly within the limits of the local authority's statutory powers (*Elgin* case, 1897, 24 R. 512).

(2) *Under the Infectious Diseases Notification Act*, 1889 (52 & 53 Vict. c. 72).—The Board prescribes the form of certificates (s. 4), and its approval is required to the making, varying, or revoking of any order extending the definition of "infectious disease" (s. 7).

(3) *Under the Cleansing of Persons Act*, 1897 (60 & 61 Vict. c. 31).—The Board's sanction is required to the erection by the local authority of buildings for the purposes of the Act (s. 3).

(4) *Under the Housing of the Working-Classes Act*, 1890 (53 & 54 Vict. c. 70).—Part III., relating to working-class lodging-houses, can be adopted by a district committee only on receiving the necessary certificate from the Board (ss. 55, 96 (1)), which may be given after local inquiry (s. 94 (3) (*b*)), and the Board's consent is required for the sale and exchange of lands acquired by district committees under these powers (ss. 60, 96 (1)).

(5) *Dairies.*—By sec. 9 of 49 & 50 Vict. c. 32, the Board (as coming in place of the Board of Supervision) is vested with the power, conferred on the Privy Council by 41 & 42 Vict. c. 74, s. 34), of making orders relative to Dairies, Cowsheds, and Milkshops (*q.v. ante*).

3. *Miscellaneous.*—(1) Kirk-sessions are bound to report to the Board annually, or oftener if required, as to the application of moneys arising from church collections in parishes in which the poor funds are raised by assessment. Practically this simply informs the Board as to the amount spent by kirk-sessions on the poor, though it also is a safeguard against illegal use of such funds (8 & 9 Vict. c. 83, s. 54).

(2) *Under the Orkney and Zetland Small Piers and Harbours Act*, 1896 (59 & 60 Vict. c. 32), the Board's approval is required to the formation, enlargement, or alteration of special districts for harbour purposes, and to the levy of any assessment on such district.

Locality—The decree of the Teind Court apportioning the stipend among the heritors liable to pay (Ersk. ii. 10. 47; Bell, *Prin.* ss. 1162 *et seq.*; Black, *Paroch. Eccles. Law*, 147). See Augmentation; Teinds.

Locality of a Widow.—See Marriage Contract; Terce.

Locatio conductio, or letting and hiring, was one of the consensual contracts of Roman law. The contract was concluded and the parties bound, as soon as they were agreed upon what was to be hired, and the consideration (*merces*) to be paid for it (Gaius, iii. 142; *Inst.* iii. 24 pr.). The *merces* must be money, "*pecunia numerata*," except that the rent of agricultural land might be a certain proportion of its annual produce (*Cod.* 4. 65. 21).

There were three forms of *locatio conductio: locatio conductio rei; locatio conductio operarum; locatio conductio operis.*

Locatio conductio rei is the letting or hiring of a *res*, moveable, immoveable, or even incorporeal, *e.g.* a usufruct (*Dig.* 7. 1. 12. 2). The tenant of a house was called *inquilinus*, of agricultural land, *colonus*. The usual term for a lease of land was the *lustrum* of five years. If there was no stipulation to the contrary, the obligations formed by the contract passed to the representatives of both parties (*Dig.* 19. 2. 19. 8; *Inst.* iii. 24. 6), and the lessee might sublet to another (*Cod.* 4. 65. 6; *Dig.* 19. 2. 60. pr.). The lessor was bound to put the lessee in possession of the subject; to deliver it in a proper state of repair; to maintain it in such a condition that it might be fit for the purpose for which it was let: and to warrant undisturbed possession to the lessee during the term agreed on (*Dig.* 19. 2. 7 *et seq.*). A purchaser of the subject let was not bound by the lease; he could eject the tenant, whose only remedy was a claim of damages against the lessor under the warranty. To prevent this, it was usual in the case of a sale to stipulate that the purchaser should be bound by the current leases (*Dig.* 19. 2. 25. 1). The lessee is bound to pay the rent or hire (*pensio, merces*) at the stipulated periods, and interest, if the payment falls into arrear (*D.* 22. 1. 17. 4); to take reasonable care of the subject and keep it in good condition; to put it to no other use than that for which it was let (Gaius, iii. 196, 197); and to give up possession of it at the end of the term. When two years' rent fell into arrear, the tenant might be ejected (*Dig.* 19. 2. 54. 1). The tenant of a farm is entitled to a proportionate reduction (*remissio*) of his rent, if part of his crop is destroyed by an unavoidable accident, such as an inundation; but if, during the remaining years of the lease, the previous loss is compensated by more than usually abundant harvests, the tenant is bound to pay the sum previously remitted (*Dig.* 19. 2. 54. 1).

Locatio conductio operarum is a contract of hire whereby one party agrees to supply the other with a certain amount of labour in consideration of a money payment. Owing to the prevalence of slavery, this contract *i.e.* the hiring of free men, was much less important in Roman than in modern law. The labour to be suppled under *locatio conductio operarum* must always consist of *operæ illiberales, i.e.* unskilled labour. *Operæ liberales*, the services of advocates, physicians, etc., could not form the subject of *locatio conductio* (*Dig.* 50. 13. 1; 11. 6. 1 pr.; 19. 5. 5. 2).

Locatio conductio operis is a contract whereby one party agrees, for a fixed *merces*, to do for another some definite job, *e.g.* to build a house, or manufacture something, or do certain repairs. To this category belongs a contract concluded with a common carrier. The person who undertakes the job is the *conductor operis*. He is not bound to obey the orders of the *locator operis* in regard to the details of the work (*Inst.* iii. 24. 4; *Dig.* 19. 2. 2. 1). On the whole subject, see *Inst.* iii. 24; *Cod.* 4. 65; *Dig.* 19. 2, a title translated and annotated by C. H. Monro, M.A., Camb. Univ. Press, 1891.

Location.—See Hiring.

Lochs.—(*a*) *Surrounded by Lands of one Proprietor.*—In this case the loch passes as part and pertinent of the lands without being particularly mentioned by name, or without even the general expression *cum lacubus* (Stair, ii. 3. 73; Bankt. ii. 3. 12; *Macdonnell*, 8 S. 881). Both the solum and the water belong to the proprietor of the lands. His use of the

water may be subject to the rights of inferior proprietors if they have an interest in a stream flowing from the loch. He has the sole right of fishing in the loch, which cannot be defeated by forty years' fishing on the part of the public, even although there is public access to the water (*Montgomerie*, 23 D. 635). He may drain the loch dry, even though in so doing he floods the stream (*Mayor of Berwick*, Mor. 12772), but he has no right to do away with the source of a stream. If the loch have no outlet, but be a *stagnum*, the proprietor may make an outlet and send a stream in any direction he please. He may change the direction, provided other parties have not by prescription acquired a right to the stream so made.

(*b*) *Surrounded by Lands of different Proprietors.*—Here there is a legal presumption that all the riparian proprietors have a common right to the loch. This presumption holds where the loch is not expressed in the titles of either or any of the proprietors, and has not been possessed exclusively by either or any for the prescriptive period; but it may be overcome. This happened when one party was infeft in the loch, *per expressum*, and the other in lands adjoining the loch *cum lacu et piscationibus*. It was held without proof that the owner of the express right, though it was derived from the same author as the general title, and at a date subsequent to it, had the sole right to the loch (*Scott*, Mor. 12771). If the loch be discontiguous to the lands, even an express title will require proof of possession, as such a conveyance may be held only to imply a water servitude (*Stewart's Trs.*, 1874, 1 R. 334). Fishing in a loch is ordinary use thereof. Where of two proprietors one had a clause *cum piscationibus* in his titles, and the other had not, but they had both fished, it was held that the proprietor lacking the grant could not be restricted from so doing (*Macdonald*, 1836, 15 S. 259). One proprietor may have a right to the *solum* of the loch, and another only a servitude over it for certain purposes (*Cunninghame*, 1836, 15 S. 295; 1838, 16 S. 1060). For example, one estate was held *cum lacubus et piscationibus*, and prescriptive possession of exclusive right of ownership was proved, whereas the other title only showed liberty to use the loch for washing, etc., opposite the lands. The loch was held to belong to the first proprietor (*Baird*, 1836, 14 S. 396).

The boundary of a loch is decided by the margin of the water when it is in its ordinary state (*Dick*, 1769, Mor. 12813). It is not the highest mark of the water, as in the sea, nor the medium line (*Baird*, 1839, 1 D. 1051). In spite of artificial draining, the state of the loch is accepted as decisive when it has continued so beyond the prescriptive period, but within the prescriptive period artificial operations do not affect the boundary (*Graham's Tr.*, 1835, 1 D. 1053: *Baird*, *cit.*; and *Cunninghame*, *cit.*).

Joint proprietorship of a loch has two aspects: (*a*) as to the *solum*, and (*b*) as to the water. The right of each proprietor to the *solum* extends to the middle of the loch *ex adverso* of the lands, and carries the right to all minerals beneath such portion (*Cochrane*, 1815, 6 Pat. 139). Each proprietor, on the other hand, has a *pro indiviso* right to use the whole loch for fishing, boating, etc. He may use only his own lands, however, for landing nets (*Loch Rannoch* case, 1798, quoted *Menzies*, 1854, 16 D. 827, 828; affd. 1856, 2 Macq. 463, 19 D. H. L. 1), and each has a right to prevent abuse by a joint proprietor. The joint right may be included under an entail (*Stirling*, 1827, 6 S. 272; affd. 1829, 3 W. & S. 462).

Lock (in Scots "a small quantity of any readily divisible dry substance, as corn, meal, flour, or the like"), a payment in kind, under the

obligation of THIRLAGE (*q.v.*), due to one of the miller's assistants. See BANNOCK; SEQUELS.

Lockfast Places.—It is an aggravation of THEFT (*q.v.*) that it has been committed by "opening lockfast places." In this category is included breaking into rooms, etc., within a house (*Young* or *Gilchrist* and *Hislop*, Bell, *Notes*, 34; *Cathie*, *ib.*); cabins in a ship (*Henderson* and *Craig*, 1836, 1 Swin. 300, Bell, *Notes*, 35; *Miller*, 1838, Bell, *Notes*, 35); and any article the contents of which are secured by lock and key. It is immaterial whether the security of the lockfast place is overcome by actual violence, or by picking the lock, or stealing the key, or using false keys (Alison, i. 295). If the key has been left in the lock, "the better opinion would rather appear to be," that the aggravation does not occur should the thief make use of the key to open the room or article (Alison, i. 296). But if the key has been concealed, or taken out of its place and laid on a table, etc., the full crime is committed if it be taken from that situation and the lock so opened (*ib.*). If a locked box be stolen, the subsequent opening of the box and removal of the contents does not constitute theft by opening lockfast places (*Stuart* and *Low*, 1842, 1 Br. 260, Bell, *Notes*, 34; *Walker*, 1836, 1 Swin. 294). Opening lockfast places with intent to steal can now be charged as an attempt to commit theft (Crim. Procedure Act, 1887, s. 61. Cf. *Lawrie*, 1837, 2 Swin. 101, note; Bell, *Notes*, 40; *Mickel*, 1844, 2 Br. 175; and Macdonald, *Crim. Law*, 69, note 4).

Locomotive.—The Locomotive Act, 1861 (24 & 25 Vict. c. 70), repeals previous provisions in Turnpike or Bridge Acts regulating the use of locomotives upon roads. The provisions now regulating their use are to be found in the Locomotives Act, 1861 (24 & 25 Vict. c. 70); the Locomotives Act, 1865 (28 & 29 Vict. c. 83); the Locomotives Amendment (Scotland) Act, 1878 (41 & 42 Vict. c. 58); the Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61, s. 5); and the Local Government Act, 1889 (52 & 53 Vict. c. 50, ss. 11 and 16). The use of light locomotives upon roads is regulated by the Locomotives on Highways Act (1896, s. 1, and schedule 59 & 60 Vict. c. 60).

Rules for Working Ordinary Locomotives on Highways.—Every locomotive propelled by steam or any other than animal power on a turnpike road or public highway must be worked according to the following rules and regulations, viz.:—

1. At least three persons must be employed to drive or conduct a locomotive, and if more than two waggons or carriages be attached thereto, an additional person must be employed to take charge of such waggons or carriages (28 & 29 Vict. c. 83, s. 3 (1) (boys are not permitted); *Smith and Wood*, 1882, 10 R. (J. C.) 31).

2. One person, while the locomotive is in motion, must accompany the locomotive on foot, and must in case of need assist horses, and carriages drawn by horses, passing the same (41 & 42 Vict. c. 58, s. 4) (repealing 28 & 29 Vict. c. 83, s. 3).

3. The drivers of a locomotive must give as much place as possible for the passing of other traffic (28 & 29 Vict. c. 86, s. 3).

4. The whistle of a locomotive must not be sounded for any purpose whatever. The cylinder taps must not be opened within sight of any person riding, driving, leading, or in charge of a horse upon the road.

Steam must not be allowed to attain a pressure such as to exceed the limit fixed by the safety valve, so that no steam shall blow off when the locomotive is upon the road (28 & 29 Vict. c. 83, s. 4).

5. A locomotive must be instantly stopped, on the person preceding the same, or any other person with a horse, or carriage drawn by a horse, putting up his hand as a signal to require the locomotive to be stopped (28 & 29 Vict. c. 83, s. 5).

6. Any person in charge of a locomotive must provide two efficient lights, to be affixed conspicuously, one at each side on the front of the same, between the hours of one hour after sunset and one hour before sunrise (28 & 29 Vict. c. 83, s. 4).

Non-compliance with the above provisions entails on the owner of a locomotive a penalty not exceeding £10; but "it shall be lawful for such owner, on proving that he has incurred such penalty by reason of the negligence or wilful default of any person in charge of or in attendance on such locomotive, to recover summarily from such person the whole or any part of the penalty he may have incurred as owner" (28 & 29 Vict. c. 83, s. 3).

Limit of Speed.—Subject and without prejudice to the regulations made by local authorities, a locomotive may not be driven on the highroad at a greater speed than four miles an hour, or through a city, town, or village at a greater speed than two miles an hour. A penalty is imposed for breach of this regulation (28 & 29 Vict. c. 83, s. 4).

Use of Locomotives over Bridges.—Where a notice has been placed upon a bridge that it is insufficient to carry weights beyond the ordinary traffic of the district, it is not lawful for the owner or driver of a locomotive to drive it over the bridge. Damage caused by locomotives to bridges must be made good by the owners (24 & 25 Vict. c. 70, ss. 6 and 7).

Smoke Consumption.—Steam locomotives must consume their own smoke (41 & 42 Vict. c. 58, s. 5) (repealing Locomotive Act, 1861, s. 8).

Wheels, Weight, and Width of Locomotives—Regulations and Restrictions as to.—It is not lawful to use on a highway a locomotive constructed otherwise than in accordance with the following provisions:—

(1) A locomotive not drawing any carriages, and not exceeding in weight three tons, must have the tires of the wheels thereof not less than three inches in width, with an additional inch for every ton or fraction of a ton above the first three tons; and

(2) A locomotive drawing any waggon or carriage must have the tires of the driving wheels thereof not less than two inches in width for every ton in weight of the locomotive, unless the diameter of the wheels exceed five feet, when the width of the tires may be reduced in the same proportion as the diameter of the wheels is increased; but in such case the width of the tires must not be less than fourteen inches; and

(3) A locomotive shall not exceed nine feet in width or fourteen tons in weight, except as hereinafter provided; and

(4) The driving wheels of a locomotive must be cylindrical and smooth soled, or shod with diagonal cross bars of not less than three inches in width, or more than three-quarters of an inch in thickness, extending the full width of the tire, and the space intervening between each such cross bar must not exceed three inches.

(5) The exact and true weight of a locomotive, including necessary water and coals, must be legibly written in letters of not less than one inch in length, and affixed to some conspicuous part of the locomotive.

The owner of any locomotive used contrary to the foregoing provisions is for every such offence liable to a fine not exceeding £5. The road authority of any county or burgh may, on the application of the owner of any locomotive exceeding nine feet in width or fourteen tons in weight, authorise such locomotive to be used on any highway within the areas respectively above mentioned, or part of any such highway, under such conditions (if any) as to them seem desirable (Locomotives Amendment (Scotland) Act, 1878, s. 3).

The weight of a locomotive and the name of its owner must be conspicuously and legibly affixed thereon, and any owner not having affixed such weight and such name is liable in a penalty (24 & 25 Vict. c. 70, s. 12). A waggon drawn by a locomotive may not carry a greater weight than one ton and a half for each pair of wheels, unless the fellies, tires, or shoes are four inches or more in breadth; nor carry a greater weight than two tons for each pair of wheels, unless the fellies, tires, or shoes are six inches or more in breadth; nor carry a greater weight than three tons for each pair of wheels, unless the fellies, tires, or shoes are eight inches or more in breadth; and for every single wheel, one-half of that permitted to be carried on a pair of wheels. In no case may a waggon carry a greater weight than four tons on each pair of wheels, or two tons on each wheel; but if the waggons have springs upon each axle, they may be allowed to carry one-sixth more weight in addition to the above-mentioned weights upon each pair of wheels. The above regulations do not extend to a waggon carrying only one tree, or one log of timber, or one block of stone, or one cable or rope, or one block, plate, roll or vessel of iron or other metal, compounded of any two or more metals cast, wrought, or united in one piece (24 & 25 Vict. c. 70, s. 4). It may be noted in this connection that the provisions of the General Road Acts apply to locomotives where these provisions are not inconsistent with the Locomotive Acts.

Bye-laws as to Use of Locomotives (see Local Government Act, 1889, ss. 11 to 16 (20)).—The road authority of any county or burgh may make bye-laws as to the hours during which locomotives are not to pass over the highways situate within the areas they govern, the hours being in all cases consecutive hours, and no more than eight out of the twenty-four, and for regulating the use of locomotives upon any highway, or preventing or regulating such use upon every bridge where such authority is satisfied that such use would be attended with damage to the public from the narrowness, inclination, or imperfect construction of such highway or bridge respectively. Any person in charge of a locomotive acting contrary to such bye-laws is liable to a fine not exceeding £5. A bye-law made by the road authority, and any alteration made therein, and any repeal of a bye-law, must be confirmed by the Secretary for Scotland. Notice must be given by advertisement of the intention of applying for the confirmation of any bye-law, or addition thereto or repeal thereof (Locomotives Amendment (Scotland) Act, 1878, ss. 6 and 7 (41 & 42 Vict. c. 58); and Secretary for Scotland Act, 1885, s. 5 (48 & 49 Vict. c. 61)). See BYE-LAWS.

Power to Prohibit Use of Locomotives.—If it appear to the Secretary for Scotland that the use of any particular description of locomotive causes excessive wear and tear of the highways, or is dangerous or inconvenient to the public, or that the use of locomotives generally, or of any particular description of locomotive, is dangerous or inconvenient to the public in certain districts or places, he may prohibit the use of locomotives by order (Locomotives Act, 1861, s. 5).

Use for Ploughing.—Locomotives may be used for ploughing near highroads without being subjected to the penalties attached to working uncovered locomotives near roads by Turnpike Act, 1831, s. 107, incorporated in Roads and Bridges Act, 1878 (Locomotives Act, 1865, s. 6).

Light Locomotives (*Motor Carriages*).—By the Locomotives on Highways Act, 1896, s. 1, and schedule (59 & 60 Vict. c. 36), the following enactments *inter alia* do not apply to the use of light locomotives on roads, viz.: the Locomotive Act, 1861 (24 & 25 Vict. c. 70) (except as regarding tolls, and secs. 7 and 13); the Locomotives Act, 1865 (28 & 29 Vict. c. 83); the Locomotives Amendment (Scotland) Act, 1878 (41 & 42 Vict. c. 58). A light locomotive is "any vehicle propelled by mechanical power if it is under three tons in weight unladen [not including water, fuel, or accumulators used for the purpose of propulsion], and is not used for the purpose of drawing more than one vehicle [such vehicle with its locomotive not to exceed in weight, unladen, four tons], and is so constructed that no smoke or visible vapour is emitted therefrom except from any temporary or accidental cause."

The county council, or town council of a burgh, may make bye-laws restricting the use of light locomotives upon any bridge where it appears dangerous to use them. A light locomotive is deemed to be a carriage within the meaning of any Act of Parliament, whether public, general, or local, and of any rule, regulation, or bye-law made under any Act of Parliament, and, if used as a carriage of any particular class, is deemed to be a carriage of that class, and the law as relating to such carriages applies (1896 Act, s. 1).

Lights—Bell—Speed.—During the period between one hour after sunset and one hour before sunrise the person in charge of a light locomotive must carry attached thereto a lamp, so constructed and placed as to exhibit a light in accordance with the regulations of the Board of Trade (s. 2). Light locomotives must carry a suitable bell, and must not travel faster than fourteen miles an hour, or any less speed that may be prescribed by the regulations of the Secretary for Scotland (ss. 3 and 4).

Regulations by the Secretary for Scotland.—The Secretary for Scotland may make regulations with respect to the use of light locomotives on highways, and their construction (see sec. 18, and Locomotives Amendment Act, 1878, s. 3 (4)), and the conditions under which they may be used. These regulations may be local and apply only to a particular area. The regulations may, on the application of any local authority, prohibit or restrict the use of locomotives for purposes of traction in crowded streets, or in places where such use may be attended with danger (ss. 6 and 10). Penalties are imposed by the Act for contravention of regulations or bye-laws, and an excise duty is imposed upon light locomotives.

Locus delicti—The place where an offence is committed. This regulates the jurisdiction of the criminal Court which is to try the case (Hume, ii. 57; Macdonald, 247). The *locus* must be precisely stated in the indictment or complaint. If, on proof, a *material* error in the statement of the *locus* appears, this will entitle the accused to an acquittal. But by sec. 10 of the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), the words "or near," or "or in the near neighbourhood thereof," or similar words, are implied in all statements of place where the actual place is not of the essence of the charge: and where the circumstances of the offence charged make it necessary to take an exceptional latitude in regard to place,

it is not necessary to set forth such circumstances in the indictment, or to set forth that the particular time is to the prosecutor unknown.

See COMPLAINT (SUMMARY); INDICTMENT; CRIMINAL PROSECUTION; ALIBI; JURISDICTION; JUSTICIARY, HIGH COURT OF.

Locus pœnitentiæ.—This legal doctrine is closely associated with the subject of the completion of contracts, a contracting party's *locus pœnitentiæ* being his opportunity or power to withdraw from a proposed contract until the time when, in the appropriate method, it is completed. Professor J. G. Bell calls it "a corollary to the rule of final engagement," and defines it as "a power of resiling from an incomplete engagement" (*Prin.* s. 25).

The doctrine is derived from the civil law, and appears already developed in the time of Justinian, in connection with the contract of sale and the formalities necessary to constitute that contract by writing: (*Donec enim aliquid ex his deest, et pœnitentiæ locus est et potest emptor vel venditor sine pœna recedere ab emptione—Inst.* l. iii. t. xxiv., *De Emptione et Venditione*). The doctrine is applicable in our law to contracts generally, wherever the final consent of parties has not been given. Consent is proved by the particular, relative, evidence; but it is the absence of complete consent which creates the *locus pœnitentiæ*, not the want of the evidence. Without reference, then, to historical order, connected with the adoption of particular solemnities for particular contracts, the principal cases in which the doctrine is applied under our law may be stated thus (as enumerated in Bell's *Prin.* ss. 25, 73, 173, and *Com.* i. 345):—

1. Contracts of offer and acceptance, before acceptance is complete. One of the leading decisions on that subject (*Thomson*, 1855, 18 D. 1) deals with the question of a retractation of an offer—substantially a question of *locus pœnitentiæ*—and there Ld. Pres. M'Neill says: "From these and other passages [viz. Stair, *Inst.* i. 3. 9, and i. 10. 6] I deduce the doctrine, recognised indeed by all our writers and authorities, that a simple offer is revocable till it be accepted." . . . This, and the other authorities cited under OFFER AND ACCEPTANCE (*q.v.*), fully illustrate the doctrine of *locus pœnitentiæ*, for that particular contract, and in general; and they are referred to here.

2. Mutual contracts between more than two parties, before all have finally given their assent.

3. Contracts which as matter of law require writing, before, by writing, the contract is complete, such as conveyances or leases of heritage, constitutions of servitude, assignations of written obligations (see *Dickson*, 1871, 10 M. 41; *Robertson* or *Weir*, 1872, 10 M. 438). Reference to oath cannot bar the *locus pœnitentiæ*, the law holding that there is no completed contract where the required solemnities are awanting.

4. Contracts which by arrangement require writing (see *Smeaton*, 1868, 7 M. 206; rev. 1871, 9 M. H. L. 24; *Robertson* or *Weir, supra*). But formal writing may be stipulated without suspending a present engagement, and in that case there is no *locus pœnitentiæ*.

5. Contracts by writing, where the writing is defective or informal.

6. Contract or promise of marriage, after the contract is completed, but before marriage takes place. In this case, however, penalty or compensation is competent. Where, as in 1.–5. *supra*, there is no completed contract, there can be no breach and no damages (see *Allan*, 1875, 2 R. 587).

There is no *locus pœnitentiæ* where *res non sunt integræ*. *Rei interventus*,

or homologation, by completing a contract, excludes the operation of the doctrine.

See (besides authorities cited) Ersk. *Inst.* iii. 2. 2–3; *Prin.*, 19th ed., pp. 269, 380–1, 345 (in connection with arles, in contracts of service); Hunter, *Landlord and Tenant*, i. p. 362; Rankine on *Leases*, 111, 114.

See Arles; Contract; Delivery; Homologation; Lease; Obligation; Offer and Acceptance; Promise; Rei interventus.

Locus standi.—This expression is applied in a general way to the right of parties to appear in any process. It is applied specially to the right of petitioners to appear and be heard against the passing of any private parliamentary Bill. In the House of Lords questions of *locus standi* are disposed of incidentally as they arise in the course of the proof of the preamble by the committee to which the consideration of the Bill upon its merits is referred. In the House of Commons, since 1864, all such questions have been disposed of by the Court of Referees—a separate body to whose determination such questions, if any, are referred before the Bill comes before a select committee for discussion on its merits.

Practice.

Before this body questions of *locus standi* are brought by means of objections lodged by the promoters of a Bill against the right of petitioners to oppose it—the Bill, the petition, and the objections thus forming the written pleadings in the case (Clifford and Stephens, 8). In the debate only one counsel is allowed on each side (S. O., 88), and the order of hearing is the reverse of that which prevails before committees on the merits, counsel for the petitioners being heard first, while counsel for the promoters replies. When there are several petitions, the usual course is that the petitioners are all heard in the first instance, and then the promoters reply. But with consent of parties the petitions may be dealt with separately or in classes. The debate is substantially one on relevancy, and the leading of evidence is seldom appropriate or competent. It is practically confined to proof of matters affecting the petitioners' title or interest to appear, when these are disputed by the objectors. In such matters the Court simply requires oral evidence sufficient to establish a *primâ facie* right. Formerly the Court made it a rule, in pronouncing judgment, to give no explanation of the grounds of its decision. It simply allowed or refused the *locus standi* of the petitioners. Latterly the rule has been in great measure departed from. The Court has no power to give expenses to either party.

Regulations regarding the form, time of deposit, etc., of the pleadings are laid down partly in the Standing Orders and partly in the rules which the chairman of Ways and Means is, by Standing Order 88, authorised to frame. If any of these are infringed, a preliminary objection will be taken either by the promoters or by the petitioners. Regulations regarding the lodging of papers are strictly enforced. Apart from this class, the regulations may relate either to the form or the substance of the petition or objections. In form the petition must conform to the rules and orders of the House applicable to petitions generally (S. O., 129; Erskine May, 496, 752). The parties, any number of whom may be combined in one petition, should be accurately designed, and must duly sign the petition. Signatures may be executed in a representative or delegated capacity, but, though the Court is not too technical, the requisite authority to subscribe should, except perhaps in the case of a mandate implied by law

or conferred by Statute, be distinctly alleged, and must, if it is questioned, be proved (Smethurst, 11; Rickards and Michael, 16, 306). As regards its character and substance, the petition may be directed either against the whole Bill or against certain parts of it, or it may simply seek protective clauses. If a general *locus standi* (*i.e.* against the whole Bill) is desired, the petition should contain a distinct prayer against the preamble. The petition should distinctly specify the characters in which the petitioners oppose the Bill, and the grounds of their objections to its provisions, or, in other words, the special injuries which the proposed scheme will inflict upon them; and petitioners are only heard upon the grounds so stated (S. O., 128; Clifford and Stephens, 11; Smethurst, 6; Erskine May, 753). The notice of objections must likewise state clearly the grounds upon which it proceeds (chairman's rules under S. O., 88), and its statement should be specifically directed against the allegations made in the petition, the petitioners being "at liberty to assume anything not traversed in the notices of objection" (2 Clifford and Stephens, 278). The rule that parties are bound down to the statement made in the pleadings applies not only to the petition, but to the Bill itself, on which the referees, as distinguished from a select committee, have no power to authorise alterations. The Bill must, accordingly, be taken as deposited, and the promoters cannot escape opposition by offering to alter it so as to obviate the petitioners' objections (Saunders and Austin, 19). Persons who have already filed a petition are not precluded from presenting and insisting in another. Nor, when a bill has already been before one House of Parliament, is a petitioner barred from opposing it in the other by reason of his having failed to petition, or petitioned unsuccessfully, in the first, unless he has then agreed to take a protective clause in satisfaction of his demands (Erskine May, 740).

The *locus standi* allowed to petitioners is either general or limited. It may be virtually limited by the terms of the petition, because the petitioner will not be allowed to travel beyond his pleadings. It may also be expressly limited by the Court. In one case, however, viz. where the Bill proposes to take lands belonging to the petitioner, it is an invariable rule that the Court allows a general *locus standi*, whatever be the nature and scope of the Bill. The rule was first clearly affirmed in the often-quoted "post case" (1 Clifford and Stephens, 62). In all cases other than those of interference with real property, the Court exercises its discretion in limiting the *locus standi* or not as it thinks fit. The limitation is generally expressed with reference to the clauses, sometimes with reference to the objects of the Bill. The Court will not limit the *locus standi* by restricting the petitioners to certain of the grounds of objection stated in their petition (Rickards and Michael, 129, 154).

If a petitioner fails to appear at the time fixed for hearing the case, his *locus standi* will be disallowed (Smethurst, 10). Other general rules, applicable to all kinds of cases, are that the Court will not entertain considerations of general policy affecting a Bill. It will only consider objections special to the petitioners or those whom they represent (Rickards and Saunders, 199). It will not inquire into allegations of breach of faith, involving the hearing of evidence (*ib.* 191). Nor will it, as a rule, undertake to construe Statutes. If the receipt of injury is contingent upon the construction of an ambiguous clause in a Bill, it will give the petitioners the benefit of the doubt, and will allow a *locus standi* (*ib.* 137, 339). Finally, it will not grant a *locus standi* where the petition is directed against the consequences of past legislation (1 Clifford and Stephens, 95; Rickards and Saunders, 56, 93). The last-mentioned rule is not, however, invariable.

Doctrine of Representation.

Stated generally, this doctrine is that members of a company or corporation or other public body are, for the purposes of *locus standi*, presumed to be represented by it; and are not entitled either to oppose a Bill promoted by it, or to take independent action, concurrent with or opposed to the action taken by such body, with reference to a Bill affecting the common interests of both, promoted by a third party. In the case of representative bodies, public and private, with reference to which questions most frequently arise, the principle applies to those who, though not themselves members of them, are represented thereon. In both cases the grounds of the rule are the same, viz. that on the one hand the decision of the majority should be binding, both on members and constituents; and on the other hand, that opposition to a bill should not be unnecessarily multiplied (Clifford and Stephens, 96, 103; Smethurst, 111; Erskine May, 748). In the case of companies, which alone are regulated by Standing Orders, two exceptions to this rule are provided for. By Standing Order 132, any member who has dissented at a Wharncliffe meeting, by which, in terms of other Standing Orders, every Bill promoted by a company must be approved, is entitled to a *locus standi* against the Bill. The second exception is contained in Standing Order 131, which provides that where a Bill is promoted by an incorporated company, shareholders thereof shall not be entitled to be heard against it "unless their interests, as affected thereby, shall be distinct from the general interests of such company." Preference shareholders form an example of what is generally a distinct interest. The same principle as that embodied in the Standing Order last referred to is applied to corporations and other public bodies. The question frequently arises between public authorities and inhabitants of the same district. In such cases it has been held that the rule of representation does not apply where inhabitants petition either as landowners or consumers, the interest in each of these cases being held as distinct, but only to the case where they petition simply as ratepayers or occupiers. Even in the case of ratepayers the rule is elastic, especially where the local authority has taken no action (Rickards and Michael, 76, 78, 191, 210; Rickards and Saunders, 53, 349; Saunders and Austin, 39, 129). The doctrine has a special application to the right of opposition founded on injury to business or trading interests, and also to the right of opposition conferred on inhabitants of a district founded on general injury to the district. The peculiarity of the former ground of opposition is that wherever trade interests pure and simple are involved, the privilege which it confers rests not with the individual but with the class to which he belongs; and, accordingly, the general rule is that while any body fairly representative of a trading interest will be heard, the individual trader, being represented by it, is excluded. Similarly, in the case of opposing inhabitants the petitioners must be substantially representative of the district (Clifford and Stephens, 49, 96; Smethurst, 51, 102).

Owners, Lessees, and Occupiers.

Of the leading grounds of opposition to a Bill there may be considered, first, that vested in the various lessees and occupiers of lands and houses to be taken or injuriously affected under any proposed scheme. The right of opposition attached to this qualification is almost entirely the result of parliamentary practice, and, so far as concerns the title of petitioners, it has been widely construed, extending to "all persons who have a vested interest in the property, whether present or future, legal or equitable"

(Smethurst, 1). The title must, however, have been acquired before the date of presentation of the petition against the Bill (Smethurst Append. 99). Otherwise almost the only exceptions are the case of a mortgagee, whose title would not appear to be sufficient unless he is in possession, and that of a proprietor previously served with a notice to treat, he being regarded as a mere creditor for the price of his land (Erskine May, 736; 3 Clifford and Rickards, 294, 440). Under the Standing Orders, promoters require to serve notices not only on owners, etc., of lands to be taken, but, in the case of certain special classes of Bills, upon owners, etc., within a certain distance of the proposed works. All those on whom such preliminary notices require to be served have a *locus standi* according to the practice of Parliament (Smethurst, 22). But the fact that such service has been made is not conclusive of its necessity, and does not bar the promoters from afterwards questioning the title of the petitioners (1 Clifford and Stephens, 4).

A large number of cases have arisen upon disputes as to the kind of interest in property, or, to put it from the other point of view, the kind of damage done to the property which will confer a right to oppose. It is a general rule of the Court that a *locus standi* will not be conceded to petitioners against a Bill which does not empower the promoters to take their lands, but simply authorises the construction of works which will or may injuriously affect their property (Clifford and Stephens, 39; Smethurst, 36; Erskine May, 738). In other words, as a general rule, indirect injury is not a ground for according a *locus standi*. Manorial rights, mineral rights, rights of servitude, and the right of riverian proprietors in a running stream, have all been held to constitute a sufficient interest. In such cases the physical interference is direct. It is more than an injurious affection. But it is otherwise where the proposed scheme infringes a mere natural right of property, as by encroaching on lights or destroying amenity, or interferes with a public access; and a *locus standi* has been refused in a long series of cases in which petitioners have alleged serious injury from deprivation of access, from loss of support, from obstruction to light and air, from vibration, and from loss of amenity and salubrity caused by unsightly buildings and noxious works. The rule is, however, subject to many exceptions, partly by decisions of the Court, and partly under the Standing Orders. Thus Standing Order 135 entitles frontagers on the line of a proposed tramway to be heard on allegations that the construction or use of the tramway will injuriously affect them. And Standing Order 15, by prescribing notice to be served upon owners, etc., within 300 yards of proposed gas or sewage works, confers the right to oppose Bills for these objects upon all such persons.

In the case of two classes of subjects, viz. water and roads, rights of various kinds are apt to be specially complicated and involved. As already stated, a right to surface water is sufficient to ground a claim to a *locus standi*, and the claim is fortified by Standing Order 14, which, in the case of proposed abstraction of water from a stream, directs notice to be served upon owners, etc., of mills and works for a distance of twenty miles below the point of abstraction. In such cases there are usually many other than purely proprietary interests to consider. There may be bodies statutorily intrusted with powers of management or appropriation, such as statutory owners of waterworks, river conservators, fishery boards, and canal companies; and all these are likewise entitled to oppose any interference with the streams or waterways within their charge. On the other hand, in cases of interference with underground water by the sinking of wells or otherwise, the right of opposition is usually refused. The rule as

to *locus standi* used to follow the legal maxim, that there is no property in underground water flowing in undefined channels; and though it has latterly been to some extent relaxed, the "Court still requires some *primâ facie* evidence of a well-defined channel" (Rickards and Michael, 95; Saunders and Austin, 134). In the case of highways, the ownership of the *solum* is usually retained by the proprietor of the adjoining land, while the management is vested in a local authority, who are trustees for the public incorporeal right of passage. Both the proprietor and the body which has control of the highway are entitled to oppose interferences with the *solum*. But in addition to these, there are, especially in the case of streets, many other bodies which have an interest of some kind or another to protect. Tramway or railway companies may have the right to use the surface, and sewage, water, or gas commissioners may have right to pipes underground. As a rule, the right of these bodies is a mere servitude, with a right of property in the pipes or rails, and in such cases the *locus standi* is limited to the construction of works which will prejudicially affect their plant. But if they are owners of the track, they will be allowed a general *locus standi* (Rickards and Saunders, 204, 246, 248, 325).

There is another considerable class of cases affecting owners of land, where the ground of opposition is the liability to new taxation or regulation consequent upon the erection or transfer of jurisdiction of local authorities. In such cases each individual owner has a *locus standi* to oppose a Bill by which he would be subjected to liability to new taxation or other burdens, and by which his property would thus be rendered less valuable (Rickards and Saunders, 276). Where a bill seeks no increase of jurisdiction, but simply asks authority for increased expenditure, petitioning owners may be granted a right of opposition on the ground that the rates will be raised; but to found a *locus standi* in this case the proposed expenditure must be large (Saunders and Austin, 139).

There are two classes of bills with regard to which the rules affecting the *locus standi* of landowners are peculiar, viz. abandonment Bills, which seek power to relinquish schemes already sanctioned, and extension of time Bills, which ask for an extension of the time fixed for the completion of such schemes under previous Acts. Though in the case of both these classes of Bills the Standing Orders direct notice to be given to owners, etc., affected, that fact, contrary to the general rule of practice, confers no right to oppose. As a rule, a *locus standi* is not granted at all against abandonment Bills, and against extension of time Bills only when the lands have been scheduled but not taken, or when the compulsory powers have altogether expired (Rickards and Michael, 29, 67).

Status, Jurisdiction, etc.

Analogous to the right of opposition founded on the taking of land, is that founded on threatened alteration of status or invasion of other incorporeal rights. Questions of this kind usually arise in connection with companies or corporations or other statutory bodies, and the interference complained of may affect either their constitution or their jurisdiction and powers. Any proposed interference with the constitution of such bodies will confer a *locus standi* not only on the bodies themselves, but also on those members and constituents whose rights are thereby affected, the rule as to representation not applying in these circumstances. The commonest case of interference with jurisdiction is the proposed extension of burgh boundaries. Such an extension necessarily involves a loss of rating area to the adjoining authorities, which they are entitled to object to both in their

own interest and as representing the ratepayers subjected to the new jurisdiction. A loss of rating area may also be brought about by the demolition of rateable subjects, or by the exemption of certain classes of buildings from assessment. In the latter case the rating authority is allowed a *locus standi* as a matter of course. In the former case the loss of rating area must be substantial (Rickards and Michael, 173; Rickards and Saunders, 68, 91, 341). In like manner, bodies statutorily invested with the right to levy tolls or dues, such as railway companies, harbour authorities, canal commissioners, or statutory water companies, are entitled to oppose any interference with such rights. The interference is seldom direct, but generally arises through the application of some competing body for similar powers, or through some anticipated obstruction or diversion of trade, and the cases accordingly rather fall under other leading grounds of *locus standi*.

There remains to be noticed the case of creditors, the subjects of whose security are affected by any Bill. The general rule is that company creditors have no *locus standi* against a Bill promoted by the company (Clifford and Stephens, 106). But wherever the result of the scheme will be to alter their status, or to materially affect their position, a *locus standi* will be conceded (Rickards and Saunders, 28, 264).

Traders, Freighters, etc.—Injury to Business and Trading Interests.

Another leading ground of opposition to a Bill is that founded on anticipated injury to business or trading interests. Such injury may arise from the erection of works proving obstacles to traffic, from the abandonment of undertakings involving diversion of traffic, from the imposition of tolls and dues, or from the amalgamation or transfer of undertakings resulting in monopoly and consequent prejudice to trade; and the Bills involving such injuries are generally connected either with land or water carriage —railway, road, and tramway Bills, and canal, harbour, and navigation Bills. The right of opposition is primarily vested in traders, and the term is widely construed, embracing producers and middlemen as well as carriers. It extends also to trade associations, to bodies such as harbour boards and canal companies, possessing or statutorily intrusted with the supervision and management of trade or trade routes, and likewise to certain classes of owners, such as owners of wharves and minerals.

An association representing a particular class of traders affected by a Bill may be heard; but an association representing a combination of various trades and interests, some of which are not affected by the Bill, is not entitled to a *locus standi* (Rickards and Saunders, 115, 217, 346). This rule formerly excluded Chambers of Commerce (2 Clifford and Rickards, 18), and a Standing Order was therefore framed (S. O., 133A) by which, in the case of a railway Bill, the referees have a discretionary power to allow a *locus standi* to Chambers of Commerce or Agriculture, or other similar bodies sufficiently representing a particular trade or business in the district to which the Bill relates. Another Standing Order, passed later (S. O., 133B), still further enfranchised such bodies, by providing that, in the case of any Bill where a Chamber of Commerce, Agriculture, or Shipping, or a Mining or Miners' Association similarly qualified, petitioned on similar grounds, it should be competent to the referees to admit them to be heard.

Traders and freighters cannot be heard against existing tolls, but "they can of course be heard against any Bill which authorises the levying of tolls for the first time, or which professes to vary existing tolls" (2 Clifford and Rickards, 18). While this is the general rule, Standing

Order 133A authorises the referees to admit petitioners to be heard against rates already authorised.

In case of railway transfer or amalgamation Bills, the question of monopoly may be raised either by traders or by connected railway companies. The right of opposition is freely conceded on this ground; but the petitioners must show "that the Bill will be detrimental to them in some respect" (2 Clifford and Stephens, 64).

As already pointed out, the general rule is that a single trader cannot petition. The rule is, however, by no means absolute. Exceptions are allowed where the injury complained of is special to the petitioning trader (Rickards and Saunders, 50), or where it is sufficiently substantial (1 Clifford and Rickards, 107, 180; Rickards and Michael, 184, 236).

Competition.

Competition as a ground for asking a *locus standi* rests upon the allegation that the undertaking proposed by the Bill will compete with the business of the petitioners. The plea is founded on Standing Order 130, which provides that it shall be competent to the referees to admit petitioners to be heard against a Bill on the ground of competition if they shall think fit. It arises in all kinds of Bills, but chiefly in the largest and most important classes—railway, harbour, and light and water supply Bills. The discretion reposed in the Court is freely exercised, but the cases are for the most part complicated and special, the decision of the Court depending on its opinion of the extent and directness of the competition in the special circumstances of the case (Erskine May, 744).

With regard to the title to oppose, petitioners must be entitled to carry on the same business as that which they object to (2 Clifford and Stephens, 59). On the other hand, it is not necessary, even in the case of opposition to gas and water supply Bills, that ordinary petitioners should have parliamentary powers to carry on similar undertakings. It is sufficient that they have been actually engaged in the business (1 Clifford and Stephens, 14, 111). Those interested in a concern with which the proposed undertaking will compete, have been allowed a separate right of opposition where their interest was sufficient and distinct (Smethurst, *Append.* 151).

Private individuals may petition on this ground if they are truly competitors. But the Court has not gone so far as to grant a *locus standi* to those engaged in what may be termed retail trade, as in the case of hotel-keepers opposing a railway hotel (3 Clifford and Rickards, 23).

Another rule is that the petitioner's business must be sufficiently similar to that of the proposed undertaking properly to raise the issue of competition. Thus tramway traffic has been held not to be sufficiently *pari materiâ* with railway traffic, unless the tramway company proposes to acquire steam powers; so the proprietors of omnibuses have been heard, but cab proprietors have been refused a hearing against tramway Bills (Erskine May, 744). On the other hand, a canal has been held to be competitive with a railway, a tunnel with a ferry, and gas supply with electric lighting (1 Clifford and Stephens, 90; Smethurst, *Append.* 162; 2 Clifford and Rickards, 251).

That the plea of competition may properly arise with regard to Bills affecting carriage by land or sea, or harbour Bills, the termini of the competing routes must be sufficiently near to render an obstruction or diversion of traffic probable. The degree to which this rule is applied depends a good deal upon the scope of the route and the nature of the traffic. With regard to through land traffic or ocean routes, much greater latitude is allowed than in the case of local traffic (Smethurst, *Append.* 136; Saunders and Austin, 105).

In the case of light and water Bills the analogous rule is, that to found a right of opposition the petitioner's district must be invaded. In the case of statutory bodies the district will be the legal, in the case of individuals and private companies, the actual, area of supply (Smethurst, 68).

Yet another rule—practically an application of the general rule which bars opposition to past legislation—is that a *locus standi* will not be allowed when the objects of the Bill involve no new competition, but merely extend existing competition or make it more effective. On the other hand, representation will be allowed wherever the competition is materially changed in character or is introduced from a different source, as in the case where a railway Bill proposed an extension creating a new and materially shorter competing route (Clifford and Stephens, 64; Smethurst, 75).

Both in regard to this and the immediately preceding rule the most numerous examples are furnished by railway transfer and amalgamation Bills. But these are also subject to the special rule, that in amalgamation Bills a wider latitude is always allowed to petitioners than is given in ordinary cases; and it is the practice to allow any person who has an interest which he reasonably desires to be protected, to be heard against the Bill (3 Clifford and Rickards, 349; Rickards and Saunders, 334).

A considerable number of cases have arisen out of the specialty that one railway company has facilities or running powers over the line of another, or works the line of another company under agreement. A company which possesses facilities over another line is not entitled to a *locus standi* against a proposal to confer similar powers on, or to amalgamate the company subject to the powers with, a third company. But when the company has not only rights of user, but completely works the traffic or leases the line of another, its position is stronger, and a *locus standi* is usually allowed (Smethurst, 87; R. & S. 353). Standing Order 133 provides that where a railway Bill contains provisions for taking the lands, etc., of another company, or for running engines or carriages on the same, or for granting other facilities, such company shall be entitled to be heard against the Bill. This Order entitles a company, which is subject to existing powers, to be heard against any proposal to extend the facilities to others, either directly, or indirectly through an amalgamation scheme.

Local Authorities and Inhabitants.—General Injury to District.

General injury to a town or district is likewise a ground for granting a *locus standi*; and the right to plead it is by Standing Order vested in local authorities and bodies of inhabitants. Standing Order 134, first passed in 1863, provides that—

> It shall be competent to the referees on private Bills to admit the petitioners, being the municipal or other authority having the local management of the metropolis or of any town, or the inhabitants of any town or district alleged to be injuriously affected by a Bill, to be heard against such Bill if they shall think fit.

The terms of the Standing Order of course extend to gas and water supply Bills. But the referees, in the exercise of their discretion, refused to extend the Order to the case of a Bill merely for the creation or spending of further capital (3 Clifford and Rickards, 40). This led to the passing, in 1882, of Standing Order 134A, which provides that—

> The municipal or other local authority of any town or district alleging in their petition that such town or district may be injuriously affected by the provisions of any Bill relating to the lighting or the water supply thereof, or the raising of capital for any such purpose, shall be entitled to be heard against such Bill.

Upon the introduction of local popular representative government the referees decided that a county council did not come under Standing Order 134A (Rickards and Saunders, 160), and two new Orders were framed to meet the case of the newly-constituted bodies. Standing Order 134B provides that—

> It shall be competent to the referees on private Bills to admit the petitioners, being the council of any administrative county or county borough, the whole or any part of which is alleged to be injuriously affected by a Bill, to be heard against such Bill if they think fit.

Standing Order 134C provides that—

> The council of any administrative county alleging in their petition that such administrative county, or any part thereof, may be injuriously affected by the provisions of any Bill relating to the water supply of any town or district, whether situate within or without such county, shall be entitled to be heard against such Bill.

The benefit of Standing Order 134 has been restricted to bodies with general powers of management, the referees refusing to extend it to quasi-public authorities, or authorities with limited functions, such as inspectors of lighting or overseers of the poor (2 Clifford and Stephens, 196). The local authority of rural districts is the sanitary authority—formerly the guardians of the union (Rickards and Michael, 194), now the district councils (Saunders and Austin, 42).

After a good deal of variation in the opinions expressed by the Court from time to time, it may now be taken as settled that a "district" from which inhabitants may petition under Standing Order 134 need not be coincident with the area of jurisdiction of a municipal or local authority, or with any administrative area, but, with certain limitations, may consist of a district *ad hoc* or neighbourhood specially affected by a scheme (2 Clifford and Rickards, 165; Rickards and Saunders, 133).

Whatever the district be, the petitioners, if they appear simply as ratepayers or inhabitants, must be substantially representative of it (Clifford and Stephens, 96; Smethurst, 102). They may be so either by their own numbers or in virtue of their being mandataries of a public meeting. The substantial interest of the petitioners in the objects of the Bill, as, for example, the rating value of the petitioners' property in a question of rating, is likewise an element of importance. There is no precise proportion which makes a petitioning body representative of the district, each case depending on its own circumstances. In the case of a light or water supply Bill, inhabitants will generally petition as consumers. Where they do so it has been held that the rule requiring the body to be representative is not applicable, each consumer having an individual interest to protect (Rickards and Saunders, 53).

While Standing Orders 134 and 134B give the referees a discretion to allow or refuse a *locus standi*, 134A and 134C are in form mandatory, and the Court has held that it has no option, if the proper allegations are made against a Bill which satisfies the conditions of the Standing Orders (Rickards and Saunders, 169). The necessary allegations are not identical in both Orders, for while under Standing Order 134A the Bill must relate to the petitioners' town or district, it need not do so under Standing Order 134C.

Under Standing Orders 134 and 134B the rule is that the petition must disclose a *primâ facie* case of importance (Smethurst, 97). Subject to this limitation, the Court freely exercises its discretion in allowing a *locus standi* on the ground of general injury to the district. It is obviously impossible to classify such injuries. Among the commoner cases are those of injuries

apprehended from Bills affecting the sanitation or water supply of a town or district, or its means of access by land or sea.

These grounds of opposition are open both to local authorities and to inhabitants. The latter are not included in Standing Orders 134A and 134C; but, subject to the rules of representation, they may oppose light or water supply Bills as consumers or under Standing Order 134. They have no interest, however, to be heard against a Bill for the supply of gas for the first time—being free to take it or not, as they choose (2 Clifford and Rickards, 78).

[Erskine May, *Parliamentary Practice*, 732; Clifford and Stephens, *Practice of the Court of Referees*; Smethurst, *Locus Standi*: Fawcett, *Court of Referees*; Shirres Will, *Practice of the Court of Referees*; Clifford, *History of Private Bill Legislation*; *Report of Select Committee on Private Bill Legislation*, 1888; *Locus Standi* Reports; *Standing Orders of Lords and Commons on Private Bills*.]

See PRIVATE BILL; PROVISIONAL ORDER; REFEREES.

Lodgers.—See FRANCHISE.

Lodging-Houses.—See COMMON LODGING-HOUSES; INNKEEPER; NAUTÆ, CAUPONES, STABULARII.

Lodging Papers.—The documents forming a process are kept by the Clerk of the Court before which the cause depends and in the case of Court of Session actions are lodged at his office in the Register House. Along with the summons at calling, it is necessary to lodge certain documents, forming the foundation of the process. These have been already specified in the article CALLING LIST (*q.v.*). These documents should all be lodged on the lawful day preceding the calling-day, or, in vacation or recess, on the second day preceding the box-day. Defences are due and should be lodged on the tenth day after the day of calling if in session; in vacation, defences to summonses called within the last ten days of the preceding session may be lodged on the first box-day; to summonses called on the first box-day, on the second box-day; and to summonses called on the second box-day, on the first sederunt day of the ensuing session. See DEFENCES. Within eight days of the lodging of the defences or the revised pleadings, the pursuer must deliver two printer's proofs to the opposite agent, and two to the Clerk to the process. If he fails, the pursuer may take decree of absolvitor by default (Court of Session Act, 1868, s. 26). Within four days from the date of the interlocutor closing the record, the pursuer's agent should lodge with the Clerk to the process two copies of the closed record as finally adjusted, one for the process and the other for the use of the Lord Ordinary. See RECORD. For provisions as to the lodging of papers in reclaiming notes, see RECLAIMING.

By 6 Geo. IV. c. 120, s. 38, and A. S., 11 July 1828, parties to an action are directed to produce, along with the summons or defences, the deeds or writings upon which they found, so far as in their custody or within their power. If not so lodged before the closing of the record, they could not competently be produced afterwards, except on the ground of *res noviter*, or where it was necessary to lodge them to rebut productions made by the opposite party after the record was closed, or where production was

ordered by the Court. This rule was altered by the Court of Session Act, 1868, s. 99, which provides that it shall not be competent to object to the production of any writing after the record is closed, on the ground that it was in the possession or under the control of the party producing it at the time when the record was closed; but the Court or Lord Ordinary may attach such conditions as to expenses or otherwise to the receiving of the documents as to them or him shall seem proper. It is proper and usual to lodge all documents founded upon in the pleadings of either side before the record is closed. When documents are to be used in evidence in jury trials, whether in the custody of the parties or other persons, they must be lodged eight days before the trial, notice being at the same time given to the agent for the opposite party of the writing being lodged. No writings, except such as are lodged in this way, can be admitted in evidence at the trial except of consent, or unless it is established to the satisfaction of the Court that they could not be lodged eight days before the trial, nor before the period at which they were actually produced or exhibited to the opposite party, and that notice to the opposite party had been given of the particular writing or writings proposed to be produced (A. S., 16 Feb. 1841, s. 19). Plans, maps, models, or other productions of that description must also be lodged eight days before the trial, unless by permission of the Court, on its being made out on oath to the satisfaction of the Court that the productions could not be lodged in time (s. 18). These rules do not apply to proofs before a judge. In such cases the documents may be produced in process while the proof is proceeding, unless they have been previously called for under diligence (see COMMISSION, PROOF BY; PRODUCTIONS).

In the Sheriff Court the pleadings and other documents forming the process are lodged with the sheriff clerk. While the process is current they may be borrowed by agents practising within the sheriffdom, who are liable to pecuniary penalties and also to caption if they fail to return them (Sheriff Courts Act, 1876, s. 21). If any of the pleadings are lost or destroyed, copies authenticated to the satisfaction of the Sheriff may be substituted (s. 11). This, however, does not apply to the interlocutor sheet (*Cofton*, 1875, 2 R. 599), which, if lost, can only be set up by a proving of the tenor (Dove Wilson, *Sh. Ct. Pr.* 92).

Log-book.—An ordinary ship's log contains a record, made up from day to day, of all circumstances connected with the ship, whether at sea or in harbour, of which it is desirable that evidence should be preserved. Thus, when the ship is at sea, the log-book presents a daily record of the courses steered and distances run by the ship, the state of wind and weather, latitude and longitude by observation and dead reckoning, sail made and taken in, and, generally, all work done on board ship.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which repealed and consolidated the former Merchant Shipping Statutes, the keeping of an official log-book is an obligatory duty laid upon the master of every ship, except such as are employed exclusively in trading between ports on the coasts of Scotland. The official log-book must be in the form approved by the Board of Trade for the particular class of ship, and may, in the discretion of the master or owner, be kept distinct from, or united with, the ordinary ship's log (s. 239, (1), (2), (3)). In practice, it is believed, they are generally kept distinct. The matters of which entries are required to be made are enumerated in sec. 240, and include convictions, offences committed by the crew (see s. 228), punishments, statements relating to the

conduct and character of the crew, illnesses and injuries, marriages, the names of seamen quitting the ship, the wages due to seamen entering the navy or dying, sales of the effects of deceased men (see s. 169), collisions with any other ship, and the circumstances under which the same occurred. This last provision is extended by sec. 423 so as to cover the case of any collision, whether with a ship or any other object. Provision is also made in the Statute for entering in the official log-book the ship's draught of water and the extent of her clear side on leaving port to proceed to sea (s. 436); the distance between the ship's load-line and deck-lines (s. 440); and various miscellaneous matters affecting the safety of the ship and crew, etc. (see ss. 198, 200, 258, 483). Births and deaths occurring on board ship are to be recorded, but not necessarily, under the statute, in the official log-book (s. 254; see also s. 690).

All entries in an official log-book are to be made as soon as possible after the occurrence to which they relate; if not made on the same day, the date of the occurrence and of the entry must both be stated; and no occurrences happening prior to the ship's arrival at her final port of discharge can be entered after the lapse of twenty-four hours from such arrival (s. 239 (4)). All entries are to be authenticated by the signatures of the master and the mate, or some other of the crew; and if they be entries of illness, injury, or death, by the surgeon on board (s. 239 (5)). The observance of these regulations is enforced by stringent penalties: and any person wilfully destroying, or mutilating, or rendering illegible any entry in an official log-book, or wilfully making a false or fraudulent entry in or omission from such log-book is declared guilty of a misdemeanour (s. 241). Provision is also made, under certain penalties, for the transmission and delivery of official log-books to the superintendent of the Mercantile Marine Office at stated periods, according as the vessel is a foreign-going or a home-trading ship; and for the sending home of the log-book in cases of transfer of ownership, change of employment, loss, or abandonment of the ship (s. 242). The log-books are finally transmitted by the superintendent to the Registrar-General (s. 256).

In practice, the principal question which has arisen in this connection is the admissibility of a log-book as evidence of the statements it contains. An ordinary ship's log has not the status of an official record; it is merely the statement of the master and mate, and therefore is not to be taken as evidence of the truth of the facts therein stated (*Cairns*, 1820, 2 Murr. 248, correcting the earlier case of *Carleton*, 1816, 1 Murr. 32). Though inadmissible, however, as direct evidence of the facts, the log-book may be put to a witness to refresh his memory (*Innes*, 1827, 4 Murr. 164; *Wight*, 1829, 5 Murr. 36; *Burrough*, 1809, 2 Camp. 112), although it may not have been actually written by him (*Anderson*, 1852, 3 C. & K. 54). It is in no sense evidence *per se*, and therefore cannot be received as evidence in favour of the ship or of the writer (*The Sociedade Felix*, 1842, 1 Wm. Rob. 303, 311; *The Singapore*, 1866, L. R. 1 P. C. 378, Westbury, *L. C.* p. 382; cf. *The Niemen*, 1811, 1 Dod. 9; *The Zepherina*, 1830, 2 Hag. Adm. 318); and it has, in England, been refused admission even where the mate who wrote it was proved to be dead (*The Henry Coxon*, 1878, 3 P. D. 156), a decision which, it is submitted, would not be followed in our Courts. The log-book may, of course, be used to contradict the master and mate, and for this purpose may be recovered by diligence (see *The Singapore*, *supra*; *The Solway*, 1885, 10 P. D. 137; cf. *The Talisman*, 1896, 4 S. L. T. No. 93; *Barnyeat*, 1897, 4 S. L. T. No. 396); and frequently affords valuable evidence against the ship (*The Europa*, 1849, 13 Jur. 856; *The Earl of Dum-*

fries, 1885, 10 P. D. 31—engineer's log), or those to whom it may be brought home as concerned either in writing it (*The Malta*, 1828, 2 Hag. Adm. 159, n.), or as directing and controlling what is therein contained. Statements in the log-book have been represented as being equivalent to admissions made by parties representing the owners, and it has been ruled that the latter are not entitled to impugn statements therein made to their prejudice (*Campbell*, 1841, 4 D. 342). It is thought, however, that this ruling overstates the effect of such statements when sought to be used against the ship.

The log-book of a ship, however, frequently affords good, if not always conclusive, evidence when appealed to in a question between outside parties. Thus the log-book of a man-of-war has been held admissible to prove the time of the sailing of a ship under convoy (*D'Israeli*, 1795, 1 Esp. 427), or the separation by storm of merchant vessels from their convoy (*Watson*, 1815, 4 Camp. 275; see also *Heathcote*, 1851, 1 Macq. 277). As regards the official log-book, it is declared by the Merchant Shipping Act, 1894, that "every entry made in an official log-book in manner provided by this Act shall be admissible in evidence" (s. 239 (6)); and it is further enacted, with regard to all documents declared by the Act to be admissible in evidence, that these shall, "subject to all just exceptions, be evidence of the matters stated therein in pursuance of the Act, or by any officer in pursuance of his duties as such officer" (s. 695).

Marsden (*Collisions at Sea*, 4th ed., p. 335) says that notwithstanding the terms of the Statute, the official log is not evidence for the ship; but the cases he refers to do not support his statement. It would rather seem that any question of admissibility is foreclosed by the terms of the Statute, all questions, of course, being left open as to its effect and the weight which ought in the circumstances to be attached to it.

(See generally, Bell, *Com.* i. 658: Bell, *Prin.* ss. 496, 2214; Dickson, *Evidence*, ss. 1777, 1210; Greenleaf, *Evidence*, s. 495).

Loosing of Arrestment.—See ARRESTMENT.

Lord Advocate.—The Lord Advocate, or Queen's Advocate, is the principal Crown lawyer, and one of the great Officers of State in Scotland. He is "the public accuser, who insists in the name of the King, and for His Majesty's interest in the execution of his laws, and in the tranquillity and welfare of his people" (Hume, ii. 127). The office is of very ancient origin, but is not much taken notice of before the beginning of the sixteenth century. There are records of the office from 1483. According to the common account, the Lord Advocate's powers and duties as public prosecutor were first conferred by the Act 1587, c. 77, which provides "That the Thesaurer and Advocate persew slaughters and utheris crimes, althoucht the parties be silent, or wald utherwayes privily agree." Hume points out that this is not accurate. The earlier Act 1579, c. 78, fixes the penalties of calumnious prosecution, and provides for the case of a process at the instance of the Lord Advocate alone; and it is obvious that, with respect to crimes of a public nature, such as treason, sedition, blasphemy, and several others, for which no private individual ever had a right to prosecute, "there must always have been some regular course of complaint, wherein the offenders in that sort might be brought to justice" (Hume, ii. 128). In any view, however, the Lord Advocate's powers and importance as public prosecutor were largely increased by the Statute of

1587. It is said that the trial of Arnot of Woodmiln, on 3 November 1598, is the first instance of his being named in the record under the title of *Lord* Advocate, by which he has ever since been addressed. In the modern form of indictment, he is now described as "Her Majesty's Advocate" (Criminal Procedure Act, 1887). [In an unreported case (*Donald*, June 1896) the omission of the words "Her Majesty's Advocate" in an indictment in the Sheriff Court, was held by the High Court not to be a good ground of objection.]

He has full discretionary power as to the prosecution of crimes, for the public interest, in Scotland. Where a private party has been injured, and the Lord Advocate declines to prosecute, the private party may, with the concourse of the Lord Advocate, prosecute. See CONCOURSE OF PUBLIC PROSECUTOR. The Lord Advocate cannot be constrained to prosecute, even by the Supreme Court (*Complaint of Sir John Gordon*, 1766, Hume, ii. 131; Maclaurin, No. 74). Throughout the proceedings, after the libel has been brought into Court, he has full discretion as to the extent to which he will insist against the panel. He may (in the requisite form) abandon proceedings at any stage, and, even after the verdict has been returned, he may restrict his libel to an arbitrary punishment, in the case even of a capital crime (cases of *Carswell*, *Lyle*, *Fraser*, and *Mossman*, Hume, ii. 132).

The Lord Advocate is not required to find caution, or to take an oath of calumny, nor is he liable in expenses or penalties in the event of the panel being acquitted (Hume, ii, 132; Alison, ii. 92). (As to whether he is obliged to disclose the name of his informer, see Hume, ii. 136; Alison, ii. 94; Burnet, 313.) The Lord Advocate may delegate his powers to deputes (see ADVOCATES-DEPUTE). He may prosecute in any Court (Alison, ii. 86); and he is the only competent prosecutor in the High Court of Justiciary, the Solicitor-General and the Advocates-Depute being his deputies. The Lord Advocate and his deputies remain in office until their successors are appointed; and the successors may take up libels raised by those who have demitted office (Alison, ii. 96). Sec. 3 of the Criminal Procedure (Scotland) Act, 1887, further provides that "the Lord Advocate shall enter upon the duties of his office immediately on receiving his appointment, and may take the oaths of office before any Secretary of State or any Lord Commissioner of Justiciary; and all indictments which have been raised by any Lord Advocate shall continue in force and effect notwithstanding such resignation, and may be taken up and proceeded with by his successor; and where any Lord Advocate shall die during his tenure of office, or otherwise be removed from office, it shall be lawful to indict persons accused in name of the Solicitor-General then in office, until another Lord Advocate is appointed; and the advocates-depute and procurators-fiscal shall have power, notwithstanding such death or removal from office of the Lord Advocate, to take up and proceed with any indictments already raised in name of such Lord Advocate, and any indictments that may be raised in name of such Solicitor-General" (see *Halliday*, 1891, 3 White, 38). As the indictments in the Sheriff Court are now in the Lord Advocate's name, they can also be proceeded with under this section. (For relations between Lord Advocate, Sheriff, and Procurator-Fiscal, see *C. C. of Dumfries*, 1895, 22 R. 538.) As to procedure, etc., in criminal prosecutions, see ADVOCATES-DEPUTE; CONCOURSE OF PUBLIC PROSECUTOR; CROWN AGENT; BAIL; CRIMINAL PROSECUTION; JUSTICIARY, HIGH COURT OF; PROCURATOR-FISCAL.

In civil actions the Lord Advocate has a title to sue, and is the proper party to sue and be sued, on behalf of the Crown and the public departments (20 & 21 Vict. c. 44, s. 1; 19 & 20 Vict. c. 56, s. 22. As to previous

law, see *Lord Dunglas*, 1836, 15 S. 314). It is not necessary that special authority to the Lord Advocate to pursue should be averred (*Comrs. of Woods and Forests*, 1860, 23 D. 216), although such authority of Her Majesty or the department is necessary (20 & 21 Vict. c. 44, s. 2); nor can a private party object that such authority was not given, or evidence of it not produced (s. 3). Change in the holder of the office of Lord Advocate does not affect an action or proceeding (*ib.* s. 5). (See also *Officers of State*, 1846, 8 D. 711; affd. 6 Bell's App. 487; *Alexander*, 1868, 6 M. (H. L.) 54, at 67; *D. of Atholl*, 1852, 1 Macq. 65; *Mays. of Edinburgh*, 1884, 11 R. 283; affd. 13 R. (H. L.) 78). By special Statutes the Lord Advocate has a title to sue in special cases. Examples are: petitions and complaints under the Bankruptcy Act, 19 & 20 Vict. c. 79, s. 178; reduction of letters-patent under 15 & 16 Vict. c. 83 (see *Gillespie*, 1861, 23 D. 1357); etc. He may appear in actions of declarator of nullity of marriage and of divorce; and where collusion is brought to his knowledge, he is bound to state it (Mackay, *Manual*, 483). See COLLUSION. In the settlement of any charitable or other endowment, intimation must be made to the Lord Advocate, and he may appear for the interests of the charity, or the public interest (30 & 31 Vict. c. 97, s. 16). By the Lunacy Act, 1857 (20 & 21 Vict. c. 71, s. 81), it is provided that when the Board of Lunacy or the Accountant of Court has reason to believe or suspect that the property of any person detained or taken charge of as a lunatic is not duly protected by being placed under the management of a judicial factor, and that the property or the income thereof is not duly applied for his maintenance, the Board or Accountant must report thereon in writing to the Lord Advocate; and if the Lord Advocate is of opinion, either by reason of such report or from inquiries at his instance, that such proceeding is expedient and proper, he may apply to the Court of Session to have a judicial factor appointed to such lunatic. As to whether the Lord Advocate may intervene in an application for custody of children, see *Bryce* (1828, 6 S. 425, specially Ld. Craigie, at p. 442).

The concurrence of the Lord Advocate is necessary in certain cases. In such cases unless the concurrence has been obtained, the application will be dismissed (*Mackenzie*, 1843, 5 D. 771, where the petition bore to be with concourse of Her Majesty's Advocate, although such concourse had not been actually obtained). The concurrence of the Lord Advocate is necessary in petitions and complaints at common law (*Duke of Northumberland*, 1822, 10 S. 366; *Usher and Cunningham*, 1839, 1 D. 639; *Mackenzie*, *ut supra*; *Paterson*, 1872, 11 M. 76; Mackay, *Manual*, 587)—such as for breach of interdict, and against judges and officers of Court for malversation where punishment is concluded for and not merely damages (*Syme*, 19 January 1810, F. C.; *M'Aulay*, 1830, 9 S. 48; *Harvey*, 1837, 16 S. 249; *Baillie*, 1822, 1 S. 345). In a petition and complaint for malversation in office, presented under Act of Sederunt of 6 March 1783, such concourse is apparently not requisite (*Macfarlanes*, 1827, 5 S. 504 (537)). The concurrence of the Lord Advocate is also required in proceedings for contravention of lawburrows (Stair, i. 9. 30; *Robertson*, 1873, 11 M. 910; and 45 & 46 Vict. c. 42, s. 6 (8)). It is no longer necessary to obtain the Lord Advocate's concurrence to any summons of reduction-improbation, or ranking and sale; but the right of the Lord Advocate to institute any such summons for the interest of Her Majesty, her heirs and successors, is of course reserved (Court of Session Act, 1868, 31 & 32 Vict. c. 100, s. 17. See, as to former law, *Colt*, 1610, Mor. 7897).

At the trial of an election petition in Scotland the Lord Advocate is represented by one of his deputies (*i.e.* an advocate-depute), or by the pro-

curator-fiscal of the Sheriff Court of the district, who must attend such trial as part of his official duty; and it is the duty of the advocate-depute or, in his absence, the procurator-fiscal, if it appears to him that a corrupt or illegal practice has been committed by any person who has not received a certificate of indemnity, to report the case to the Lord Advocate in order that the person may be brought to trial, although no warrant may have been issued by the judge (46 & 47 Vict. c. 51, s. 68 (2), (a), (c)).

The Act 48 & 49 Vict. c. 61, which instituted the office of Secretary for Scotland, does not affect the powers or duties of the Lord Advocate (s. 9).

The Lord Advocate is entitled to plead within the bar (Act 1537, c. 67). Before the Union he had a seat in Parliament *ex officio*; and since the Union it has been customary for the holder of the office to be also returned a member of Parliament. He is a member of the Ministry of the day, quitting office with them. In Parliament, along with the Secretary for Scotland, he has the special charge of Scottish affairs, answering questions thereanent addressed to the Government, and having the care of legislation for Scotland.

[Hume, i. 9; ii. 118; Alison, ii. 84; Macdonald, *Criminal Law*, 284, 428; Mackay, *Practice*, i. 119 (*b*); *Manual*, 30, 137, 205; Omond, *History of Lords Advocate*.]

Lord Clerk-Register.—See Register, Lord Clerk, Depute Clerk; Registration.

Lords, House of.—The history of the House of Lords may be traced back to the Witenagemot of the Anglo-Saxon period; but, from the modern constitutional point of view, it dates from the year 1295, when Edward I. summoned the first complete Parliament of Lords and Commons. Before that period, it may be stated generally that the central government was wielded exclusively by the King and his great council of prelates and barons, individually summoned, while the rest of the population was unrepresented except in the local government of the County Courts. The great council was not, however, a mere aristocratic oligarchy, but had always, in theory at least, indirectly represented the *plebs circumstans*, who usually signified their approval or disapproval of their proceedings. In practice, too, the prelates and barons patriotically vindicated the rights of the people on several important occasions, such as the passing of the Great Charter and the rebellion against Henry III. At length, in 1295, by summoning representatives from the shires, cities, and boroughs to Parliament, Edward I. further extended the principle of direct representation from the local to the central government of the country. From that period onwards, government by the King and his magnates is gradually superseded by the parliamentary government of Crown, Lords, and Commons. Among other landmarks, one of great importance is the concession to the Commons, in 1407, of the sole right to initiate money grants. Another new epoch is marked by the final dissolution of the monasteries in 1539, when the withdrawal of the mitred abbots converted the ecclesiastical majority in the House of Lords into a minority; while the lavish distribution of Church lands enriched the peerage generally. The chief subsequent landmarks are: the Revolution of 1641–60, which extinguished the House of Lords for the time; the Bill of Rights of 1689, which greatly advanced the cause of representative government; the creation of twelve new peers in one day

by Queen Anne in 1711, which signified the national control over the Upper Chamber; the Reform Bill of 1832, which immensely purified and strengthened the Representative Chamber; the Reform Bills of 1867 and 1885, which further enhanced the power of the Commons; and the rejection by the Lords, in 1860, of the Bill for the abolition of the duty on paper, which enabled the Commons, in the following year, to assert their supreme control over finance. This outline may suffice to recall the history of the House of Lords. It remains to define briefly the constitution, powers, and privileges of the House as one of the three Estates of Parliament, apart from its judicial functions in peerage cases, in trials of peers, and in impeachments, and apart from its appellate jurisdiction. As all the greater feudal barons holding directly of the Crown were anciently entitled to receive the King's writ summoning them to sit in the great council, such writ came to be regarded as in itself a title to nobility, while from the fifteenth century onwards the title has always been conferred by a letter-patent from the Crown. These barons, whether by tenure, by writ, or by patent, have never formed a privileged caste, as in most other countries, their sole right being that of acting as hereditary counsellors of the Crown, in which capacity they are *pares inter se*, peers, or equals. The chief difference between this peerage and the noblesse of foreign countries consists in the fact that, in the eye of the law, all the children of a British peer are commoners, while those of a foreign noble are usually nobles. While the ancient thegn and hlaford have been gradually replaced by the duke, marquess, earl, and baron, these last are still equals before the law, not only *inter se*, but *inter totam communitatem*. The total number of peers now entitled to sit in the House of Lords is 580, including the 28 Irish representative peers elected for life, 16 Scottish peers chosen for each Parliament, and 26 bishops or spiritual peers. The powers and duties of the House of Lords are briefly these: No legislation can be passed without the concurrence of Lords and Commons and the assent of the Crown. Any member of the House of Lords may initiate a bill, other than a money bill. Money bills, like others, require the concurrence of the Lords and the assent of the Crown; but, since the incident of 1860 above alluded to, it is unlikely that the Upper House will ever again venture either to amend or to reject such Bills. Members of the House of Lords enjoy the parliamentary privileges of freedom of speech in Parliament, freedom from arrest on civil process during the sitting of Parliament, and right of access to the Crown. The House also extends its protection to persons transacting business in its presence, such as counsel, solicitors, and witnesses, while the printers of its proceedings are protected against possible actions under the law of libel by the Act 3 Vict. c. 9 (1840). It is no longer a breach of privilege to report the discussions of the House, reporters having been freely admitted since the Reform Bill of 1832. The question whether the Crown may admit a life-peer to sit in the House has given rise to much discussion. While the report of Lord Redesdale's Committee "On the Dignity of a Peer," and other subsequent authorities, acknowledged the right of the Crown to create a life-peer, the House of Lords, in Lord Wensleydale's case in 1856, denied that the Crown had power to admit such a peer to sit in the hereditary Chamber. On that occasion the Government of Lord Palmerston yielded the point. Two life-peerage bills have since been lost, and the question therefore remains still unsettled.

[See constitutional histories of Stubbs, Hallam, and May; May, *Parliamentary Practice*; Report on the Dignity of a Peer.]

Lords, House of (as Appellate Tribunal).—In Scotland up to the earlier part of the fifteenth century appeals were competent in civil cases to the King and his Council, and also to Parliament. An original jurisdiction was sometimes exercised by the Scots Parliament, but this being attended with inconvenience, an Act was passed in 1424 providing that bills of complaint should not be determined by Parliament, but by the judges of the ordinary court; and if they refused to execute the law evenly, recourse was to be had to the king. In the following year the Session of James I. was instituted by the Act 1425, c. 65, the Court being vested with jurisdiction to "conclude and finally determine all and sundry complaints, causes, and quarrels that might be determined before the King and his Council." This Act was confirmed and explained by the Act 1457, c. 62, which provided that causes before the Session "sall be utterly decided and determined be them, but [*i.e.* without] ony remeid of appellation to the King or the Parliament." It is doubtful whether these Acts were ever in strict observance, or whether, in so far as the right of appeal was concerned, they did not rapidly fall into desuetude. Appeal to Parliament by "Falsing of Dooms" of the Justiciars and Judges Ordinary certainly continued, for provision is made for its regulation by the Act 1503, c. 95. Stair states that at the time of the institution of the Court of Session appeals were in vigour and observance,—though he adds that they then ceased because the "Senators of the College of Justice had the same power and authority that the Lords of Session and Daily Council had before; and so their final sentences were ultimate, without appeal to King or Parliament" (Stair, ii. 3. 63; iv. 1. 31, 55, 56). He admits, however, that one form of appeal, "by protestation for remeid of law," continued; and he enters into an inquiry whether it would be beneficial that this should be extended, or limited to the cases in which the Court of Session had exceeded its jurisdiction. The Act 1587, c. 39, refers to decisions pronounced by Parliament upon cases which must have been brought before it by way of appeal, and Erskine (*Inst.* i. 3. 20) and Balfour (*Practicks*, p. 268) note cases of the same kind. The nature and extent of the right were, however, matter of controversy, and in 1674 gave rise to a memorable dispute between the judges of the Court of Session (over which Lord Stair then presided) and the bar. The dispute arose in the course of a suit between the Earl of Dunfermline and the Earl of Callendar, and his son, Lord Almond (Mor. 2941; Stair's *Decisions*, 5 Feb. 1674, 16 Feb. 1676; Forbes, *Decisions*, preface). The defenders appealed to Parliament. This was treated by the judges as contempt of Court, and they summoned Lord Callendar and his counsel, who had signed the appeal, to answer for their conduct. The latter refused to withdraw the appeal, and the judges then complained to the king (Charles II.). He addressed a letter to the Court expressing his "abhorrence of appeals," peremptorily forbidding them for the future, and ordering at the same time that any advocate who refused to disown them should be disbarred. Meanwhile other appeals of the same kind were taken, and further complaint was made to the king. Most of the advocates supported their brethren and seceded from the Court, and they were prohibited by the Privy Council from returning to within twelve miles of Edinburgh. This order affected about fifty of their number, who were disbarred for nearly two years. The dispute was, however, settled by a compromise in 1676. The advocates disowned and disclaimed all "appeals which sist process and stop execution, as being contrair to law and inconsistent with the honour of the Lords of Session and prejudicial to the subjects in their just rights." They were then

restored by the Court to practice, the A. S. (25th January 1676) which reponed them declaring "that it was never allowed by the Lords to quarrel or impugn their sentences or interlocutors upon iniquity, and that they will in no ways suffer or allow the same." This goes further than the concession of the advocates, but it was understood that the right to protest to Parliament for remeid of law without stay of execution was recognised in the compromise, and it was never relinquished.

Matters remained in this state until the Revolution, when the Convention of Estates (1689, c. 18) declared the banishment of the advocates to be illegal, and it was made one of the articles of the Claim of Right (c. 13) "that it is the right and privilege of the subjects to protest for remeid of law to the King and Parliament against sentences pronounced by the Lords of Session, providing the same do not stop execution of these sentences." From the Revolution until the Union in 1707 protests to Parliament for remeid of law were made under this condition. They do not appear, however, to have been numerous.

At the time of the Union the right of appeal to Parliament was much debated. It was contended upon the one side that it was part of the common law of Scotland and inherent in the subject; upon the other, that if the right of review were conceded, the law of Scotland might be seriously tampered with by a tribunal in London composed chiefly of English peers. A proposal was made that appeal should be to a Court sitting in Scotland, and consisting of certain peers delegated annually or triennially by the House of Lords (Defoe, *History of the Union*, p. 158). This proposal, however, was not carried into effect.

No express provision was made in the Treaty of Union for appeal from the Courts of Scotland to the British Parliament, though by the 19th article their decisions were expressly protected from review by the Courts of England. An appeal was, however, taken to the House of Lords in the first session of the British Parliament, which was followed two years afterwards by another, and the general right of appeal against final judgments on the merits in civil cases has never since been disputed. At the time of the Union the rule in English and Irish cases was that appeal stopped execution. In 1709 it was enacted by Order that "after appeal shall be received by this House from any sentence or decree pronounced in any court of Scotland, and an Order made by this House for the respondent to answer the said appeal, and notice of such Order duly served upon the respondent, the sentence or decree so appealed against from such time ought not to be carried into execution by any process whatsoever." This was a direct infringment of the Scots Claim of Right, and was productive of great abuse, appeals being frequently taken merely for the purpose of obtaining delay. This was remedied, however, by the Act 48 Geo. III. c. 157, s. 17, which gave power to the "Division to which the cause belongs, or any of the four judges thereof, to regulate all matters relative to interim possession or execution, and payment of costs and expenses already incurred, according to their sound discretion, having a just regard to the interests of the parties as they may be affected by the affirmance or reversal of the judgment or decree appealed from." The provisions of the Order and Statute are still in force. See INTERIM EXECUTION.

The constitution of the House of Lords as an appellate tribunal remained unchanged from the Union until the passing of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59). While in practice the disposal of judicial cases has been left in the hands of the law lords, all peers of Parliament are entitled to sit and vote, and in various cases the right has been exercised.

The last occasion upon which the matter was discussed in modern times was in the case of the *Queen* v. *O'Connell*, in 1844, when party feeling ran high, and a number of the lay peers seemed inclined to exercise their right to vote in order to secure O'Connell's condemnation. But owing to the timely intervention of Lord Wharncliffe, who urged that it would be a scandal to allow personal or political feeling to enter into a judicial decision, the lay peers abstained from voting (M'Carthy, *History of our own Times*, i. 296). In the case of *Bradlaugh* (1883, 8 App. Ca. 354), Lord Denman, a lay peer was present, and expressed his opinion in support of Lord Blackburn, who disssented from the judgment (May, *Parliamentary Practice*, 340). An attempt was made in 1873 to take away the appellate jurisdiction of the House of Lords, and to establish a new Court in England, composed chiefly of English Common law judges, as an imperial tribunal of review. This attempt was, however, frustrated (see Letter by Lord Fraser, *Journal of Jurisprudence*, xix. 195), but the judicial arrangements then existing, which certainly were not free from defect, and afforded some justification for the change proposed, were materially improved by the Appellate Jurisdiction Act above cited. This Act was amended by the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70), and the composition and procedure of the House, as an appellate tribunal, are now regulated by these Acts, and the Standing Orders and Directions which have been issued to carry them into effect. Before the passing of the Act of 1876 there was no provision for securing a sufficient attendance of law lords for the hearing of appeals, cases being sometimes disposed of by a single judge. Sec. 5 of that Act, however, provides that no appeal shall be heard and determined unless there be present not fewer than three "Lords of Appeal," a term which is defined to include the Lord Chancellor of Great Britain for the time being, two Lords of Appeal in Ordinary appointed under the Act, and such peers of Parliament as are for the time being holding or have held "high judicial office"; *i.e.* (s. 25) the office of Lord Chancellor of Great Britain or Ireland, or of paid judge or member (1887 Act, s. 5) of the Privy Council, or judge of one of Her Majesty's Superior Courts of Great Britain and Ireland. By s. 4 of the Supreme Court of Judicature Act, 1881, the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice for the time being is also declared to be Lord of Appeal. The Lords of Appeal in Ordinary under the Appellate Jurisdiction Act are appointed by the Crown (s. 6), and must have held high judicial office for two years, or have been for fifteen years in practice at the bar. They hold office during good behaviour, and may be removed on the address of both Houses of Parliament. They receive salaries of £6000 a year, take rank as barons, and during their lifetime (1887 Act, s. 2) are entitled to sit and vote in the House of Lords. Their dignity as Lords of Parliament does not descend to their heirs. The Lords of Appeal in Ordinary, if Privy Councillors, are bound to sit and act as members of the Judicial Committee of that body (s. 6). They are entitled to pensions after fifteen years' service or disablement by permanent infirmity (s. 7). With the view of preventing delay in the administration of justice, it is provided (s. 8) that the House may sit for the purpose of hearing and determining appeals during any prorogation of Parliament at such time and in such manner as may be appointed by order of the House, made during the preceding session, and even during a dissolution of Parliament if authorised by Her Majesty under her sign-manual (s. 9). See APPEAL TO HOUSE OF LORDS.

See Stair, iv. 1, *passim*: Ersk. i. 3. 20; Mackay, *Practice of the Court of Session*, i. 37; May, *Parliamentary Practice*, 48, 340; Preface to Robertson's

Appeals; Preface to Paton's *Appeals*, vol. vi.; Hale, *Lords' Jurdisdiction*; Report of Lords' Debate on Appellate Jurisdiction, 1856, Report of Lords' Committee, etc., in 2 Macq. 577.

Lost Property falls under the rule "*Quod nullius est fit domini regis*" (Bell, *Prin.* s. 1291; Ersk. ii. 1. 12). But in most cases the Crown waives its right in favour of the finder of the property, provided the prescribed means are taken of finding the true owner, and restoring the goods to him. Such a waiver is contained in the provisions of the Burgh Police (Scotland) Act, 1892, s. 412, and in most local Police Acts. By the Burgh Police Act, s. 412, the magistrates may, when lost property, duly advertised, has not been claimed within six months, award it to the finder, under deduction of expenses; or if it is claimed, award it to the owner, under deduction of the expenses and a reasonable reward to the finder.

At common law lost property (including "waifs and strays") remains the property of the original owner, where the element of abandonment does not come in, until such right is lost by the long negative prescription (*Sands*, 22 May 1810, F. C.). Accordingly, where goods deposited in a public warehouse had been forgotten, and the true owner could not be found, it was held that the fact of deposit precluded the idea of abandonment, and therefore that an action by the Crown against the warehouse-keeper for the goods, or their value, was premature before the period of prescription had expired, and the defenders were accordingly assoilzied, but reserving to the Crown their right to sue when the true owner's right had prescribed (*Sands, supra*).

Where the Crown is, on this principle, prevented from claiming, or where it has waived its claim to the lost property, the finder is entitled to retain it against everyone except the true owner. In an English case (*Bridges*, 21 L. J. Q. B. 75) a person who found money on the floor of a shop, and handed it to the shopkeeper in order that he might restore it to the true owner, was found entitled to claim it again from the shopkeeper when a reasonable time had elapsed without the true owner being found. This seems to be sound in Scots law also, but as yet it has only been followed in a case in the Sheriff Small Debt Court (*Hogg*, Guthrie's *Select Sheriff Court Cases*, p. 438).

The finder's title to the property is *occupation*, consequently it is not sufficient to see the lost property or know where it is: the finder must pick it up or otherwise reduce it into possession (*Bridges, supra*).

The law is slightly different in the case of lost or strayed animals. The finder cannot keep these, pending the owner appearing, without expense, and therefore the finder is not bound to keep them for so long a time. The animal is now generally sold, under warrant of a Sheriff or magistrate, after "a reasonable time" (which is a question of circumstances), and the proceeds applied, in the first place, to payment of the keep and the expenses of advertising, etc. (Barclay's *Justice's Digest*, *voce* "Estrays or Waifs"). Formerly the strays were kept for a year, and if not claimed before then they belonged to the Crown or its donatory, who was usually the Sheriff of the county (Ersk. *Inst.* ii. 1. 12; Bell, *Prin.* s. 1294; *Napier*, 1749, 3 Pat. 649).

By the Burgh Police (Scotland) Act, 1892, ss. 386, 387, and 390, and in the special Police Acts of most burghs, provision is made for the impounding, custody, and ultimate disposal of strays.

The most important class of lost property is that lost at sea, for which see the special article on Wrecks, *infra*. See also Derelict, *supra*.

Lost Writings, etc.—See Proving of the Tenor. When a summons, petition, or other original writ or pleading is lost or destroyed, a copy thereof, proved in the cause to the satisfaction of the Court before whom the cause is depending at the time, and authenticated in such manner as the Court may require, may be substituted, and shall be held equivalent to the original for the purposes of the action (31 & 32 Vict. c. 100, s. 15).

Lottery.—State lotteries were at one time a regular institution in the United Kingdom, and indeed they are still in many countries, as a method of increasing the revenue; but the last of these was authorised by a Statute of 1823, and they have now been finally abolished. The holding or setting up of a private lottery has probably always been illegal at common law in Scotland (Bell, *Dict.*), and it has been penalised by Statute.

The principal statutory provisions with reference to lotteries are the following: The Lotteries Act, 1722 (9 Geo. I. c. 19), forbids anyone, under a penalty of £200, "by virtue or colour of any grant or authority from any foreign prince, State, or Government whatsoever," to "erect, set up, continue, or keep . . . . any lottery or undertaking in the nature of a lottery under any denomination whatsoever"; or to "make, print, or publish . . . . any proposal or scheme for any such lottery or undertaking": or "within this kingdom sell or dispose of any ticket or tickets in any foreign lottery." The Lotteries Act, 1732 (6 Geo. II. c. 35), includes under the same penalty a prohibition to sell, procure, or deliver any ticket, receipt, chance, or number in or belonging to any foreign lottery, or to receive any money for any such ticket, etc. By the Gaming Act, 1802 (42 Geo. III. c. 119), certain forms of lotteries which were conducted in imitation of State lotteries, and were called 'little goes," are declared to be common and public nuisances, and against law (s. 1). This Act forbids any person, under a penalty of £500, to "keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goe, or any other lottery not authorised by Parliament," or to suffer such gaming "in his or her house, room, or place" (s. 2). A penalty of £100 is imposed upon anyone who, by any pretence, device, form, denomination, or description whatsoever promises or agrees to pay any sum, or to do anything for the benefit of any person on any event or contingency relative or applicable to the drawing of any ticket or lot in any such game or lottery, or who publishes any proposal for any of such purposes (s. 5). It is doubtful whether this Act applies to Scotland. If it does not, a person who keeps any such house may be prosecuted at common law for keeping a gaming-house (*Bernard Greenhuff and Others*, 1838, 2 Swin. 236), or, in the case of burghs, under sec. 407 of the Burgh Police (Scotland) Act, 1892. By the Lotteries Act, 1806 (46 Geo. III. c. 148), all pecuniary penalties for any offence against the law concerning lotteries are to go to the Crown, and no private person may raise action for any such penalty. They are to be sued for by the Attorney-General in the Court of Exchequer in England, and by the Advocate-General in the Court of Exchequer in Scotland. Accordingly, a conviction against the Gaming Act, 1802, obtained in a Justice of Peace Court in England, has been set aside (*The Queen v. Tuddenham*, 1841, 10 L. J. M. C. 163). The Lotteries Act, 1823 (4 Geo. IV. c. 60), by sec. 41, forbids any person to sell any tickets for, or chances in, lotteries authorised by any foreign potentate or State, or to be drawn in any

foreign country, or in any lottery not authorised by Act of Parliament, or to publish any proposal or scheme for such sale; and provides that for every such offence the person shall forfeit the sum of £50, and shall also be deemed a rogue and vagabond, and punished as such in manner thereinafter directed. It is provided by sec. 62 that all pecuniary penalties for any offence under the Act are to be sued for in the name of His Majesty's Advocate-General in the Court of Exchequer in Scotland; and sec. 67 provides that if any person shall be brought before any two or more justices of the peace and be convicted of any offence against the Act, and be adjudged a rogue and vagabond, then he is to be imprisoned for not more than six nor less than one month. In charging an infringement of sec. 41 of this Act it is not sufficient to specify the sale of tickets at a certain place on a certain date. The lottery must be identified, and a mere enumeration of some of the prizes will not do this. It is desirable that the place where the lottery is drawn be mentioned, and the prosecutor must specify the persons to whom the tickets were sold, if they are in fact known to him (*McAllister*, 1878, 4 Coup. 28; cf. *Walker*, 1894, 22 R. J. C. 22, 1 Adam, 523). A question was raised in *McAllister*, whether action could be taken under sec. 67 without, as a necessary preliminary, a decree of the Court of Exchequer in terms of secs. 41 and 62, but this doubt has been set at rest by a subsequent case in which proceedings, by way of summary complaint in the Justice of Peace Court, without antecedent proceedings in the Court of Exchequer, were held perfectly competent (*Lamb*, 1892, 3 White, 261). The Lotteries Act, 1836 (6 & 7 Will. IV. c. 66), prohibits, under a penalty of £50, recoverable in the Court of Session, the advertisement of any foreign or other lottery not authorised by Parliament; and the Lotteries Act, 1845 (8 & 9 Vict. c. 74), says who are to prosecute for this last-mentioned fine. The Burgh Police (Scotland) Act, 1892, prohibits two or more persons assembling together in any street or open place for the purpose of engaging in lotteries (s. 393; see GAMING). Power of entry and search are given by The Gaming Act, 1802, s. 4, The Lotteries Act, 1823, s. 37, and The Burgh Police (Scotland), Act, 1892, s. 407.

The Art Unions Act, 1846 (9 & 10 Vict. c. 48), legalised associations having for their object the distribution by lot of works of art, or of money prizes to be expended for the purchase of works of art. In order that any such association may conduct lotteries, it must either be incorporated by royal charter, or be approved by the Art Unions Committee of the Privy Council. Lotteries conducted by such an association, with the object mentioned, are the only lawful lotteries; to advertise any other lottery as conducted on Art Union principles is a meaningless cloak for an illegal operation, and can confer no immunity or right on those who take part in it (*Christison*, 1881, 9 R. 34; *Regina* v. *Harris*, 1866, 10 Cox C. C. 352).

The object of the Lottery Acts is to prevent the setting up of any lottery (other than Art Union lotteries) in the United Kingdom, and the promotion by advertisement, sale of tickets, or chances, or otherwise of any foreign lottery in the United Kingdom. It is not contrary to the Acts for a company to acquire the concession of the exclusive privilege of conducting lotteries in a foreign country, or to advertise in this country general statements of the number of drawings in that country to be made annually, no advertisement being made of any specific lottery (*Macnee*, 1890, 44 Ch. D. 306). It is not always easy to determine whether an enterprise or transaction constitutes a lottery within the meaning of the Acts. A man sold packets of tea, each of which contained a coupon which entitled the

purchaser to a prize—the prizes varying in description and value. The purchaser could not know to what prize he was entitled until the packet was purchased and opened. It was held that this was a lottery within the meaning of the Gaming Act, 1802. Hawkins, J., said: "In Webster's dictionary a lottery is defined to be a distribution of prizes by lot or chance, and a similar definition is given by Johnson; such definitions are, in our opinion, correct, and in such sense the word is used in the Statute" (*Taylor*, 1883, 11 Q. B. D. 207). The missing-word competition recently in vogue in many perioideals was held to be an illegal lottery. A paragraph was published in which one word was missed out. A word, not the most suitable, was decided upon by the editor to fill the blank. A coupon was supplied in each copy of the paper, on which the competitor wrote a word to supply the blank, and also his name and address, and sent this, with one shilling, to the publishers of the paper. Those who correctly guessed the word chosen by the editor to fill the blank in the paragraph, each got as a prize an equal share in the total amount paid by the competitors (*Barclay*, [1893] 2 Ch. D. 154). This case may be contrasted with another in which a coupon was issued with each copy of a paper, but was filled up, not with a guess at random, but with the names of the horses which the subscriber thought likely to win a race, and a prize was given to the person who filled in the names of the first four winners. Here the element of chance was absent from the selection, and there was therefore no lottery (*Stoddart*, [1895] 2 Q. B. D. 474; *Caminada*, 1891, 60 L. J. M. C. 116). Other examples of lotteries are to be found in *Morris* (1864, 2 H. & C. 912), *Regina* v. *Harris* (1866, 10 Cox C. C. 352), *Youdan* (1858, 22 J. P. 287). When the profits of an undertaking are to be divided among the partners by lot, the undertaking is resolved into a lottery (*Sykes*, 1879, 11 Ch. D. 170); but the fact that certain benefits of a mutual benefit society are to be allotted among the members by periodical drawings will not suffice to impress the society with illegality (*Wallingford*, 1880, L. R. 5 App. Ca. 685). A sweepstake is a lottery (*Allport*, 1845, 1 C. B. 974; *Gatty*, 1846, 9 Q. B. 431).

Ex pacto illicito non oritur actio.—No action can be sustained which has a lottery as its *medium concludendi* (*Christison*, 1881, 9 R. 34). An action for the price of lottery tickets furnished to the defender has been dismissed in accordance with this maxim (*M'Laren*, 1878, 2 Guthrie's Cas. 105). The maxim *in pari delicto potior est conditio defendentis* must be applied with more caution. There is no action to have an illegal contract implemented, nor, which is the same thing, is there an action of damages for breach of the contract (*Sykes*, 1879, 11 Ch. D. 170). "You cannot ask the aid of a Court of justice to carry out an illegal contract; but in cases where the contract is actually at an end, or is put an end to, the Court will interfere to prevent those who have in the illegal contract obtained money belonging to other persons, on the representation that the contract was legal, from keeping that money" (per Jessel, M. R., in *Sykes*, *supra*). This idea of the money which a subscriber paid to a lottery having been obtained on the representation that the contract was a legal one, was merely differently expressed by Stirling, J., when he found that the Lottery Acts were passed for the benefit of a class, and that there is no *par delictum* in the holder of a lottery and the subscriber thereto. Accordingly, an unsuccessful subscriber may demand the repayment of his money, so long at anyrate as it has not actually been paid over to the winner (*Barclay*, [1893] 2 Ch. D. 154; cf. *Diggle*, 1877, 2 Ex. D. 422; *Trimble*, 1879, 5 App. Ca. 342).

Lucrative Succession.—See Passive Title.

Luggage.—See Carrier; Innkeeper; Nautæ, caupones, stabularii; Railway.

Lunacy Acts.—The care and treatment of lunatics are regulated by the Lunacy (Scotland) Acts, 1857 to 1887, which comprise:—

The Lunacy (Scotland) Act, 1857 (20 & 21 Vict. c. 71).

The Lunacy (Scotland) Act, 1862 (25 & 26 Vict. c. 54).

The Lunacy (Scotland) Act, 1866 (29 & 30 Vict. c. 51).

The Criminal and Dangerous Lunatics (Scotland) Amendment Act, 1871 (34 & 35 Vict. c. 55).

The Lunacy Districts (Scotland) Act, 1887 (50 & 51 Vict. c. 39).

By the Lunacy Act of 1862, "lunatic," when used in the Lunacy Acts, means "every person certified by two medical persons to be a lunatic, an insane person, an idiot, or a person of unsound mind."

The subject may be conveniently treated under the following headings:—

I. Property of Lunatics.
II. The Board of Lunacy for Scotland: their Powers and Duties.
III. Reception and Detention of Lunatics.
IV. District Asylums: Institution and Maintenance.
V. Pauper Lunatics.
VI. Dangerous Lunatics.
VII. Criminal Lunatics.
VIII. Miscellaneous.

I. Property of Lunatics.

The property of persons incapable of managing their own affairs is usually put under guardianship by the judicial appointment of a *curator bonis*. This may be done on summary petition to the junior Lord Ordinary at the instance of any near relative, or, failing relatives, of any interested party. Sec. 81 of the Lunacy Act, 1857, which is the principal Act, enacts that where it is thought by the Board of Lunacy or the Accountant of the Court of Session that the property of a person detained or taken charge of as a lunatic is not under judicial management and not properly applied for his benefit, application may be made to the Court of Session by the Lord Advocate for the appointment of a judicial factor, with a view to the proper care and protection of the property, and the application of it to the maintenance of the lunatic. Where it is thought that the property of a lunatic, though under the management of a judicial factor, is not properly applied for the benefit of a lunatic, the Board of Lunacy or the Accountant of the Court of Session shall report to the Lord Advocate, who may apply to the Court of Session in order that the matter may be investigated, and the property of the lunatic applied to his maintenance (s. 82). The Board may obtain from the Accountant of the Court of Session the names of all lunatics having judicial factors, and a statement of their funds and of the sums allowed for their maintenance, in order to ascertain in what manner such lunatics are cared for; and if such treatment is deemed by them unsatisfactory, they may present a summary petition to the Court of Session (s. 17, Lunacy Act, 1866). For the case of a lunatic in England or Ireland who has personal property in Scotland, or of a lunatic in Scotland who has personal property in England or Ireland, see sec. 131 of the

Lunacy Act, 1890 (53 & 54 Vict. c. 5). These are the only provisions of the Lunacy Acts which deal with the property of lunatics. For further information regarding the appointment of a *curator bonis* to a lunatic, see JUDICIAL FACTOR.

II. THE BOARD OF LUNACY FOR SCOTLAND: THEIR POWERS AND DUTIES.

For the purposes of the Acts a Board, to be called the General Board of Commissioners in Lunacy for Scotland, is constituted as follows: Three persons are appointed by Her Majesty, one of whom is an unpaid commissioner and chairman of the Board, and two of whom are paid commissioners, receiving salaries not exceeding £1200 each per annum. In addition to these, Her Majesty may further appoint three unpaid commissioners (s. 4). Her Majesty may also appoint a secretary (s. 13), and two medical men to be deputy-commissioners (s. 21). The Board have an office in Edinburgh, and have the superintendence, management, and regulation of all matters arising under the Acts in relation to lunatics and to public, private, and district asylums, and to every house in which a lunatic is kept or detained under an order of the Sheriff, and have the power of granting or refusing licences to private asylums, and of recalling or suspending the same (s. 9). They may license lunatic wards of poorhouses for the reception of lunatics on the order of the Sheriff, and they may sanction the reception of pauper lunatics in poorhouses without the order of the Sheriff. They may also grant special licences for reception in private houses of not more than four lunatics (ss. 3–5, Lunacy Act, 1862). They are to make rules for the inspection and visitation of public, private, and district asylums; and it is the duty of the two paid commissioners to visit and inspect, at least twice in each year, all the public, private, and district asylums, and every house in which any lunatic is detained under an order of a Sheriff. They are also to visit lunatics in prisons or in poorhouses (ss. 17–19, Lunacy Act, 1857). "Public asylum" means an asylum established for the custody of lunatics by Act of Parliament or Royal Charter, or under any charitable endowment, or into which lunatics cannot be refused admission without special cause shown. "Private asylum" means one licensed under the Act of 1857. "District asylum" means one established in terms of the same Act in one of the districts described in the Schedule thereto. The Board may grant licences to any charitable institution established for the care and training of imbecile children (s. 7, Lunacy Act, 1862).

III. RECEPTION AND DETENTION OF LUNATICS.

"Every medical person signing any certificate under or for the purpose of this Act shall specify therein the facts upon which he has formed his opinion that the person to whom such certificate relates is an insane person, an idiot, or a person of unsound mind, and distinguish in such certificate facts observed by himself from facts communicated to him by others; and no person shall be received into any asylum or house in terms of this Act under any certificate which purports to be founded only upon facts communicated by others" (s. 35, Lunacy Act, 1857). A long definition of "medical person" is given in the Act, but is now obsolete, for by sec. 34 of the Medical Act, 1858 (21 & 22 Vict. c. 90), "any words importing a person recognised by law as a medical practitioner or member of the medical profession, when used in any Act of Parliament shall be construed to mean a person registered under this Act." Anyone registered under the Medical Acts, therefore, is a "medical person" under the Lunacy Acts. Penalties

are inflicted on persons granting false certificates, and on persons receiving lunatics into unlicensed houses (s. 35–39). By sec. 14 of the Lunacy Act, 1862, the Sheriff of any county in Scotland may grant an order for the reception into and detention in any asylum, lunatic ward of a poorhouse, or licensed house, of any lunatic resident or found within the county, or if the asylum mentioned in such order be situate within such county; but no such order shall be granted unless upon a petition subscribed by the party applying for the same, accompanied by a statement of full particulars as to the history, condition, and illness of the lunatic, and setting forth the degree of relationship or other capacity in which the petitioner stands to the lunatic, and accompanied by two medical certificates of the mental incapacity of the lunatic. The order of the Sheriff shall be in the form of Sched. E annexed to the Act of 1857. No superintendent of any asylum shall receive or detain any person as a lunatic without such order, except in the case of any lunatic whose case is certified by a medical person to be one of emergency, in which case the lunatic may be detained for three days without an order. But the Board have power to sanction the reception of a pauper lunatic in the lunatic ward of a poorhouse, or of any lunatic in a house holding a special licence, without the order of the Sheriff (ss. 4, 5, Lunacy Act, 1862). The reception of a lunatic in a private house not licensed is regulated by secs. 13, 14, Lunacy Act, 1866, and by them no person shall receive or keep any person as a lunatic for gain without the order of the Sheriff or the sanction of the Board, and no person shall keep or detain in his private house, without the order of the Sheriff or the sanction of the Board, any person as a lunatic, although not for gain, beyond the period of one year; and if the malady is such as to require restraint or coercion of any kind, the case shall be intimated to the Board, and the reasons stated which render it desirable that the lunatic should remain under private care, and the Board may in certain circumstances apply to the Sheriff for the removal of the lunatic to an asylum. On the petition by a brother and the *curator bonis* of a woman who had been insane for some months, but for *less than a year*, and who was detained by a relative in her private dwelling-house, the Court, of its *nobile officium*, ordained her to be delivered up to the curator for removal to an asylum, it being certified that a private dwelling-house was unsuitable, and confinement in an asylum necessary (*Gardiner*, 1869, 7 M. 1130).

The Board may authorise the transfer of a lunatic from one asylum or house to another, and may also grant authority for the liberation, on trial or probation, of any lunatic from any asylum or house, under such regulations as they may think proper (s. 16, Lunacy Act, 1862).

"It shall be lawful for the superintendent of any asylum, with the previous assent in writing of one of the commissioners, which assent shall not be given without written application by the patient, to entertain and keep in such asylum, as a boarder, any person who is desirous of submitting himself to treatment, but whose mental condition is not such as to render it legal to grant certificates of insanity in his case." It is specially enacted that letters between the Board and a patient in any asylum or house are to be forwarded unopened (ss. 15, 16, Lunacy Act, 1866).

A Sheriff may at all times visit and inspect every asylum or house within his jurisdiction in which any lunatic is kept or detained under his order, and may institute inquiry into the care and management of such asylums and houses, and into the conduct of the officials connected therewith (s. 25, Lunacy Act, 1857). Sec. 26 of the same Act enacts that it shall be lawful for the justices of the peace of every county to appoint at

the Michaelmas meeting of quarter sessions any three of their number to visit and inspect any public, private, or district asylum situated in the county, and to insert in the patients' book such observations as they may deem necessary. By sec. 11 (5) of the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), the said powers and duties with regard to visiting asylums are transferred to the county council. Any house where a lunatic is detained under order of the Sheriff may be visited by the Board (s. 42), and also any private house where it is suspected that a lunatic is kept (s. 14, Lunacy Act, 1866). The Secretary for Scotland may order the examination of any person detained as a lunatic, and also a special visitation of any place where a lunatic is represented to be confined (ss. 104, 105). Ministers and relatives are entitled to visit patients, under regulations (s. 47). Any person procuring the certificate of two medical persons of the recovery of a lunatic, and an order from the Sheriff for his liberation, may require that the lunatic be liberated accordingly; and the Board, upon being satisfied by the certificates of two medical persons, may in like manner order the liberation of a lunatic (s. 92).

In every public, private, and district asylum a register is to be kept setting forth all particulars relating to every lunatic detained in such asylum; and in case of death, a statement setting forth the time and cause of the death shall be entered in such register, and a copy of such statement shall within three days of the death be transmitted to the Board (ss. 96, 97). The superintendent of any asylum or house, when it shall appear to him that any lunatic may be safely liberated, shall grant a certificate to that effect, and shall transmit a copy of such certificate to the person at whose instance such lunatic is detained (s. 17, Lunacy Act of 1862). The Lunacy Act, 1890 (53 & 54 Vict. c. 5), has clauses (86 to 89) which are applicable to Scotland, and make provision for bringing back under a warrant a lunatic who has escaped from England into Scotland or Ireland, or from Scotland into England or Ireland, or from Ireland into England or Scotland.

IV. District Asylums: Institution and Maintenance.

Sec. 49 of the Lunacy Act, 1857, enacts that, with a view to the erection of asylums for the reception and care of pauper lunatics, and for the purposes of this Act, Scotland shall be divided into certain districts or divisions, as set forth in Sched. H annexed to the Act. By the Lunacy Districts Act, 1887, these districts may be altered or varied on the application of the county, town, or parish council interested. Sec. 50 of the Lunacy Act, 1857, provided for the election of District Boards, but was repealed by the Prisons (Scotland) Act, 1877 (40 & 41 Vict. c. 53), which provides for the election of a District Board of Lunacy for each of the districts into which Scotland is divided, the number of members to be fixed by the General Board of Lunacy, and to be elected annually by the county councils and magistrates of burghs respectively in each county within such district. The Board are to fix the time and places at which the District Boards are to meet. Sec. 62 of the said Prisons Act of 1877 provides for the expenses of a District Board, where there is no district asylum, being met out of the county general assessment, or by each burgh, as the case may be.

After the passing of the Act in 1857, the Board were to inquire into the necessities of the districts as regards accommodation for pauper lunatics, and might require the District Board to provide a district asylum (ss. 51 and 52). If, from any change of circumstances in a district, the accommodation for the lunatics of a district becomes insufficient, the Board may call

upon the District Board to provide such further accommodation as is required, and if they refuse, may apply to the Court of Session through the Secretary for Scotland (s. 9, Lunacy Act, 1862). The expense of providing such asylum accommodation is apportioned by the Board upon the landward parts of counties and upon the burghs respectively within such district, and the necessary assessment is to be made and collected by the county and burgh authorities respectively (s. 54). "Burgh" means royal or parliamentary burgh. The sum so apportioned is to be remitted to the District Board, who are to apply it in defraying the expenses of district asylums. In any district where there is sufficient accommodation for the pauper lunatics of the district, the District Board may, instead of erecting any district asylum, contract with the proprietors of existing asylums for the use of the whole or any part of the same, or for the reception and maintenance of the pauper lunatics of the district (s. 69).

A determination by the Board of Lunacy and a District Board that a certain asylum could not be made available for the reception of lunatics under secs. 57 and 59 is not subject to review by the Court, and the proprietors of the asylum cannot enforce a claim under these sections in the face of such a determination (*Wallace*, 1882, 10 R. 245).

District Boards are empowered to borrow money for the purposes of the Act, and are to take charge of and manage the district asylums when finished (ss. 61–68).

The District Board may appoint "medical persons" as inspectors of the asylums in their district (s. 70).

V. Pauper Lunatics.

By sec. 73 of the Lunacy Act, 1857, such sums are to be paid to the District Board for each pauper lunatic detained in any district asylum as may be fixed by the District Board and approved by the Board of Lunacy; and such sums are to be sufficient to defray the expenses of maintaining such district asylums. Sec. 75 is as follows: "Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly; and the residence of any pauper lunatic shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic." By sec. 95 it is provided that every pauper lunatic shall be sent to the asylum for the district in which the parish of the settlement of such pauper lunatic is situated; but the parish council may, with consent of the Board, provide for him in such other manner, and under such regulations, as may be sanctioned by the Board. The rule laid down by sec. 75 as to settlement will apply even though the lunatic, instead of being sent to a district asylum, has been otherwise provided for under sec. 95 (*Palmer*, 1871, 10 M. 185, and *Farquharson*, 1894, 21 R. 583). Sec. 75 fixes the burden of a pauper lunatic's maintenance on the parish of his settlement so long as the lunacy continues; and so, though the husband of a pauper lunatic may change his settlement, his wife will remain chargeable to the parish which was her husband's settlement at the date when she was sent to the asylum (*Palmer, supra*). But the lunacy of a pauper as affecting the question of his settlement is part of the law of settlement, and is accordingly dealt with under Poor, pauper lunatics being referred to here only in so far as directly affected by the provisions of the Lunacy Acts. (For further infor-

mation on the question of "settlement" of lunatics, see note to sec. 75, Lunacy Act, 1857, in Graham's *Manual of Poor Law and Parish Council Acts* (1897), p. 281.) The parish of settlement is liable for the expense both of maintenance and of removing a lunatic to an asylum (s. 76). If the parish of settlement cannot be ascertained, the parish in which the pauper lunatic is found is liable for the expense of removal and maintenance, the amount to be fixed and certified by the Sheriff (s. 78). Parties interested in the question of the settlement of a pauper lunatic may have access to him in the asylum (s. 79). Every inspector of poor shall, within seven days of being aware of any pauper lunatic being in the parish, notify the same to the chairman of the parish council and to the Board of Lunacy, together with the steps he has taken for the care and custody of such lunatic (s. 112).

With the sanction of the Board, arrangements may be made for the reception and detention of all or any of the pauper lunatics of any district, county, or parish in any public, private, district, or parochial asylum or hospital within or beyond the limits of such district, county, or parish (s. 8, Lunacy Act, 1862). A pauper lunatic discharged on "probation" remains subject to inspection by the Board. A parish council may direct the discharge of any pauper lunatic for whose maintenance it is liable, unless the superintendent of the asylum represents that he is unfit to be discharged. A parish council may also remove from the poor-roll any pauper lunatic, and may intrust the disposal of such lunatic to any party who shall undertake to provide to the satisfaction of the council for his care and treatment (s. 8–11, Lunacy Act, 1866).

VI. Dangerous Lunatics.

When a lunatic has been apprehended, charged with assault or other offence inferring danger to the lieges, or has been found in a state threatening danger to the lieges, or offensive to public decency, the Sheriff, upon application by the fiscal, inspector of poor, or other person, accompanied by a medical certificate that the lunatic is in such state, shall commit him to safe custody. After notice in a local newspaper the Sheriff shall then inquire into and take evidence as to the condition of the lunatic, and may commit him to an asylum unless the inspector of poor undertakes to make due arrangements for his safe custody. The Sheriff may also authorise the delivery of the lunatic to any person finding caution for his safe custody. The Sheriff is also to pronounce a judgment finding the amount of expenses connected with such application and procedure, and shall grant decree for the said sum against the parish where the lunatic was found, such parish having recourse against the estate of the lunatic, or his relations, or the parish of settlement (s. 15, Lunacy Act, 1862). By sec. 8, Criminal Lunatics, etc., Act, 1871, it is specially provided that sec. 15 of the Act of 1862 is not limited to pauper lunatics. The expenses incurred in obtaining a warrant for the apprehension of a dangerous lunatic, and in his subsequent committal to an asylum under sec. 15, being expenses incurred in the public interest, do not constitute an alimentary debt against the lunatic, and so cannot be made a charge against an alimentary fund held by testamentary trustees for his behoof (*Craig*, 1884, 11 R. 1038). In "remote parts of the country" any justice of the peace for the county, on being satisfied by sworn information of the minister or any elder of the parish, or other credible person, that a person is a lunatic in pauper or reduced circumstances, or is a dangerous lunatic, may grant warrant for his transmission in safe custody to the nearest town in which a Sheriff resides (s.

90, Lunacy Act, 1857). If the release of a lunatic (not being a pauper) is desired, and the superintendent of the asylum is of opinion that he is a dangerous lunatic, he shall communicate with the fiscal, who shall take such proceedings under sec. 15 of the Act of 1862 as he may see fit (s. 12, Lunacy Act, 1866). The Sheriff may authorise the discharge of a lunatic committed as dangerous, on two medical certificates approved by the fiscal (s. 19, Lunacy Act, 1866).

VII. Criminal Lunatics.

"When any person charged under any indictment or criminal libel with the commission of any crime shall be found insane, so that such person cannot be tried upon such indictment, or if upon the trial of any person so indicted such person shall appear to the jury charged with such indictment or criminal libel to be insane, the Court before whom such person shall be brought to be tried as aforesaid shall direct a finding to that effect to be recorded, and thereupon such Court shall order such person to be kept in strict custody until Her Majesty's pleasure shall be known" (s. 87, Lunacy Act, 1857). The above section provides for the case of anyone charged with crime and found to be insane *at the time* of his trial, and who is therefore not in a fit state to defend himself, or to instruct counsel for that purpose. In such a case insanity is a plea in bar of trial, and the judge, if satisfied by evidence of the insanity of the accused, deserts the diet against him, without impannelling a jury, and orders him to be confined in terms of sec. 87. The section also provides for the case where neither a plea in bar nor a special defence of insanity has been lodged, but where, upon trial, the jury are yet of opinion that the accused is insane. Such a case could only arise in consequence of negligence in the preparation of the panel's defence. If the insanity is not sufficiently clear to justify a plea in bar, a special defence of insanity at the time the crime was committed is lodged, and the case goes to trial; but sec. 88 enacts that if it shall be given in evidence that the accused "was insane at the time of committing such crime or offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of committing such crime or offence, and to declare whether such person was acquitted by them on the ground of insanity"; and if acquitted on such ground, the Court shall order him to be kept in custody until Her Majesty's pleasure shall be known (s. 88 of the Lunacy Act, 1857). Her Majesty may afterwards give orders for the safe custody of such lunatics. The said orders may be renewed and varied from time to time, and an order may be given under the hand of the Secretary for Scotland for liberation from custody on such terms and conditions as may be specified (s. 2 Criminal Lunatics, etc., Act, 1871). If any person while in prison becomes insane, the Sheriff of the county shall, with the aid of two medical men, make inquiry into his condition; and if they certify that he is insane, the Secretary for Scotland may authorise his removal to an asylum, and his reconveyance to prison on his recovery, if he is then still liable to be kept in prison (s. 89, Lunacy Act, 1857). If within sixty days of the expiration of the sentence of any convict or other prisoner confined in the general prison at Perth it is certified by two medical persons that he is insane, and that it is advisable that he should be detained in the lunatic department of the said prison rather than in a lunatic asylum, the Secretary for Scotland may authorise such prisoner to be detained in the general prison, after the expiration of his sentence, during Her Majesty's pleasure (s. 19, Lunacy Act, 1862). Any person ordered by the Court to be kept in custody till

Her Majesty's pleasure be known, may be detained in the general prison at Perth, and Her Majesty may thereafter give such order for his safe custody as may seem fit (s. 20, Lunacy Act, 1862). In the case of a prisoner who has become insane, the sentence, although for a shorter period than nine months, may be carried into effect in the general prison at Perth (s. 22, Lunacy Act, 1862). If within fourteen days of the period when a prisoner in the general prison of Perth will fall to be liberated it shall be certified that he is insane, he may be removed back to the local prison to which he had been committed, and may be transferred from there to a lunatic asylum. Where it is certified by two medical persons that a prisoner in the general prison at Perth is insane, but that his insanity is of a kind which can be properly treated in a lunatic asylum, the Secretary for Scotland may order that such prisoner be removed to any district asylum, or to any chartered or licensed asylum in which pauper lunatics are maintained in terms of any contract for such maintenance, and the managers of such asylum, unless there is not sufficient accommodation, shall be bound to receive him, and until his sentence has expired the amount to be paid for his maintenance shall be fixed by the Board of Lunacy, and shall be charged in the accounts for the maintenance of the general prison at Perth (s. 4, Criminal Lunatics, etc., Act, 1871). In the case of an insane prisoner in a local prison, the Sheriff may order his removal to a lunatic asylum, and the amount to be paid for his removal and detention until his sentence has expired shall be charged against the assessment for current expenses under the administration of the Prison Board of the county in which the prisoner's offence was committed (s. 6, Criminal Lunatics, etc., Act, 1871).

VIII. Miscellaneous.

Medical Persons.—It has been pointed out, under "Reception and Detention of Lunatics" (p. 169), that the term "medical person" in the Lunacy Acts means a person registered under the Medical Act, 1858. In every asylum licensed for one hundred patients or more there shall be a medical person resident therein as the medical attendant thereof, and every asylum licensed for more than fifty and less than one hundred persons shall be visited daily by a medical person (s. 45, Lunacy Act, 1857). No one other than a medical person is entitled to practise, or to be employed, or to grant any certificate under the provisions of the Lunacy Acts; and it is not competent for any medical person who has any interest in any asylum or house for lunatics, or whose father, brother, or son is superintendent of any such asylum or house, to practise, be employed, or grant certificates under the Lunacy Acts; and any person contravening this enactment is liable to a penalty not exceeding fifty pounds, or to three months' imprisonment (s. 71, Lunacy Act, 1857). It is not lawful for the medical superintendent, ordinary medical attendant, or assistant medical officer of any asylum to grant a certificate of insanity for the reception of any lunatic not a pauper lunatic into such asylum, except the certificate of emergency authorised by sec. 14 of the Act of 1857. In any action at law which may be raised against any medical person in respect of any certificate granted by him under the provisions of the Lunacy Acts, the issue or issues after being adjusted shall be tried, and the amount of damages, if any, assessed by the Lord Ordinary before whom such action depends, without a jury. Such action must be raised within twelve months from the time when the person alleging injury has been liberated from the asylum (s. 24 Lunacy Act, 1866).

Maltreatment of Lunatics.—Any superintendent or other person employed in any asylum or house in terms of the Lunacy Acts, or having the care of any lunatic patient, who ill-treats or neglects such person, is liable to a penalty not exceeding one hundred pounds, or to imprisonment not exceeding six months, without prejudice to any action for damages at the instance of the party aggrieved. Where such maltreatment amounts to an assault, the offender may be prosecuted either for the assault or for the offence under this Act (s. 99, Lunacy Act, 1857).

[*Pauper Lunatics* under Poor; Lunacy Acts in Graham's *Manual of Poor Law and Parish Council Acts.*]

See Insanity; Brieve; Judicial Factor.

Lyon King of Arms.—The principal officer of arms in Scotland, corresponding in this respect to Garter in England, though the latter officer is under the immediate control of the Earl Marshal, an office which does not now exist in Scotland. The office of Lyon is one of the most ancient in the country. Sir James Balfour states that the Lyon King of Arms and his heralds attended at the coronation of Robert II. at Holyrood on 27 May 1371. Whether or not this is the case, we find in the Exchequer Rolls a payment to "Lyon Herald" in 1377, and ten years after he is styled *Leo Rex Heraldorum.* In accordance with the usual Scottish custom in regard to the holders of the more important offices, he is styled in the Acts of Parliament and elsewhere Lord Lyon. The principal duties of the Lyon are as follows: (1) Keeping the register of all arms and bearings in Scotland. (2) Granting patents or new grants of arms to all "virtuous and well-deserving persons" who may apply to him. (3) Matriculating in his books the arms of cadets of families who have already recorded arms. (4) Confirming arms to those families who omitted to register them in accordance with the directions of the Act of 1672, afterwards referred to. (5) Empowering applicants to add to or alter their arms. (6) Marshalling arms in accordance with stipulations in deeds of entail or other settlements. (7) Investigating and deciding on questions of family representation and claims to particular coats of arms. (8) Recording genealogies in the official register of pedigrees after the same have been proved. (9) Making searches in and giving extracts from the registers, manuscripts, and other documents in the Lyon office. (10) Conducting genealogical investigations and answering inquiries regarding points of genealogy, heraldry, and precedence. (11) Preparing funeral escutcheons. (12) Conducting the execution of royal proclamations. (13) The marshalling of State processions and deciding questions of precedence. (14) The appointment and control of messengers-at-arms, and the trial of complaints against these officers.

Many distinguished men have held the office of Lyon, the most celebrated of them all being Sir David Lindsay of the Mount (1542–55), whose register, compiled by himself or under his direction, is now in the Advocates' Library. Sir Robert Forman of Luthrie, Sir James Balfour of Denmiln, and Sir Alexander Erskine of Cambo were all efficient and learned officers. After the death or resignation of the latter about 1727, a time when the practice of heraldry had reached a period of much deterioration, the office was held by nominees of the Crown, who did not perform their duties in person, but delegated them to a depute,—a practice too common in Scotland,—contenting themselves with drawing the fees which they exacted.

In 1796 the office was for the first time granted to a peer in the person of Robert, ninth Earl of Kinnoull, the grant being for two lives. On the death of his son, the tenth earl, in 1866, the whole office was reorganised under the provisions of 30 Vict. c. 17. By that Act the Lyon office was made a Government office. All fees, which are regulated by a table appended to the Act, were appointed to be paid over to Her Majesty's Treasury. The Lyon was taken bound to perform his duties personally, and not by deputy, a stipulation also made in the case of the Lyon Clerk, and both these officers were henceforth to be paid by salary. The number of heralds and pursuivants, formerly amounting to twelve, was reduced to six, with a fixed and almost nominal salary. The effect of the Act was to put the office upon a much better footing than it had hitherto been. Its business was conducted in a much more satisfactory manner than formerly, and continued to increase; indeed, so much so has this been the case, that in the year 1897 a greater number of grants and matriculations of arms were carried through than in any previous year of its recorded history.

While the Lyon office was reorganised by the Act above quoted, the jurisdiction of the Lyon in armorial matters depends upon much more ancient legislative enactments. In consequence of prevalent irregularities in the bearing of coat armour, probably resulting from the disuse of seals in the witnessing of deeds, the Scottish Parliament passed an Act in 1592 (c. 29, Record edition) empowering the Lyon and his heralds to hold visitations throughout the realm, in order to distinguish the arms of all noblemen and gentlemen, and to record or "matriculate" them in his books; "to put inhibition to all the common sort of people not worthy by the law of arms to bear any signs armorial," and to enforce certain penalties against all persons using arms unlawfully. Again, by an Act of 1662 (c. 53) he was declared to be the only competent judge in all questions respecting the distinction of arms to be borne by younger branches of armigerous families; and it was likewise provided that all persons were to have their arms examined and renewed by the Lyon, and inserted in his register. This Act was, however, repealed in the following year, probably on account of some dissatisfaction at the amount of fees appointed to be exacted by the Lyon at funerals. The next enactment dealing with the subject was in 1672 (c. 47), and it is still the governing Statute as to heraldic jurisdiction and armorial procedure. It ratified generally the Act of 1592; but its most important provision was the ordering of all persons of whatever degree who were in the habit of using arms to give in a description of such arms and of their lineage, in order that they might be distinguished with "congruent differences" and properly recorded. The register thus instituted was to be considered as the true and unrepealable rule of all arms and bearings in Scotland, and all persons using arms without their being recorded therein rendered themselves liable to a fine of £100, and the goods on which the arms were engraved were to be escheat to the king. The register commenced in conformity with these injunctions has been carried on ever since. What became of the old registers which must have been in existence previously is not quite certain. They may have been carried off, along with other Scottish records, by Cromwell, and been lost at sea as they were being returned at the solicitation of the Scottish Parliament; but other authorities state that they perished in a fire which took place in 1670. A large proportion of Scottish families duly obeyed the directions of the Act, and had their arms properly entered in the register, but unfortunately a certain number from various causes failed to do so; and as the compulsory powers conferred on Lyons were not at first vigorously exercised, the record

is not so complete as it might have been had all combined to give a loyal and generous support to an Act which was meant as a final regulation regarding arms.

These Acts of 1592 and 1672 are those which establish the jurisdiction of the Lyon in the matter of armorial bearings. This jurisdiction has not been in any way interfered with since, his authority being expressly reserved by the Treaty of Union, the 19th article of which, after dealing with the Courts of Session, etc., declared that "all other Courts now in being within the kingdom of Scotland do remain," while the 24th article provides that "the rank and precedency of the Lyon King of Arms of the kingdom of Scotland . . . be left to Her Majesty." No special order has been issued regarding his precedency; but the ancient practice, according to Nisbet, is that he has precedence of all knights and gentlemen within the kingdom not being officers of State or Senators of the College of Justice.

While the jurisdiction of the Lyon as to armorial bearings is ministerial, it does not seem to be privative. It seems probable that there was an appeal from his decisions to the Scottish Privy Council; but whether or not this was the case, the Court of Session has regarded his jurisdiction as subject to its review and control (*Dundas*, 1782, Bro. Supp. 493; *Procurator-Fiscal of Lyon Office* v. *Murray*, 1778, Mor. 7656; *Cuninghame*, 1849, 11 D. 1139). But the Court of Session will not interfere unless they are satisfied that the Lyon has invaded the rights of others (*M'Donnell*, 1826, 4 S. 371). And in the case of *Hunter* (1882, 9 R. 492, at 498) the Lord President said that the pursuer's statement that the Lyon had been misinformed and misled was not very intelligible, because it must be taken for granted that the Lyon knows more about coats of arms than any other person. "He is the proper officer for the purpose, and by his judgment and authority anyone who bears the coat armorial is bound. And I know of no authority for taking to another Court, and bringing up as a side issue, the decision arrived at on such a point by the Lyon King, without in the first place having had recourse to the regular proceedings by which such a decision can be reviewed. There have been cases in which the judgment of the Lyon has been brought under review by advocation or reduction; and if a party has a proper interest, he will be entitled to be heard upon the merits in such a matter." As a rule, it may be assumed that the Court of Session will not interfere with the Lyon's judgment as to what a coat of arms should be; but the case is conceivable where the Court might be asked to review the Lyon's decision as to which of two or more parties had a right to a particular coat.

The Lyon had formerly under him six heralds and the same number of pursuivants. The heralds were styled Islay, Rothesay, Marchmont, Albany, Ross, and Snowdon; and the pursuivants, Kintyre, Dingwall, Carrick, Bute, Ormond, and Unicorn. By the Act 32 Vict. c. 17, above referred to, the number was reduced to six altogether, the present heralds being Albany, Rothesay, and Marchmont, and the pursuivants Carrick, Bute, and Unicorn. Their reduction was in some degree, no doubt, owing to the difficulty at the time of getting suitable persons to take the appointments; but it is to be regretted that their numbers were so diminished, as, owing to the greatly increased interest taken of late in armorial matters, there would now be no difficulty in filling the places with earnest students of heraldry. There are also attached to the Lyon office a procurator-fiscal, macer, and six State trumpeters.

Lyon is also King of Arms of the Order of the Thistle, and attends the Chapters of the Order. His insignia are a crown of gold, only used at Royal

coronations—formerly on the appointment of Lyon there used to be a solemn crowning at the ceremony of his inauguration into office, but such a practice has not taken place since the Union. The crown is now of the pattern used by the other Kings of Arms, with the motto round it, *Miserere mei Deus secundam tuam misericordiam*—formerly it used to be a facsimile of the Royal Crown, but unjewelled. A velvet tabard, with the Royal Arms embroidered in gold, is worn on all occasions of public ceremonial when the Lyon appears in his official capacity. He shares with the other Kings of Arms the privilege of wearing a gold collar of SS.; and he has also the badge of the Order of the Thistle suspended from a triple gold chain. His baton of office is powdered with roses, thistles, shamrocks, and fleurs-de-lys, probably the only bit of insignia now used which bears the lilies of France.

Macer.—The macers or mace-bearers of the Court of Session are the servants of the Courts, and are charged with the duties of ushers, the preservation of silence, and attendance upon the judges. They attend upon the Courts of Session, Teinds, and Justiciary. The seven macers of the Court of Session receive £100 each (1 & 2 Vict. c. 118, s. 25), while the three in the Court of Justiciary have an annual salary of £200 each. The Session macers may be called upon to do service in the High Court of Justiciary (52 & 53 Vict. c. 54, s. 11).

The office of macer is coeval with the Court of Session, and we find regulations for their appointment and for the exercise of their duties in the Act of the Parliament of Scotland (17 May 1532) establishing that Court. The office seems to have been a much coveted one, and there are many instances of its remaining in certain families for a very long time. The macers fought hard for their privileges, chiefly the right of exacting fees, and attained to no mean position. By Act of Sederunt of 23 February 1687, they were expressly included among persons declared to be members of the College of Justice, whereby they obtained immunity from local taxation. They reached the acme of their power when they sat as a Court, for their functions in connection with the service of heirs practically amounted to this. Their doings in this connection were abolished by 1 & 2 Geo. IV. c. 38, s. 11, and they have now been shorn of all their former dignity. A few duties still remain to them from which they derive some slight remuneration, among which are the execution of caption warrants in connection with overdue processes, and the execution of warrants for the apprehension of delinquents, etc.

The appointment of six out of the seven macers of the Court of Session lies with the Crown. The right to appoint the seventh is invested in the Marquis of Bute, who holds the right in virtue of a feudal grant given by James III. in 1483—"officii clavigeri et sergeandi"—along with the Barony of Byres to John Scrymgeour. The said barony with its accompanying office have in course of time become the property of the Marquis of Bute. The tenure of this right has given rise to two reported cases, viz. *Gardner* (1835, 13 S. 664), and *Bruce* (1839, 1 D. 583); and one of the present macers of Court is a nominee of the marquis.

[Stair, bk. iv. tit. 3, s. 18; Ersk. bk. i. tit. 4, s. 33; bk. iii. tit. 6, s. 7; tit. 8, s. 64; *Journal of Jurisprudence*, xxviii. 292, 351, 400; *Scots Law Times*, vol. iii. p. 52.]

Machinery.—Questions concerning machinery sometimes arise between landlord and tenant, or heir and executor, most of which depend on whether or not the machinery is to be regarded as a fixture (see FIXTURES). Further, very important questions arise in connection with loans upon the security of machinery. Lastly, there is a considerable amount of law, both common and statutory, dealing with the rights and duties of masters and servants (see FACTORY AND WORKSHOP ACTS).

FENCING.—1. *At Common Law.*—The duty of the owner of machinery to fence arises only when fencing is the ordinary and reasonable precaution for a master to take (Glegg on *Reparation*, p. 356). The owner of machinery is answerable for the consequences of any patent and preventible defect by which it may have been rendered unsafe; where a machine is incapable of being used in an unfenced state without danger to limb or life, the master is liable for accident if it is left unfenced (*Darby*, 1861, 23 D. 529). An owner is not bound to have the latest appliances, and he fulfils his duty if he has those which are generally known to the trade as proper precautions against accidents; but wherever fencing is recognised and well known in connection with the class of machine in question, the master's duty is to provide it (*Edwards*, 1889, 16 R. 694). Of course in working at machines the employees are expected to take reasonable care. Any form of rashness on the part of the employee will relieve the master of liability (*Ross*, 1882, 20 S. L. R. 46). There is a general rule that a master is liable if he puts a child in charge of a dangerous machine (*Sharp*, 1885, 12 R. 574). Although liability in every case depends on the circumstances, it may be regarded as the duty of an owner to fence all machinery where children are at work (*Gemmills*, 1861, 23 R. 425). Wherever the owner takes reasonable care, he will not be liable if an accident occurs which he could not have been expected to foresee and provide against (*Murray*, 1890, 17 R. 815).

2. *By Statute.*—In addition to the common-law liability to fence, there is provision for fencing in several Statutes. Under the Factory Acts provision is made for fencing factories (see FACTORY AND WORKSHOP ACT, vol. v. pp. 218, 219). Again, by the Coal Mines Regulation Act, 1887, 50 & 51 Vict. c. 58, s. 49, Rule 6, it is provided that "every entrance to any place which is not in actual use or course of working and extension shall be properly fenced across the whole width of the entrance, so as to prevent persons inadvertently entering the same." By Rule 19 the top and all entrances to shafts, and, by Rule 31, fly-wheels and all exposed and dangerous parts of the machinery used in or above a mine, must be fenced (*Hogg*, 1886, 24 S. L. R. 14; *M'Gill*, 1890, 18 R. 206).

[Glegg on *Reparation*; Gloag and Irvine on *Rights in Security*.]

See COAL MINES REGULATION ACTS.

Magistrate.—In its wider sense, the term magistrate comprehends all in authority, and includes the Sovereign, as chief magistrate, as well as all who derive their authority from him. In its colloquial and limited sense, the term is restricted to the provost (or chief magistrate) and bailies of a burgh. See BURGH (PARLIAMENTARY); BURGH (POLICE); BURGH (ROYAL). See also APPREHENSION; BACKING A WARRANT; MOBBING; DECLARATION BY PRISONER; CAPITAL PUNISHMENT; etc.

Burgh magistrates have civil jurisdiction in matters of debt, service, and questions of possession betwixt the inhabitants (Ersk. *Prin.* i. 4. 12); but in practice this is now confined within very narrow limits, where it is not altogether in abeyance. The criminal jurisdiction at common law of burgh

magistrates is now in practice confined to petty offences; while a large number of statutes empower them to try various offences also, of a more or less trifling character. Their jurisdiction is, of course, confined to crimes committed within their burghs, except in the case of crimes committed at sea, and crimes in regard to which jurisdiction is by statute conferred on magistrates of the place of apprehension (4 Geo. IV. c. 34, s. 3; *Clark*, 1846, Ark. 33). Threatening a magistrate in reference to his official conduct is a high crime (1540, c. 104; *Porteous*, 1832, Bell, *Notes*, 106; 5 Deas & And. 53; *Carr*, 1854, 1 Irv. 464). A magistrate may, on emergency, appoint a person to act as procurator-fiscal in conducting a prosecution when the procurator-fiscal who instituted it cannot attend, or when there is no procurator-fiscal (*Hill*, 5 Coup. 284; 10 R. (J. C.) 66, 20 S. L. R. 660; and see note 3, Macdonald, *Crim. Law*, 286).

"Maiden" Circuit.—This was the term applied to a sitting of a Circuit Court in any town for which no cases had been set down for trial. By the Criminal Procedure Act, 1887, "maiden" circuits were abolished. The High Court no longer proceeds to any town for the purpose of holding a Court in use to be held in such town when there are no cases indicted for the sitting (50 & 51 Vict. c. 35, s. 48).

Mail.—In the older legal terminology of Scotland, *mail* was used to signify rent. See RENT; GRASS; MAILLS AND DUTIES; MANSE (*Manse "Maill"*).

Mail Coach.—See CARRIER.

Maills and Duties.—"Maills and duties" is an old term meaning rents. "Maills," being the name of a coin at one time current in Britain, meant money payments, while duties meant personal services, such as carriages (Ross, *Lect.* ii. 235). The term maills and duties is now seldom met with except in the expressions: (1) Action of maills and duties; (2) Assignation of maills and duties; (3) Prescription of maills and duties.

I. ACTION OF MAILLS AND DUTIES.

Any action to enforce payment of rents was formerly called an action of maills and duties. The action was accordingly competent to anyone entitled either to be in possession of the land or to enter into possession of it. The following classes of persons might be pursuers in an action of maills and duties (see Stair, iv. 22. 7 to 9; Ersk. iv. 1. 49; Rankine on *Leases*, 335): (1) Proprietors infeft; (2) disponees uninfeft, or mere assignees of the rents (1 Bell's *Com.* 793); (3) liferenters by constitution or by reservation; (4) widowers in right of courtesy, or widows in right of terce, the title of the latter being sufficiently established by production of her service (see Fraser on *H. & W.* 1105) without an instrument of kenning (*A. v. B.*, 1632, Mor. 15842); (5) trustees, voluntary or judicial; (6) heirs in heritage, even for rents falling under the executry (*Lawson*, 1834, 7 W. & S. 397; *Lennox*, 1893, 21 R. 77); (7) apprisers or adjudgers (see *Scott*, 1628, Mor. 207; *Moncrieff*, 1629, 1 B. S. 378 and 292: *Belshes*, 1686, 2 B. S. 95: *L. of Heron*, 1760, 5 B. S. 876); (8) heritable creditors. These classes of

persons may still be pursuers in the action, subject to the qualifications mentioned below. The pursuer did not require to be infeft (*Scott, Monerieff,* and *Belshes, supra*; Stair, iv. 22. 7). A superior or his assignee has no title to raise the action for the recovery of feu-duties or casualties, the reason being that the infeftment of the vassal excludes him from possession (*Prudential Insurance Co.*, 1884, 11 R. 871; *Nelson's Trs.*, 1896, 23 R. 1000); nor can the holder of a reserved burden over the land use the action for enforcing his rights (1 Bell's *Com.* 731; Bell's *Prin.* 922), because he has no title of possession. Heritable creditors have not in all cases a title to raise the action. To enable them to do so, they must hold an assignation of the rents, express or implied, along with their disposition in security of the property (see Ld. M'Laren in *Smith's Trs.*, 1890, 17 R. 1088, at p. 1090). The use of the action of maills and duties is now restricted to the case in which a third party enforces his right to exact from the tenants payment of the rents, as against the proprietor or civil possessor of the ground, to whom the tenants would, apart from the decree, pay the rents. The most usual case is the action by an heritable creditor under a bond and disposition in security. In *The Scottish Heritable Security Co.*, 1876, 3 R. 333, Ld. Pres. Inglis said: "It is only an incumbrancer that requires to use a process of maills and duties in order to give him a title, in a question with the tenant, to uplift the rents"; and he expressed the opinion that such an action at the instance of a proprietor or an *ex facie* absolute disponee was unnecessary, and indeed incompetent. The usual remedy open to a proprietor or *ex facie* absolute disponee is an ordinary petitory action for debt (Mackay's *Practice*, ii. 309; Rankine on *Leases*, 331). This remedy would at one time have been understood to be included among actions of maills and duties; but the term has now the narrower signification above explained.

The action of maills and duties is not intended to establish a right to the rents. Such a right is presupposed in the title to sue. The object of the action is merely to prevent the tenants from paying the rents to any other person than the pursuer, and to put the pursuer in a position to enforce from the tenants payment to himself (*Home*, 1666, 1 B. S. 522; *Forsyth*, 1853, 16 D. 197; *Chambers' Judicial Factor*, 1893, 20 R. 257). It has been stated, on the authority of *Fairlie's Trs.* (1860, 22 D. 682), that an action of maills and duties is not a competent process for testing a question of heritable title to land; but this is doubtful (see Rankine on *Leases*, 335). In the old view of the nature of the action an important distinction was drawn between the petitory and the possessory forms. The petitory was the form which could only be adopted by one who had a valid title to the rents. The possessory, on the other hand, was the form adopted by one who had been in civil possession of the lands for seven years, either as proprietor or on a title short of property (Stair, iv. 22. 14; Ersk. iv. 1. 49). This distinction seems now to be of less importance, since the action of maills and duties, as now understood, is considered unnecessary and incompetent to a proprietor who is in civil possession of the land, and therefore the action will usually be in the petitory form, though the possessory action will still be available to a possessor for seven years whose title is insufficient to support a petitory action. The difference in form between the petitory and the possessory action is explained in dealing with the title which the pursuer has to produce, and in stating who are called as defenders.

What persons it is necessary to call as defenders depends on whether the action is petitory or possessory. If petitory, there are called the

proprietor or the civil possessor (as, *e.g.*, a tacksman or liferenter) of the lands, and the tenants or natural possessors (Stair, iv. 22. 14.; Ersk. iv. 1. 49). The proprietor or civil possessor, though called as a principal defender, is in effect called merely for his interest (*Robertson's Trs.*, 1889, 16 R. 705; *Schaw*, 1889, 16 R. 336). All the tenants must be called, the decree giving no right to the pursuer against those not called (*Smith's Trs.*, 1890, 17 R. 1088); but no service or other intimation is necessary to entitle the pursuer to enforce his right against any tenant acquiring the land subsequent to decree, if all the tenants at the date of raising the action were called (*Robertson's Trs., supra*). Under the Heritable Securities Act, 1894, it is now unnecessary to call the tenants in an action of maills and duties at the instance of an heritable creditor against the proprietor of the ground. The provisions of the Act are given below. Where there are no tenants in the lands, the action is incompetent, as there are no rents (*Smith's Trs.*, 1890, 17 R. 1088). If the action is possessory, no one has to be called but tenants or natural possessors (Stair, iv. 22. 14; Ersk. iv. 1. 49).

The Court in which the action is brought may be (1) the Court of Session, if the amount of the rents sued for exceeds £25; (2) the Sheriff Court, whatever be the amount of the rents sued for; or (3) the Justice of the Peace Court, if the amount of the rents sued for does not exceed £5 and there is no question of title involved. The jurisdictions of the Burgh and Baron Courts have never been taken away, but have become obsolete (Hunter on *Landlord and Tenant*, ii. 351; Rankine on *Leases*, 336; Mackay's *Prac.* ii. 308).

The form of a summons of maills and duties at the instance of an heritable creditor, which is the most usual case, is given in Sched. A of the Heritable Securities Act of 1894. The schedule runs thus:

In the Sheriff Court of at .

A. B., Pursuer, against *C. D., Defender.*

The above-named pursuer submits to the Court the condescendence and note of pleas in law hereto annexed, and prays the Court

To grant a decree against the above-named defender, finding and declaring that the pursuer has right to the rents, maills, and duties of the subjects and others specified in the bond and disposition in security for £ granted by in favour of , dated the and recorded in the register , or, at least so much of the said rents, maills, and duties as will satisfy and pay the pursuer the principal sum of £ , with interest thereon at the rate of per centum per annum from the day of 18 , liquidate penalty and termly failures, all as specified and contained in the said bond and disposition in security, dated and recorded as aforesaid; and to find the said *C. D.* liable in expenses, and to decern therefor.

Add condescendence and pleas in law.

The old form of such a summons will be found in *Jurid. Styles*, 3rd ed., iii. p. 35. Subject to the provisions of the Heritable Securities Act, the following are some of the rules relating to the form of the summons: The pursuer must set forth his title to sue (*Mackintosh*, 1835, 13 S. 884; *Hutchison*, 1846, 8 D. 1228). What title is sufficient depends on whether the action is petitory or possessory. If petitory, the pursuer must set forth a valid title to the rents. If possessory, he need only set forth possession for seven years, and his warrant for such possession (Stair, iv. 22. 14; Ersk. iv. 1. 49). In a question with tenants it gave a sufficient

title to sue, to produce a sasine in the lands (Stair, iv. 26. 4). If the pursuer were not infeft, he had to produce his author's infeftment to instruct his title, unless his right had been in some way recognised by the defenders, as, *e.g.*, by their accepting a lease from him (Stair, iv. 22. 7). The character in which the tenants or possessors are due rent must also be set forth (*Hutchison, supra*). The summons concludes for payment not only of the rents due, but also of those to become due by the tenants during their possession, and decree may be granted for future rents as well as for those due at the date of action (*Woodward*, 1829, 7 S. 566; *Bruce*, 1824, 2 S. 657). In one case no interest on a bond was actually due when the creditor raised an action of maills and duties, and in the bond three months' premonition was stipulated for before calling up the principal sum; yet the debtor's estate having been sequestrated on the same day as that on which the action was raised, and a term's interest having fallen due before it was called in Court, the action was sustained (*Ferrier*, 1831, 9 S. 837). The conclusion for expenses is usually against the proprietor of the land and against those tenants who appear and oppose.

The action fails where the pursuer does not produce a valid title to sue as above explained, or where, in a petitory action, a defender can show a better title to the rents than that of the pursuer. A pursuer can also be defeated by the production on the part of a defender of a possessory judgment following on seven years' possession, such possession being founded on a sufficient warrant, such as a tack (Stair, iv. 22. 16). A tenant cannot plead in defence to an action at the instance of an heritable creditor, that he is entitled to retain the rent against a debt due to him by the landlord, or to set off the rent against the debt (*Chambers' Judicial Factor*, 1893, 20 R. 257). Though it is doubtful if a *pro indiviso* proprietor can sue for his share of the rents without the concurrence of his co-proprietors, yet he cannot object to the title of his assignee under a bond and disposition in security, to sue an action of maills and duties (*Schaw*, 1889, 16 R. 336). A judicial factor in the management of the estate cannot come forward as a defender and exclude the pursuer (*Ferguson*, 1853, 15 D. 682). Sequestration of the estates of the owner of the land does not prevent a creditor from insisting in the action, but he will not be entitled to expenses against the trustee (*Johnston*, 1871, 8 S. L. R. 381).

Decree in the action gives the pursuer the means of entering into possession and drawing the rents. To enforce his right against the tenants, he may, after decree, sequestrate their effects in respect of the landlord's right of hypothec, so far as applicable (*Wedderburn*, 1707, Mor. 10399; *Railton*, 1834, 12 S. 757; *Smith's Trs.*, 1890, 17 R. 1088; Bell, *Prin.* 914 (3)). Decree may give the pursuer right to proceed with an action of ranking and sale (Bell, *Lect.* ii. 826). An heritable creditor in possession may be entitled by the terms of the bond to raise a summary action of removing against a tenant, but it is not essential for this purpose that he should hold a decree of maills and duties (*Forsyth*, 1853, 16 D. 197; *Blair*, 1853, 16 D. 291). Decree does not take away the right of property in a proprietor against whom it is pronounced: it only encumbers his right (Bell, *Lect.* i. 1168). By decree no preference is obtained over the tenant's moveables. Such preference can only be obtained by sequestration or by poinding the ground (Bell, *Lect.* ii. 1169). While in general the pursuer in an action of maills and duties is not entitled to poind the ground (Ross, *Lect.* ii. 431), an heritable creditor can do so before or after obtaining decree of maills and duties (*Henderson*, 1875, 2 R. 272), and he can even raise a combined action of maills and duties and poinding the ground (see *Jurid. Styles*, 3rd ed., iii. 202).

An heritable creditor in possession of land, and receiving rents under a decree of maills and duties, must account for his intromissions to the proprietor, or to others having a right to the rents postponed to his. After payment of the interest due to himself, he may pay over the balance of the rents to the proprietor of the land, without being responsible to those having postponed rights (*Brown*, 1835, 13 S. 256) unless he has taken possession in a competition with them (Bell, *Prin.* 914 (3)). He is liable for the feu-duty due to the superior, and for the public burdens affecting the lands (*Liquidator of City of Glasgow Bank*, 1882, 9 R. 689; and see Gloag and Irvine on *Rights in Security*, p. 101, and authorities there cited), and he incurs, if he conducts himself as owner of the subjects, the liabilities to third parties which attach to ownership of the land (*Baillie*, 1894, 21 R. 498). On the other hand, he appears to have no rights in virtue of his decree except such as go to reduce the amount of the proprietor's indebtedness to him (see *Forsyth*, 1853, 16 D. 197; *Heron*, 1893, 20 R. 1001; and compare *Grindlay*, 1833, 1 Ross, *L. C.* 140). He might at common law grant leases for the term of his possession (Bell, *Lect.* ii. 1170). By the provisions of the Heritable Securities Act, 1894, a creditor in possession of the security subjects may grant leases for periods not exceeding seven years, and he may apply to the Sheriff for power to let the land on longer leases, not, however, exceeding twenty-one years for heritable property in general, and thirty-one years for minerals (57 & 58 Vict. c. 44, ss. 6 and 7).

Before 1839 the execution of a summons of maills and duties after sequestration, but before the confirmation of the trustee, gave the pursuer a complete preference over the rents (*Ferrier*, 1831, 9 S. 837; *Campbell's Trs.*, 1835, 13 S. 237; compare *Falside's Tr.*, 4 March 1815, F. C.). The Bankrupts' Estates Act, 1839 (2 & 3 Vict. c. 41, s. 95), limited the extent of the preference to one and a half year's interest, viz. the current half-year's interest and one year's arrears, unless a charge had been given sixty days before the date of the sequestration, but left undisturbed the right to insist in the action. Sec. 118 of the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), re-enacting the provision of the Act of 1839, provided that no decree of maills and duties on which a charge had not been given sixty days before the date of the sequestration should, except to the extent after mentioned, be available in any question with the trustee, but that no creditor who held a security over the heritable estate preferable to the right of the trustee should be prevented from obtaining a decree of maills and duties after the sequestration, but such decree should, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term (see *Budge*, 1872, 10 M. 958). The provision of the Act of 1839 was repealed by sec. 2 of the Act of 1856. Sec. 118 of the Act of 1856 has been repealed by sec. 55 of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), and the law therefore is now as it was before 1839. An heritable creditor can now obtain by action of maills and duties, raised even after confirmation of the trustee on his debtor's sequestrated estate (Goudy on *Bankruptcy*, 259; *Johnston*, 1871, 8 S. L. R. 381; *Budge, supra*), a complete preference for the amount of the debt and interest, at least over the rents falling due after the date of the action.

It is not clear how far simple intimation to the tenants can take the place of an action of maills and duties. Probably such intimation would be sufficient to put the tenants in bad faith in paying the rents to the landlord, and render them liable in second payment, but it would not entitle the assignee of the rents to the landlord's remedies against them (*Webster*, 1780,

Mor. 2902). Sec. 119 of the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101), re-enacting the provisions of sec. 2 of the Heritable Securities Act, 1847 (10 & 11 Vict. c. 50), provides that the import of the clause of assignation of rents in a bond and disposition in security shall include a power to enter into possession of the lands, and uplift the rents if the lands are disponed, or to uplift the rents if the lands are not disponed, but it has not been decided how the creditor must proceed. Probably a decree of mails and duties would still be necessary to enable him to enforce his right against the tenants (see *Neils*, 1863, 2 M. 168). The action is not necessary to give an heritable creditor who holds a registered assignation of the rents a preference over a personal creditor of the debtor who has used arrestments (*Webster*, 1780, Mor. 2902; *Budge*, 1872, 10 M. 958). In a recent case, however, it was held that the right of a house factor to retain rents collected by him, in repayment of a debt due to him by the proprietor, was preferable to the right of a bondholder who had not raised an action of maills and duties (*Stevenson, Lauder, & Gilchrist*, 1896, 23 R. 496).

By the Act 1669, c. 9, it is provided that actions for maills and duties "shall prescrive within ten years except the saids actions be wakened every five years," and by 1685, c. 14, it was declared that such actions "shall prescribe in five years if they be not wakened within that time." The five years has been held to run from the date of the last step of procedure in the process (*Graham*, 30 May 1811, F. C.). Apart from these Acts, one having a claim to maills and duties could, by raising an action and then allowing it to fall asleep, have reserved his claim for forty years, the period of the long negative prescription (see also *Prescription of Maills and Duties, infra*).

An important change was, as already indicated, made on the form of and procedure in an action of maills and duties at the instance of an heritable creditor by the Heritable Securities Act, 1894 (57 & 58 Vict. c. 44). Under that Act the tenants in possession of the ground need not be called as defenders. Notice is given to them by registered letter in the form of Sched. B of the Act, whereupon they are interpelled from making payment of the rents to the proprietor, as if they were called as defenders in the action. Sched. B of the Act is as follows:

In the Court of Session (*or*)
In the Sheriff Court of shire at .

NOTICE.

An action has been raised of this date [*specify place and date*] in the above Court, at the instance of *A. B.* [*design him*], pursuer, against *C. D.* [*design him*], defender, in which the said pursuer asks that it be declared that, as holding a bond and disposition in security over the subjects situated at [*here give such description of the subjects*, e.g. *their name or the number of street in which they are situated, as may identify them*], he has right to the rents due, current, and to become due from the subjects.

Should you, after receiving this notice, pay your rent to the defender, you will do so at the risk of having to pay again to the pursuer should he obtain decree in the action.

[*To be signed by the pursuer or his law agent or messenger-at-arms or sheriff officer.*]

On decree being granted, intimation thereof is made to the tenants by registered letter in the form of Sched. C, and thereafter they can be compelled to pay the rents in the same way as if they were charged under a decree of maills and duties in the former style. Sched. C of the Act is as follows:

In the Court of Session (*or*)
In the Sheriff Court of shire at .

NOTICE.

Decree having been obtained of this date [*specify place and date*] in the above Court, at the instance of *A. B.* [*design him*], pursuer, against *C. D.* [*design him*], defender, finding and declaring that the pursuer has right to the rents, maills, and duties of the subjects and others situated at [*here give such description of the subjects, e.g. their name or the number of street in which they are situated, as may identify them*], specified in a bond and disposition in security for £ , granted by in favour of , dated the , and recorded in the register, you are hereby notified of the same, and desired and required to make payment to the said *A. B.* of the rents, maills, and duties due by you in respect of the occupancy of said subjects, or part thereof.

[*To be signed by the pursuer or his law agent or messenger-at-arms or sheriff officer.*]

The tenant's right is reserved to refuse payment of the rent on any ground not affecting the creditor's title, or a prior creditor's right to enter into possession. The old form is left competent, and any right competent to the creditor of entering into possession without action is reserved (s. 3). Any person interested may take proceedings to interpel the creditor from entering into possession of the lands disponed in security, or collecting the rents thereof (s. 4). The Act only refers to actions at the instance of heritable creditors, so that if one not in this position desires to raise an action of maills and duties, he must use the old form.

II. Assignation of Maills and Duties.

This is synonymous with what is now generally called assignation to rents. The subject has been dealt with under Feu-Charter; Bond and Disposition in Security; and Assignation to Rents.

III. Prescription of Maills and Duties.

By the Statute 1669, c. 9, it is enacted: "And likewayes Mails and Duties of tennents, not being pursued within five years after the tennents shall remove from the lands for which the mails and duties are craved, shall prescrive in all time coming: except the saids . . . mails and duties shall be offered to be proven to be due and resting-owing by the defenders their oaths, or by a special writ under their hands, acknowledging what is resting-owing." It has been held that the Act did not apply in the case of a liferenter who held a tack of the liferented lands and continued to possess them as proprietor after the death of the fiar (*Murray*, 1709, Mor. 11054), or of a tacksman of maills and duties (*Nisbet*, 1729, Mor. 11059), apparently on the ground in both cases that these were not tenants within the meaning of the Act. Erskine says that the Act was introduced to protect tenants, natural possessors of the ground, from the effects of their rusticity or ignorance in business (Ersk. iii. 7. 20). The Act was applied, however, in the case of a tacksman of a whole estate (*Fairholm*, 1725, Mor. 11058). It applies whether the lease on which the tenant possessed was written or verbal (*Nisbet*, *supra*), and whether the tenement let was rural or urban (*Boyes*, 1823, 2 S. 190). The dependence of a sequestration in security for rent does not bar the prescription (*Cochrane*, 1830, 8 S. 324), but a sequestration for past-due rents does (*Hogg*, 1826, 4 S. 702). If the landlord judicially pleads the rents in compensation of a debt due by him to the tenant, or, where the tenant has retained the rents, in security of a debt due by the landlord, this bars the running of prescription (*McDonald*, 1826, 5 S. 28; *Nicholson*, 1832, 10 S. 759; *Hedalle*, 1847, 9 D. 1254); but the land-

lord cannot plead compensation if the rents have already prescribed (*Macintosh*, 1753, Elchies, "Prescription," No. 35). The Act was held to apply to the case of a partner of a firm who had undertaken an obligation to relieve his copartners of rent due by them (*Daes*, 1710, Mor. 11056), and to the case of a cautioner for a tenant (*Duff*, 1771, Mor. 11059). The prescription does not begin to run till the tenant's removal (*Strahorn*, 1739, Mor. 11059; *Johnston's Executrices*, 1897, 24 R. 611). Partial payments by the tenant, made within the five years, found no interruption of prescription, as tending rather to fortify the presumption that all bygones are cleared (*Nisbet*, 1729, Mor. 11059): but if payments of interest made after the expiry of the five years can be proved by the tenant's writ, this will be sufficient to prove the debt (Dickson on *Evidence*, 458, 482).

For the rules relating to proof of the debt by writ or oath of the defender, see OATH ON REFERENCE.

Maim.—(From Old Fr., *mahemer*; and written in English law language, *mayhem*.) To injure the body of a person by forcibly depriving him of the use of some member serviceable in fight. This, of course, may be charged as an attempt to murder or an aggravated assault, as the circumstances warrant. By 10 Geo. IV. c. 38, s. 2, if any person shall, within Scotland, "wilfully, maliciously, and unlawfully stab or cut any of His Majesty's subjects, with intent in so doing, or by means thereof, to murder or to maim, disfigure or disable such His Majesty's subject or subjects," or with intent to do them some other grievous bodily harm, such person shall be held guilty of a capital crime, and shall receive sentence of death accordingly. The crime is still a capital offence (Crim. Proc. Act, 1887, 50 & 51 Vict. c. 35, s. 56).

Maiming of Cattle, while a crime at common law and punishable as malicious mischief, was also made criminal by the Statutes 1581, c. 110, and 1587, c. 83; the killing, goring, or houghing of oxen, horses, or other cattle, in time of spring or harvest labour, "in despite against neighbours," being declared punishable with death (Hume, i. 124; Macdonald, 115).

Maintenance.—See ALIMENT.

Maintenance.—See BUYING OF PLEAS; CHAMPARTY; PACTUM DE QUOTA LITIS.

Majestatis crimen.—See TREASON.

Major.—A major is a person of full legal age, *i.e.* in both sexes, of twenty-one years complete. See MINOR; CURATOR.

Major and Minor.—See INDICTMENT.

Majority.—Apart from statutory enactment, special agreement, or inveterate custom, there is no rule or principle by which the greater

number of persons intrusted with the performance of a certain duty can bind the smaller number. The number of Acts of Parliament, however, which so provide, is very considerable; and in many of these it is enacted that the majority must not be less than a fixed proportion of the whole (see Bell, *Dict.*, *voce* "Majority"). See also QUORUM.

Mala fides.—Bad faith; dishonesty; malice; the absence of an upright purpose in the affairs of life. *Mala fides* is never presumed unless the act done is forbidden by the common or statute law, whether it is punishable or not. Thus a slanderous statement is presumed to be malicious when the person who makes it has no particular duty or interest to make it, and one who sets up a lottery is presumed to do so with a dishonest intention towards those who are induced to purchase tickets (see Stirling, J., in *Barclay*, [1893] 2 Ch. 154, at 167). See BONA FIDES. No action is maintainable on the ground of *mala fides* against a person who has caused injury to another by doing an act which it was within his legal right to do, unless he thereby induced a third person to do an illegal act to the injury of the pursuer (*Allen*, [1898] L. R. A. C. 1; and see *The Scottish Co-operative Wholesale Society Ltd.*, 1898, 5 S. L. T. 336).

A lack of candid and fair dealing in a litigant is held a proof of *mala fides*, and the Court will take account of that when it comes to consider the question of expenses. One who is eventually unsuccessful may be found liable in the whole expenses of the cause, including the expenses of a part in which he succeeded, if he has "all along been maintaining a plea contrary to equity and good conscience" (*Murray*, 1839, 1 D. 484; *Cullen*, 1855, 17 D. 636; *Lyall*, 1867, 6 M. 42, and see Ld. Pres. M'Neill in *Lindsay*, 1863, 1 M. 380). On the other hand, a successful litigant may be found entitled only to modified expenses (*Shepherd*, 1896, 23 R. 695), or to none at all (*Manners*, 1872, 10 M. 532; *Kellock*, 1892, 9 S. L. Rev. 291); or he may even be found liable in expenses to the unsuccessful party (*A. B.*, 1839, 1 D. 610) when the litigation has been improper or has evinced bad faith on his part. "I am aware," said Ld. Fullerton (*A. B.*, *supra*), "that it is very unusual to award expenses against the party who has prevailed on the merits of the cause. But it is not incompetent to do so, and it becomes proper to do so in any case where it is through his improper conduct that the expenses have been occasioned." And the above rules apply to extrajudicial conduct as well as to the litigation itself (*Campbell*, 1868, 6 M. 640; *Hamilton*, 1827, 6 S. 58; *Orr*, 1872, 10 S. L. R. 81; *E. Minto*, 1873, 1 R. 165).

An impression on the part of the Court that a pursuer was not acting in *bona fides* in bringing an action, formed an element in leading them to require him to find caution for expenses before proceeding further (*Powell*, 1896, 23 R. 955).

Male appretiata.—See AD OMISSA VEL MALE APPRETIATA; EIK TO A CONFIRMATION; CONFIRMATION OF EXECUTORS.

Malice.—Broadly speaking, the term malice may be taken as co-extensive with wrongful intention. Mere naked intention, however wrongful, is of no legal significance whatever. The law takes no cognisance of malice until it is clothed and evidenced by some overt act. "Malice is in

the breast of the party accused, and it cannot be known to the outer world unless there has been some act that evinces malice, from which the existence of the malice is to be deduced" (Ld. J.-C. Moncreiff, *Gordon*, 1886, 14 R. 75, p. 84).

And, first, the overt act in and by which malice is expressed may be a wrongful act, that is, an act done in breach of a public or private duty. In the former case, where the act is done in violation of those duties which an individual owes to the community, the malice or wrongful intention is, in our law, generally spoken of as dole, and the act itself as crime—*crimen dolo contrahitur*. Used in this sense, malice or wrongful intention is the essential factor in crime, and it may vary from deliberate purpose down to that gross negligence or *culpa lata* which the law regards as involving resposibility in a criminal Court. In this aspect, the legal bearing of malice belongs to the department of criminal law, and is elsewhere treated (see Hume, i. 21 *seq.*; see also CRIME).

Where, on the other hand, the overt act which expresses or evidences malice or wrongful intention is an act done in breach of a private duty, the determination of the legal significance of malice forms part of the law which relates to the legal remedies afforded for damage caused by actionable wrongs or torts. In this connection, malice, inasmuch as it presupposes a positive act on the part of the wrong-doer, is frequently used, in contrast to negligence, as marking a broad division of actionable wrongs into intentional and unintentional wrongs. "Malice is active—commission; negligence is passive—omission. The duty which malice offends against is a duty to refrain from doing something. The duty which negligence offends against is a duty to do something. In the one a person causes injury by doing something which he has no occasion or excuse for doing; in the other, he causes injury by failing to do something, by being inactive without excuse" (Glegg, *Reparation*, p. 11). But while this offers a convenient division of actionable wrongs for the purpose of general classification, it is apt to be misleading. For example, slander and assault are frequently included among breaches of duty which spring from wrongful intention. In neither case, however, is malice or wrongful intention essential, in the sense of being a necessary element in the constitution of the wrong. Slander is an actionable wrong although there be no malice; a person may be rendered civilly liable for assaulting another with whom he has been throughout upon the most friendly terms (see *Reid*, 1885, 12 R. 1129). In other words, the presence of wrongful intention is in such cases *accidental*, not *essential*. Malice, therefore, so far as the grounds of legal responsibility are concerned, is here of no moment. It is, accordingly, necessary to clearly distinguish this dual part which is played by malice, as being (1) of the essence of a wrong, or (2) merely incidental to it.

(1) In the case of a few actionable wrongs, more or less akin to crime,—for example, seduction (in Scots law) and fraud,—wrongful intention, under the name of dole, or such ignorance or indifference as amounts to guilty recklessness,—for *culpa lata dolo æquiparatur*,—is of the essence of the wrong. It alone renders the wrong an actionable wrong, and must necessarily be averred in order to make an action relevant. To these, perhaps, may be added malicious prosecution and abuse of civil process (Pollock, *Torts*, 5th ed., p. 300; see below).

(2) On the other hand, in other cases of actionable wrongs, malice or wrongful intention is not in any sense the root of the wrong. The act done is regarded as being *primâ facie* actionable, independently of the wrongful intention which accompanied the doing of it; the legal function of malice

being to counter or elide an anticipated defence, not to constitute the right of action in the pursuer. In these cases "the knowledge or state of mind of the person violating the right is not material for determining his legal responsibility" (Pollock, *v.s.*, p. 266). Our forms of pleading do not preserve this distinction, because, in most cases in which the facts show that proof of malice will be necessary to ultimate success, averments of malice are generally stated *in limine*, and in anticipation of the defence; but in estimating the legal import of wrongful intention, the distinction is vital. In short, the use or value of malice in this class of actionable wrongs is simply as a reply to "justification."

Many acts *primâ facie* wrongful are frequently justified or excused owing to the exceptional circumstances which attend them. "There are various conditions which, when present, will prevent an act from being wrongful, which in their absence would be a wrong. Under such conditions the act is said to be justified or excused" (see Pollock, *v.s.*, ch. iv.). So the forcible invasion of the liberty of another person is *primâ facie* a wrong; but if the invader be a constable acting in the due discharge of his duty, the law holds the act to be justified. Again, defamation is a wrong, but there are circumstances, *e.g.* where the occasion is "privileged," in which a man may with impunity make and publish untrue statements to the prejudice of another. Now, the legal function of malice is to cut down or elide the force of this "justification."

The principle here stated finds its clearest illustration in questions of slander. In our law, malice has generally been regarded as an essential element in slander (Bell, *Prin.* s. 2044; Glegg, *Reparation*, pp. 100, 116). This, however, is not so. The gist of the legal wrong lies not in the malice or intent to injure, but in the fact that the statement complained of is false and defamatory (Ld. Herschell, *Allen*, [1898] App. Ca. 1, p. 126; Ld. Watson, *id.*, p. 92; Cooper, *Defamation*, p. 2); and liability for such statements has been held to follow even where no malice existed or was even alleged (*Outram*, 1852, 14 D. 577; see *Shepheard*, 1875, 10 C. P. 502). The existence or non-existence of malice is always a material factor in estimating damages (see *Bromage*, 1825, 4 B. & C. 247, Bayley, J., p. 257; Pollock, *v.s.*, p. 263), but, as bearing on the liability of the defender, it only becomes relevant when "justification," that is, privilege, is pleaded by the defender, or raised by the circumstances of the case. Our law has always held that it is only in such cases that malice requires to be averred; but "because in a strictly limited class of cases the law allows the defence that the statements were made in good faith, it is illogical to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander" (Ld. Herschell, *Allen*, *v.s.*).

The acceptance of this view would seem to obviate the necessity for the distinction between what was known as malice in fact and malice in law; for this was largely due to the supposed necessity for assuming malice where none existed. Malice in fact was defined as personal spite or ill-will against an individual; malice in law, as the intention of doing an act which was in fact the breach of a legal duty, whether known by the doer to be so or not (*Bromage*, *v.s.*; Glegg, p. 116). The first is always a question of fact; the latter pointed rather to a rule of evidence. But the existence of malice must in every case, privileged or non-privileged, be an inference from the facts and circumstances established by the proof, and the narrow definition of malice in fact, which confined it to cases of personal animosity, no longer holds. "Malice is not confined to personal spite or ill-will, but includes every unjustifiable intention to inflict injury on the person defamed,

or, in the words of Brett, L. J., every wrong feeling in a man's mind" (Lindley, L. J., *Stuart*, [1891] 2 Q. B. 341, p. 351; see *Clark*, 1877, 3 Q. B. D. 237, pp. 246, 247); and covers any indirect or improper motive, though not directed against any individual in particular (*Hicks*, 1882, 8 Q. B. D. p. 175; see also *Adam*, 1841, 3 D. 1058, p. 1067; *Auld*, 1875, 2 R. 940, per Ld. Gifford, p. 958; *Abrath*, 1883, 11 Q. B. D. 440). As regards the evidence from which malice may be inferred, see Glegg, *Reparation*, p. 117; Cooper, *Defamation*, p. 200 *seq.*

The existence and proof of malice is, of course, immaterial in cases of absolute privilege. In such cases no action lies, "and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed" (Lopes, L. J., *Royal Aquarium Co.*, [1892] 1 Q. B. p. 451; see Glegg, p. 120; Cooper, p. 126 *seq.*; Pollock, *v.s.*, p. 251; see also DEFAMATION; PRIVILEGE).

The principle above stated might also be illustrated in cases of civil actions for assault. Even in the case of abuse of civil process, which has generally been classed among wrongs to the constitution of which malice is essential, it may be doubted whether the wrong ought not to be regarded as completed by the raising of process without reasonable and probable cause; the necessity for instructing malice being, on the analogy of privilege in cases of slander, merely a concession granted to the defender upon grounds of public policy (see *Allen*, *v.s.*, Lds. Herschell and Davey, pp. 125, 172).

There remains the question of the legal significance of malice when appearing in conjunction with an act in itself lawful. It was at one time thought that, where a man was injured by the lawful exercise of another man's legal right, the presence of a malicious or improper motive in him who did the injury would convert this exercise of a legal right into an actionable wrong. This doctrine has, however, been finally decided to be erroneous. In the civil law it was otherwise (*Dig.* 39. 3. 1. 9), an act otherwise lawful in itself being deemed illegal if done with malicious intent; and this principle was supposed to have been adopted in our law (Bell, *Prin.* s. 966; see ÆMULATIO VICINI). The doctrine was shaken by the decision in *Chasemore* (1859, 7 H. L. C. 349); and in two recent decisions of the House of Lords it has been decided that, provided the means employed be lawful (*The Mogul Steamship Co.*, 1889, 23 Q. B. D. 598; [1891] App. Ca. 25), no person who has a legal right to do what he threatens or intends to do can be interfered with, however selfish, vexatious, or even malicious his conduct may be (*Mayor of Bradford*, [1894] 1 Ch. 145), and that no act lawful in itself can be converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action (*Allen*, [1898] App. Ca. 1; *Mayor of Bradford*, [1895] App. Ca. 587).

The result seems to be that malice must now be regarded as of no legal significance except in so far as it appears in conjunction with an act which is itself a violation of the law; and that even in such conjunction, apart from crimes and a few excepted cases of actionable wrongs, malice is of no legal effect as a ground of legal responsibility; that motive may be neglected as constituting an element of civil wrong; and that the proper function of malice is, as stated above, as an answer or reply to be used to cut down justification or excuse when pleaded by the defender, or raised in his favour by the circumstances of the case.

Malice may be relevantly averred against a corporation (*Gordon*, 1886, 14 R. 75); for a corporation which commits an actionable wrong is as liable

therefor as a private individual if (1) the thing done is within the purpose for which the corporation exists, and (2) would have been actionable if done by an individual; and this principle has been held to extend to liability for malicious wrongs (*Edwards*, 1880, 6 Q. B. D. 287, following *Green*, 1859, 7 C. B. N. S. 290; and disregarding *Stevens*, 1854, 10 Ex. 352; *Whitfield*, 1858, El. B. & E. 115; *Kemp*, 1891, 7 T. L. R. 50; see *contra*, Ld. Bramwell, *Abrath*, 1886, 11 App. Ca. 247, p. 250). In the case of public bodies acting for the public interest only, very specific allegations of malice would probably be necessary (*Macaulay*, 1887, 15 R. 99; Glegg, pp. 10, 78, 118). This, however, forms the exception, if there is any, to the rule that malice is not vicarious (Ld. Ardmillan, *Wilson*, 1875, 3 R. 18, p. 20), and that, outside the special relation of master and servant, no liability attaches to one person for the malice of another (*Barr*, 1868, 6 M. 651; *Chalmers*, 1790, Mor. 6083; affd. 3 Pat. Ap. 213).

See generally, Glegg, *Reparation*; Cooper, *Defamation*; Pollock, *Torts*. See also under Assault; Civil Process, Abuse of; Defamation; Issues; Prosecution, Malicious; Privilege.

Malicious Mischief.—This term denotes the common-law crime of feloniously injuring property. The essence of the crime is the malice which prompts the injurious act. There must, of course, be some damage done, but the extent of injury is immaterial, so long as it is at all substantial, and the result of a malicious act. Ordinary cases of malicious mischief, which may be prosecuted at common law, are such as these: breaking windows, injuring trees or plants, destroying buildings, cutting up turf, throwing down corn-stacks, firing stacked wood or peats, breaking implements of labour, destroying or maiming domestic animals (*Thompson*, 1874, 2 Coup. 551; *Stewart*, 1874, *ib.* 554), maliciously placing any obstruction on a railway, or wilfully doing so in a manner calculated to obstruct (*Millar*, 1848, Ark. 525; *Murdoch*, 1849, J. Shaw, 229).

Hume points out that the crime of malicious mischief is committed whether the injury to property has been caused from motives of malice or misapprehension of right. He adds, however, that, in the latter case, the damage must have been done with circumstances of tumult and disorder, and of contempt and indignity to the owner (Hume, i. 122). This view of Hume has been substantiated by decision, and it is now the law that no charge of malicious mischief will lie against a person who vindicates a civil right in a manner which cannot be characterised as riotous and disorderly. Thus where a fence had been erected by magistrates across the only access to a person's property, which had been possessed for time immemorial, a conviction for malicious mischief for pulling it down was quashed (*Black* v. *Laing*, 1879, 4 Coup. 276). In an earlier case the servants of the buyer of wood refused to unload their master's cart at the command of the seller, who desired to retain the wood till it was paid for. The seller thereupon cut the harness, but it was held that his conduct in so acting did not amount to malicious mischief (*Speid* v. *Whyte*, 1864, 4 Irv. 584). Even where property is injured for a fraudulent purpose the crime may not amount to malicious mischief. Thus the charge of malicious mischief was held irrelevant in a case where a farmer was charged with breaking beams in a farmhouse, in order to increase a claim for compensation (*Reid*, 1833, Bell, *Notes*, 47).

By certain Statutes malicious mischief, in certain circumstances, is made a statutory offence. By the old Acts of 1581, c. 110, and 1587, c. 83, it was

a capital crime to maliciously break or destroy ploughs or plough-gear in time of tilth; to kill, gore, or hough oxen, horses, or other cattle at the same season, or in harvest-time; or to break or destroy mills. By 29 Geo. III. c. 46, the penalty of death was decreed against the offences of destroying certain woollen goods in the loom or on the rack, and of destroying the apparatus used in the manufacture of these goods. These Statutes are in desuetude, and the offences which they penalise would now be prosecuted at common law.

By the Act 3 & 4 Vict. c. 97, s. 15, it is a criminal offence wilfully to do or cause to be done anything in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or to aid or assist therein. To make a good charge under this Statute there must have been actual obstruction or imminent danger (see *Millar, supra*).

By 46 & 47 Vict. c. 22, s. 5, it is criminal to use any instrument to damage or destroy, by cutting or otherwise, the fishing implements of a fishing-boat, or to take or have on board any instrument which is serviceable only, or is intended for, such purposes. Where there is danger of fouling, such cutting is not criminal (Sched. I, Arts. 20 and 21 of Act). To manufacture implements for such purposes is criminal (s. 9 of Act). The statutory penalty for violation of these provisions is a fine not exceeding £50, or, in the discretion of the Court (Summary), imprisonment for a term not exceeding three months, with or without hard labour, the prohibited instrument being forfeited.

By 47 & 48 Vict. c. 76, s. 3, it is criminal to put fire, or an explosive substance, or any dangerous, filthy, noxious, or deleterious substance, or any fluid in a post letter-box; and by sec. 4 it is a criminal offence to send by post explosive, inflammable, or delcterious substances. Any person contravening these sections is liable, on summary conviction, to a fine not exceeding £10, and on conviction on indictment, to imprisonment, with or without hard labour, for a period not exceeding twelve months.

By 48 & 49 Vict. c. 49, s. 3, it is a crime for a person, unlawfully or wilfully, or by culpable negligence, to break or injure any submarine cable in such manner as might interrupt or obstruct, in whole or in part, telegraphic communication, unless the injury is done to preserve life or limb or a vessel. The penalty (*a*) for *wilful* contravention of this section is penal servitude for a term not exceeding five years, or imprisonment, with or without hard labour, for a term not exceeding two years, and a fine either in lieu of or in addition to such penal servitude or imprisonment; (*b*) for contravention of the section caused by *culpable negligence*, imprisonment for a term not exceeding three months, without hard labour, and a fine not exceeding £100, either in lieu of or in addition to such imprisonment.

Attempt.—Attempt to commit malicious mischief is now a competent charge (50 & 51 Vict. c. 35, s. 61). Formerly it was doubted whether attempt to commit this crime was a relevant charge at common law (*Duthie*, 1849, J. Shaw, 227).

Aggravation.—Malicious mischief is aggravated, like other crimes, by previous convictions. It may also be aggravated by intent, as where the crime was committed with intent to coneuss masters or workmen (*Barr and Others*, 1834, Bell, *Notes*, 47). It has been held to be an aggravation that the malicious mischief was committed by means of house-breaking (*Munro*, 1831, Bell, *Notes*, 47).

[Hume, i. 122; Alison, i. 448; Macdonald, 115; Anderson, *Crim. Law*, 145.]

Malicious Prosecution.—See Prosecution (Malicious).

Malum in se; Malum prohibitum.—In crimes and offences a distinction has commonly been drawn between (1) such as are regarded as crimes from their own nature, as being against the laws of nature and of morality (as murder, assault, theft, and the like), and (2) such as are regarded as offences merely because they are prohibited by enactment within the community (as poaching, contravention of the Public-House Statutes, etc.). See also Crime.

Malversation.—Malversation is misconduct in office, *e.g.* oppression or partiality by judges, or the receiving of bribes. The punishment is imprisonment or fine, to which may be added deprivation of office and infamy (Hume, i. 407, 408; Stair, i. 6. 25; see also 52 & 53 Vict. c. 69, ss. 1, 7).

Mancipatio, in Roman law, was an early form of conveyance. The form is described by Gaius (i. 119): "Mancipatio is effected in the presence of not less than five witnesses, who must be Roman citizens and of the age of puberty, and also in the presence of a libripens, who holds a pair of copper scales." The transferee took hold of the subject being conveyed, and, using certain words of style, declared it to be his by purchase with the *aes*, a bit of copper, with which he struck the scales, and which he delivered to the transferor as a symbol of the price. The sale *per aes et libram* was no doubt at first a real one, but in the time of Gaius it was merely "*imaginaria quædam traditio*," *i.e.* mancipatio was then a mere form of conveyance. It was only *res mancipi*—lands and houses *in Italico solo*, prædial rural servitudes, slaves, oxen, horses, mules (Gaius, i. 120; ii. 15, 17)—that were required to be conveyed by mancipatio; other things, *res nec mancipi*, were allowed to pass by informal delivery of possession. The formal words of mancipation were frequently accompanied by an oral declaration, setting forth the terms of the conveyance or qualifications on the right of the transferee. Such terms or qualifications were *leges mancipii*, and were obligatory on the parties in virtue of the provision of the Twelve Tables, "*Cum nexum faciet mancipiumque uti lingua nuncupassit, ita jus esto.*"

In Roman law, *mancipatio* or the form of conveyance *per aes et libram* was used not only for the purpose of transferring property, but also in many other transactions, *e.g.* in freeing a person from the *patria potestas* (*emancipatio*); in transferring a child from the *potestas* of one man to the *potestas* of another (*adoptio*); in the old form of marriage (*coemptio*); and in making a will (*testamentum per aes et libram*).

Mancipation, being an institution of the strict *Jus Civile*, gradually lost its importance with the development of the *jus gentium*. In Justinian's legislation it was entirely superseded by the informal *traditio*. Accordingly, in passages of the *Corpus Juris*, where the jurists had written *mancipatio*, the compilers altered the original text and substituted the term *traditio*.

Mandatary (Judicial).—When any person residing abroad is a party to a litigation in this country he is required, as a rule, to sist a

mandatary, *i.e.* to appoint a substitute who will act in his stead as a party to the cause. Such a mandatary differs from one to whom a mandate is given merely to sue or defend, the latter being no more than an agent for the litigant, and in no sense a party to the action. Since the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), and the Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), other parts of the United Kingdom have not been accounted foreign countries, and the Court will not order a person residing there to sist a mandatary unless there are special circumstances, apart from the liability for expenses of process, which render such a course desirable (*Lawson's Trs.*, 1874, 1 R. 1065; *Carr & Sons*, 1885, 1 S. L. Rev. 262; *O'Kane*, 1885, 1 S. L. Rev. 124; *Nero*, 1886, 2 S. L. Rev. 342: *Byers & Co.*, 1887, 3 S. L. Rev. 153; *Lawson*, 1891, 7 S. L. Rev. 319; *Fairweather*, 1892, 9 S. L. Rev. 19; *M'Donald Puncture-Proof Tyre Co.*, 1895, 11 S. L. Rev. 193).

Who must Sist.—The sisting of a mandatary is always a matter for the discretion of the Court (*Lawson's Trs.*, *supra*), but greater latitude is exercised when the absent party is defender than in the case of a pursuer (*Simla Bank*, 1870, 8 M. 781). Diligence proceeds without a mandatary (*Lockhart*, 1832, 11 S. 236; *Ewing*, 1823, 2 S. 534; *Ross*, 1849, 11 D. 984); but if litigation should follow, the occasion for one arises (*Ross*, *supra*). When a wife sues an action which she is entitled to sue without her husband's concurrence, but does so with his consent and concurrence, he being abroad, a mandatary for the absent husband will not be required, but a *curator ad litem* may be adpointed to the wife (*Mackay*, 1868, 40 Sc. Jur. 221; *Gale*, 1857, 19 D. 665). And in an action by partners or trustees, one of whom is abroad, the Court will not order a mandatary to be sisted for him, provided the others in this country combining in the action are solvent (*Antermony Coal Co.*, 1866, 4 M. 544; *Morrison*, 1863, 4 M. 546). A defender will be allowed to appear and discuss preliminary pleas, *e.g.* want of jurisdiction and the incompetency of the action, without a mandatary (*D'Ernesti*, 1882, 9 R. 655; *Clark*, 1873, 1 R. 281). A claimant in a multiplepoinding has been required to sist one (*North British Rwy.*, 1881, 9 R. 97). The necessity for a mandatary arises from residence abroad, not being a short and temporary absence from this country (*Walkinshaw*, 1891, 18 R. 491). It is, therefore, an important element in considering whether the sisting of a mandatary should be ordered, that the litigant is a soldier who has gone abroad in the discharge of his duty (*Simla Bank*, 1870, 8 M. 781), or a sailor who has gone on a voyage and intends to return (*Steel*, 1826, 4 S. 527; *Baik*, 1855, 17 D. 568). A bankrupt will not be exempted from such an order owing to his insolvency (*Overbury*, 1863, 1 M. 1058). Consistorial actions do not form an exception to the rule for a litigant providing a mandatary (*Tingman*, 1854, 17 D. 122), although a wife residing abroad was not required to sist one in an action of divorce against her husband, a domiciled Scotsman (*Campbell*, 1854, 17 D. 514; and see *D'Ernesti*, *supra*). A litigant cannot on the one hand keep his opponent abroad and prevent him coming to this country, and on the other require him to sist a mandatary (*Robertson*, 1853, 19 D. 996). There is one important exception to the general rule. A litigant possessed of heritable estate in this country does not require a mandatary (*Smith*, 1828, 6 S. 852). But the title to the property must not be the subject in dispute between the parties (*Sandilands*, 1848, 10 D. 1091; *Lawson's Trs.*, 1874, 1 R. 1065), and its value must not be insignificant, but reasonably sufficient to meet the expenses of process (*Fairly*, 1839, 1 D. 399; *Caledonian and Dumbartonshire Rwy. Co.*, 1849, 12 D. 406).

How Sisting is effected.—An action may be raised at the instance of A. B.,

pursuer, and C. D., his mandatary, or the mandatary may be sisted during the cause. Proceedings are not invalid owing to absence of a mandatary (*Knight*, 1863, 2 M. 386). One party may at any stage of a case move for an order on his opponent to sist a mandatary; but when a pursuer appealed against a decree of absolvitor and moved for such an order on the defender, the Court refused the motion (*Aitkenhead*, 1874, 19 R. 803; cf. *Buik*, 1855, 17 D. 568). A refusal by the Court to order a sist is always *in hoc statu*, and the motion may be repeated (*Aitkenhead, supra*; *Walkinshaw*, 1891, 18 R. 491). When the order is made, a definite time is specified within which it must be obtempered, but the time may be extended owing to special circumstances (*Murray*, 1845, 7 D. 1000). The sisting is effected by lodging a minute signed by the proposed mandatary, upon which the Court pronounces an interlocutor sisting him as a party to the cause. Production of the mandate at the bar is not sufficient (*Thomson*, 1863, 1 M. 635). The minute is in this form:— "A. B., above designed, hereby sists himself as mandatary for the pursuer (or defender) in said action." It is not necessary to lodge the mandate authorising the minuter to sist himself (*Elder*, 1854, 16 D. 1003), but this must be produced if demanded by the opposing party (*Gunn & Co.*, 1871, 10 M. 116). The minute must be unconditional (*Pease*, 1822, 1 S. 490; *Robertson & Co.*, 1833, 11 S. 320). A factory and commission or power of attorney authorising a person to sue and defend actions does not give power to sist a mandatary for the granter, but where the terms of the mandate are not general, but with reference to a specific action, the grantee may sist himself (*Dempster*, 1836, 14 S. 521).

How Sisting is obviated.—The necessity for sisting a mandatary may be obviated in various ways, *e.g.* by undertaking to reside in this country during the progress of the case (*Faulks*, 1854, 16 D. 718; *Bracken*, 1891, 18 R. 819; *Mackay*, 1868, 40 Sc. Jur. 221), or on finding caution to attend all the diets of Court (*Hopetoun*, 1842, 4 D. 877); but an offer to attend all or any of the diets if required, on getting reasonable notice, was held insufficient in another case (*Railton*, 1844, 6 D. 1348; *Nero*, 1886, 2 S. L. Rev. 342). When a pursuer appeared personally in Court, it was held incompetent to make an order on him (*Clarke*, 1836, 14 S. 498). A defender cannot claim exemption on consigning the sum sued for (*Brown*, 1833, 12 S. 18). On a litigant who has sisted a mandatary coming to reside in this country, he may have the order to sist recalled (*Bracken, supra*).

Termination of Mandate.—The mandatary's office is brought to an end by his death or that of his constituent, or by his own insolvency (*Harker*, 1856, 18 D. 793; *Trodden*, 1862, 24 D. 1360). The mandatary may resign his office at any time, but this cannot be done by giving notice to the other side; a minute should be lodged stating the mandatary's desire to resign, upon which the Court will grant leave (*Neilson*, 1822, 1 S. 348; *Martin*, 1827, 5 S. 783). Upon failure of one mandatary, another must be sisted.

Failure to Sist.—Failure to obtemper the order of the Court to sist a mandatary involves a decree of absolvitor (*Nero, supra*), or in terms of the conclusions of the summons, according as it is on the part of pursuer or defender; but this may not follow if a jury has tried the case and returned a verdict (*Trodden*, 1862, 24 D. 1360).

Who may be Mandatary.—The Court will not accept any person residing in this country who may be willing to act as mandatary. He must not be already a party to the cause, and therefore a defender was not allowed to sist his co-defender (*Barstow*, 1851, 13 D. 854). As insolvency of the mandatary terminates his mandate, a bankrupt will probably not be sisted

even for a bankrupt litigant (*Overbury*, 1863, 1 M. 1058, per Ld. Deas). But it is not a valid objection that the person offering himself is unable to pay the expenses of process. All the Court requires is that he shall be solvent and ostensibly of the same rank as the party for whom he agrees to act (*Overbury, supra*; *Scott*, 1823, 2 S. 165; *Duncan*, 1830, 8 S. 641; *Stephenson*, 1841, 4 D. 248; *M'Kinlay*, 1849, 11 D. 1022; *Railton*, 1844, 7 D. 105). An English mandatary has been accepted in the Scots Courts (*Goodhall*, 1891, 8 S. L. Rev. 40).

His Liabilities, etc.—The powers and liabilities of a mandatary depend of course on the nature of his position in the process. "As regards the merits he is a mere representative, but he is personally answerable for all the other conditions of the contract of litis-contestation. He is liable to implement any order the Court may pronounce in regulating the conduct of the process; he is personally liable for fines, and for expenses which may be found due in the course of the process; and he is personally liable for the whole expenses of the process" (per Ld. J.-C. Inglis in *Renfrew & Brown*, 1861, 23 D. 1003). "One object of having a mandatary," said Ld. Deas, "is to get a person who shall be liable in the expenses of the cause. Another is to secure a person who shall be responsible to the Court for the proper and decorous conduct of the cause. A third is, that if there be no mandate under the hand of the mandant, the proceedings may go on for years in his absence, and he may in the end disclaim the whole of them in respect he never authorised them" (*Gunn & Co.*, 1871, 10 M. 116). And Ld. Ardmillan said in the same case: "The theory is, not that the mandatary is a substitute for his mandant, but that the opposing party has the liability of both to rely on, and is entitled to that." His liability, then, is twofold. He is responsible to the Court for the due and proper conduct of the cause, and for obtempering the orders of Court. In this regard the mandatary represents within the jurisdiction the party who is beyond it (*Overbury*, 1863, 1 M. 1058, per Ld. Deas; *Railton*, 1844, 6 D. 1348, per Ld. J.-C. Hope). He is also liable conjunctly and severally with his constituent, but with full relief, for the expenses of process found due to the opposite party, whether incurred prior to his being sisted or during the period when he held office (*Renfrew & Brown*, 1861, 23 D. 1005).

When he resigns, the date of tendering a minute of resignation fixes the term of his liability (*Cairns*, 1841, 2 R. 29); and when a mandatary has died, his estate is liable for expenses up to the date of death (*Barclay*, 1850, 12 D. 1253). Mandataries withdrawing on the morning of the day when the case was going to trial by jury were found liable for necessary expenses incurred through them not withdrawing sooner (*Chapman*, 1875, 2 R. 291). But a mandatary is not liable for expenses when his principal is on the poor-roll, but only for the proper conduct of the litigation (*Carling*, 1826, 4 S. 548; *Middlemas*, 1828, 6 S. 511); and he is not liable for an interim award of aliment to a wife in a divorce case (*Webster*, 1896, 33 S. L. R. 369). His liability for expenses does not determine through the opposing party insisting on his mandant, who had become bankrupt, finding caution for expenses (*Cullen*, 1860, 22 D. 109). A mandatary is not liable in damages for an act done *qua* mandatary (*Cameron*, 1821, 1 S. 229).

The liability of a mandatary may be incurred by any person acting as such, although he held no mandate and may not have been properly sisted (*Cullen*, 1860, 22 D. 109).

A mandatary cannot compromise a case which he is authorised to sue (*Thoms*, 1888, 15 R. 613); nor when the action has fallen through, as by the death of the mandant and refusal of his representatives to sist themselves,

can he carry it on, like an agent disburser, to the effect of having it found that no expenses are due (*Gordon*, 1823, 2 S. 572).

[Mackay, *Manual*, 235, 658; Dove Wilson, *Sh. Ct. Pr.* 223.] See MANDATE.

Mandate.—Mandate is a consensual contract by which one person obliges himself to do an act or acts for another, or to manage the affairs of another. Erskine defines it as "that contract by which a person employs his friend to manage his affairs, or any branch of them" (iii. 3. 31). "The contract of mandate, when understood strictly and in the sense of the Roman law, is grounded entirely on personal considerations of friendship, and was therefore always deemed a gratuitous contract" (Ersk. iii. 3. 32). *Mandatum nisi gratuitum in aliam formam negotii cadit.* In the strict acceptation of the term it is by the law of Scotland always gratuitous, although this does not exclude recompense for services in the form of *honoraria*. But the exigencies of commerce have caused mandate to be almost superseded by the onerous contract of agency, which, although founded on mandate, differs in some respects from the gratuitous contract. When payment is agreed upon or implied from the circumstances of the case, it will be fully treated in the article on PRINCIPAL AND AGENT (see also AGENCY; BROKER; FACTOR; LAW AGENT; STOCKBROKER; SUPERCARGO; etc.).

The Romans were careful to distinguish mandate from mere advice, which, although acted upon, can involve the person who gave it in no legal responsibility towards the one to whom it was given (see Stair, i. 12. 1; Ersk. 3. 3. 31). Mandate is a binding contract imposing obligations upon both the parties to it—an obligation to act, and an obligation to relieve the actor. Stair (i. 12. 7) includes trust under mandate; but although the office of trustee is to carry out the directions of the truster, and is gratuitous, it seems better to consider it as a separate and distinct contract (M'Laren, *Wills*, s. 1507 *et seq.*; see BENEFICIARY INTEREST).

The person who undertakes to act under a mandate is called the mandatary; the granter of the mandate is called the mandant. No one can grant a mandate to another to act on behalf of a third person without a special authority to do so, nor to act for the sole behoof of the mandatary himself. Capacity to grant a mandate is coextensive with capacity to act in one's own right on one's own behalf; capacity to act as mandatary is coextensive with capacity to contract (see CONTRACT).

Constitution.—The contract of mandate is entered into by offer and acceptance. "As the bare granting of a power to act can infer no obligation upon the person empowered, who is at liberty to refuse the office, this contract cannot be perfected till the mandatary has undertaken to execute the mandate, which he may do either by word, by writing, or by any deed which sufficiently discovers his resolution" (Ersk. iii. 3. 31). When authority is given by written instrument it may take the form of a Factory and Commission (*q.v.*) or a Power of Attorney (*q.v.*), but any grant of authority under the hand of the mandant is sufficient. A *falsa demonstratio* will not invalidate the mandate, nor will the fact that it is partly written on an erasure, provided the alteration has been made before delivery to the mandatary (*Muir*, 1876, 3 R. H. L. 1). The mandate may be general or special (see FACTORY AND COMMISSION). "If the powers are special, they form the limits of the authority. If general, they will be more liberally construed, according to the necessities of the occasion, and the material or ordinary or reasonable course of the transaction and usage of trade"

(Bell, *Com.* i. 508; *Smith*, 1854, 18 D. 727). Mandate may be proved *prout de jure* (*Corbet*, 1808, Hume, 346; *Mackenzie*, 1859, 21 D. 1048; *Annand's Trs.*, 1869, 7 M. 526; *Ross*, 1888, 16 R. 224; Dickson on *Evidence*, s. 495); or it may be implied from circumstances. Thus a wife is *præposita negotiis domesticis* and entitled, by presumed mandate, to bind her husband for suitable furnishings to the family (Bell, *Prin.* s. 1565; see PRÆPOSITURA). A course of conduct by a master, which is equivalent to holding out, may imply power in his servant to bind him without particular authority (*Oliver*, 1792, Hume, 319; *Dewar*, 1803, Hume, 340; *Morrison*, 1885, 12 R. 1152). If a bill stamp is delivered signed, there may be implied authority to fill it up with any sum the stamp will cover. An advocate is presumed to have a mandate from anyone for whom he appears in Court (see ADVOCATE).

Omnis ratihabitio retrotrahitur et mandato priori æquiparatur—ratification or homologation of an act done, as on the authority of the person homologating, is tantamount to its having been done on his mandate (Ersk. iii. 3. 47; Bell, *Com.* i. 139; see HOMOLOGATION). But no one can do an act as mandatary for a mandant who does not come into existence until after the date of execution (*Tinnevelly Sugar Refining Co. Ltd.*, 1894, 21 R. 1009).

An illegal or immoral act cannot be the object of a mandate; and there are many actions so personal to the one on whom the duty or right of performance is laid, that they cannot be done through the medium of another. Subject to these exceptions the rule may be stated as absolute, that whatever a person may do by himself in his own right he may do by another. And, on the other hand, the brocard applies *qui facit per alium per seipsum facere videtur*.

Obligations on Mandatary.—The duty of a mandatary is to perform what he has undertaken in accordance with the instructions of the mandant. He must account for his intromissions, including any benefit or ease obtained; but he is liable in a less degree of diligence in carrying out the mandate than is a paid agent. All that is required of him is that, like a depositary, he should exercise such care and foresight as an ordinary man of business would employ in the conduct of his own affairs (Bell, *Prin.* s. 212; *Anderson*, 1583, Mor. 10082; *Grierson*, 1802, Hume, 329). But if he undertakes a duty requiring professional skill *spondet peritiam*, and he is liable for the results of improper or unskilful work. The mandatary must conform to the directions given by the mandant, and will be responsible for the consequences of acting *ultra fines mandati* (*Paisley*, 1779, Mor. 8492; *M'Neil*, 1696, Mor. 10085). A mandatary has all the powers implied in the necessity for carrying out the mandate. "Where you have a particular agent employed by a principal to perform a particular piece of business for him, he must act within the instructions given for the particular occasion, and does not bind his principal if he acts otherwise. If you have a general agent employed generally in his master's or his principal's affairs, or in a particular department, he is assumed to have all the authority which is necessary to enable him to serve his master as such general agent or general agent in a particular department" (per Ld. Young in *Morrison*, 1885, 12 R. 1152). A mandatary who exceeds his commission will not bind the mandant, but will incur a liability for damages to the person with whom he contracted (*Morrison, supra*; *Wylie & Lochhead Ltd.*, 1889, 16 R. 907). Otherwise he does not necessarily render himself liable to third persons (an exception being recognised in the case of a mandatary in judicial proceedings). A railway passenger who hands the ticket of a fellow-passenger to a ticket collector does not constitute himself a

mandatary to the effect of becoming liable to any penalty for fraud committed on the railway company by that person; and may not thereby incur any liability whatever (*Harris*, 1891, 18 R. 1009). In the case of two or more mandataries, their power must, in the absence of other direction, be exercised jointly, and they are liable to their mandant *in solidum*.

A mandatary cannot without express power delegate his authority—*delegatus non potest delegare*. But this rule does not hold when usage of trade or professional custom prescribes a contrary practice, or when the power conferred requires for performance, in whole or in part, skill not professed by the mandatary. The nature of the mandate and usage of trade will show the necessity for a devolution of authority. If there is a competent delegation, the mandatary is only liable for his *bona fides* in selecting a sub-agent.

Obligations on Mandant.—As the mandatary is bound to account to his mandant for any moneys received from him, he is entitled also to be reimbursed any expenses he may have *bonâ fide* incurred in carrying out the mandate, with interest. When the outlays are caused by payment of tradesmen's accounts, his claim will not fall by the triennial prescription (*Saddler*, 1794, Mor. 11119; *Grant*, 1881, 9 R. 257), and he may sue for indemnification in the summary method prescribed by the Debts Recovery (Scotland) Act, 1867 (*Grant, supra*). The other obligation on the mandant is to relieve his mandatary of any liability he may have required to incur.

Two or more mandants are liable to their mandatary *in solidum*, but employment by each must be clearly proved (see CO-OBLIGANT).

Termination of Mandate.—The contract is brought to an end (1) by renunciation on the part of the mandatary; (2) by revocation by the mandant, whether actual or constructive, but he is not entitled to revoke *intempestive, i.e.* when the mandatary will suffer injury thereby, as by the matter being in course of execution; (3) bankruptcy of either party, or (4) death of either party puts an end to mandate, but a mandatary is entitled to proceed with the execution until the mandant's death has been sufficiently made known to destroy his *bona fides* in continuing to act (*Campbell*, 1829, 3 W. & S. 384), or to complete an act after he is aware of that event; (5) insanity of the mandant, if not slight and temporary in its character (*Wink*, 1849, 11 D. 995), has the same effect as his death, but third parties contracting with the mandatary in *bonâ fide* ignorance of the insanity will not be deprived of their claim against the mandant's estate on the ground that "the acts of the mandatary must be binding on the mandant till the mandate is formally recalled, at least so long as the contracting parties are ignorant of any change of circumstances" (*Pollock*, 10 Dec. 1811, F. C.); (6) insanity of the mandatary terminates the contract; (7) performance of a special act for which a mandate was given exhausts the mandate.

[Stair, i. 12. 1; Ersk. iii. 3. 31: Bell, *Prin.* s. 216, *Com.* i. 505; Evans on *Principal and Agent*; Story on *Agency*.]

See MANDATARY (JUDICIAL); PRINCIPAL AND AGENT; STAMP ACTS; etc.

Mandate, in Roman Law, is a contract by which the one party intrusts some business or the performance of some work to the other party, who undertakes to do it gratuitously. The party who gives the commission is the mandant or mandator, and the party who undertakes it is the mandatary. The contract was one of the four recognised consensual contracts, *i.e.* the legal relation exists as soon as the two parties have

mutually agreed, the one to employ the other, and the other to be so employed. The contract is essentially gratuitous; if it is intended that any remuneration should be given to the agent for his services, the contract is not mandate, but *locatio operarum*. Again, if A. merely suggests to B. to do something in B.'s own interest, the suggestion is held to amount merely to advice (*consilium*), which involves no legal responsibility (*Dig.* 17. 1. 2. 6). Moreover, if B. does some work for A., and in A.'s interest, without previous instructions, B. is a *negotiorum gestor*, not a mandatary (*Dig.* 3. 5. 2).

Mandate is a *negotium bonæ fidei, i.e.* both parties are bound to do all that is required by *bona fides*. The mandatary is bound to account to the mandant for any profit arising from the transaction, and to show *omnis diligentia*. On the other hand, the mandant is liable to the mandatary for expense or loss properly incurred or strictly incidental to the execution of the commission. The rights of the mandant are enforced by the *actio mandati*; the rights of the mandatary, by the *actio mandati contraria*.

Every mandate is revocable by the mandant if things are entire. Similarly, if the mandatary renounce it, the renunciation must be made in time to prevent loss to the mandant (*Dig.* 17. 1. 22. 11). The contract is terminated by the death of either party; but if the mandatary, while ignorant of the death of the mandant, does any act *in bonâ fide* within his authority, the heirs of the mandant are bound by what is so done.

A special kind of mandate is *mandatum credendi*, or, as it is frequently called, *mandatum qualificatum*, where A. requests B. to lend money or give credit to C. In such a case, A., the *mandator*, is bound to indemnify B. if the latter sustain loss by lending the money or giving the credit to C. That being so, the *mandator* is practically in the position of a *fidejussor* or cautioner (*Dig.* 17. 1. 12. 14; *Dig.* 46. 1. 13). The Scots law authorities on the question whether the mandant in such a case does, or does not occupy the position of a cautioner, are collected in Gloag and Irvine, *Rights in Security*, pp. 661, 662.

On the Roman law of mandate generally, see Gaius, iii. 155 *et seq.*; *Dig.* 17. 1.; 46. 1.; *Cod.* iv. 35. 36; *Inst.* iii. 26.

Mania.—See Insanity.

Manse.—The word manse (*mansus*) seems to have been originally, and in very early times nearly exclusively, used to denote the piece of land which was set apart for the clergyman.

In the course of time a dwelling-house was usually given to the parochial clergy as well as the ground, and the house ultimately came to be spoken of as "The Manse," and is now so popularly understood.

Who are entitled to Manses.

(1) Ministers of landward parishes are, under the Statute 1663, c. 21, entitled to have manses provided for them by the heritors.

(2) By a long series of decisions it has been held that the minister of a parish partly landward and partly burghal has a right to a manse (*Minister* v. *Heritors of Dunfermline*, 1812, 5 Pat. 593; *Magistrates of Ayr*, 1825, 4 S. 99; revd. 2 W. & S. 600). In the case of *Downie* (1883, 11 R. 51), the Lord Justice-Clerk (Moncreiff) said: "It is conceded that the minister of a parish partly burghal and partly landward is

entitled to be provided with a manse, and if so, that his right rests on Statute."

(3) In the case of a collegiate charge, it may be held that the first minister is entitled to a manse (*Heritors of Elgin*, 1769, Mor. 8508, 1 Hailes, 283). The right does not generally extend to the second minister (*Adamson*, 14 Feb. 1816). The claim of the first minister will not be excluded by the second minister having got decree against the heritors for a manse (*Carnegie*, 1849, 11 D. 1250).

Who are not entitled to Manses.

Under the existing law the ministers of burghal parishes are not entitled to have manses provided for them by the heritors (*Adamson*, *supra*).

Obligation to provide Manses.

Before the year 1560 it would appear to be the case that neither parishioners nor heritors were bound to erect or repair the manses of the clergy. This obligation fell upon the clergy themselves (*Heritors of Elgin*, *supra*). On the eve of the Reformation the Popish parsons and vicars were accustomed to grant feus and long leases, and the operative effect of the Statutes of 1563, 1572, and 1592 seems to have been to transfer the manses and glebes from their Popish incumbents, and from those deriving right from them, to the reformed clergy.

It is unnecessary, in detail, to go into the different Statutes passed during the latter end of the sixteenth and during the seventeenth centuries relating to and regulating the law on this subject. The burden may be said to now rest on the Statute of 1663, c. 21, which takes the place of and has been construed by the help of the rescinded Statutes of 1644, c. 31, and 1649, c. 45. Ld. Westhall in the case of *Griersons*, 1778, 2 Hailes, 799, says:— "Manse, etc., and glebe are distinct rights; formerly ministers had only right to a manse if there was a vicar's or parson's manse in the parish; if there was a glebe in the parish they had a right to it; if there was none, none could be designed. The Act 1663, copying a rescinded Statute, 1649, made a general provision for ministers." The enactment of this Statute with reference to "providing" manses (in the case of parishes where no manse had formerly been set aside) is: "That the heritors of the parish shall, at the sight of the bishop of the diocese (the jurisdiction thus conferred upon bishops is now transferred and exercised by Presbyteries) or such ministers as he shall appoint, with two or three of the most discreet men of the parish, build competent manses to their ministers, the expenses thereof not exceeding £1000 (Scots), and not being beneath 500 merks." See also the Small Stipends Act, 5 Geo. IV. c. 72, ss. 2 and 3, which grants further relief to the benefice, and the Statute 5 Geo. IV. c. 90, which provides for the erection of manses for the clergymen in the Highlands and Islands of Scotland.

Competent Manses.

What are held to be Competent Manses.—It is very clear that no "competent manse" could to-day be built for the sum specified in the above-mentioned Act, and the question has arisen what construction is now to be put upon the limitation.

In the case of the *Minister of Inverurie* v. *Leith*, 1760 (not reported), one of the heritors brought a suspension of the Presbytery's decree for a new manse on the ground that the cost would exceed the limitation specified in the Act. The Presbytery there held that the minister was entitled to a

"sufficient" manse irrespective of the said limit, and ultimately the Lord Ordinary (Coalston) ordained the heritors to build a "competent" manse according to a plan. The final judgment of the Court was to ordain the heritors to build a manse at the cost of £2000 (Scots) (Duncan, *Parochial Law*, p. 429; Connell, *Parishes*, 278; *Mercer*, 1786, 3 Pat. 43).

In the case of *Dingwall*, 27 Nov. 1816, F. C.; affd. 1821, 3 Bligh, 72, the House of Lords held that the section of the Statute referred only to the erection of new manses, *i.e.* to the case of a parish where no manse had previously been; and in the case of *The Magistrates of Elgin*, 1841, 4 D. 25, the Court followed the above decision. In this case Ld. Mackenzie remarked that "this Court rather held that the Statute was modified by custom, that the first provision as to the building of a manse was in force, but that the clause as to the limitation of the sum to be expended was in desuetude. The House of Lords did not adopt that view, but another, namely, that wherever a manse had once existed, the keeping up of it must be considered as repairs, and the expense of such repairs fell under the second clause (quoted *supra*), in which there is no limitation."

There appears to be no decision in regard to the case of a parish where no manse had formerly existed as to the effect of going beyond the limitation specified in the Statute. The point may be held as undecided.

Maintenance of Manses.

This is the most important burden laid on the heritors. The words in the Statute 1663, c. 21, are: "And where competent manses are already built, ordains the heritors of the parish to relieve the minister and his executors of all cost, charges, and expenses for repairing of the foresaid manses: declaring hereby that the manses being once built and repaired, and the building and repairing satisfied and paid by the heritors in manner foresaid, the said manses shall thereafter be upholden by the incumbent ministers during their possession, and by the heritors in time of vacancy out of the readiest of the vacant stipend." (The provision as to vacant stipend is annulled by 54 Geo. III. c. 169, s. 9.)

The intention of the Statute appears to have been that where a manse was once put into proper repair by the heritors, the burden of upholding it fell on the minister during his possession (Ld. Chan. Eldon in *Duke of Hamilton*, 1813, 5 Pat. 745).

"Free" Manse.

Every incumbent is entitled at his entry to the benefice to have his manse put into a state of proper repair. The heritors, after they have made the manse sufficient, may take steps to have it declared a "free" manse.

This is a technical term, denoting that the manse is by the Presbytery decerned and declared to be a sufficient residence for the minister. The term "free" may now be held not only to denote thoroughness of repair, but to include proper amount of accommodation (Ersk. ii. 10. 58). The procedure is for the heritors to petition the Presbytery to declare the manse "free" (see Cook, *Church Styles*, p. 200). By the manse being declared free by minute of the Presbytery, the incumbent is burdened with ordinary repairs only. The decree cannot be opened up during the tenancy of the same incumbent, except in the case of some calamity, or after the lapse of a reasonably long period of inevitable deterioration. The opinion was expressed in the case of *The Heritors of Pitsligo*, 1879, 6 R. 1062, that it was incompetent for the Presbytery to make an order on heritors to execute

repairs on a manse which had been declared a "free manse" two years before (Rankine on *Landownership*, p. 667; *Heritors of Pitsligo, supra*). The minister's express declaration of his contentment with the state of his manse (*Mackenzie*, 1833, 12 S. 151, 13 S. 1014), or long acquiescence by both him and the Presbytery in its condition, it never having been declared "free" (*Eliott*, 1867, 5 M. 1028), may operate as a decerniture of the Presbytery and bar any objection that may be raised by these parties. Under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, 31 & 32 Vict. c. 96, it is enacted by sec. 12 that "after the completion of the works ordered in the course of any proceedings for the building, rebuilding, or repairing of any manse, it shall be competent for any heritor of the parish to move the Sheriff to declare it a 'free manse'; and if the Sheriff shall be satisfied that the manse is in a state of thorough repair, he shall find and declare accordingly; and his decree shall have the same force and effect as a decree in similar terms pronounced by a Presbytery before the passing of this Act would have had: provided always that such decree shall have effect only till the expiration of fifteen years from its date, or till the appointment of a new minister to the parish, whichever event shall first happen" (see *Heritors of Pitsligo, supra*). By sec. 13 of the same Act "it shall be competent for the parties, or any of them, to require the Sheriff to make a personal inspection of the premises or locality, as the case may be, and the Sheriff shall comply with such requisition." By sec. 1 the expression Sheriff includes Sheriff-Substitute. The judgment of the Sheriff is final, unless appealed to the Lord Ordinary on Teinds Causes within twenty days.

A minister's liability for the upkeep of a "free" manse is limited to ordinary tear and wear. If he has not fulfilled this limited obligation, his representatives may be held responsible.

There is little or no authority as to the details of the repairs which are required before a manse can be declared free. The question is one of degree, and is generally determined after there has been a report by experts. Manses which are not free manses are upheld by the heritors, and there is no limitation by Statute as to the amount that may be spent.

Repairs, Additions, etc.

Professor Rankine says: "The circumstances in which mere repairs, repairs and additions and rebuilding are respectively required of the heritors cannot be better detailed than by quoting Ld. Pres. Inglis' summary in a recent case: 'When the repairs required on a manse to make it sufficient are slight and of the nature of proper repairs,—that is, when they amount merely to the restoration of the manse against wear and tear,—there is no doubt that the Presbytery can go no further than merely to order such repairs, although it may be that the manse is not such as they would be authorised to order as a new manse, if the old one has fallen into ruin; and, on the other hand, when the manse is in such a state of decay that the repairs will amount very nearly to the cost of building a new manse, the Presbytery are entitled to order a new manse to be built. These are the two extreme cases as to which there is no difficulty. But there is a variety of cases between these two extremes, and many such cases have come before the Court. It may not be possible to reconcile all these cases, but we must endeavour to extract from them some general rule. It appears to me that the cases in which a Presbytery may order additions to a manse which is clearly unsuitable in capacity and accommodation for the minister, are those in which it has either become impossible to keep it up at all

without structural alteration, or in which the extent and expense of the repairs, even opining that they do not involve structural alteration, are very large, and approach to the cost of what is necessary to convert it, by additions and alterations, into a suitable residence'" (Rankine, *Landownership*, p. 667; *Heritors of Insch*, 1869, 8 M. 363; see also *Carmichael*, 1835, 15 S. 1020; *Heritors of Olrig*, 1851, 13 D. 1332; *Earl of Airlie and Others* v. *Haldane* (*Kingoldrum*), 1863, 1 M. 325; approved 8 M. 368).

Suitable Residence—Standard of Comfort—Sufficient Manse.

"The manse" was formerly held to comprehend a dwelling-house, stable, barn, byre, and garden, all occupying not less than half an acre of ground, but by later decisions the accommodation has been increased, and has been held to include a washing-house, poultry-house, pig-stye, garden wall, and a force pump for water when necessary (Duncan, 425; *Anderson*, 1791, Mor. 5152; *Earl of Glasgow*, 1868, 7 M. 6; *Maxwell*, 1867, 40 Jur. 13; *Elliot*, *supra*).

It is of course always a question of circumstances whether a manse can be repaired or should be rebuilt. If it can be put into a proper state of repair, the Court will never sanction a new one (*Niven*, 1858, 1 M. 324; *Heritors of Kingoldrum*, 1863, 1 M. 324); but where that is impossible, the Court will decern for a new manse (*Dempster*, 1813, Connell, *Parishes*, 300; *Hamilton*, 1826, 4 S. 543).

In the case of building a new manse if the site of the old one be held to be insanitary or otherwise objectionable, the Presbytery, who have the right of selection, subject to the review of the Court of Session, may fix upon a different site; but this must be within the glebe and as near the church as circumstances will allow (*Fountainhall*, 31 January 1712; Dunlop, 457; *Steel* v. *His Parishioners*, Mor. 8502; *Hamilton*, 1826, *supra*).

What may be deemed a sufficient manse must depend largely, if not altogether, on the standard of comfort in the district at the time. Due care must be taken in securing that the accommodation be sufficient for the wants of an ordinary family, and for the dispensing of a reasonable hospitality. "It is of great importance that the residence of the minister of the parish should be suitable to his position and comfortable for his family. . . . The manse of the minister should be the dwelling-house of a gentleman. This is very properly attended to in the construction of new manses" (*Heritors of Insch*, *supra*, per Ld. Kinloch; see also the cases of *Heritors of Strathblane*, 1827, 5 S. 914; *Carmichael*, *supra*; *Carnegie*, *supra*; *Heritors of Balfron*, 1863, 1 M. 324). It may be laid down as the criterion of the sufficiency of repairs, that they should be such as to entitle the heritors to demand that the minister shall accept of the manse as a free one.

Manse "Maill."

While the rebuilding or repairing is in progress, and the minister is excluded from his manse, or when at his entering to the benefice no manse has been provided, he is entitled to an allowance from the heritors as manse rent. The Presbytery has no power in this matter, and the claim must be made good in the civil Courts; and the summons must conclude against each heritor for his proportion of the rent, and not against the whole heritors jointly and severally. Where there has been a difficulty as to the *quantum* of rent, the Court has remitted to the Sheriff to ascertain and report what in his opinion would be a sufficient allowance (*Steel*, *supra*: *Potter*, 1708, 4 Bro. Supp. 691; see also Duncan, 471).

Minister's Obligation to reside in Manse and Right to let it.

Although the manse is the dwelling-place provided for the residence of the parish minister, the opinion has been expressed that it is incompetent for a Sheriff or a Presbytery to ordain a parish minister to reside in it (*Heritors of Pitsligo, supra*).

It has been held in the case of *The Heritors of Aberdour* (1871, 10 M. 221) that the minister has a right to let his manse. In this case the Lord Justice-Clerk (Moncreiff) remarked: "They" (the heritors) "are not proprietors of the manse. Neither are they in any sense the trustees of the property. In virtue of their resulting obligation, they have a title to see that the property is duly administered, with a view to its being kept in repair. But they have nothing more; they have no right beyond this to interfere in any way with the minister's possession or administration. Their right in the church and churchyard stands on an entirely different footing, for as regards them the minister has no patrimonial interest in either, and the heritors have the property as administrators-in-trust. But a minister's right to his manse and glebe is entirely otherwise. He is more than occupant. He represents and administers for the series of incumbents, who are collectively the proprietors. He cannot affect the interest of his successors; but, subject to this condition, he has all the rights of a proprietor, at least so far as necessary for the complete enjoyment of the subject for the period of his incumbency. . . . His right is precisely the same kind as his right to the glebe. I give no opinion as to how far the minister can virtually alienate the manse during his incumbency, or let it for a prolonged term to his own exclusion. I can conceive cases in which this might not be an unreasonable exercise of his power. I can also conceive cases in which it would be entirely inadmissible."

In a question between a parish minister and a surveyor of taxes, it was held that a minister of a parish was entitled to let his manse (*Inland Revenue* v. *Fry*, 1895, 22 R. 422).

Upon whom the Burden of Building and Repairing lies.

The burden of building and repairing manses lies on the heritors who are the proprietors of the lands within the parish. A person whose only interest in the land within the parish is a liferent right is to be burdened with no proportion of the charge in building a manse (*Minister of Moreham*, 1679, Mor. 8499). It appears to be the case that liferenters are not liable even in repairs (*Anstruther*, 1823, 2 S. 306). Superiors are not to be regarded as heritors quoad the obligation or burden to repair (*Dundas*, 1778, Mor. 8511, Hailes, 802). Titulars or tacksmen of teinds are not liable.

In the allocation of the heritors' liability the general rule, although it is not an invariable one, is that each heritor pays in proportion to his valued rent. In Shetland, where there is no valued rent, the real rent is taken as the criterion (see Duncan, 468; *Highland Railway Co.* v. *Foster*, 1870, 8 M. 850).

Singular successors and creditors are not liable for arrears, except and only in so far as these have been incurred during their years of possession.

Persons who are not heritors, but merely occupy seats in the parish church, are not liable (*Fairie*, 2 Feb. 1813, F. C.).

The burden is entirely a parochial one (*Bruce-Carstairs*, 1773, Mor. 2333, 3 Pat. 675; *Nicoll*, 1829, 7 S. 479).

In a parish partly burghal and partly landward, the magistrates of the

burgh, along with the heritors of the landward district, are liable in the upkeep of the manse (*Lockhart*, 1832, 10 S. 243; *Magistrates of Elgin*, *supra*). It was held in the case of a parish partly landward and partly consisting of a royal burgh, that an assessment for the repairs of the manse had been rightly imposed on the individual owners of lands and heritages in the parish without distinction, according to their real rents as shown in the valuation roll (*Downie*, *supra*). Lands annexed *quoad sacra* are not burdened with the expense of building and repairing (Cook, *Styles*, p. 194).

Minister's Liability for Taxation.

A minister is not liable for poor-rates. This exemption, as Ld. Young remarks in the case of *Hogg*, 1880, 7 R. 986, "is undoubtedly a class privilege, which the pursuer enjoys only as an individual member of the class, and does not attach to the parish manse and glebe in his whose hands soever they may be, but only to his own ownership and occupation of them as parish minister. If he let the manse to a householder, or the glebe to a neighbouring farmer, it is not, I suppose, doubtful that his tenants would be liable to poor assessment as occupiers of these lands and heritages" (see also *Gillanders*, 1884, 12 R. 309). Under the Act 35 & 36 Vict. c. 62 (The Education (Scotland) Act, 1872), a minister is assessed for school rates in respect of his manse and glebe. He is also liable for road assessment (*Cowan*, 1868, 6 M. 1018). Following the above decision, the minister is entitled to be entered on the valuation roll as proprietor *qua* liferenter (see also *Robie*, 1868, 7 M. 296).

Manses of Quoad Sacra and Quoad Omnia (Parliamentary) Parishes.

Provision is made for such manses by the Act of 1844, 7 & 8 Vict. c. 44, intituled "An Act to facilitate the disjoining or dividing of extensive or populous parishes, and the erecting of new parishes, in that part of the United Kingdom called Scotland." This Act deals with the case of two kinds of parishes, *i.e.* (1) those erected into parishes *quoad sacra*, and (2) those erected, under the Acts 4 Geo. IV. c. 79 and 5 Geo. IV. c. 90, into parishes *quoad omnia*. With regard to the first class the Act provides (s. 8) that where a church is built and endowed, a district may be attached thereto; and the section goes on further to enact: ". . . that the endowment for the minister of the said new parish shall be not less than a stipend of £100 per annum or 7 chalders of oatmeal to be calculated at the highest fiars of the county, exclusive of the sum necessary for communion elements, with a suitable dwelling-house or manse and offices and appurtenances, or a stipend of not less than £120 or $8\frac{1}{4}$ chalders of oatmeal to be calculated at the highest fiars of the county, per annum, where there shall be no such dwelling-house or manse." The title to the manse is to be made up so that the dwelling-house, etc., is inalienably secured as the manse of the new parish; and the due provision for its future maintenance must be made to the satisfaction of the Lords of Council and Session. By sec. 9 the pew rents may be taken for "the purpose of upholding in due repair and improving the fabric of such church or of the dwelling-house and offices of the minister, etc. etc." With regard to the second class of parishes provided for in the Act, *i.e.* parishes *quoad omnia*, sec. 15 of the Statute provides that the provision made by the Statutes of George IV. above referred to "for upholding such place of worship and such dwelling-house in repair, shall cease and determine, and the burden of upholding the same shall fall on the parties who by the law of Scotland would be bound to uphold the church and manse of the parish if such church and manse had been

appointed to be built for the newly-erected parish." (For procedure, see *Jurid. Styles*, vol. iii.)

[Stair, bk. ii. tit. 3. 40; Ersk. bk. ii. tit. 10; Bell, *Prin.*; Connell on *Parishes*; Dunlop, *Parochial Law*; Duncan, *Parochial Law*; Cook, *Styles*; Rankine on *Landownership*; Black, *Paroch. Ecclesiastical Law*; etc.]

Mansion-house.—The mansion-house of an estate with its appurtenances and accessories as such is an appanage of the estate, designed for the residence of the heir in possession for the time being. Whether a particular house is the mansion-house of an estate in this sense is a question of fact to be determined by common sense, looking to the purpose for which the house was built, and the use to which it has been put by the proprietors (see *Montgomerie*, 1895, 22 R. 465, Ld. M'Laren, p. 473); and there may be more than one house upon an estate entitled to be so called (see *M. of Ailsa*, 1853, 15 D. 308; *Stirling*, 14 Dec. 1814, F. C.; *Lockhart*, 1835, 14 S. 150; Ld. Pres. Inglis, *Earl of Breadalbane*, 1877, 4 R. 667, p. 669).

The legal questions which have arisen in this connection have had reference chiefly to cases in which *pro indiviso* rights are created by law, or in questions as to the powers and rights of limited proprietors, *e.g.* life-renters or heirs of entail.

The first class is illustrated in the case of the succession of heirs-portioners. The mansion-house being *sua natura* indivisible, the general rule of law, that, in such cases, the right of primogeniture prevails, entitles the eldest-born daughter to the mansion-house as a *præcipuum*. These cases are fully referred to elsewhere. See HEIRS-PORTIONERS.

In the case of persons having only a limited or fiduciary title to the estate, as, for example, liferenters and heirs of entail, their powers of dealing with the mansion-house, as with the estate in general, are limited at common law to such acts as fall within a fair and ordinary administration, consistent with the legitimate interests of their successors. In the case of heirs of entail, these powers are largely regulated by statute.

Thus while at common law, and in the absence of special provisions in the deed of entail, an heir of entail in possession cannot be compelled at the instance of succeeding heirs to maintain and repair the mansion-house (Menzies, *Convey.* 738; Sandford, *Entails*, p. 281; Ld. Craighill, *Earl of Breadalbane*, 1877, 4 R. 667, p. 668), or to rebuild it, if destroyed by fire he is not entitled to pull it down and sell the materials for his own benefit, and may be prevented from doing so by interdict at the instance of substitute heirs (*Gordon*, 24 Jan. 1811, F. C.), this being in no sense a reasonable or ordinary use of the subject. An heir of entail is under no obligation to insure the mansion-house; but if he do so, and the mansion-house be destroyed by fire, a succeeding heir cannot insist upon his laying out the price in building it anew (see Rankine, *Landownership*, p. 625). Such obligations, viz. to repair and maintain the mansion-house, to insure and rebuild in case of fire, to reside therein, etc., may of course be made matter of express condition in the deed of entail (see *Moir*, 1826, 4 S. 730). On the other hand, it has been held that an heir of entail may pull down the mansion-house, provided that he shall *bonâ fide* immediately build another equally good, upon a site equally suitable for the estate (*Moir*, *c.s.*). The danger attendant upon such a course, however, is shown by a subsequent case, in which the mansion-house had been pulled down in order to rebuild, but the heir of entail died before completing it. It was held that the

obligation to complete the rebuilding did not transmit against the personal representatives of the deceased heir (*Earl of Breadalbane, v.s.*).

The power of an heir of entail to cut wood or trees in the neighbourhood of the mansion-house is also limited to what is consistent with a fair and proper administration; and the Court will interfere to protect succeeding heirs against any abuse of this power involving deterioration of the residential character and amenity of the mansion-house and policies (*Boyd*, 1870, 8 M. 637; see also *Dickson*, 1823, 2 S. 152; *Mackenzie*, 1824, 2 S. 775; *Bontine*, 1827, 6 S. 74; see *contra*, *Hamilton*, 1757, Mor. 15408).

In older deeds of entail it was usual to except the mansion-house and accessories from the powers of leasing thereby conferred by the heir. Apart, however, from special provisions, the mansion-house and offices have always been treated in our law as falling under exceptional rules. So, it has long been settled that the power of an heir of entail to lease the mansion-house is limited to the lifetime of the granter (*Catheart*, 1755, Mor. 15403; *Leslie*, 1780, 2 Pat. App. 533; 1779, Mor. 15530; Sandford, *Entails*, 280, n.). So, also, tutors and curators cannot, in general, lease the mansion-house for a period extending beyond the term of guardianship (*Hill*, 1851, 14 D. 13; see *Speirs*, 1854, 17 D. 289). But this rule does not extend to a house not originally built as a mansion-house, nor occupied as such by the proprietor, albeit the only suitable proprietary residence on the estate (*Montgomerie*, 1895, 22 R. 465).

The various Entail Statutes have maintained this distinction between the mansion-house and offices and the general estate. Thus, the manor place, offices, houses, gardens, etc., usually in the natural occupation of the proprietor, and land within 300 yards thereof, are excluded from the powers of leasing conferred by the Montgomery Act (10 Geo. III. c. 51, s. 6; *Turner*, 6 December 1811, F. C.). A similar prohibition attached to any tack of the home farm, mansion-house, or policies in the Rosebery Act (6 & 7 Will. IV. c. 42, s. 1) for any period beyond the granter's lifetime. The power to grant feus, long leases, or building leases conferred by the Rutherfurd Act (11 & 12 Vict. c. 36, s. 24), and the amending Act of 1853 (16 & 17 Vict. c. 94, s. 6), contain a similar exception. See also the Entail Amendment Act of 1868 (31 & 32 Vict. c. 84, s. 3). Accordingly, in order to feu or lease the mansion-house an heir of entail must proceed by obtaining the necessary consents, as in the case of a disentail. See ENTAIL, xii. 1. 4.

In regard to the power to charge improvement expenditure, also, the Statutes contain special provisions applying to the mansion-house and offices. By the Montgomery Act, ss. 27, 28, an heir of entail is entitled to stand creditor to the next succeeding heir to the extent of three-fourths of the cost of building or repairing the mansion-house or offices, provided that the sum do not exceed two years' rent under deduction of burdens (see also s. 9). In the construction of these sections, or in connection with improvements authorised by the Rutherfurd Act, *v.s.*, s. 26, it has been held that the authority thus conferred does not cover a mansion-house which is *de facto* occupied by the estate factor (*Marquis of Ailsa*, 1853, 15 D. 308); or a shooting-lodge (*Duke of Athole*, 1855, 17 D. 1015; *Davidson*, 1859, 21 D. 1086); or a game-watcher's house on outlying parts of the estate (*Marquis of Huntly*, 1857, 19 D. 818); or a racquet court (*Earl of Eglinton*, 1857, 19 D. 346). On the other hand, it has been held to extend to a jointure-house (*Agnew*, 1858, 20 D. 787); a gamekeeper's house and dog-kennels (*Marquis of Huntly, v.s.*; see *Munro*, 1856, 18 D. 994); expense attendant upon the introduction of water and gas (*Earl of Eglinton, v.s.*; *Muirhead*,

1853, 15 D. 517), and other necessary fixtures for a mansion-house (*Morison*, 1847, 9 D. 1394); the erection of milk and ice houses (*Fraser*, 1835, 14 S. 89); the building of garden walls (*Fraser*, *v.s.*; cf. *Carnegie*, 1856, 18 D. 323; a porter's lodge and gates (*Muirhead*, *v.s.*); and, with difficulty, a mausoleum (*Fraser*, 1840, 2 D. 684). In order to be chargeable under the Act, however, repairs must have some permanent character, and exceed the mere restoration of ordinary tear and wear (*Fraser*, 1841, 4 D. 266; *Johnston*, 1856, 19 D. 68). See also Entail Amendment Act, 1875, s. 3 (7). The mansion-house, offices, and policies are not chargeable with provisions to younger children (Rutherfurd Act, s. 21), or improvement expenditure to be laid upon the fee and rents of the estate (Rutherfurd Act, s. 18; Entail Act, 1868, s. 11). In calculating the free yearly rental of the estate, the yearly value of the mansion-house, let or unlet, is not included (*Leith*, 24 D. 1059; *Heriot*, 1856; Duncan, *Entails*, p. 391). See also Excambion.

As regards the question to what extent the mansion-house of an estate is affected by the widow's right of terce, see *Mead*, 1796, Mor. 15873; cf. *Montier*, 1773, Mor. 15859; Bell, *Com.* i. 56; Bell, *Prin.* ss. 1598, 1603; Ersk. ii. 9. 48; Fraser, *H. & W.* ii. 1097. See also Terce.

Manslaughter.—See Culpable Homicide.

Manumissio, in Roman law, was the grant of liberty by a master to a slave. *Manumissio est datio libertatis.* There were three modes of manumission recognised by the old *jus civile*, known as *legitimæ manumissiones*: (1) *Manumissio vindictâ*, a proceeding before a magistrate, in which an *adsertor libertatis*, touching the slave with a rod, claimed that he was free, whereupon, there being no defence by the slave's master, the magistrate declared that the slave was free; (2) *Manumissio censu*, by entering the slave's name on the register of citizens; (3) *Manumissio testamento*, by a grant of freedom in his master's will. The grant might be made either directly to the slave, by his being made *heres* or legatee, in which case, on becoming free, he became a freedman of the testator (*libertus orcinus*), or indirectly, by the testator instructing his heir to manumit the slave, in which case, on becoming free, he became a freedman of the heir. A slave manumitted in one of these public and formal modes became not only free, but a citizen, provided that the *manumissor* was quiritarian owner of the slave, and that he had legal capacity to perform the act of manumission.

Subsequently it was common for slaves to be informally manumitted. These modes of informal manumission were numerous, *e.g. per epistolam*, by a letter announcing his freedom; *inter amicos*, by making a declaration before friends, as witnesses; *mensâ*, by the master inviting the slave to sit with him at table. Slaves thus irregularly manumitted, like slaves manumitted by one who was merely bonitarian owner, were not *liberi*, but merely *in libertate*; they were *de jure* slaves and *de facto* free, the prætors protecting them in their freedom.

Towards the close of the Republic a series of enactments was passed with a view to restrict the practice of manumission, and in particular to diminish the number of freed slaves who became citizens. One of these enactments was the *Lex Fufia Caninia* (A.D. 8), which, until repealed by Justinian, set a maximum limit to the number of slaves whom an owner

could manumit by testament. More important was the *Lex Ælia Sentia* (A.D. 4), which prevented a manumitted slave becoming a citizen, unless certain prescribed conditions were observed. The position of persons informally manumitted, or manumitted without due regard to the provisions of the *Lex Ælia Sentia*, was for a time a very indefinite one. In A.D. 18, however, the *Lex Junia Norbana* defined the position of these persons, conferring on them the status known henceforth as Junian Latinity. Hence arose the Junian Latins, who formed a numerous and important class in Rome during the earlier centuries of the Empire.

Manure.—See DUNG.

Maps and Plans.—Maps and plans are adminicles of evidence. They require to be sworn to as accurate, and do not prove themselves. In the case of *Gibson* (1869, 7 M. 394) Ld. Neaves (at p. 400) said: "I think it would be highly dangerous if we held that a man could be deprived of his property on such evidence as an Ordnance Survey map." Observations by the Ld. J.-C. Moncreiff, Ld. Neaves, and Ld. Young, as to the admissibility and effect in evidence of old private plans of estates in questions of disputed boundaries, will be found in the report of the case of *Place* (1874, 1 R. 1202).

Marches.—Under the title FENCES (*q.v.*) the law in relation to fences in general has been considered. It is now proposed to deal specially with the peculiarities attaching to *march fences*. The term "march fence" is a *nomen juris* not known to the common law, but introduced by the Statutes 1661, c. 41; 1669, c. 17; 1685, c. 49; and 1686, c. 11. Prior to 1661 there existed no such thing in Scotland as actual fences between coterminous estates, and, necessarily, there existed no law with reference thereto (per Ld. J.-C. Inglis in *Strang*, 2 M. at p. 1030). By the Act of that year, entitled an "Act for Planting and Inclosing of Ground," it was provided, after sundry provisions for the encouragement of planting, "That where Inclosures fall to be upon the border of any person's Inheritance, the next adjacent Heritor shall be at equal pains and charges in Building, Ditching, and Planting that Dike which parteth their Inheritance" (see Stair, ii. 3. 75; Ersk. ii. 6. 4). By the Act 1669, c. 17, "anent inclosing of ground," it is provided: "That whensoever any person intends to inclose by a Dike or Ditch upon the march betwixt his Lands and the Lands belonging to other Heretors contiguous thereunto, it shall be leisom to him to require the next Sheriffs . . . or other Judges Ordinar, to visit the marches along which the said Dike or Ditch is to be drawn, who are hereby authorised when the said marches are uneven or otherwayes uncapable of Ditch or Dike to adjudge such parts of the one or other Heretor's ground, as occasion the inconveniency betwixt them, from the one Heretor in favours of the other, so as to be least to the prejudice of either party, and the Dike or Ditch to be made to be in all time thereafter the common march betwixt them." These Acts are for the protection of plantations and other ground on which labour has been expended; the benefit of them was extended to all lands by the Act 1686, c. 11, entitled "Act for Winter-Herding."

Primarily, a "march fence" means the fence erected on the boundary line between two adjacent estates at the mutual expense of the adjoining

proprietors under these Statutes. "But without applying to the Sheriff, heritors may agree and contract with each other to erect a fence upon their properties at the mutual expense. And where such march fence in the one way or the other has been erected, it will follow as a consequence that it must be maintained at the mutual expense. Further, it may be that without express agreement or contract a march wall . . . has for time immemorial been . . . treated as if it had originally been erected under the Statutes or under express agreement, and then by implied contract the same obligations may attach to the heritors or to their successors in their several properties" (per Ld. Cowan in *Strang*, 2 M. at p. 1024; affd. 4 M. H. L. 5).

Those desirous of studying this subject philosophically and historically are referred to Rankine on the *Law of Landownership*, ch. xxxii. It is here proposed merely to notice the more important decisions by which the law founded on the above-mentioned Statutes has been extended and settled.

The Acts only apply to proprietors. Accordingly, where a crofter under the Crofters Holdings (Scotland) Act, 1886 (49 & 50 Vict. c. 29), sought to have his landlord ordained under the Act 1661, c. 41, to bear half the expense of erecting a march fence between the croft and the landlord's adjoining property, it was held (1) that the Act only applied to proprietors, and (2) that a crofter was not a "proprietor" in the sense of the Act (*Macdonald*, 21 R. 900).

Where a march fence had fallen into such disrepair that a man of skill reported that it required to be rebuilt, and in a different manner, it was held that the Sheriff had power, in a petition for the repair of the fence under the Act 1661, c. 41, to order it to be rebuilt, and to approve an alteration in the style of the fence which experience recommended (*Paterson*, 7 R. 958). On the other hand, it was held that the Court were not entitled, in a petition under the Act 1661, c. 41, for compelling the coterminous proprietor to bear half the expense of a march fence, to straighten the marches (*Pollock*, 7 M. 815).

In the case of *Kintore* (13 R. 997) it was held to be *intra vires* of the Sheriff, in a petition for straightening the marches under the Act 1669, c. 17, to fix a longer and less direct march if that was more convenient. A doubt was expressed how far the Court of Session had the power to review the Sheriff's judgment on the merits.

In *The Lord Advocate* (11 M. 137) it was decided that the procedure laid down in the Act 1669, c. 17, by which the Sheriff may be required to visit the marches, is imperative and cannot be supplied by a remit to a man of skill, even of consent. In the same case it was also held that the Act does not apply (1) where there is a natural boundary of steep cliffs, minimising the danger of trespass, and (2) where the cost of erecting the fence would be out of proportion to the value of the ground which the fence was to benefit.

By the case of *Lockhart* (Mor. 10488) it was settled that a march fence having once been erected under the Acts, the coterminous proprietors are bound at common law to keep it in repair at their joint expense. In questions between landlord and tenant, the obligation to maintain a march fence devolves on the tenant, and that whether the fence was in existence at the commencement of the tenancy or not, since the erection of a march fence, unlike other fences, is not purely voluntary on the part of the proprietor (*Dudgeon*, 23 November 1813, F. C.).

The march line between two neighbouring estates is the common property of the adjoining heritors, and therefore one proprietor cannot

set up march stones on that line, unless either with the consent of the coterminous proprietor or under judicial sanction (*Stewart*, 11 D. 1176).

In questions of disputed hill marches, weight will be given, in the absence of positive proof, to the real evidence furnished by the natural features of the ground (*Lumsden*, 42 Sc. Jur. 530; *Whitson*, 5 Pat. App. 664).

Instead of the statutory or conventional obligation to bear equally the cost of erecting and maintaining a march fence, there seems no reason why the obligation of bearing the whole cost may not, by a competent mode, be laid on the proprietor of one of the adjoining estates, and transmit against singular successors. Though there is no reported case of this kind in Scotland, there have been many examples in England. The obligation will render the person bound to keep the fence repaired liable for the consequences of his failure to repair (*Lawrence*, L. R. 8 Q. B. 274).

See Bounding Charters, *supra*, vol. ii.

Marginal Additions.—See Deeds (Execution of) (vol. iv. p. 136); Affidavit.

Marine Insurance.—This contract is one of indemnity, whereby the insurer undertakes to indemnify the assured, in manner and to the extent agreed, against losses incident to marine adventure.

The insurance may be extended to protect the assured against losses on inland waters, or on any land adventure interposed in or subsidiary or incidental to the marine adventure. A policy on goods may cover risks during their carriage by rail preparatory or subsequent to the sea voyage, or while the goods are in warehouses waiting transit or final delivery. The contract is also used to insure a ship undergoing repairs against risk of loss or damage during the operation. The ship is practically always insured during construction, and against the risk of loss and damage when being launched. Any insurance of an adventure analogous to a marine adventure by a policy of marine insurance will be subject to the general law of marine insurance, so far as applicable.

Although the fact that the contract is one of indemnity underlies the whole law applicable to it, this does not mean that the assured may not in any case recover more than his actual loss, or that the contract is one necessarily of indemnity only. Of course he may recover less, for he may have only assured part of his risk. But he may also recover more, *e.g.* in the case of a valued policy where the valuation represents more than the true value of the subject insured at the time of loss, or of a total loss of freight where the law does not require a deduction to be made in respect of the cost of earning the freight, which the assured has been saved by the loss. In a very recent case, under a valued policy, where a ship was insured against loss by fire only, and where thirty-six hours before being burnt she had sustained such severe injuries as to make her a constructive total loss, on her total loss by fire the assured was held entitled to recover the full amount agreed to (*Woodside*, [1896] 1 Q. B. 105). (See also *Lidgett*, L. R. 6 C. P. 616.) Numerous cases of the same kind may happen one way or the other from the application of the settled principles on which adjustment of losses proceeds. (See Adjustment.)

Every lawful marine adventure may be the subject of the contract. Ships, goods, or other moveables, or the earning or acquisition of any freight, passage-money, commission, profit, or other pecuniary benefit, or the security

for any advances, loan, or disbursements, may be insured against the risk of loss or damage from the perils specified in the policy. So also may any liability which a third party incurs to the owner of, or other person interested in or responsible for, property itself insurable. In one well-known case the insurance was of an interest in a company concerned in the laying of the Atlantic Cable (*Wilson*, L. R. 2 Ex. 139); in another case it was the risks attending the transit of certificates of stock (*Baring Brothers & Co.*, Cave, J, 1893, W. N. 164).

Honour Policies.—By Statute (19 Geo. II. c. 37) the assured must, in general, have an interest in the subject of insurance before or at the time of loss. When the policy declares that it is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or uses other like terms, it is declared void by the Statute.

The assured may, however, lawfully bargain that the insurer is not to have the benefit of salvage in the case of a second or other subsequent policy for an additional sum on the same subject-matter and interest.

In the case of a policy which bargains that the risk is to attach "ship, lost or not lost," or uses similar words, it is immaterial that the subject-matter of the insurance was lost at the date of the insurance, provided the assured was ignorant of the loss.

The Statute of George II. applies only to British ships, and it does not apply to any policy or insurable property from any ports or places in Europe or America in the possession of the Crowns of Spain or Portugal. But probably all contracts of marine insurance by way of wagering are struck at by the Act 8 & 9 Vict. c. 109, which provides that all agreements by way of gaming or wagering are void.

Notwithstanding the statutory prohibition, a large business is done by underwriters under "honour policies," that is, policies which contain such clauses as those struck at by the Statute. As a general rule, underwriters fulfil their obligations under such policies, so as to make sure that their word shall be held as good as their bond. In the rare cases where legal questions arise the underwriters either allow the assured to sue in Court when this can be done without raising the point of illegality, or else agree to refer the true question at issue to a suitable arbiter. If the trade in honour policies is to be stopped, some further disability must be imposed on those who take and those who grant such policies. At present honour policies are largely used in real transactions where the assured has, or is supposed to have, a substantial interest to insure, but owing to special circumstances there may be room for legal question as to the extent of his insurable interest. It is desired to avoid questions, and the underwriter therefore bargains that he shall not raise them. But the result is frequently anomalous. Underwriters in most of these cases insure only against total loss, and treat the policy as one which involves payment of the amount if the ship be lost, even although the assured may truly not be the shipowner or interested in her, and may have sustained no loss (*Henrichson*, 2 East, 549). This is of course pure wagering. If, however, the interest is clearly described as something which has no necessary dependence for loss on the loss of the ship, it is submitted the underwriter has a perfect right, consistently with respecting his position as an underwriter of an honour policy, to raise the question whether or not the subject insured has been lost by perils insured. But it is in these cases he provides a tribunal to decide the matter.

Insurable Interest.—The insurable interest required by law must be some-

thing more than a mere possibility of gain, not founded on any right or liability (legal or equitable) in, or in respect of, the subject-matter insured. Insurable interest, in the absence of proof to the contrary, is presumed (*Cousins*, 3 Taunt. 513). The tendency of modern law is to recognise an insurable interest in all cases where there is legal foundation for doing so. The assured cannot acquire an interest by any act of his after the date of loss.

The question of insurable interest in goods may, and frequently does, depend on how far under the contract of sale the property has passed before the date of loss (see, *e.g.*, *Anderson*, 1 App. Ca. 713; *Col. Insur. Co. of New Zealand*, 12 App. Ca. 128; *Inglis*, 10 App. Ca. 263). In the case of shipbuilding risks, the builder's insurance generally ends with delivery, and the question then (sometimes nominally tried between builders and purchasers) is, Has the builder made over by delivery the ship to the purchaser? (*e.g. Brewer*, 20 R. 230).

The insurable interest may be one defeasible, contingent, or inchoate. It may be partial only (*Inglis, ut supra*; *Wilson, ut supra*).

An insurer has an interest to reinsure. Even though a reinsurer becomes insolvent and unable to pay the claim on him, he can recover from the reinsurer the full amount (*re Eddystone Insurance Co.*, [1892] 2 Ch. 423), and the usual clause in the reinsurance policy, "to pay as may be paid," does not affect this matter. That clause has in any view, it has been held, a very limited application (*Chippendale, etc.*, 1 Com. Cas. 197). A reinsurance of policies, and subject to the same terms as original policies, has been held not necessarily to imply that the policies on which the reinsurer has to pay are in existence at the date of the reinsurance (*Lower Rhine etc. Assoc.*, 3 Com. Cas. 70).

A carrier or other custodier has an interest to insure to the extent of his responsibility; so a lender on bottomry or respondentia, or a mortgagee, to the extent of the loan. In the latter case the mortgagor has an insurable interest for the full value of the subject; while the mortgagee, if he insures for the benefit of the mortgagor as well as himself, may then insure to the full insurable value. A consignee has insurable interest to insure the subject to the full extent in the ordinary case (see *Ebsworth*, L. R. 8 C. P. 596). The Court were equally divided in opinion in that case; but it is submitted the view stated is sound (see per Bowen, L. J., *Castellain*, 11 Q. B. D 398).

Insurances on freight present delicate questions on this branch of the law. In the case of a general ship, the rule was supposed to be that the ship must be ready to load, and the goods at least alongside ready for shipment, before there was interest. But this does not express the limits of insurable interest on freight. If there is an agreement to load on the part of the cargo-owner, and the ship is at the port of loading ready to load, this is sufficient to entitle the freight insurer to recover. If the insurance is on chartered freight, and the ship, having sailed in ballast in terms of the charter for the port of loading, is lost on the way, there is a good insurable interest (*Barber*, L. R. 5 Q. B. 59; *Foley* L. R. 5 C. P. 155). So it is thought, even where the ship has sailed with cargo for the loading port in terms of or as contemplated by the charter. Of course much depends on the terms of the agreement as to risk. In a recent case where a shipowner had a freight engagement from Valparaiso to the United Kingdom, and the ship sailed from London to Valparaiso, Ld. Esher, M. R., said that there was no doubt the shipowner had insurable interest to insure the home freight as at risk on the outward voyage (*The Copernicus*, [1896] P. 237). In such a case, however, the terms of the policy should clearly cover the outward risk.

A person advancing freight under circumstances or on conditions which imply that it is not to be recoverable in the event of loss, has an insurable interest in the advance (see *Smith*, [1891] 1 Q. B. 742).

The master has an insurable interest in his wages as well as his effects. Seamen cannot, it is said, insure their wages, but this is not clear, and it is proposed to declare by statute that they may so insure.

Insurable Value.—The principles by which the insurable value of subjects is to be ascertained have already been stated, and in this connection there has also been stated the meaning given to such words as "ship" or "steamship," so far as that meaning is technical (see ADJUSTMENT). Recently the question was considered, What are the respective meanings of the terms "hull and machinery" of a ship, and "disbursements," in marine policies? The case is of interest as throwing light on how far bunker, coals, etc., are included in the general word "ship," and as indicating a possible distinction in the meaning of the words in the matter of stores in the respective cases of voyage and time policies (*Roddick*, [1895] 2 Q. B. 380).

Concealment and Misrepresentation.—As the contract of marine insurance is one *uberrimæ fidei*, if either party fail to observe good faith to the other the latter can avoid the policy. It will be noticed that the obligation is *reciprocal*, but in general the question arises at the instance of the underwriter on an allegation that the assured has either failed to disclose, or has misrepresented, some material circumstance bearing on the contract. If proved, either ground will avail. The burden of proof is on the insurer (*e.g. Davies*, [1891] A. C. 485). The circumstance will be material if calculated to influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk; and in each case it is a question of fact whether or not the concealment or misrepresentation is material. The concealment may be of communications or information received by the assured which he has not verified, but which nevertheless would naturally influence the mind of the insurer. One or two illustrations may be given. The *State of Florida* was overdue, and was being further insured. It was held material concealment not to disclose that a ship, which had reached home, thought she had made out the letters "Sta" signalled to her by another ship (*Blackburn*, 21 Q. B. D. 144). A gross case of over-valuation of the subject insured was held to make the policy voidable, on the ground that the fact should have been disclosed (*Ionides*, L. R. 9 Q. B. 531; see also *Rivaz*, L. R. 6 Q. B. D. 222). In another case, where the insurance covered risks when the goods were in lighters, it was held material concealment not to disclose that by the assured's arrangement with the lighterman there was no recourse on him for loss due to his negligence (*Tate*, L. R. 15 Q. B. D. 368). See also *Bates*, L. R. 2 Q. B. 595; *Harrower*, L. R. 5 Q. B. 584; *Hutchinson & Co.*, 3 R. 682; *Harvey & Co.*, 10 R. 680; *Gandy*, L. R. 6 Q. B. 746; and *British and Foreign Mar. Insurance Co.*, [1897] 2 Com. Cas. 244). Each case depends on its own circumstances and the usages of the trade.

The assured is not bound to disclose any circumstance which diminishes the risk, or as to which information is waived by the insurer. Where a charterer insured profit on freight, and disclosed the fact that he had a charter, it was held he was not bound to disclose the material fact that the freight was a lump sum and not a tonnage rate, because it was for the insurer to make further inquiry, as the provision for a lump freight is usual in such charters, though of course so is provision for a rate freight (*Asfar*, [1896] 1 Q. B. 123). The assured must disclose unusual clauses

in a charter. If the insurer stipulates for an express warranty on any particular point, the assured need not disclose any circumstance affecting that point, so far as covered by the bargain. So with an implied warranty, *e.g.* in an ordinary voyage policy, the assured need make no disclosure with reference to the seaworthiness of the ship, for he warrants her seaworthiness (*Baker and Adams*, 18 D. 691). The rule would be different in a time policy.

As the insurer is presumed to know matters of common notoriety or knowledge, and matters which in the ordinary course of his business he ought to know, the assured need make no communication regarding these (see *Thomson*, 2 Pat. App. 592; *Laing*, 11 T. L. R. 359; and *British and Foreign Mar. Insur. Co., ut supra*). The case of *Asfar* to some extent illustrates the rule; also that of *Gandy*, and indeed many of the cases on the subject of concealment. These exceptions apply in the absence of inquiry. If inquiry is made, then the answers, so far as material, must be true and must be frank.

No particular form of words is needed to constitute a representation. Whatever the assured says or does which reasonably leads the insurer to a particular conclusion will amount to a representation. If there be doubt whether or not there was actual misrepresentation, in marine insurance, the case will generally be met by holding it to be either a positive misrepresentation or a case of undue concealment. As long as a representation is substantially correct, this is enough. A representation may be either as to matter of fact, or as to matter of expectation or belief. In the latter case, if made in good faith, it is not a misrepresentation (*Anderson*, L. R. 7 C. P. 65; *Harvey & Co., ut sup.*). Though asked, the assured is not bound to state his personal opinion on matters affecting the risk. Of course, if he does do so, the opinion must be fairly stated. But so long as the assured puts the insurer in possession of all the materials he has on which to form a judgment, he can leave the latter to come to his own conclusion.

The rules applicable to the assured also apply to the agents he employs to negotiate the contract (*Blackburn*, 21 Q. B. D. 144). But it has been held that when brokers employed to insure were in possession of material information which they did not disclose to the assured, an insurance subsequently effected through other agents was not affected by the concealment of the first agent (*Blackburn*, 12 A. C. 531). On the other hand, where mercantile agents of the insured kept back from him the knowledge of material facts which in ordinary course they should have communicated, to give him time to insure, this was held concealment for which the insured was so far responsible as to entitle the insurers to void the policy (*Proudfoot*, L. R. 2 Q. B. 511). But there must have been time for the knowledge to reach the party dealing with the insurers by the ordinary channels. The telegraph must be used if this is the reasonable way to make the communication. If the assured or his agents keep back, from sub-agents employed to insure, material facts they know, the plea of undue concealment will be sustained (*Blackburn, ut sup.*).

The matter of warranties will be referred to later; but meantime it may be noted that while, to void a policy, a misrepresentation must be material, in the case of breach of an express warranty it is of no moment whether or not the breach is material—if the warranty is broken the insurer may void the policy.

In questions arising out of the contract of marine insurance it is not necessary that either the concealment or misrepresentation should be fraudulent, though in general fraud must be proved, to ground a claim in

respect of concealment or misrepresentation (see, *e.g.*, *Morrison*, L. R. 8 Ex. 197). In all cases of concealment and of misrepresentation the policy is voidable only, and therefore the insurer may waive his right to set it aside (*Morrison, ut supra*). The ordinary rules of law in such cases apply, and therefore are not here further considered.

In general, proof of concealment or misrepresentation as to a material fact will end the matter; but if it can be affirmatively shown that the insurer himself was not influenced by the misrepresentation, then he cannot set aside the policy. If, *e.g.*, the insurer knows and has in view the material fact concealed; but it is not enough that he may have heard it, if in point of fact it is not present to his mind (*Bates, ut supra*). It is on this principle that a representation, if made on a particular point with regard to which an express warranty is asked, is held superseded. The insurer has not relied on the representation, but has made the point matter of bargain, and must stand or fall by his bargain.

Once the proposal of the assured has been accepted by the insurer, the bargain is concluded, to the effect of entitling the assured to conceal facts, however material, which may come to his knowledge between the acceptance and the issue of the policy. For the purpose of showing when the proposal was accepted, it is competent to refer in evidence to the slip or other memorandum, although it be unstamped (*Cory*, L. R. 9 Q. B. 577; *Lishman*, L. R. 10 C. P. 179). The slip is a short memorandum of the terms of the contract, initialed by or on behalf of the insurers. No action will lie on it to compel issue of a policy (*Fisher*, L. R. 9 Q. B. 418).

Policy.—By Statute the contract itself can only be evidenced by a policy (The Stamp Act, 1891, ss. 91–97). Policies are not infrequently voluntarily issued after loss. The policy must specify—

(1) The name of the assured, or of some person who effects the insurance on his behalf.

(2) The undertaking to insure.

(3) The subject-matter insured.

(4) The voyage, or period of time, covered by the insurance.

(5) The sum or sums insured.

(6) The name or names of the insurers.

But it usually does also set forth various other matters. The following is the form of Lloyd's Policy annexed to the Marine Insurance Bill of 1897.

FORM OF POLICY.

Lloyd's S.G. Policy.

BE IT KNOWN THAT as well in
own name as for and in the name and names of all and every other
person or persons to whom the same doth, may, or shall appertain, in part
or in all doth make assurance and cause
and them, and every of them, to be insured lost or not lost, at and
from
Upon any kind of goods and merchandises, and also upon the body, tackle,
apparel, ordnance, munition, artillery, boat, and other furniture, of and in
the good ship or vessel called the
whereof is master under God, for this present voyage,
or whosoever else shall go for master in the said ship, or by whatsoever
other name or names the said ship, or the master thereof, is or shall be
named or called; beginning the adventure upon the said goods and
merchandises from the loading thereof aboard the said ship,
upon the said ship, etc.
and so shall continue and endure, during her abode there, upon the said
ship, etc. And further, until the said ship, with all her ordnance, tackle,
apparel, etc., and goods and merchandises whatsoever shall be arrived
at

upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever
without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods, and merchandises, and ship, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of

In witness whereof we, the assurers, have subscribed our names and sums assured in London.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides, and skins are warranted free from average, under [five] pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under [three] pounds per cent. unless general, or the ship be stranded.

Policies cannot be materially altered without consent of the insurers; and even with such consent they can only be altered to a limited extent, owing to the provisions of the Stamp Acts (The Stamp Act, 1891, s. 96).

With reference to the requisites of a policy—

(1) The name inserted in the policy is very commonly that of the insurance broker who negotiates the contract, and as the policy indicates, those insured are the persons to whom the assurance pertains at the date of the loss. This does not mean that the policy is transferred simply by sale of the subject insured. On the contrary, if the assured ceases to have interest in the subject before loss, and does not, as part of the bargain of sale, expressly assign his right under the policy, the policy lapses (*North of England Pure Oil Cake Co.*, L. R. 10 Q. B. 249, and *Raynor*, 18 Ch. D. at p. 12).

As has been seen, it is sufficient if the true assured has interest before the time of loss. If a policy has been *bonâ fide* made by or on behalf of the true assured, without, however, his authority, the latter may ratify the assurance even after loss (*Williams*, L. R. 1 C. P. D. 757). Policies should be assigned, to transfer the interest in them. But the universal custom is

to pass them by blank endorsement. It is doubtful if at present such endorsement is a legal mode of transfer, at all events in Scotland. The Marine Insurance Bill has a clause legalising the custom.

(2) and (5) The undertaking to insure, and the sums insured, call for no special remark meantime.

(3) The subject-matter insured must be designated with reasonable certainty, a rule in substance common to all contracts. The nature of the assured's interest need not ordinarily be specified, unless it be of such a character as to materially affect the risk. When a lender on bottomry or respondentia insures, or an insurer reinsures, the nature of the interest should be specified. It has, however, been held not essential to specify a reinsurance (*Mackenzie*, L. R. 1 Ex. D. 36, an instructive case on the whole subject). Bills of Exchange are not covered by the general term "goods." Commissions and profits should be specified. An insurance on profits at least *primâ facie* means profits on goods (*Hodgson*, 6 East, 316). An insurance on freight includes the profit made by a shipowner by carrying his own goods (*Flint*, 1 B. & Ad. 45), but not passage-money, unless the policy so indicates. If there is a usage with regard to the designation of the risk, this should be followed. If the subject-matter insured is sufficiently designated in general terms, and a question is raised what interest is covered, in the absence of other indication the interest intended by the assured will be that held insured (*Allison*, 1 A. C. pp. 216, 235).

(4) There are, as we shall see, different incidents to the contract, according as it is a contract to insure the subject-matter from one place to another, in which case the policy is called a voyage policy, or to insure the subject-matter for a definite period of time, under what is called a time policy. A time policy for any period exceeding twelve months is invalid (Stamp Act, 1891, s. 93). A contract for both voyage and time is frequently included in the same policy. A ship is insured, say, for a voyage and thirty days after arrival. Insurances on steamships are generally now on time policies. In the case of sailing ships, these are frequently insured by voyage policies, and goods are generally so.

(6) The policy must be signed by or on behalf of the insurer, or, in the case of a corporation, it may be sealed. Where there are two or more insurances, each subscription, unless the contrary be expressed, constitutes a distinct or separate contract with each insurer, and not a joint-contract (*Tyser*, [1896] 1 Q. B. 135; *General Insurance Co. of Trieste*, [1896] 1 Com. Cas. 379).

Stamp.—If the policy is not duly stamped, it can only be after-stamped on payment of a penalty of £100 (Stamp Act, 1891, s. 95). A policy on several ships for different sums on each ship, but with one set of underwriters, falls only to be stamped for the gross sum insured (*Great Britain S. S. Assoc.*, 19 R. 109).

Premium.—The policy usually sets forth the premium or consideration given by the assured to the insurer in respect of the risks undertaken by the latter. When the premium is to be arranged, and no arrangement is come to, or when the insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens, but no arrangement is made, the premium to be paid is a premium which is reasonable. In the ordinary case payment of the premium by the assured or his agent and the duty of the insurer to issue the policy are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

According to custom long judicially recognised, when a policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the assured is responsible to the broker. The custom applies to insurance companies, though the policy issued by these companies differs from Lloyd's in form (*Universo Insurance Co. of Milan*, [1897] 2 Q. B. 93, where law reviewed). The usual acknowledgment in the policy of receipt of the premium is, in the absence of fraud, conclusive as between the insurer and assured, but not as between the insurer and the broker. The custom has not judicially been held applicable to Scotland, and it may be doubted if the custom is the same. By the Insurance Bill it is proposed to make the law identical.

A valued policy is a policy which specifies the agreed value of the subject-matter insured. In the absence of fraud the value agreed on is conclusive for the purposes of the policy as between the insurer and assured whether the loss be total or partial (see *Herring*, 1 Com. Cas. 177). But unless otherwise agreed, the valuation does not affect the question whether or not there has been a constructive total loss (*Stewart*, 6 D. 359). Not uncommonly a clause is now inserted in policies by which the value in the policy is deemed to be the value of the ship insured, even on this question.

If the valuation is of a whole cargo, or of the freight on a whole cargo, and only part of the cargo is carried, or, after the freight insurance is effected, part of the freight is paid or prepaid, then the valuation is so far opened, as it is called, that the insurer has only to pay a fair proportion of the valuation, corresponding to the quantity of goods or freight lost (*The Main*, [1894] P. 320). So also in similar cases the elements of which the valuation is made up may be looked at (see, *e.g.*, *Williams, ut supra.* See, for a case *contra*, *Thames and Mersey Co.*, [1893] 1 Q. B. 476). If in the special case it is impossible to calculate the proportion, the policy will be treated as an open policy up to the sum the insurers have agreed to pay (*Denoon*, L. R. 7 C. P., per Justice Willes, p. 351). A valued policy does not dispense with the necessity of the insured showing he has insurable interest in the subject-matter insured, and insurable interest may be disproved in whole or in part.

An unvalued or open policy leaves the insurable value of the subject-matter insured to be ascertained according to law.

A floating policy is one which describes the insurance in general terms, and leaves the name of the ship and other particulars to be defined by subsequent declaration, which is made by endorsement on the policy, or in other customary manner. Unless the policy otherwise provides, the declarations must be made in the order of despatch or shipment. They must comprise all consignments within the terms of the policy, and the value of the goods or other subjects assured must be honestly stated; but an omission or erroneous declaration may be rectified, even after loss or arrival, provided the omission or declaration was made in good faith (*Stephens*, L. R. 8 C. P. 18 ; see also *Imperial Marine Insur. Co.*, L. R. 4 C. P. D. 166, and for a recent case on such policies, *Scott*, 1 Com. Cas. 370). Where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of the declaration. A floating policy is usually on goods.

Double Insurance.—When two or more policies are effected by or on behalf of the assured on the same adventure and interest, or any part thereof, and the sums insured exceed the indemnity allowed by law, the assured is over-insured by double insurance. In such a case the assured may claim payment from the insurers in such order as he may think fit.

This rule may be of practical importance to the assured when he has taken out valued policies, and has valued the subject insured at different figures in the different policies. The assured must credit the insurer he claims from with all sums already received by him from other insurers (*Bruce*, 1 H. & C. 769); and therefore if he recover from the insurer on the larger valuation first, he may, when he claims on the lower valuation policy, be met by a plea that he has recovered full payment. If, however, he reverses the process, it is said he is not held to be double insured in a question with the insurers, so long as he does not recover more than the full valuation. When the assured recovers any sum in excess of his legal right to indemnity, he is deemed to hold such sum in trust for the insurers, according to their right of contribution *inter se*.

General Principles.—We have now to consider what are the contractual obligations undertaken by the insurers when they issue the policy, and the conditions on which they undertake these obligations. But in the first place it will be well to make one or two general remarks.

The policy in its simple form is a venerable document which generally remains unaltered in itself, but is added to, contradicted, and modified by other written or printed clauses. Accordingly, when there is a conflict between the original policy and the added clauses, the latter prevail (see on the construction of varying clauses, *Hydarnes S. S. Co.*, [1895] 1 Q. B. 500). The general rules applicable to the construction of written contracts affect this contract also. The rule, *e.g.*, that in case of ambiguity the contract is to be read *contra proferentem*, has more than once been applied against the insurers (see on the general question of construction, *Birrell*, 9 A. C. 345; *M'Cowan*, [1891] A. C. 401.) The various terms in the policy have either the meaning which in popular language they bear, or the same legal meaning when used in connection with the law of marine insurance, as in any other legal connection. It is well to note this, for though it seems elementary, it has only recently been formally so decided (*Thomas Wilson, Sons, & Co.*, 12 App. Ca. 503). It of course does not follow that the same result will follow in one contract as in another. That depends on the conditions and scope of each particular contract. Perils of the sea mean the same thing whether used in a contract of affreightment or in a policy. But if a ship goes on a rock through the negligent navigation of the master, in the one case, unless he has bargained to the contrary, the shipowner will be liable to the merchant; in the other he will have a good claim on the insurers.

This leads directly to one of the most important principles which affect the rights and obligations of insurers and assured, viz., that, so far as not otherwise agreed, the insurer is liable for any loss *proximately* caused by a peril insured against, but he is not liable for any loss which is not so *proximately* caused. It was said by Ld. Colonsay, and the remark was approved by Ld. Blackburn, that consideration of this rule tends to lead to "philosophical mazes," but the latter judge applied the necessary corrective when he laid down that the facts of each case should be considered on their merits, without showing too much refinement or subtlety in the application of the rule. That rule may be stated, in other words, as providing that the assured shall have full benefit of the contract of indemnity undertaken by the insurers, while at the same time the latter shall not be made liable for losses which they have not agreed to bear on a reasonable construction of the contract. So translated, the rule is one common to all mercantile contracts. It follows that each new case has to be considered on its own facts, and treated as within or without the insurer's obligations. Necessarily sometimes the line

is a fine one. Anticipating the consideration of the precise risks the insurers agree to bear, the rule may be illustrated by some cases of its application. The insurers are liable for losses due proximately to perils of the sea, though they would not have happened save for the negligence of the assured's agents, or, as has very recently been held, of the assured himself (*Trinder, Anderson, & Co.*, 1897, 2 Com. Cas. 216), *e.g.* in cases of injury to a ship by collision due to negligence of the crew navigating her, or by stranding or other casualty in navigation due to like negligence. In time policies, where no warranty of seaworthiness is implied, the insurers are liable for losses which are proximately due to perils insured against, though remotely and substantially to the ship not being in a fit state (*Dudgeon*, 2 A. C. 284; *Ballantyne & Co.*, [1896] 2 Q. B. 455; see for a further development of this last case, *Park and Others*, 35 S. L. R. 378). It may be doubted if the Courts have not in this matter pressed the doctrine of *proxima causa* too far. In a Scotch case, a ship, having experienced some bad weather, had some relatively slight damage done to her thereby, and put into a port of refuge. It was then found she was not worth repairing, owing mainly to the rottenness of her timbers, and it was held the assured were entitled to abandon, and to claim from the insurers a total loss on the basis of a high valuation (*Kenneth*, 10 R. 547). But if there is no real intervention of the perils of the seas at all, but the ship simply lets in water, *e.g.* because she is not in a state to keep it out, the insurer will not be liable (*Fawcus*, 6 El. & Bl. 192; *Ballantyne & Co., ut supra*). The insurers are not liable under the ordinary policy for any loss caused by ordinary wear and tear, ordinary leakage and breakage, inherent vice, or nature of the subject insured, or any other ordinary and normal operation of natural causes (*e.g. Lovell*, 21 June 1809, F. C. 341). The distinction in practice between perils of the sea and wear and tear or inherent vice is one sometimes difficult to draw. In the case, *e.g.*, of damage to sails, the term wear and tear has undoubtedly been stretched beyond its natural meaning (see M'Arthur, pp. 112, 113, also 223 *et seq.*). Spontaneous combustion of coal is not covered. A question has been raised whether there is a loss of freight on coals by perils insured where the freight is lost by reason of fire of the coals due to spontaneous combustion. It is submitted there is (see *The Knight of St. Michael*, [1898] P. 30). The insurers are not liable for losses proximately caused by delay, though the delay is due to perils insured against. If perishable goods decay because the voyage has been unduly protracted by adverse winds, there is no recovery unless the policy contains, as it sometimes does, special clauses. Where a charter contained a cancelling clause, and the ship having arrived after the cancelling date owing to perils insured against, the charterer exercised his option and cancelled, there was held to be no claim on the insurer (*Mercantile S. S. Co.*, L. R. 7 Q. B. D. 73). In a time charter provision was made for the charterers giving to themselves an abatement to such extent as they saw fit in the event of the ship becoming inefficient. The ship having become inefficient by perils insured against, the charterers made a deduction from the hire, but this loss was held not to fall on the insurers (*Inman S. S. Co.*, 7 A. C. 670). On the other hand, where a charter contained the usual clause, that if the ship became inefficient for a certain time the hire should cease, it was held the insurers were liable for loss of hire due to the ship being damaged by perils insured against (*The Alps*, [1893] P. 109; *The Bedouin*, [1894] P. 1). The line seems fine; but the distinction drawn is that in the former class of case there is no loss unless the charterers so resolve,

and the loss is therefore proximately due to their action; in the latter, once the perils have made the ship inefficient, the loss necessarily follows, and is therefore proximately due to perils insured against. (See also *in re Jamieson, etc.*, [1895] 2 Q. B. 90, and the very recent case of *Bensaude*, [1897] A. C. 609). The assured do not recover for extra expense or loss due to detention because of perils insured, *e.g.* detention of ship during repairs. Nor under an ordinary policy on ship can they recover the expense of clearing the ship of cargo so damaged through a collision as to have lost its identity (*Field S. S. Co. Ld.* 14 T. L. R. 310). Insurers are not liable on an ordinary policy on goods for damage done to the reputation of a cargo as a whole, because of actual damage done to part by perils insured against (*Cator*, L. R. 8 C. P. 552), nor for damage done by the handling of goods which had to be dealt with in consequence of damage to the ship (*Pink*, 25 Q. B. D. 396), nor for the cost of examining goods, which turned out not to be damaged, on the reasonable suspicion that they were or might be damaged (*Lysaght Ld.*, [1895] 1 Q. B. 49). The insurers were held liable in another case on the principle under consideration, which seems to stretch it far. The assured agreed that the insurers should be free from all consequences of hostilities. A well-known light was put out by belligerents, and the ship insured was stranded in its neighbourhood. Notwithstanding the warranty, the insurers were held liable on the ground that the proximate cause of the casualty was a peril insured against, and that the part played in the disaster by the destruction of the light was too remote and uncertain to be taken into account (*Ionides*, 14 C. B. N. S. 259). See also on the general doctrine, *Reischer*, [1894] 2 Q. B. 548. If the loss is due to the misconduct of the assured, he can, of course, make no claim. If, *e.g.*, on a time policy the assured is privy to the ship insured being sent to sea in an unseaworthy state, he cannot recover for a loss truly, though it may be remotely brought about by unseaworthiness (*Thompson*, 27 L. J. Q. B. 441; *Ballantyne & Co., ut supra*). The contract is not intended to allow the assured to make insurers liable for his own wrong.

Warranties.—The insurance is effected and the policy issued on certain conditions which are implied by law; and frequently on others which the insurers bargain for. In the former case, there is an implied, in the latter, an express warranty. In either, the insurer's liability is conditional on a full and *exact* compliance with the warranty *whether it be material to the risk or not.* If it be not so complied with, the policy may be voided by the insurers, as from the date of the breach of the warranty, but without prejudice to any liability incurred by them before such date. It is no defence to a claim to void a policy on the ground of breach of warranty that the breach has been remedied and the warranty complied with before loss has resulted from the breach (*Quebec Co.*, 3 L. R. P. C. 234). But the insurers may agree to continue the risk notwithstanding breach of the warranty, or they may waive the breach, *e.g.* by accepting abandonment in full knowledge, in which case they will be liable for a total loss (*Prov. Ins. Co.*, L. R. 6 P. C. 224). Non-compliance with a warranty is excused when by reason of unforeseen events the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by subsequent legislation. Sometimes the word "warranted" is used with reference to clauses which do not truly infer a proper warranty by the assured, but only a limitation of the liability of the insurers, *e.g.* warranted free from average does not mean that there shall be no average loss, but only that none shall be claimed from the insurers.

Seaworthiness.—The most important implied warranty in a voyage policy is that, at the commencement of the voyage, the ship shall be seaworthy for the purpose or purposes of the particular adventure insured. To be seaworthy a ship must be reasonably fit in all respects to encounter the ordinary perils of the adventure. She must be so fit as regards her hull, machinery, and equipment, having proper stores, and in the case of a steamer, a reasonable supply of bunker coal (*Thin*, [1892] 2 Q. B. 141; *Ballantyne*, *ut supra*). She must have a sufficient number of officers and a competent crew. Not only must she be fit in herself, but she must be suitable to carry the contemplated cargo without undue risks, and the cargo must be properly stowed and trimmed (*Tattersall*, 12 Q. B. D. 297). It has been suggested that in certain cases the state of the ship and her equipment may satisfy the warranty in a policy on ship, but not do so in a policy on goods, for the latter, though not the former, may be affected by some want of precaution or defect (see *Daniels*, L. R. 10 C. P. 1). Where specie was carried as part of the cargo of a ship, it was held in a question under a bill of lading, a breach of the implied contract not to have proper precautions against theft (*Queensland National Bank*, 2 Com. Cas. 228; 1 C. A. 14 T. L. R. 166). It may be noted that insurers of goods do not generally take advantage of a breach of the warranty when the assured are innocent and free from all blame. One or two extreme examples of unseaworthiness may be given. A port-hole left unclosed when the ship started on a voyage at a place where it could not be reached without disturbing cargo (*Steel & Craig*, 3 A. C. 72), an uncased pipe exposed from the want of casing to the risk of damage by contact with cargo, and which once damaged could let in sea water (*Gilroy*, [1893] A. C. 56), were each held to make the ship unseaworthy. It is no answer that the shipowner had used all reasonable diligence to make her seaworthy. However latent the defect, if in point of fact there is one which makes the ship unseaworthy, there is a breach of the warranty. This was so held as regards a latent defect in a steamship's machinery (see *Glenfruin*, 10 P. D. 103). These examples, as it happens, are taken from cases on contracts of affreightment, but they serve to illustrate the scope of the warranty.

The standard is that current in the country to which the ship belongs at the date of the adventure. It follows that the standard may vary from time to time according to the state of knowledge and practice of the day. This is well illustrated by the fact that in a case recently tried both in England and Scotland, with different results in the two countries, it was held in both, that it was now a requisite to seaworthiness in a modern type of sailing ship with flat bottom, sailing from Hamburg to Barry in November with sand ballast, to have shifting boards fitted, to prevent the ballast shifting (*The Culmore*, 5 S. L. T. 113). The same decision would certainly not have been given twenty years ago.

The ordinary rule of English law is that the warranty applies only, and must be complied with at the commencement of the risk *when the ship starts on her voyage*. But it is not unseaworthiness for a ship to start with hatches not yet battened down, with accessible portholes open, or with some work still to do in trimming ballast or cargo, or other work of a like kind, provided there is time to do the work as the ship goes down a river, or before the occasion arises when for the safety of the ship it should be attended to, and putting it off causes no real extra trouble, and is reasonable. But wherever the operation is one which it is usual to do before the ship starts, and which can only be done later with practical inconvenience, the neglect to do it, it is submitted, infers a breach of the warranty (*Gilroy, ut supra*). A ship started on her voyage with muddy water in her boilers, so

as to be a source of danger if left there, and as by a common and simple operation the engineer without difficulty could have got rid of the water on the voyage, the fault was held to be negligence during the voyage, not unseaworthiness at the start (*Cunningham*, 16 R. 295; compare with *Seville Sulphur, etc., Co.*, 15 R. 616). Where a ship was in fact seaworthy, but some goods had been carried on deck by the master or ship from a foreign port in breach of a foreign statutory regulation, this also was held not unseaworthiness (*Wilson*, L. R. 1 Q. B. 162). Where the policy contemplates a voyage in different stages, during which the subject-matter insured will be exposed to different degrees or kinds of peril, or the ship will require different kinds of equipment, the ship must be seaworthy at the commencement of each stage, and it is sufficient if she is seaworthy for the purpose of that stage (*Quebec Marine Ins. Co., ut supra*, and cases there cited). Thus, where a policy insures a ship at and from a port, it is sufficient if she is, when in port, seaworthy for lying in port, and is made seaworthy for the voyage prior to starting on it (*Haughton*, L. R. 1 Ex. 206). If, however, the voyage is truly one voyage, where it is usual and reasonable to fit the ship once for all before she starts, and the ship has started without having made reasonable preparations for resisting the perils of the whole voyage, this, as already indicated, is a breach of the warranty.

The question has been raised in this connection how far failure to take a pilot in the course of a voyage at points where there is a statutory obligation to take such pilot, or it is usual to do so, is unseaworthiness. It is one which has not been clearly settled. Except perhaps in the case where by Statute a pilot must be taken, it is submitted the failure to take a pilot, unless at the commencement of the risk, is not unseaworthiness but negligence (*Thomson*, 1823, 3 Mur. 294; 1826, 4 S. 670; Arnould, 6th ed., pp. 677 *et seq.*).

Implied warranties may in general be modified or waived by bargain. In particular the warranty of seaworthiness may be dispensed with or modified. It is not uncommon to limit the warranty so as not to free the insurer if there are latent defects in the ship. If the policy clearly contemplates an adventure which implies that the ship cannot be in all respects fit to encounter the perils insured, the warranty will be held modified accordingly (*Burges*, 33 L. J. Q. B. 17). The right to waive or modify the warranty is illustrated by the fact that in a time policy, as has already been stated, there is no implied warranty of seaworthiness (*Dudgeon,' ut supra*). In a policy on goods or other moveables there is no implied warranty that they are seaworthy, nor does the warranty extend to craft in which the goods may happen to be, although the insurers cover the goods when in such craft (*Lane*, L. R. 1 C. P. 412). The burden of proving unseaworthiness is on the insurer (*Pickup*, 3 Q. B. D. 594), though, as in other cases, the burden may be shifted by the real evidence of the case.

Legality, etc.—There is an implied warranty that the adventure insured is a lawful one, and that so far as the assured can control the matter the adventure shall be carried out in a lawful manner. Of course it is a principle applicable to all contracts that they must not be in breach of the law. In marine insurance contracts interesting questions arise as to legality in connection with private international law relating to war, neutrality, and aliens, but reference must be made to text writers so far as these matters are not dealt with under separate articles. There is no implied warranty as to the *nationality* of a ship, or that her nationality shall not be changed during the risk (*Dent*, L. R. 4 Q. B. 414). But in a Scotch case it was held undue concealment not to disclose that a British ship was having her

flag changed in order to avoid the requirements of the Merchant Shipping Acts (*Hutchinson & Co., ut supra*).

Deviation—Abandonment or Change of Voyage insured.—This subject has already been treated of (see DEVIATION), and it is not proposed to repeat at length what has been said, or to quote of new the authorities. But the general rules will be shortly stated.

When the assured abandons the adventure insured, the contract is put an end to, as, *e.g.*, if before the commencement of the risk the destination of the ship is changed from that contemplated in a voyage policy, or the ship does not sail from the port of departure so contemplated. The same result follows after the commencement of the risk (*Newbigging*, 1 Sh. App. 117). The voyage is deemed to be changed *as soon as the election to change is made*, and the insurer may avoid the contract as from the date of election. It is therefore immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs (*Simon Israel & Co., e.g.*, [1893] 1 Q. B. 303). In the case of a voyage policy the adventure must be prosecuted throughout its course with reasonable despatch; and if without lawful cause it is not so prosecuted, the insurer may avoid the policy as from the time when the delay became unreasonable. A ship must not deviate from the voyage contemplated, or else the insurer may avoid the policy *as from the time of deviation*, and it is immaterial that the ship may have regained her route before a loss occurs. In the case of deviation it is now very common to provide that notwithstanding deviation the ship is to be held covered at a premium to be arranged. Sometimes the assured are taken bound to give prompt notice. There is a deviation when the ship does not proceed on the course of the voyage specifically designated in the policy, or, where there is no specification, on the usual course, or, in the absence of usage, when *with the privity of the assured* the ship departs from the course which a prudent master navigating the ship in a seamanlike manner would take. When several ports of discharge are specified, the ship may proceed to all or any of them, and the omission to proceed to one or more is not a deviation, but in the absence of usage or sufficient cause to the contrary she must proceed to such of the ports as she elects to go to in their specified, and failing specification their geographical order. Deviation or delay in prosecuting the voyage is excused when caused by circumstances beyond the control of the master and his employer; when reasonably necessary to comply with any warranty or for the safety of the adventure, whether the danger apprehended be a peril insured against or not; for the purpose of saving human life or aiding a ship in distress when human life may be in danger; but not for the purpose of saving property. It is also excused if due to the wrongous and barratrous conduct of the master or crew, if barratry be one of the perils insured against. A deviation or delay is justified where authorised expressly or in general terms by the policy. But the licence in the ordinary form of policy does not authorise a deviation from the usual course of voyage, and, as has been pointed out in the article on DEVIATION, a very wide authority to deviate will not entitle a ship to practically go outside the voyage insured altogether. (See for a very recent illustration of this rule, *The Dunbeth*, [1897] P. 133.) When the cause excusing or justifying deviation or delay ceases to operate, the ship must resume her course and prosecute her voyage with reasonable despatch.

Express warranties may be in any form of words from which the intention to warrant can be inferred, but must be part of the bargain

contained in, or incorporated by reference into the policy. An express warranty does not exclude an implied warranty, unless it be inconsistent therewith (*Quebec Marine Insurance Co., ut supra*). As these warranties depend on bargain, they are of the most varied kind. The assured may warrant that he will take a certain portion of the risk by to that extent remaining uninsured (*General Ins. Co. of Trieste*, [1897] 1 Q. B. 335: *Muirhead*, [1894] App. Ca. 72); that the ship shall sail by a named date (*Bond*, 2 Cowp. 601; *Bouillon*, 33 L. J. C. P. 37; *Sea Insurance Co.*, 3 Com. Cas. 1); or was "well" or "in good safety" on a particular day, in which latter case it is sufficient if she be safe at any time during the day (*Blackhurst*, 3 T. R. 360); or that the ship shall not be in particular waters either between given dates, or, it may be, at all (*Birrell, ut supra*). Then there are conditions which, as already explained, are not warranties proper, but conditions limiting the insurer's liability, *e.g.* the assured warrants that the ship shall be free from capture. (See for a full treatment of the express warranties commonly bargained for, M'Arthur, pp. 301 *et seq.*) The words will in all cases be construed to give fair effect to the bargain, and where necessary the express warranty will carry with it implied conditions to give reasonable effect to it, but such implications will not be easily inferred.

Where a ship is expressly warranted "neutral," she must be neutral at the commencement of the risk, and so far as the assured can control the matter, must continue neutral during the risk. She must also so far as the assured can control the matter be properly documented, that is, must carry the necessary papers to establish her neutrality, and the assured must not falsify or suppress his papers, or use simulated papers. When goods or other moveables are warranted neutral, there is an implied condition that they shall be neutral owned throughout the risk and properly documented, and that so far as the assured can control the matter the ship shall continue neutral throughout the risk. As regards documents, it is submitted it is part of the implied warranty of seaworthiness that a ship shall carry all usual documents reasonably necessary to her safety (see *Trinder, Anderson, & Co., ut supra*).

Commencement of Risk.—In the case of time policies, this is settled by the date from which the policy runs. The rules under voyage policies require fuller statement. When the subject-matter is insured "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and so that the risk shall not be materially varied, otherwise the insurer may avoid the contract (*De Wolf*, L. R. 9 Q. B. 451). *A fortiori*, the contract may be voided by such delay as is evidence of an abandonment of the voyage insured. The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or that he agreed to the delay. In an insurance "from" a particular place the risk does not attach until the ship starts on the voyage insured. The start must be *bonâ fide*, but once the ship has broken ground in order to proceed on the voyage the risk has begun. In the case of an express warranty to sail from a port by a given date the vessel must be outside the port by the date (*Moir*, 4 Camp. 84). Where a ship is insured "at and from" a place, either a port, or it may be a district, and the ship is at the place in good safety when the contract is concluded, the risk attaches immediately (*Palmer*, 8 Bing. 79). If she is not there at the time, the risk attaches as soon as she arrives, provided she is in a state to lie in reasonable safety (*Parmeter*, 2 Camp. 235; *Bell*,

2 Camp. 475), and, unless the policy otherwise provides, that whether or not she is covered by another policy for a time after arrival. Where, however, a ship was insured by a "port" policy while "at L.," and by another policy from L., it was held she ceased to be covered by the former policy the moment she broke ground to sail on her outward voyage, though still within L. when a loss occurred (*Hunting & Son*, 1 Com. Cas. 120). The rules with regard to the insurance of chartered freight are the same as those applicable to ship.

When freight other than chartered freight is insured "at and from" a particular place the risk attaches *pro rata* as the goods are shipped, but if there be cargo in readiness which belongs to the shipowner, or if some other person has agreed with him to ship cargo, the risk attaches as soon as the ship is ready to receive such cargo.

When goods or other moveables are insured "from the loading thereof" the risk does not attach until the goods are on board, and the insurer is not liable for them while in transit from the shore to the ship unless the policy so provides.

In this, as in other cases, under the contract the parties are at liberty to make such arrangements as they see fit within the limits of legality, and their bargain will be given effect to. The risk may be bargained to begin only on a particular date (*Sea Insurance Co., ut sup.*); and as has been incidentally seen, the insurers frequently cover the risk of preliminary transits, of storage, of transit from shore to ship of goods, the risk of chartered freight, long before the ship reaches her port of loading, etc. In these cases the real question at issue is often one already considered, viz. the insurable interest of the assured.

Sometimes to avoid double insurance where a ship is being covered inwards and outwards, the risk on the latter policy is declared to commence only when that on the former ceases. A ship insured to the port of Greenock and at it for thirty days after arrival, having started during the thirty days to leave the port was damaged, and the question arose was she at the time of damage still in port (*Hunter*, 13 A. C. 717). It was there held that a port in mercantile contracts is not necessarily extended or restricted to the custom-house or legal limits of the particular port, but is the port as understood by mercantile and seafaring men. Where the policy gives, as it often does, a general description of various ports or places at which the risk may commence or end in the ship's option, what is within the description is to be gathered in the same way. In the absence of usage the ordinary meaning will be given to the terms used. (See for a recent example, *Croeker and Others*, 3 Com. Cas. 22.)

Termination of Risk.—In all policies the risk ceases in ordinary cases in accordance with the bargain made—in the printed form as regards the ship after she has been moored at anchor in the port of destination for twenty-four hours in good safety, and as regards goods until the same be discharged and safely landed. In the latter case they must be landed in the customary manner and within a reasonable time after arrival, and if they are not so landed, the risk ceases. What answers to the term "good safety" has been the subject of more than one decision (see, *e.g.*, *Lidgett, ut supra*). In time policies the risk may cease on one policy when the ship is at sea in the course of a voyage, and that on another policy commence. In cases where the ship sails on a voyage and is never afterwards heard of, it is a question of fact at what time the ship is to be deemed lost, depending on the whole circumstances and presumptions of the case (*Reid and Others*, 2 T. L. R. 807). It is possible to imagine that the assured might in such a case be unable to prove against either set of insurers, but the latter generally

arrange as to the liability, while it is not uncommon in time policies to provide—in cases of twelve months' policies an illegal provision—that the ship is to be covered until her arrival in port, after the specified time runs out.

Perils insured against.—These depend on the will of the parties as expressed in the policy. But in the first instance it is proposed to deal with those enumerated in the form.

Perils of the Seas.—"All perils, losses, and misfortunes of a marine character or of a character incident to a ship as such" has been suggested as a definition of perils of the sea (*Thames and Mersey, etc., Co.*, 12 A. C. 484, per Ld. Bramwell). In a question under a charter, an incursion of sea water into a ship due to the action of rats, without negligence on the part of the ship, was held a peril of the sea (*Hamilton, Fraser, & Co.*, 12 A. C. 518; see also *The Thrunscoe*, 13 T. L. R. 566). A collision with another ship or other object (*Thos. Wilson, Sons, & Co., ut supra*) is within the words. The admission of water into a ship through a stopcock left open by the negligence of the engineer was held in a policy on goods either a peril of the sea or covered by the general words at the end to be hereafter noticed (*Davidson*, L. R. 4 C. P. 117). Claims for damages by collision against an insured ship for damage done by the negligence of those in charge of her are not within the ordinary terms of the policy, but are covered by a special clause (See COLLISION). So damage by the insured ship to a pier or other such object is neither covered by the ordinary policy nor by the collision clause, but is usually insured with Protection Clubs. Reference may be made to the illustrations of risks within or beyond the policy given when dealing with the doctrine of *proxima causa*. The terms of the policy, speaking generally, will cover all fortuitous accidents or casualties of the seas whereby the subject-matter insured is damaged. But it will not include the ordinary action of the wind or waves. It covers risks which *may*, not those which must happen. In a recent case where a steamer insured by a time policy sailed with an insufficient supply of bunker coal, and in consequence, and from, it was held, no special action of the wind or seas, had to accept aid from another ship and to pay her salvage, this was held not to be a loss by a peril of the sea (*Ballantyne, ut supra*). It has been held that a claim which shipowners had to pay in respect of salvage of life under the Merchant Shipping Act, 1894, s. 544, is not a peril insured against under the ordinary form of policy (*Nourse*, [1896] 2 Q. B. 16). There is of course no doubt that sums which the insured have to pay for the salvage of the subject-matter insured *from perils insured against* form a claim on the insurer. But it has been held that the claim on this head is one in respect of loss by perils insured against (*Aitchison*, L. R. 4 A. C. 755); and not one for charges under the suing and labouring clause. The soundness of the judgment of the House of Lords on this latter point has been strongly assailed (Arnould, 6th ed., pp. 793 *et seq.*), but it must be taken to be law. The question of salvage generally will be treated of under its proper heading in this work. (See SALVAGE.)

Men-of-war.—Enemies—Letters of Mart and Countermart—Surprisals—Takings at Sea—Arrests, Restraints, and Detainments of all Kings, Princes, and People of what Nation, Condition, or Quality soever.—These are mainly war risks, which, during the great wars, were of the utmost importance, but have received relatively little illustration of late years. Capture is the typical example of a loss by men-of-war, etc. In connection with the risks there were various express warranties—"Warranted to sail with convoy," *e.g.* Where the assured warranted the ship from capture and seizure, and the master having barratrously engaged in a smuggling

adventure, the ship was seized, it was held, though barratry was one of the perils insured against, and there was a loss by barratry, the warranty freed the insurers, as capture or seizure was the proximate cause of the loss (*Cory*, 8 App. Ca. 393; see also *Johnston*, L. R. 10 Q. B. D. 432). Insurers will not be liable for loss by perils insured where the assured at the time of the insurance are alien enemies, or become so after the insurance is effected. In the one case it is illegal to enter on the contract. In the other, once the war breaks out, the policy becomes void. Reference must be made to text writers for a full examination of this subject (Arnould, 6th ed., pp. 131 *et seq.*).

Arrests, restraints, and detainments are distinguished from the war risks proper by this, that there is supposed in the case of an arrest to be an intention to restore the property some time or other to the assured, or to make compensation. The acts are not generally acts of an enemy of the country of the assured, but in connection, it may be, with hostilities against another country. One example is a case where the subject-matter insured was detained in Paris because of the siege, and this was held a loss within the policy which covered land transit (*Rodocanachi*, L. R. 8 C. P. 649), though it was argued that it was within the principle applied to a ship turned away from her port of destination, to be immediately noticed. An embargo by which a government interdicts ships from sailing from a particular port is the ordinary example of a peril insured against by arrests and restraints of princes, rulers, and people. The terms used refer to political or executive acts of the government, and do not include a loss caused by riot or by ordinary judicial process. Contraband of war was being carried to Yokohama under a bill of lading, by which "restraints of princes" were excepted. The ship was at Hong-Kong when war was declared between China and Japan. It was well known she had contraband for Yokohama on board, and Chinese men-of-war were about. The master discharged the contraband at Hong-Kong, and it was held by Mr. Justice Mathew he was prevented delivering the goods by the excepted peril (*Nobel's Explosives Co.*, [1896] L. R. 2 Q. B. 326). It has, however, been held *in this country* that the risks insured do not cover a ship, because of blockade or of reasonable fear of capture, failing to reach her port of destination, and there being in consequence a loss on, *e.g.*, goods insured or of frieght.

Fire.—This term does not cover a fire caused by the inherent vice of the subject-matter insured. It includes fire voluntarily caused to avoid capture by an enemy. There has been keen litigation over the question whether or not an explosion of machinery was covered by the ordinary policy, either by this term or by the general words at the end of the enumeration. It has now been finally held that such damage is not covered by the ordinary policy (*Thames and Mersey, etc., Co. Ld.*, 12 A. C. 484). In this case the damage was to a donkey pump air-chamber which burst. In a previous case there was an explosion of steam which did serious damage, and this was held either within the term "fire" or the general words, but it must now be held overruled (*West India and Panama Telegraph Co.*, 6 Q. B. D. 51).

Pirates—Rovers.—It has been said perils from pirates are covered by perils of the seas. This is true also of others of the enumerated risks. The same peril may fall under more than one of those specified. Risk from pirates includes mutiny of passengers, and loss from rioters from shore.

Thieves.—It is said there must be something of violence in the theft to bring it within the cover of the insurance, and so thieves does not include, without special words, theft by either passengers or crew, such theft being

of a character preventible by due care, and of so ordinary a kind as not to be insured (*Taylor and Others*, L. R. 9 Q. B. 546). Where the words used were "thieves of whatever kind, whether on board or not, or by land or sea," this was held not to exempt a shipowner from liability for theft by stevedores' men employed by him, but this decision, in part, at least, proceeded on the fact that it was the contract of affreightment which was under consideration (*Steinman & Co.*, [1891] 1 Q. B. 619).

Jettison.—This is a peril of the sea, or within the general words, though specially enumerated. It has been dealt with under the head of General Average (see AVERAGE).

Barratry of the master and mariners. This also has been treated of under its special head (see BARRATRY). It has recently been held that, when a mortgagee was insured, he could recover for loss due to the barratry of the master who was also owner, having taken part in his appointment (*Small*, [1897] 2 Q. B. 311). Where a charterer is not the employer of the master, and the act alleged to be barratrous is done with the privity of the shipowners, the loss due to the fraud of the master is not barratry (see *Hobbs*, 3 Camp. 93). It is otherwise if the charterer is to be deemed *pro hac vice* owner, and the master's employer.

All other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the subject-matter insured.

Wide as are those general words, they are restricted to losses *ejusdem generis* with some one of these which have gone before. They "cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes" (per Ld. Ellenborough, *Cullen*, 5 M. & S. 461). Their application has been illustrated once or twice already in dealing with the particular perils. One or two more illustrations may be given. In *Cullen's* case a British ship and goods were sunk by another British ship firing upon the ship insured by mistake for an enemy. The loss was held within the general words. So where dollars were thrown overboard to avoid capture by the enemy (*Butler*, 3 B. & Ald. 398). The same was held with respect to a ship in a graving dock, which by the violence of the wind was thrown over on her side and injured by striking the ground (*Phillips*, 5 B. & Ald. 161; *Napier*, 4 S. 19). Loss of freight due to coals having so heated as, though not on fire, to require to be discharged and sold at an intermediate port, has been held covered either by the risk of fire or the general words (*The Knight of S. Michael, ut supra*). See on the whole subject, *Thames and Mersey, etc., Co.*, 12 A. C. 484).

As has been said, and as has more than once been incidentally seen, the risks actually undertaken by the insurers may widely differ from those that have now been referred to. In each case what the risks are depend on the terms of the policy. To meet such cases as the *Inchmaree*, the dangers and accidents incident to steam navigation are frequently expressly covered; to meet the *Glenfruin*, the warranty of seaworthiness may be waived *quoad* latent defects. In other cases the insurers free themselves from special risk.

One class of risk, that of live stock, may be specially referred to. In these cases, under the ordinary policy nice questions have arisen whether or not the loss is to be held proximately due to perils insured against or to natural causes, though indirectly brought about by the course of events in transit (see *Laurence*, 5 B. & Ald. 107; *Gabay*, 3 B. & C. 793). Sometimes, to avoid such questions, special bargains are made enlarging or restricting the insurer's obligations. In a recent case "all risks" were insured, and the insurers were held liable under the suing and labouring clause for extra fodder supplied because of the protracted character of the

voyage (*The Pomeranian*, [1895] P. 349)—a case which stands out in contrast to the ordinary rule that the shipowner or other assured is allowed no claim in respect of extra expense or loss because of detention or delay on the voyage due to perils insured, *e.g.* for wages or keep of crew, or by way of demurrage; or for injury to perishable goods. Meat shipped at Hamburg for London was delayed on the voyage by tempestuous weather, and solely thereby became putrid. The loss was held uncovered (*Taylor*, L. R. 4 C. P. 206). So also the loss due to the fact that full freight has to be paid on goods which arrive *in specie* at their destination, however damaged, is in no way one covered by the ordinary policy as to be brought into calculation with insurers (*Farnworth*, *ut supra*).

Another special risk which in practice always forms the subject of agreement with insurers are claims against a shipowner in respect of collision between his ship and another. The subject has already been dealt with (see Collisions). The word "collision," as used in a policy, includes collision between a ship and another ship temporarily sunk (*Chandler*, 3 Com. Cas. 18).

Losses due to perils insured may be either total or partial.

Total loss includes both actual and constructive total loss; and unless a different intention appears from the terms of the policy, an insurance against total loss only includes a constructive total loss. A ship founders at sea, and ship and cargo are lost, or having sailed, the ship is never heard of again. In such cases there is no room for doubt,—the loss is an actual total loss. But if the ship is wrecked and so irreparably damaged that she has ceased to be a ship, and is only what has been called a "congeries of planks," or if the cargo, in like manner *from perils insured*, has ceased to answer to the denomination under which it was assured, *e.g.* hides which have putrified (*Roux*, 3 Bing. N. C. 266), there is an actual total loss, which needs no notice of abandonment. The assured recover for a total loss, of course crediting any sum they may receive for the salvage, or accounting for it to the insurers. It is said the same result follows when goods are so damaged that they cannot reach the port of discharge in a state to answer to the denomination under which they are insured. In most cases the question may be of no practical importance, as immediate sale may be the only course to follow. But cases can be figured where goods which cannot be forwarded so as to keep their denomination may so answer to their denomination at the place they are as to make the loss, if total at all, only a constructive total loss. Improved means of communication certainly affect the question of actual or constructive total loss, and render it proper to give notice of abandonment in all cases when the subject-matter assured is of some value and the question of total or partial loss of practical importance. If before notice can be given a justifiable sale takes place, that is, a sale which was necessary, then the want of notice will not affect the question whether or not there has been total loss. No notice need be given if there is in point of fact at the time when notice falls to be given nothing to abandon (*Rankin*, L. R. 6 English and Irish Appeal Cases, 83).

Capture of, or an embargo for an indefinite period on, a ship, are cases of constructive total loss. In the case of damage to ship—including such a case as stranding—the test is, What would a prudent uninsured owner do? Would he sell her as she lies, because the expense to which he would be put in making her fit for use as a ship would exceed, or probably exceed, her value when so fit? If yes, there is a constructive total loss, and the owner can abandon. But the whole circumstances must be reasonably taken into account. The fact, *e.g.*, that cargo will pay part of the expense by way of general average (*Kemp*, L. R. 1 Q. B. 520). A ship stranded on

a sandy beach on the Indian coast very shortly before the monsoon burst. It was at the moment in a high degree probable she would be broken up by the force of the monsoon, but nothing could be reasonably done until the effect of the monsoon was seen. The owner abandoned. Thereafter the monsoon burst without injuring the ship, which was got off comparatively little damaged. It was held that as a prudent uninsured owner would have waited to see what happened when the monsoon broke, the abandonment was premature (*Shepherd*, 9 R. H. L. 1, 7 App. Ca. 49). In the case of freight there will be a constructive total loss if there is a loss of ship, but a possibility of forwarding the goods to their destination by another ship. There is a total loss of freight in the case of a total loss of the goods on which the freight is being earned.

In all cases of constructive total loss the principle is substantially the same. With goods or subjects of insurance other than ship, the test is said to be whether or not the subject-matter is so damaged or affected by a peril insured against that, having regard to cost, it is not reasonable *to require the adventure to be prosecuted to its termination*; that is, that a prudent uninsured owner would not so prosecute it. The fact that goods which reach their destination have, by perils insured, got mixed with others so that it is impossible to say which particular goods are the property of the assured, will not make the case one of total loss (*Spence*, L. R. 3 C. P. 427). There can only be a total loss of goods which have reached their destination if they have ceased to answer to their denomination (see *Asfar*, *ut supra*; *Francis*, 1 Com. Cas. 217).

Where there is a constructive total loss, the assured may either treat it as a total or a partial loss. In the former case he must make his election within a reasonable time, and must give notice of abandonment.

Assuming that the notice of abandonment is not given timeously, but that thereafter the state of matters change substantially for the worse, it is submitted that the assured can of new elect to treat the case as one of total loss, and recover by giving notice of abandonment (*Stringer*, L. R. 5 Q. B. 599). If the loss becomes an actual total loss he certainly can claim a total loss (*Cossman*, 13 A. C. 160). The policy may, and sometimes does, make special bargains on this matter of total loss and the test to be applied so as to modify the ordinary rules. In a recent case where "profit on freight" was insured by a policy which was warranted free from average, the loss of part of the freight, causing a loss of the profit on freight to the assured, was held a total loss within the policy, though this would not have been so had the insurance been on freight *per se* (*Asfar*, *ut supra*). It was argued that in the case of profits on goods insured there must be a total loss of all the goods to make a total loss of profits on them, but it is submitted that after *Asfar's* case the terms of the insurance in each case should be looked at. (See also *Smith & Scaramanga*, 3 Com. Cas. 75.)

However much there may in one sense have been a total loss to the assured, it is no loss under the contract, unless due to perils insured. Goods greatly damaged have to pay full freight, but this is not an item which can be considered in calculating the question of total loss, though all reasonable expenses of conditioning damaged goods, and extra freight and charges if the goods have to be transhipped in order to be forwarded, must be brought into the calculation (*Farnworth*, L. R. 2 C. P. 204). So there is no actual total loss of freight by the perils insured if the goods reach their destination and the freight is earned. There is no loss at all of freight if the voyage has, *e.g.*, not been completed because the master, acting reasonably, has sold the cargo damaged by perils insured against, although

it could have been brought forward *in specie* to its destination. The loss is due to the master's act. So if the master, not being able to reach the port of destination because of blockade, brings the voyage to an end elsewhere, and loses his freight. These are illustrations only of a law already examined in other connections, and of course applicable here. The subject of Abandonment and Notice of Abandonment has already been treated of (see ABANDONMENT), but as in the case of DEVIATION, the general rules will be shortly stated under reference to that article. Notice of abandonment may be given verbally, or in writing, and in any terms which sufficiently indicate the assured's intention to abandon the subject-matter insured unconditionally to the insurers. The notice must be given promptly; but when the information before the assured is of a doubtful or vague character, he is entitled to reasonable time for inquiry and verification before he gives notice. The notice, once given, cannot be withdrawn without the insurers' consent. Once accepted, the insurers are held to have admitted the loss and the sufficiency of the notice of abandonment. The acceptance may be either express, or implied from acts, *e.g.* by dealing with the ship as their own. But where the insurers salved the ship, *giving intimation that their operations were without prejudice to their declinature of the abandonment,* this was held not to be acceptance (*Shepherd, ut supra,* and cases there dealt with). Notice of abandonment may be waived by the insurers. Since the article on ABANDONMENT was published, it has been decided that in Scotland, as in England, if there is any material change in the state of matters between the time of notice of abandonment and that of action brought which affects the validity of the notice, it is the state of matters at the latter date which determines the question (*The Sailing Ship Blairmore Co.*, 34 S. L. R. 678). This case has been heard on appeal in the House of Lords, and judgment reserved. It has also been decided that where a ship was captured, and notice of abandonment given, and action brought, but after the action had been raised, the ship was restored, the assured could nevertheless recover for a total loss (*Ruys*, [1897] 2 Q. B. 135). The effect of abandonment in vesting the property in the insurers will be considered *infra* when dealing with the subrogation of the insurers to the rights of the assured generally.

A *partial loss* may be either a particular average or a general average loss. As we have seen, a partial loss, in the option of an assured, may in certain cases be a constructive total loss, and a partial loss may be 100 per cent. of the sum insured, indeed it may exceed this (see, *e.g.*, *Aitchison, ut supra*). But of course the insurers are in no case liable for more than 100 per cent., and their proportion of suing and labouring charges, so far as damage at one time from perils insured against is concerned. A particular average loss is a loss caused by a peril insured against which is not a general average loss and which falls exclusively on the assured, giving him no right of contribution against other persons who may be interested in the common marine adventure. A sum payable for salvage proper is recoverable in the same way as a particular average loss (see *Aitchison, ut supra*).

The subject of General Average has been dealt with in the article on the subject (see AVERAGE). Since the date of that article the Privy Council have held that though average may fall to be adjusted at the port of discharge, and though shipowners are bound to use reasonable diligence to have the adjustment timeously carried through, they are under no absolute obligation to employ an adjuster at all, and therefore under none to employ one at the port of discharge (*Wavertree Ship Co.*, [1897] A. C. 373). Where a ship on fire was scuttled by the port authorities, with the

master standing by, but deeming the course taken that best for all concerned, this was held a case for general average contribution (*Papayanni*, [1896] 1 Com. Cas. 448). Where a ship had to put back for repairs and got icebound, the expense of breaking up the ice to get the ship out was held not the subject of general average contribution (*Westoll*, 14 T. L. R. 281).

Memorandum Clause.—By this clause, as printed in the form, certain perishable goods are warranted free from particular average, certain other goods free from average under five per cent., and all other goods, also ship and freight, free from average under three per cent. in each case, unless general or the ship be stranded.

In the cases where special goods are enumerated as free from average under a certain percentage, there must be a sufficient percentage damaged of each species. Thus, if there is a cargo composed partly of sugar and partly of flax, and the sugar is damaged over, but the flax under, five per cent., there is a claim in the one case, and not in the other. But where the cargo is not made up of enumerated articles, different species can be dealt with in whole, so that the percentage can be averaged over all. The meaning of the words corn, etc., is that given to them by usage. (See M'Arthur for a full treatment of the Memorandum Clause.) The warranty from average differs according to the bargain. Sometimes the insurance is against total loss only. Very commonly a particular average claim is allowed not only when the ship is stranded, but when she is sunk, burnt, or in collision. Where there is a warranty from particular average, the assured cannot recover for a total loss of part, unless the contract is that the insurance is to be apportionable. Separate valuations of parts imply apportionment (*Ralli*, 6 E. & B. 482). Loss of part of the master's effects insured entitles him to recover, notwithstanding the warranty (*Duff*, 3 C. B. N. S. 16). Agreement or usage may make the contract apportionable. The warranty does not interfere with the recovery of salvage charges, though, as we have seen, these are not general average, or of particular charges and expenses reasonably incurred under the suing and labouring clause *in order to avert a loss insured against.*

Under the ordinary clause, a general average loss or liability cannot be added to a particular average loss to make up the three per cent. or five per cent. specified (*Price*, 22 Q. B. D. 580). But in the case of a voyage policy successive losses may be added, and in the case of a time policy so may successive losses on the same voyage, but not those on different voyages (*Stewart*, 16 Q. B. D. 619).

Salvage charges and particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded from the calculations as to the specified percentage. Particular charges are charges incurred on a special part of the adventure to lessen damage or to avert a peril insured. But conditioning charges and other expenses incurred at the port of destination which diminish the loss to an extent exceeding the charges and expenses may be added to the loss eventually ascertained. Of course this means that the loss would have been within the insurance but for these expenses, and therefore it is not fair to ignore them. In truth the goods are just so much damaged by the perils insured because these expenses have to be incurred.

A ship is *stranded* which takes the ground out of the ordinary course and remains fast, though it may be only for a very short time. It is not a stranding for a ship to take the ground in the ordinary way in a tidal river where ships at states of tide do this. Nor is it a stranding if the ship is not pulled up for any appreciable time, but just touches the ground and goes on (*M'Dougle*, 4 Camp. 283). If, on the other hand, there was no

reason to anticipate that the ship should ground where she did, or if she grounds in an extraordinary way, and if she remain fast for even a few minutes, this is a stranding (see *Baker*, 1 Stark. 436; *De Mattos*, L. R. 7 C. P. 570). The effect of a stranding is to let in claims for particular average, though the loss is unconnected with the stranding, provided the goods, in the case of a policy on goods, were on board the ship at the time of the stranding (*Alsace Lorraine*, [1893] P. 209; *Thames and Mersey, etc., Co.*, [1893] 1 Q. B. 476). In the case of a ship and of a policy on time the particular average must be in the course of the voyage in which the stranding takes place. Special clauses are often introduced into policies on time dealing with what a voyage is to mean, or it may be excluding all particular average under three per cent.

The words "unless the ship be sunk, burnt, or in collision" have no technical meaning, and it is a question of fact whether or not the ship has been sunk, burnt, or in collision, as the case may be. A ship is not "burnt" merely because some part of her happen to go on fire, *e.g.* a part of the cross bunkers (*The Glenlivet*, [1894] P. 48).

Cumulative Losses.—Under the ordinary policy the insurers are liable for successive losses, though the total amount of such losses may exceed the sum insured. Thus they are liable, after having made good a partial loss of say thirty per cent., to pay in full a total loss. Where, however, under the *same policy* a partial loss which has not been repaired or made good, and in respect of which the assured is not under obligation which will involve him in loss under it, is followed by a total loss, the insurers are only liable for the total loss, *e.g.* the insurers would not be liable for the cost of repairing a ship partially damaged which had been totally lost before anything was done to make good the damage; but they would be liable for a general average expenditure, which the assured had still to pay notwithstanding the total loss. If, however, the partial loss is claimable under one policy, and the total under another, both can be recovered (*Lidgett, ut supra; Woodside, ut supra*).

Suing and Labouring Clause.—It is the duty of the assured and his agents in all cases to take reasonable measures for the purpose of averting or minimising a loss, and they cannot recover for damage so far as it has been aggravated by want of care in these respects. The ordinary policy contains a suing and labouring clause which is deemed to be supplementary to the contract of insurance, and under it the insured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss or that the insurance may be warranted free from particular average either generally or under a specified percentage. But the expenses must be incurred to avert a loss covered by the policy. Expenses to diminish a partial loss, which there is no reason to think could become a total loss, will not be recoverable under a policy which covers total loss only. Reference may be made to an elaborate judgment of Mr. Justice Willes on the scope and effect of the clause (*Kidston*, L. R. 1 C. P. 535, 2 C. P. 357; see also *Aitchison, ut supra*). General average and salvage charges *proper* are not expenses within the clause, but if the salvage services are rendered on an agreement as to remuneration and on the employment of the assured or his agents, they may, it is submitted, be expenses under the clause (see *Aitchison, ut supra*). The cost of litigation in regard to salvage falls to be distributed among ship, freight, and cargo in proportion to contributing values (*Hick*, 1 Com. Cas. 244).

Adjustment of Losses.—This subject has been separately treated of (see ADJUSTMENT). Where a ship sustains a particular average loss which is followed by a general average sacrifice making her a constructive total loss,

the amount to be made good to the ship in general average is the difference between her sound value and the cost of repairing the particular damage less the amount realised by her sale as a total loss. In such a case no deduction of one-third for new for old should be made (*Henderson*, [1896] 1 Q. B. 525). A recent case on the subject of adjustment of a particular average loss on goods is *Francis* (1 Com. Cas. 217), which deals with the mode of adjustment in the case of damaged goods which have been conditioned. In another case it has been held that dock dues fall to be apportioned between insurers and shipowners where work is done on the ship in dock both to repair the damage from perils insured and also for other purposes for which docking is necessary (*Ruabon S. S. Co.*, [1897] 2 Q. B. 456, 14 T. L. R. 330, following *The Marine Insurance Co.*, 11 A. C. 573).

Subrogation of Insurers in rights of Assured.—The fact that the contract of marine insurance is primarily one of indemnity is brought perhaps most prominently under notice in this connection (see *Castellain*, 11 Q. B. D. 380, for a full exposition of the subject). In the case of constructive total loss the right has a special importance, because before the assured can claim a total as distinguished from a partial loss he has to give timeous notice that he vests the subject-matter of the insurance in the insurer, but the right, in substance, is the same in all cases. In cases of partial loss, though the assured remains vested in the property the insurers get the benefit of every right which the assured has by which the loss can be lessened to the extent of their interest, *e.g.* in the case of a general average sacrifice, say, of part of the ship, the insurers get the benefit of the assured's right to contribution. So in the case of actual total loss the salvage vests in the insurer on payment by him, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of the subject-matter assured as from the time of the casualty causing the loss. Exactly the same result follows in the case of constructive total loss once the abandonment is accepted or determined to be good. In all cases the insurers to the extent of their interest are subrogated in the rights of their assured so as to give them relief, and they may use all the remedies which the assured can use in order that they may recover from anyone liable to the assured the sum which they have paid. They are, in short, in the same position as a surety (*Darrell*, 5 Q. B. D. 560). Some illustrations will serve to make clear the principles. In the case of loss of goods where there is a claim under the contract of carriage against the shipowner the insurer can have this claim enforced in his interest. In the case of collision the insurer of ship or goods can claim the benefit of the remedy against the wrong-doing ship. In one case a ship was insured for £6000 and *valued at that sum*. Through the fault of another ship she became a total loss. The insurers paid the £6000. In the action against the wrong-doing ship, though £9000 was held to be the true value of the ship the insurers were held entitled to the *whole* sum recovered (*North of England Insurance Association*, L. R. 5 Q. B. 244). The soundness of this judgment has been challenged, but it has not been overruled (see *Burnand*, 7 A. C. 333). There can be no doubt the rule so applied may place the assured in an awkward position where the subject-matter has been insured under two policies at different valuations, but the remedy may in some cases be found in claiming only a partial loss. Separate valuations require in all cases careful consideration. Another apparently hard case for the assured is where the ship, though a constructive total loss, earns the freight by reaching her destination after the casualty and delivering the goods. In such a case the insurers can claim the freight which has been earned (*Stewart*, 2 H. of L.

Cases 159; *Cory, ut supra*). On the other hand, the assured cannot claim from the freight insurers, for the freight having been earned there is no loss of freight, at least none proximately due to perils insured (*Sc. Mar. Ins. Co.*, 1 Macq. H. L. 334); but the hull insurers cannot claim the freight if it is earned by means of transhipping the goods into another ship and carrying them on to their destination, nor can they claim the damages for loss of freight awarded to the shipowner, *e.g.* in case of collision (*Sea Ins. Co.*, L. R. 13 Q. B. D. 706). It is held the contract of affreightment is personal to the shipowner, and does not pass by the abandonment, and the hardship is thus so far limited. It is only if the ship herself earn the freight the insurers get it, because it is their property which has completed the work upon completion of which alone freight is due. In such a case the insurers are only liable for disbursements necessary to earn the freight incurred after the date of the casualty, but they cannot claim prepaid freight (*The Red Sea*, [1896] P. 20). If the ship is carrying goods of the shipowner, the insurers can claim a *quantum meruit* remuneration for the carriage of the goods as from the time the casualty happened till their delivery, but not full freight (*Miller*, 27 L. J. Q. B. 120). The subrogation extends to benefits received by the assured in a sense voluntarily, if with a view to lessen the loss, *e.g.* an allowance made by Government (*Randal*, 1 Ves. Sen. 98), but the insurers cannot claim a gift to the assured made clearly to benefit him beyond the indemnity given by the insurers, and not to diminish the loss they have made good (*Burnand*, 7 A. C. 333). The Scotch case of *Whitworth* (12 R. 204) may be referred to as showing how the rights of insurers and assured were worked out in a case where the insurer of a portion of the risk accepted abandonment, but the case ultimately was dealt with as regards the bulk of the insurers as one of partial loss, and the assured disregarded the rights of the insurers who had accepted abandonment in that part of the ship which their insurance was proportionate to. The insurers cannot claim to rank on the fund paid into Court by a shipowner one of whose ships has collided with another insured by, but belonging to him, and by fault of the former, damage, excluding the ship, has been done to an amount exceeding the statutory limit of liability. To allow the insurers relief in such a case would just be to allow them to claim from the assured relief in respect of the negligence of his agents (*Simpson*, 3 A. C. 279).

Within the last few years it has been more than once held that shipowners who in case of total loss have abandoned to the insurers the ship, have thereby freed themselves from responsibility for the expense of raising wreck or doing other work under such Acts as The Harbours, Docks, and Piers Clauses Act, 1847 (*The Ship Chrystal*, [1894] A. C. 508; *Howard, Smith, & Sons*, [1896] A. C. 579), which it is held throw the expense on the owners at the time it is incurred. The question arises, Are the insurers necessarily bound to become owners of the wreck, so as to incur the further liability for such expenses over and above total loss? That question does not seem to have been formally decided, but it is submitted the abandonment is for the insurers' benefit, and if they take the proper steps they cannot be forced to accept either ship or other subject-matter insured if this will entail a burden and not a benefit. It may be, a mere declinature of abandonment in ordinary form might not suffice, for that refers to a denial that there is a total loss more than to a refusal to take the salvage. But if insurers formally intimated that they declined to take the salvage or to have anything to do with it, it is submitted they would be held free from any liability connected with it. This is the view of Mr. Phillips, the well-

known American writer on the subject, and it is also that of Mr. M'Lachlan, the editor of Arnould (Arnould, 6th ed., p. 977).

The insurer of a mortgagee's interest in, say, a ship is to the extent of any sum paid by him entitled to be subrogated to the mortgagee's personal claim on the shipowner for the debt; but in general the insurance is effected in the joint interest of mortgagor and mortgagee. If the particular insurer pays more than his due proportion of the loss in a question with his co-insurers, *e.g.* in a case of double insurance, he can recover the difference from those who have underpaid.

Return of Premium.—In the ordinary case where the insurer does not run *any part* of the risk he has agreed to bear, he must return the premium of insurance if it has been paid, or cannot recover it if not (*Tyrie*, 2 Cowp. 666). In England this rule may have been based on the doctrine of failure of consideration, which has not the same place in Scots Law as in English, but there is no doubt the law in the two countries is identical. The question to be answered in general is, Has the risk attached? A ship insured from a port is wrecked before she sails, and the premium is returned. If, however, she starts, but immediately after deviates, there is no return. If the premium is apportionable to different parts of the risks expressly or by usage, if the risk is not run *quoad* any part the premium apportionable to that part is returnable. Where part of the subject-matter insured has not been put at risk, there is a porportionate return of premium. So where there are port and voyage risks and separate rates of premium and the latter risk is not run. If the policy is voided by the breach of the implied warranty of seaworthiness, the premium must be returned. So if the assured has no insurable interest. If he has only part insurable interest there may be a return of part. There will be no return in any case if there has been either fraud or illegality on the part of the assured or his agents. By illegality is meant that the adventure or contract is illegal or struck at by Statute. In such a case the Courts decline to interfere. The assured is, however, under no obligation to run the risk so as to let the insurer earn the premium, nor does it prevent him from claiming return that there has been concealment or misrepresentation, unless there has been fraud on his part (see M'Arthur, 2nd ed., p. 7). The parties may of course bargain as to return of premium, and in point of fact there are clauses introduced into time policies on the subject. If an assured is over-insured he can get a return of part of the premium, but this is subject to qualification where there is double insurance.

Mutual Insurance Associations.—Cursory as this article necessarily is, it would be incomplete without reference to the development of insurance by means of mutual associations. There have been such associations for long (see M'Arthur, pp. 338, 339). But during the last thirty years their progress has been enormous. In one way or another the special risks which shipowners run have been minimised; insured, or distributed over so large area, as to prevent in the ordinary case heavy losses falling on any one owner. The risks the association cover are exclusive of those covered by Lloyd's policy in ordinary form, and it is due to this that more than one question as to the protection given by such a policy has been settled by decision. The associations very generally make special provision with regard to the terms of the contracts of affreightment entered into by their members to secure that these contain such clauses exemptive of liability for negligence of crew and other matters as are practicable. Beyond they cover in one way or another every variety of loss and risk to which the shipping trade is subject. Small damage claims; claims in respect of loss

or injury to life; of damage to cargo on board the carrying ship; of collision, so far as not covered by the usual running-down clause; of injuries done to pier or harbour works, or the expense of removing a ship which is an obstruction in a channel; loss due to fault of the master or crew;—in short, as some rules put it, "all losses incident to shipowning" may be covered, though it may be remarked these general words will be held limited by their context (see *Rogers & Co.*, 1 Com. Cas. 414). Nor is the protection limited to insurance proper; the costs of litigation to enforce claims for freight and demurrage, of legal inquiries in which the ship is interested, or of defending her from unjust claims, are fair examples of expenses which mutual clubs or associations agree to bear jointly for individual members. Naturally there has been a good deal of litigation in connection with such associations, but the questions have in the main turned on the special words used in the rules or policy of the special association concerned, and it is impossible to do more than refer to some of them, *e.g.*: Action by manager (*Evans*, 1 Q. B. D. 45); right of member only to sue on mutual insurance policy (*Montgomerie*, [1891] 1 Q. B. 370); stamp on association policy (*In re Teignmouth General Mutual Shipping Assoc.*, L. R. 14 Eq. 148); illegal association under Companies Acts (*In re Arthur Average Assoc., etc.*, L. R. 10 Ch. 542); specification of members' names in policy of association underwritten for them (*Inverkeithing Assoc.*, 9 R. 1043); Are individual part owners liable for calls, or the managing owners only? (*Great Britain* 100 *A1 Assoc.*, 22 Q. B. D. 710). Cases which have decided what is the true meaning of such phrases as improper or negligent navigation or management of a ship have been already treated of. (See CHARTER.) It may be noted liability for improper stowage is frequently excluded by the rules of particular associations. In each case the rules of the association must be carefully examined, and their fair meaning will be given effect to, having regard, of course, to any decision on the meaning of particular phrases, and in general to the principles which underlie the law applicable to marine insurance.

Notes.—(1) This article is to a material extent based on the Marine Insurance Bill, 1897. (2) American authorities and text writers are always suggestive and valuable, but care must be taken in dealing with them, as the insurance law of the States differs in important matters of detail from our own, *e.g.* in what constitutes a constructive total loss.

[Arnould, Phillips, M'Arthur, on *Insurance.*]

See ABANDONMENT; ADJUSTMENT; AVERAGE; BARRATRY; CHARTER PARTY; COLLISION; DEVIATION; FREIGHT; SALVAGE; etc.

Mark, Subscription by.—A deed signed by mark or cross will not be sustained (*Crosbie*, 1865, 3 M. 870; *Graham*, 1848, 11 D. 173; Dickson, *Evidence*, s. 672; M. Bell, *Com.* i. 49, 457; Craigie, *Mov. Rights*, 2nd ed., 68, 88). When a person cannot write his name, his deed must be authenticated by a notary public or justice of the peace in the manner prescribed by 37 & 38 Vict. c. 94, s. 41. See DEEDS (EXECUTION OF). Custom and favour to commerce have excepted from this rule documents *in re mercatoria.* See IN RE MERCATORIA WRITINGS. Documents so signed, however, will not warrant summary diligence (M. Bell, i. 457). Where a mark is admissible, the subscriber's name is usually written by someone to identify the mark, thus: JOHN + BROWN (Dickson, *ut sup.*, note (L)). See also BILLS OF EXCHANGE (vol. ii. at p. 112). Forgery of a person's mark is of course a crime (Macdonald, *Crim. Law*, 77).

Marking of Goods.—See Delivery of Moveables.

Market Overt.—"Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. The provisions of this section do not apply to Scotland." "Where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise" (Sale of Goods Act, 1893, ss. 22, 24). These sections do not apply to Scotland, where the rule has always been that the owner of things stolen (except money, bank notes, and negotiable bills and securities; see, *e.g.*, *Walker & Watson*, 1897, 35 S. L. R. 26) may recover them out of the hands of a *bonâ fide* purchaser for value. "Market overt in the country is held on special days provided by charter or prescription, but in London every day except Sunday is market-day. In the country the only place that is market overt is the particular spot of ground set apart by custom for the sale of particular goods, and this does not include shops; but in London every shop in which goods are exposed publicly for sale is market overt for such goods as the owner openly professes to trade in" (Benjamin on *Sale*, p. 8). See Restitution; Sale; Vitium reale.

Markets.—See Fairs and Markets.

Marks (Merchandise) Act.—See Merchandise Marks Act.

Marque.—See Reprisal.

Marquis (*Marchio*).—A noble of the second rank in the British peerage. The title of "marquis" is said to have originated in the military office of Keeper of the Frontier—the marches of the kingdom (Selden on Drayton's *Polyalbion*, s. 7; *Titles of Honour*, pt. ii. s. 47; Blackstone, *Commentaries*, i. 12. 3). The dignity was introduced into Scotland in 1476, when it was conferred by James III. on his second son James, who was made at his baptism Marquis of Ormond. At that time it had already become purely a degree of nobility, without the duty of performing the special services which are said to have given rise to the title.

The parliamentary robe of the marquis is of scarlet, with three doublings of ermine on the left front and four on the right. His coronet is a circle of gold, from which rise four strawberry leaves alternate with four silver balls. The coronet is worn over the cap, which is common to all the peers (see Duke). When the coronet is represented heraldically, two balls and three leaves, of which latter two are in profile, are shown. A marquis or marchioness is styled, in formal terms, "The Most Honourable the Marquis of ——," or "The Most Honourable the Marchioness of ——." They are similarly addressed "My Lord Marquis," "My Lady Marchioness." Their eldest son takes one of his father's secondary titles, and ranks after

the earls. Their daughters and younger sons are styled respectively as those of dukes (see DUKE). The style of the signature of a marquis or marchioness is as that of other peers.

See also DIGNITIES; PEERAGE; PRECEDENCE.

Marriage.

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I. DEFINITION.

Marriage "is the voluntary union for life of one man and one woman, to the exclusion of all others" (so defined by Ld. Penzance in *Hyde*, 1866, L. R. 1 D. & P. at p. 133; and see *Brinkley*, 1890, 15 P. D. 76). It is thought this definition would be improved by adding "entered into in a manner which satisfies the law of the place where the union is contracted," or similar words.

It differs from ordinary contracts, for they, in Stair's words, "may be framed and composed at pleasure; but so cannot marriage, wherein it is not in the power of the parties, though of common consent, to alter any substantial" (Stair, i. 4. 1). The personal rights and duties of the spouses, and the grounds upon which the marriage may be dissolved, are fixed by law, and cannot be varied by the agreement of parties (see *Warrender*, 1835, 2 Sh. & M'L. at p. 200, per Ld. Brougham; *Edmonstone*, 1816, Ferg. Div. Cases, 397; *Moss*, 4 June 1897, 13 T. L. R. 459; Fraser, *H. & W.* i. 155).

The marriage must be contracted with such ceremonies or forms as are required by the law of the country where it is entered into. But the personal rights of the spouses and, where there is no marriage contract, the interests of each in the other's moveable estate, are fixed not by the law of the place where the marriage is solemnised, but by that of the husband's domicile (see DOMICILE; and see Fraser, *H. & W.* ii. 1297–1326; Walton, *H. & W.* 372-419; and, *infra*, *International Aspects of Marriage*).

It is essential to a valid marriage that the parties consent to take each other for husband and wife. What evidence will be regarded as sufficient proof of this interchange of consent will be considered later. Persons, therefore, who, from a want of capacity, cannot give a valid consent to any contract, are unable to marry, whatever forms and ceremonies of marriage they may go through. And a man legally *capax* may be prohibited from marrying a particular woman on the ground of consanguinity or affinity, or because she has been divorced for adultery with him, and his name appears in the decree. In this case also no form of marriage can give any validity to the contract.

Sources of Marriage Law.—The law of Scotland as to marriage is, like the law of England, based upon the CANON LAW (*q.v.*), which was administered in the Ecclesiastical Courts before the Reformation (see *Dalrymple*, 1811, 2 Hag. Con. at p. 70 and p. 81; *Collins*, 1884, 11 R. (H. L.) 19; Pollock and Maitland, *Hist. of English Law*, ii. 366). Whether the canon law of Rome, as such, was binding on the Scottish Courts in the sense in which they are now bound by a British statute, or if it was only the statutes of the Scotch Provincial Councils which bound them, is a question of difficulty. Fraser thinks it *was* only the canon law embodied in the statutes of the Scotch Provincial Councils which was so binding, while the rest of the canon law was referred to, but a particular rule might be rejected by the Court (*H. & W.* i. 28 *seq.*). In England, a similar view is supported by the opinions in *Queen* v. *Millis* (1844, 10 Cl. & Fin. 534) and by the Report of the Ecclesiastical Courts Commission, 1883 (see, *e.g.*, vol. i. p. 18).

There is, however, great force in the contention, put forward with much learning by Professor Maitland, that the Ecclesiastical Courts in England, at anyrate until the eve of the Reformation, never claimed such a degree of independence, but treated the canon law made by the Popes as absolutely binding (*English Historical Review*, 1896, pp. 446 *seq.* and 641 *seq.*), and it is unlikely that the Church Courts in Scotland were more independent than those of England.

The law as administered prior to the Reformation was only abrogated so far as it was contrary to the Protestant religion (Act 1567, c. 31).

Subject to this, the canon law of marriage continued to be administered (see Report of Royal Commission on Marriage Laws, 1868, p. 16, and see Hailes, *Decis.* 499). But divorce *a vinculo* was introduced (see DIVORCE), the law has been much developed by judicial decision, some changes have been made by statute, and the Court is now entitled to reject or modify any rule of the canon law which appears not to be in itself reasonable or expedient, unless it has been received into our law and acted on (per Ld. Watson in *Collins*, 1884, 11 R. (H. L.) at p. 33; and see *Purves' Trs.*, 1895, 22 R. 513). The best modern works on the canon law of marriage, as elaborated in the Middle Ages, are Freisen, *Geschichte des Canonischen Eherechts*, 2nd ed., Paderborn, 1893, and Esmein, *Le Mariage en Droit Canonique*, Paris, 1891. The work of Friedberg, *Das Recht der Eheschliessung*, Leipzig, 1865, is a learned and valuable account of the later history of the canon law as modified in the principal European States after the Reformation. The early law of marriage in England is there fully treated—that of Scotland somewhat more slightly. Dr. Friedberg's statement of the results reached in other countries often throws much light on disputed points. (See also Friedberg, *Lehrbuch des Kirchenrechts*, 4th ed., Leipzig, 1895; Pollock and Maitland, *Hist. of English Law*).

II. GROUNDS OF NULLITY OF MARRIAGE AND EFFECTS OF DECREE.

IMPEDIMENTS TO MARRIAGE.—(1) NONAGE.—Pupils cannot marry, *i.e.* in Scotland males under fourteen and females under twelve. (For a table giving the ages of consent in the European States, see Hammick, *Marriage Law of England*, p. 386). If they lived together and continued to do so after both had attained minority, they might be found to be married, but this would be because there was evidence of consent after the impediment of nonage had ceased to exist (Ersk. i. 6. 2; Fraser, *H. & W.* i. 51; *Johnston*, 1770, Mor. 8931; see Bishop, *Marriage and Divorce*, i. 577). In the case of *Johnston* it was held that a boy could not marry until he was actually fourteen years old. It was not enough to show that he had then physical capacity

to consummate marriage, or that the alleged marriage had been in fact consummated. The action of declaration of nullity may be brought by either party, or by anyone who can show a pecuniary interest in establishing the nullity (Fraser, *H. & W.* ii. 1244; Bell, *Prin.* s. 1524; *Sherwood*, 1838, 1 Moo. P. C. C. 353; *Farmouth*, 1811, 1 Phill. 355).

(2) Impotence.—Either spouse may bring an action to have the marriage declared a nullity on the ground that the other spouse was at the time of the marriage, and still is, incapable to consummate it (*C. B.*, 1884, 11 R. 1060; affd. 1885, 12 R. (H. L.) 36). But it seems that such an action would not be competent at the instance of the impotent party (Fraser, *H. & W.* i. 98; Bell, *Prin.* s.. 1524; see *Norton*, 1819, 3 Phill. 147; *Lewis*, 35 L. J. P. & M. 105; *Halfen*, 1881, 6 P. D. 13; but see *A.*, 1887, 19 L. R. Ir. 403). And it is certain that, if the aggrieved spouse acquiesces, such an action by a third party would not be entertained (Fraser, Bell, *ut supra*; *A.*, 1868, L. R. 1 P. & D. 559). It is thought that the action is only competent during the lifetime of both parties, subject to the possible right of an executor to continue an action begun before the pursuer died (see *Green* or *Borthwick*, 1896, 24 R. 211; *P.* v. *S.*, 1868, 37 L. J. P. & M. 80; *A.*, L. R. 1 P. & D. 559).

There must be incapacity to perform the sexual act. It need not be absolutely incurable. If the evidence is that it might possibly be cured by an operation which the defender refuses to undergo, this may be sufficient (*L.*, 1882, 7 P. D. 16; *Williams*, 1861, 2 S. & T. 240; and see *F.*, 1896, 75 L. T. 192).

There may be impotence though there is a possibility of partial sexual intercourse (*Deane*, 1845, 1 Rob. Ecc. 279; *B—n*, 1854, 1 Ecc. & Ad. 248; per Ld. Watson in *C. B.*, 12 R. (H. L.) at p. 44; see *Hunt*, 1856, Dea. & Sw. at p. 129; Fraser, *H. & W.* i. 91; and see a case, decided by the Austrian Supreme Court, in *Journal du Droit International Privé*, 1896, vol. xxiii. p. 422). And it is sufficient to prove that the man was impotent *quoad hanc* though he might not be so *quoad* another woman.

For the ground of complaint is that the relation between the parties in the particular case is not a true marriage, inasmuch as it cannot be physically consummated. And where, as in the common case, there is no malformation, and impotence has to be inferred from non-consummation after opportunity, it is clearly impossible to prove that the man, *e.g.*, is necessarily impotent as to all women (see per Dr. Lushington in N. f. c. *M.* v. *M.*, 1853, 2 Rob. Ecc. Cases, at p. 635; and per Selborne, L. C., in *C. B.*, 12 R. (H. L.) at p. 44; *H.*, 1873, L. R. 3 P. & D. 126; Fraser, *H. & W.* i. 92: Bishop, *Marriage and Divorce*, i. s. 779).

In several English cases decree has been granted on the ground of the wife's impotence though no structural defect was proved. Her continued refusal to permit intercourse has, in the absence of rebutting evidence, been referred to want of capacity (*S.*, 1878, L. R. 3 P. & D. 72; *G.*, 1871, L. R. 2 P. & D. 287; *F.*, 1896, 75 L. T. 192).

Rule of Triennial Cohabitation.—By the canon law, where there has been cohabitation for three years, and the wife can show that she is *virgo intacta*, there is a presumption that the husband is impotent, and unless he rebut the presumption she will be entitled to decree of nullity (*Decretal*, 4. 15. 5, and 4. 15. 7). This rule has been recognised in England (*Lewis*, 35 L. J. Mat. H. L. 105) and would probably be followed in Scotland (per Ld. Watson in *C. B.*, 1885, 12 R. (H. L.) at p. 45; see Fraser, *H. & W.* i. 100). But where permanent impotence is proved by positive evidence, the Court will grant decree although the parties have not cohabited for three years

(*C. B.*, 12 R. (H. L.) 36: *M.*, 2 Rob. Ecc. 618; *A.*, 1853, Spinks' Rep. 12; *G.*, 1854, Spinks' Rep. 389; *F.*, 1896, 75 L. T. 192).

Insincerity and Delay as Bars to Action.—Decree will be refused if there are "facts and circumstances proved which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect" (per Ld. Watson, *C. B.*, *ut supra*, at p. 45; and see per Selborne, L. C., *ib.* at p. 38; Fraser, *H. & W.* i. 94). The elements of delay will enter into consideration (*C. B.*, *ut supra*, at p. 140), but in itself it will not constitute a bar (Fraser, *l.c.* *C. B.*, 2 Rob. Ecc. 585; *L.*, [1895] p. 274). And the fact that the pursuer has a collateral motive is not a bar. In the case of *C. B.*, 12 R. (H. L.) 36, the wife successfully pleaded nullity as a defence to an action of divorce at the husband's instance on the ground of her adultery (see also *L.*, [1895] p. 274).

Limit of Age.—There is no precise limit of age laid down by law, but it may safely be assumed that a marriage entered into by two old persons would not be annulled on this ground, at least unless there was actual malformation. For in the marriages of aged persons *potentia copulandi* is not an implied condition (Stair, i. 4. 6. 4; Ersk. i. 6. 7; Fraser, *H. & W.* i. 93). But a marriage between a man of fifty-four and a woman of forty-nine was annulled on the ground of the wife's impotence where there was malformation (*W.* v. *H.*, 1861, 2 S. & T. 240).

(3) Insanity or Intoxication.—An insane person cannot give a valid consent, and therefore the insanity of either party is an impediment to marriage (Stair, i. 4. 6; Ersk. i. 6. 2; Fraser, *H. & W.* i. 55). The question is, "Whether the defender was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject?" (per Sir J. Hannen in *Hunter*, 1881, 10 P. D. at p. 95; see *Durham*, 1885, 10 P. D. 80; *Hancock*, 1867, L. R. 1 P. & D. 335). Where no fraud has been practised a marriage may be good though one of the parties is a deaf mute and of very dull intellect (*Harrod*, 1854, 1 Kay & J. 4).

Who has a Title to Sue?—The action may be brought after recovery of sanity by the person who avers he was insane at the time of the alleged marriage (*Turner*, 1808, 1 Hag. Con. 414; Fraser, *H. & W.* i. 74). If the insane person has been cognosced, the action may perhaps be brought by the tutor-dative (*Thomson*, 1887, 14 R. 634; Fraser, *l.c.*). If the party who was insane has recovered, it appears that during his lifetime no other person has a title to sue unless he can qualify a special interest (*Turner*, *ut supra*; see *Sherwood*, 1837, 1 Moo. P. C. C. 353; Fraser, *l.c.*). The action is competent at the instance of the same party (*Durham* and *Hunter*, *ut supra*). If the pursuer die after raising the action, it may be insisted in by the executor (*Green* or *Borthwick*, 1896, 24 R. 211). And after the death of either of the parties it seems that any person qualifying an interest could institute the action (Fraser, *H. & W.* i. 75; *Turner*, *ut supra*, note on p. 415).

Burden of Proof.—The onus lies on the party averring the insanity (*Durham*, 1885, 10 P. D. 80; *Cannon*, 1885, 10 P. D. 96). If, however, permanent insanity at a date prior to the contract be proved, the onus is shifted, and it will lie on the party averring that there had been a temporary recovery or lucid interval to make good that averment (*Le Geyt*, 1834, *Milward Irish Ecc. Rep.* 325; *Turner*, *ut supra*; Fraser, *H. & W.* i. 55). Undoubted insanity shortly after the marriage is not in itself sufficient to

prove want of capacity at its date, but it will be a fact to take into consideration (*Durham* and *Cannon, ut supra*).

Intoxication.—It is a ground of nullity that one of the parties was so intoxicated as to be bereft of reason (*Johnston*, 1823, 2 S. 495 (N. E. 437); Fraser, *H.* & *W.* i. 71). Into such a case the element of fraud (see *infra*) could hardly fail to enter (see *Le Geyt, ut supra; Parker*, 2 Lee, 382; *Gore*, 1845, 13 M. & W. 623; *Pollok*, 1875, 2 R. 497).

Marriage originally Null may be Validated.—Marriage may be validated by consent after return to sanity or sobriety.

It cannot be doubted that continuation of cohabitation after return to sanity or sobriety would be *primâ facie* evidence of matrimonial consent (see *Johnston*, 1823, 2 S. 495 (N. E. 437); *De Thoren*, 1876, 3 R. (H. L.) 28; *Campbell*, 1867, 5 M. (H. L.) 115; *Hill*, 1870, 25 L. T. 183; *Pollok*, 1875, 2 R. 497).

(4) Consanguinity and Affinity.—Marriage is forbidden between persons who stand to each other within certain degrees of kin, and an alleged marriage between such persons will be declared a nullity. An action for that purpose is competent to either of the parties, to any third person showing an interest, or to the public prosecutor (Fraser, *H.* & *W.* i. 74, 129, note (*a*); *Turner*, 1808, 1 Hag. Con. 414, note; *Andrews*, 1888, 14 P. D. 15). A relation of affinity is equivalent to a relation of consanguinity, *e.g.* the relations of a man's wife stand in the same degree to him as they do to her (*Purves' Trs.*, 1895, 22 R. 513).

Ways of Reckoning Degrees.—There are two ways of counting degrees of kin. The civil or Roman law reckons in the direct line, a degree for every generation, and discovers the degree within which two persons are related collaterally by counting from one of them up to the common ancestor and then down to the other. Thus a father and son are in the first degree, brothers in the second, and first cousins in the fourth. The canon law reckons the degrees in the direct line in the same way, but in the collateral it counts only up to the common ancestor and not down again. When the parties are not in the same degree of descent, it counts only the longer line, *i.e.* the number of degrees up to the common ancestor from that one of the two persons who is furthest removed from him. This number is that of the degree of kindred between the two persons. According to this mode, brothers are in the first degree, first cousins in the second, an uncle and a niece in the second (Ersk. i. 6. 8; Fraser, *H.* & *W.* i. 106; see authorities cited in *Purves' Trs.*, 1895, 22 R. at p. 520, and the *Arbor Consanguinitatis* and the *Arbor Affinitatis* at the end of pars. 1 of Friedberg's edition of the *Corpus Juris Canonici*, or p. xxv of the introduction to the *Liber Officialis Sancti Andreæ*, reprinted by the Abbotsford Club, 1845).

Within what Degrees Persons cannot Marry.—Before the Reformation persons related within the fourth degree according to the canon law, *e.g.* third cousins, could not marry (see the Canon 65, An. 1242 and 1269, in Hailes' *Canons*, at p. 41). And kindred or affinity was created between godparents and godchildren by baptism, and was also created by carnal intercourse without marriage. A marriage, *e.g.*, was set aside because the father of the woman was the man's godfather (*Forrett*, 1548, *Lib. Off. S. And.* No. 156), or because the man's second cousin once removed had had sexual intercourse with the woman prior to the alleged marriage (*Betoun*, 1543, *ib.*, No. 133; Fraser, *H.* & *W.* i. 109; see *Wing*, 1861, 2 Sw. & Tr. 278). Papal dispensations were often granted, allowing persons to marry who were within the forbidden degrees, and, on the other hand, persons who desired to be free from a marriage and able to marry

again, though they could not obtain a divorce *a vinculo*, frequently attained the same end by discovering some ground of nullity (see pp. xvii and xxxvi of the Preface to the *Liber Officialis S. Andree*, and for examples see that work, *passim*).

At the Reformation the range of the impediments based on consanguinity or affinity was much narrowed, and the doctrine of relationship being created by baptism or by illicit intercourse was finally abolished (see *Hamilton*, 1827, 5 S. 716; Bell, *Prin.* 1527; cf. *Wing, ut supra*). The Act 1567, c. 15, provided "that the holie band of marriage" . . . "be als lawful and als frie as the law of God has permitted," and declares "that secunds in degrees of consanguinitie and affinitie, and all degrees outwith the samin contained in the Word of the Eternal God, and that are not repugnant to the said Word, might and may lawfully marry."

And the Act 1567, c. 14, declares incest punishable by death, and defines persons guilty of incest as such "as abuses their bodie with the persons in degrie as God in his Word has expressly forbidden in ony time coming, as is contained in the eighteenth chapter of Leviticus." These Acts were ratified by the Act 1581, c. 1.

The effect of these Acts is to import the eighteenth chapter of Leviticus; and in construing the Act 1567, c. 15, it has been fixed (1) that "the Act prohibits not only all marriages which are expressly prohibited in Scripture, but also all marriages which are repugnant to Scripture as being *in pari casu* with those expressly prohibited, and (2) that, unless where distinguished in Scripture, relationship by affinity is, for the purposes of the Act, equivalent to relationship by consanguinity" (per Ld. Low in *Purves' Trs., ut supra*, at p. 537). "Seconds" means according to the canon law computation, *e.g.* first cousins (*Purves' Trs., ut supra*). The result is that marriage is forbidden between ascendants and descendants *ad infinitum*, and in the collateral line between brothers and sisters, consanguinean or uterine, and between all collaterals one of whom stands *in loco parentis* to the other, *i.e.* is the brother or sister of a direct ascendant of the other, as uncle and niece, aunt and nephew, granduncle and grandniece, grandaunt and grandnephew (Stair, i. 4. 4; Ersk. i. 6. 8, 9; Bell, *Prin.* 1527; Fraser, *H. & W.* i. 119). And relationship by marriage is in all cases equivalent to relationship by blood; so marriage with a deceased wife's niece is unlawful (*Purves' Trs., ut supra*), or with a deceased wife's aunt (*Butler*, 1722, Gilbert's *Folio Rep.* 156). It appears that affinity would not be created by a marriage not consummated (Stair, i. 4. 6; Bankt. i. 5. 103; Fraser, *H. & W.* i. 106, 120, and authorities there cited).

The institutional writers are agreed that in estimating degrees it is immaterial that the relationship is only by the half-blood (Bankt. i. 5. 42; Stair, i. 4. 4; Ersk. i. 6. 9; Bell, *Prin.* ii. 1527; see a case in which a man was convicted of incest for intercourse with the daughter of his deceased wife's half-brother, *Blair* in Hume, i. 450; and cf. *R.* v. *Brighton*, 1861, 1 B. & S. 447).

As to illegitimate relations, the law is not settled. There is little doubt that a mother could not marry her illegitimate son, or a father his natural daughter. Fraser thinks it doubtful if a brother and sister born illegitimate are prohibited. But it is thought marriage between them would be forbidden as contrary to public decency (Fraser, *H. & W.* i. 131; Ersk. iv. 4. 56; Alison, 565; Bankt. i. 5. 42; Macdonald, *Crim. Law*, 199; see *Clarke*, 1891, 18 R. (H. L.) 63).

In England it seems to be settled that when the natural relationship is established it has the same effect in creating impediments to marriage as

if it sprung from a legal union (*Horner*, 1 Hag. Con. 337; *Blackmore*, 1816, 2 Phill. 359; *Woods*, 1840, 2 Curt. 516; *R.* v. *Brawn*, 1843, 1 C. & K. 144; *R.* v. *St. Giles*, 1847, 17 L. J. Q. B. 81; *R.* v. *Brighton*, 1861, 1 B. & S. 447; *R.* v. *Chadwick*, 1847, 11 Q. B. 173. See also J. Voet, 23. 2. 35; and cf. the civil law which recognised the natural kinship of slaves as an impediment to their marriage after, by manumission, they had been rendered capable of contracting lawful marriage at all—*Inst.* i. 10. 10; *Dig.* 23. 2. 54).

Affinity does not cease with the dissolution of the marriage which created it. So it is quite settled that a man cannot marry the sister or niece of his deceased wife (*Purves' Trs.*, *ut supra*). And there is no reason to think a different rule applies if the first marriage is dissolved by divorce. See DIVORCE.

The table of prohibited degrees drawn up in England by Archbishop Parker and inserted in the Book of Common Prayer is part of the statute law of England (32 Hen. VIII. c. 38; see 1649, c. 16; *Sherwood*, 1837, 1 Moo. P. C. 353; *Butler*, 1722, Gilbert's *Folio Rep.* 156; Hammick, *Marriage Law of England*, p. 34). All the marriages prohibited in it would be unlawful in Scotland. The Royal Commission on Marriage Laws, 1868, found that the prohibited degrees of consanguinity and affinity were the same in all parts of the United Kingdom (*Report*, p. v; and see *Purves' Trs.*, 1895, 22 R. at p. 536, and arg. at p. 533).

As to the legality of marriages celebrated here and not prohibited by our law, but prohibited by the personal law of one or both of the parties, see, *infra*, *International Aspect of Marriage*.

(5) PREVIOUS MARRIAGE STILL SUBSISTING.—It is impossible that a man or woman who is already married should validly contract a second marriage until the first has been dissolved by death or divorce. The moment it is shown that a former marriage still subsists, an alleged second marriage becomes a nullity (*Ballantyne*, 1866, 4 M. 494; *Petrie*, 1896, 4 S. L. T. No. 94; *Dalrymple*, 1811, 2 Hag. Con. at p. 129; Stair, i. 4. 6. 4; Ersk. i. 6. 7; Fraser, *H. & W.* i. 135; Eversley, *Domestic Relations*, 2nd ed., p. 80; Bishop, *Marriage and Divorce*, i. s. 714; Walton, *H. & W.* 11). But a cohabitation, originally illicit because one of the parties is already married, may become a marriage without any ceremony, if the impediment is removed and the cohabitation is thereafter continued in circumstances which lead the Court to infer that the parties intended their intercourse to be matrimonial (*Campbell*, 1867, 4 M. 865, 5 M. (H. L.) 115; *De Thoren*, 1876, 3 R. (H. L.) 28; and, *infra*, *Cohabitation and Habite and Repute*).

As an irregular marriage is, when proved, a marriage to all effects, it follows that a regular marriage will be annulled on proof that one of the parties was already married, though this former marriage was irregular (*Petrie*, 1896, 4 S. L. T. No. 94, O. H.; *Richardson*, 3 Aug. 1785, Hume, 361; *Wright*, 1837, 15 S. 367; Fraser, *H. & W.* i. 136; see also *Jolly*, 1828, 3 W. & S. 85; *Yelverton*, 1864, 4 Macq. 743). In both these cases declarator of the validity of an irregular marriage would have had the effect of annulling a subsequent regular marriage. (Its relevancy was not questioned.) The charge of bigamy may be established though the first marriage was irregular and the second regular (*Will. Brown*, 1846, Ark. 205), or though both marriages were irregular (*Purves*, 1848, Shaw, 126); and whether a promise *cum copula sequente* constitutes, before declarator, very marriage or not (see *infra*), it is undisputed that it is sufficient to found an action for declarator of nullity of a subsequent

regular marriage (*Pennycook*, 1752, Mor. 12677; *Dalrymple*, 1811, 2 Hag. Con. 54; Fraser, *H. & W.* i. 360).

In an action to declare the validity of a first marriage it is not necessary to call the husband or wife of the second marriage, although the result of the action may be to annul this (*Jolly, Wright, ut supra*; *Dalrymple, ut supra*, at p. 129; Fraser, *H. & W.* i. 135).

If the first marriage was null from want of true consent, or on account of any impediment, except perhaps that of impotency, it is not bigamy to enter into a second though the nullity of the first has not been declared (Hume, i. 461; *Fraser, l.c.*; see *Bruce*, 1825, 2 Add. 471).

It is not settled if it would be a good defence to a charge of bigamy to plead that the first marriage was null on the ground of impotency, but as this is a good defence to an action of divorce it is thought it would be so also to the criminal charge (*C. B.*, 1885, 12 R. (H. L.) 36; Macdonald, *Crim. Law*, 201).

Bona Fides as Defence and Pursuer not barred by his own Fraud.—In an action to find a second marriage invalid it is no defence that one or both of the alleged spouses believed that the former marriage was invalid, or had been dissolved, or that it had never existed (*Dalrymple, ut supra*, at p. 129; *Petrie*, 1896, 4 S. L. T. No. 94; *Miles*, 1849, 1 Rob. E. 684; *Bonaparte*, [1892] P. 402; see *Purves' Trs.*, 1895, 22 R. 513; and see Bona fides; Adultery; Divorce).

A husband who lies by and allows his wife to enter into a second marriage is not barred *personali exceptione* from having it declared a nullity (*Dalrymple, ut supra*, at p. 129; *Napiers*, 1801, Hume's *Decis.* at p. 372). Nor is a pursuer seeking to have his own second marriage annulled barred by showing that he was aware of the invalidity, and deceived the woman by persuading her that she was entering into a valid marriage (*Miles, ut supra*; see *Bonaparte, ut supra*, and American cases in Bishop, *Marriage and Divorce*, i. s. 722: Fraser, *H. & W.* i. 138).

When one spouse has disappeared and has not been heard of for some years, this will not enable the other safely to contract a second marriage, unless a divorce for desertion is obtained. No *bona fides* can give validity to a marriage of parties between whom there was a legal impediment, though it may be a defence to an action of divorce or an indictment for bigamy (see Bona fides; Adultery; Divorce; and cf. *R.* v. *Tolson*, 1889, 23 Q. B. D. 168). As to the effect of *bona fides* on legitimacy, see, *infra*, *Effects of Decree of Nullity*.

Proof must be led.—Decree cannot be given in absence without evidence (11 Geo. iv. and 1 Will. iv. c. 69, s. 36), and the uncorroborated admission of the defender is not enough (1 Hume, *Com.* 462; Fraser, *H. & W.* i. 139). See Consistorial Actions.

(6) Non-Residence in Scotland.—In order to put a stop to the Gretna Green marriages it was enacted by 19 & 20 Vict. c. 96, s. 1, that "no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony (after 31 Dec. 1856) shall be valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage." This means for twenty clear days, reckoning time from midnight to midnight, and until the commencement of the twenty-first day (*Lawford*, 1878, 4 P. D. 61).

The Act does not seem to cover a marriage by promise *cum copula*.

It was passed to check the Border runaway marriages, which were usually constituted by declaration before some self-constituted official, such as the well-known Gretna Green blacksmith. Marriage by promise *subsequente*

copula does not appear to be covered by any of the words "declaration," "acknowledgment," or "ceremony"; and if it had been intended to include this form of constituting marriage, some provision would naturally be expected as to whether the twenty-one days were to be before the promise or before the *copula*. But the Act is spoken of as applicable to all irregular marriages by Ld. Fraser (*H. & W.* i. 148), by Mr. Gillespie (Bar, 2nd ed., 364, *note*), and in the Report of 1868 by the Royal Commissioners on the Marriage Laws (*Report*, p. 16). Nor does the Act seem to apply to marriage proved by cohabitation and habite and repute. But it is very unlikely that the Court would in any case hold a marriage proved in this way where the cohabitation in Scotland had been only for a few weeks (see Fraser, *H. & W.* i. 400; per Ld. Blackburn in *Dysart Peerage* case, 1881, 6 App. Ca. at p. 513).

Apart from the question as to twenty-one days' residence, there is no doubt that two foreigners might be declared to be married on proof of promise and *copula*, both in Scotland (*Longworth*, 1862, 1 M. 161, 3 M. (H. L.) 49; *Dalrymple*, 1811, 2 Hag. Con. 54, and opinions of Scots counsel in Appendix to that case; and see, *infra*, *Constitution of Marriage*).

(7) Adultery.—The Act 1600, c. 20, declares all marriages null which are contracted by divorced spouses with the persons "with quhome they are declarit be sentence of the ordinar judge to have committed the said cryme and fact of adultery." It further provides that the children of such an "unlawful conjunction" shall be "unhabill to succede as airis to thair saidis parentis." (As to this point, see Fraser, *H. & W.* i. 151; and as to the disability of the woman under the Act 1592, c. 119 (c. 11 in Thomson's ed.), to defeat the heirs to have heritage, see *Irvine*, 1707, Mor. 6350 and 9471, and *sub voce* "Adultery".)

To make such a marriage null, the name of the paramour must have been inserted in the decree dissolving the former marriage (More's *Notes*, p. 16; Riddell's *Peerage Law*, 391 and 410; Fraser, *H. & W.* i. 144; see *Beattie*, 1866, 5 M. 181; *Campbell*, 1866, 4 M. 867). And probably "ordinar judge" would be held to mean "Lord Ordinary," and the Act would be treated as inapplicable where the divorce was pronounced by a foreign Court (More, *Riddell*, *ut supra*, whom Fraser cites without giving an opinion). It is very usual to omit the name of the paramour in a decree of divorce. Whether, when the name is given in the summons, the pursuer can insist on its being inserted in the decree has not been decided. It was argued in an unreported case. The wife, pursuer, maintained she had an interest, as her daughter's right of succession in the father's estate would be prejudiced if a son were born of a marriage between the defender and the paramour. But the question was not decided, as ultimately the pursuer consented not to press the motion (*Davidson*, June 1894, Ld. Stormonth-Darling, N. R.).

When the marriage of the divorced spouse with the paramour so named in the decree takes place in a foreign country, it is probable that the law of the foreign country would treat the marriage as valid, unless the same impediment was recognised by that law itself (Fraser, *H. & W.* ii. 1304; Westlake, *Priv. Int. Law*, 58; see *Scott*, 1886, 11 P. D. 128; *Kynnaird*, 1866, L. R. 1 C. P. 389; and see Walton, *H. & W.* 393).

Fraser (*ib.* 1305) goes further, and thinks the Scottish Court would not find the marriage null if contracted abroad though the paramour and the divorced spouse were domiciled in Scotland (see Opinions in *Beattie*, *ut supra*). But the opposite was held by Ld. Craighill in an unreported case cited by Mr. Mackay (*Manual*, 474; see *Brook*, 1861, 9 H. L. C. 193; Walton, *H. & W.* 395).

The Royal Commission on the Marriage Laws, 1868, reported in favour

of the repeal of this impediment to marriage (*Report*, p. 26), but no steps have been taken to give effect to this recommendation.

(8) Royal Marriage Act.—By this Act, 12 Geo. III. c. 11, certain members of the Royal Family, descendants of King George II., are disabled from marriage unless they have first obtained the consent of the reigning sovereign. But if the descendant of George II. is over 25 years of age and gives notice of the intended marriage to the Privy Council, he may validly marry after twelve months without the consent of the sovereign unless both Houses of Parliament shall have, within the twelve months, declared their disapprobation of the marriage (s. 2). The Act applies to a marriage celebrated abroad, though the marriage may be valid in the foreign country where it was contracted (*Sussex Peerage* case, 1844, 11 Cl. & Fin. 85).

Other Grounds of Nullity.—(1) No Genuine Consent.—Where neither of the parties is subject to any incapacity, and there is no impediment to their marrying each other, a marriage into which they purport to have entered may nevertheless be set aside on proof that there was no genuine consent to the contract.

It may be shown that the parties only feigned to consent to the marriage, or that the consent of one or both of them was induced by error, force, or fraud. Where there has been a regular marriage *in facie ecclesiæ*, after proclamation of banns or publication of a registrar's notice, it is not certain if the Court would allow the parties to prove that they agreed to deceive the world by a mock ceremony (see per Ld. Stowell in *Dalrymple*, 1811, 2 Hag. Con. p. 106: Ld. Deas in *Robertson*, 1874, 1 R. p. 667; Ld. Eldon in *Jolly*, 1828, 3 W. & S. 189: Ld. J.-C. Hope in *Lockyer*, 1896, 8 D. 582; Ld. Moncreiff in *Browne*, 1843, 5 D. 1295; Ld. Mure in *Maloy*, 1885, 12 R. 455; More's *Notes*, p. 14; Fraser, *H. & W.* i. 428; Bishop on *Marriage and Divorce*, ed. 1891, s. 338). But in many cases alleged irregular marriages have been found to be nullities because, upon a view of the circumstances and the conduct of the parties before and after the interchange of consent founded upon, the Court has been satisfied that there never was genuine matrimonial consent (*Sassen*, 1824, 3 S. 159, 2 W. & S. 309; *M'Innes*, 1781, Mor. 12683; rev. 2 Pat. App. 598; *Taylor*, 1786, Mor. 12687; rev. 3 Pat. App. 56; *Stewart*, 1833, 12 S. 179, 14 S. 427; 1841, 2 Rob. App. 547; *Lockyer*, *ut supra*; *Stuart*, 1874, 1 R. 532; rev. 2 R. (H. L.) 80; *Gall*, 1870, 9 M. 177; *Imrie*, 1891, 19 R. 181; *Morrison*, 1869, 8 M. 347; *Lapsley*, 1845, 8 D. 34, 1 H. of L. Ca. 498; *Maloy*, 1885, 12 R. 431).

An interchange of consent made in jest and so understood is not a marriage (Fraser, *H. & W.* i. 415; Bishop, *Marriage and Divorce*, s. 338; Swinburne on *Spousals*, p. 105; see per Ld. Campbell in *R.* v. *Millis*, 1844, 10 Cl. & Fin. at p. 785; Brouwer, lib. 1, cap. 20, n. 19).

(2) Error, Force, and Fraud.—Marriage, though a status, must be entered into by a contract, and this, like any other contract, may be found null and void if it is shown that it was induced by error, force, or fraud. But where one of the parties really meant marriage, and was deceived by the other into believing that they were both giving a genuine consent, the fraudulent party will be personally barred from showing that true consent was not interchanged, and the marriage will be valid (*Stewart*, 1833, 12 S. 179, 2 Rob. 547: *Campbell*, 1831, W. & S., per Ld. Brougham, at p. 146; *Bell*, 1859, 13 Moo. P. C. C. 242; *Dysart Peerage* case, 1881, 6 App. Ca., per Ld. Selborne at p. 556, per Ld. Watson at p. 543; Fraser, *H. & W.* i. 436). This would be so in a clear case where there was no *copula* following. For where real present consent is established, it is unnecessary to aver or prove *copula* (*infra*, *Marriage by Declaration de præsenti*). But the absence of

copula, if otherwise unexplained, will be a material element in considering whether the parties themselves regarded the contract as an actual marriage (*Taylor, ut supra; Lockyer*, 1846, 8 D. 582; and see cases under *Force and Fear*).

Error.—The error must be in substantials, and the only error which seems to be so regarded is one as to the indentity of the other party, *i.e.* in the language of the canonists, *error personæ*, or as to the nature of the ceremony, as where one took a marriage service to be a solemn betrothal. A marriage with one person in mistake for another might be set aside (Stair, i. 4. 6; Fraser, *H. & W.* i. 455; *Wakefield*, 1807, 1 Hag. Con. 394; *Cope*, 1809, 1 Hag. Con. 434; *Clowes*, 1842, 3 Curt. 785; *R.* v. *Millis*, 1844, 10 Cl. & Fin. 785; per Ld. Brougham in *Swift*, 1835, 3 Kn. at p. 293; *Moss*, 4 June 1897, 13 T. L. R. 459. See Bishop, *Marriage and Divorce*, ed. 1891, i. s. 528; *Ford*, [1896] P. 1).

An error as to the name is immaterial (*Cope, Clowes, ut supra*); and so a man who courted and married a woman erroneously, believing her to be a rich widow of whom he had heard, was held validly married (*Beau Fielding's* case, Howell's *State Trials*, vol. xiv. p. 1327). And it is not an essential error if the man supposed the woman to be a virgin, whereas in fact she was not so (Stair, Fraser, *ut supra*; and see ADHERENCE, and, *infra*, *Fraud*).

Force and Fear.—A marriage will not stand if it be shown that either party was compelled or terrified into contracting it. The consent must be freely given. The Court will look at the whole circumstances and the actings of parties before and after the marriage, and consider whether there was such a degree of intimidation as to make the party intimidated no longer a free agent (Stair. i. 4. 6; Bankt. i. 5. 31; Fraser, *H. & W.* i. 444; Bishop, *Marriage and Divorce*, i. 452; Brouwer, *De Jure Connubiorum*, 1. 17. 19; Bœhmer, *Jus Ecclesiasticum Protestantium*, 4. 1. 107; *Harford*, 2 Hag. Con. 423; see *Jolly*, 3 W. & S. at p. 190; Turner's Nullity of Marriage Bill, 17 Hansard's Parl. Deb. N. S. 1133; *Portsmouth*, 1 Hag. Ec. 355). Cases in which the woman was carried off by force, and compelled under pain of death to go through a form of marriage, were more common in a ruder age (see, in the *Liber Officialis S. Andree, Creichtone*, 1516, No. 6; *Wardlaw*, 1516, No. 20; *Boyis*, 1522, No. 35; *Fortoun*, 1553, No. 40). But in several recent cases in England a marriage has been annulled on proof that the woman's consent was extorted by force (*Scbright*, 1886, 12 P. D. 21; *Cooper*, [1891] P. 369; *Bartlett*, 1894, 72 L. T. (N. S.) 122; *Ford*, [1896] P. 1). In all of these cases the parties separated immediately after the ceremony, and the marriage was not consummated. The absence of *copula*, unless otherwise explained, is material as indicating that there had not been genuine and free consent to marriage (see per Ld. Moncreiff in *Lockyer*, 1846, 8 D. at pp. 615, 617; per Ld. Brougham in *Swift*, 1835, 3 Kn. at p. 284).

Fraud.—A marriage brought about by fraud is null, if real consent is not induced (Stair, i. 9. 9; Ersk. iii. 1. 16; Fraser, *H. & W.* i. 457). Where fraud is the only ground for reduction it is difficult to figure any misrepresentations which would be sufficient, except such as induced the party complaining to believe he was marrying one person when he was in fact marrying another, or to go through a cermony of marriage when he thought it was one of betrothal; for misrepresentations as to the family, fortune and character of the other party would not be enough to ground a reduction of marriage. Fraud as a ground of reduction of a marriage "does not include such fraud as induces a consent, but is limited to such fraud as

procures the appearance without the reality of consent," per Sir F. Jeune, Pres., in *Moss, ut supra* (*Wakefield*, 1807, 1 Hag. Con. 3941; *Sullivan*, 1818, 2 Hag. Con. at p. 247; *Swift*, 1835, 3 Kn. at p. 293; *Cameron*, 1756, Mor. 12680, and Ld. Fraser's statement of the facts of this case; *H. & W.* i. 457; *Allan*, 1773, Ferg. p. 37).

Bankton thinks it is a ground of nullity "if a man ignorantly marries a woman who is with child to another at the time." There is no other Scots authority for this (see More's *Notes to Stair*, i. 4. 6). Fraser seems to treat it as open, and gives no definite opinion (*H. & W.* i. 451).

It has been held in some of the States of America that this concealment of pregnancy from an intended husband may be a ground of nullity, if the pursuer did not show a want of due caution, and has not consented to the marriage after becoming aware of the pregnancy (Bishop, *Marriage and Divorce*, i. s. 484). In some continental countries the law appears to be the same (see the Austrian Code (*Allgemeines Bürgerliches Gesetzbuch für Oesterreich*), s. 581).

In Sweden it is enough if the woman has lived with another man as his mistress (chap. iv. s. 3, p. 8 of the translation of *Les Codes Suédois* by M. Grasserie, vol. xi. of the *Collection de Codes Étrangers*). The new German Code uses the general language as to error in substantials (s. 1334). In France it seems that fraudulent concealment of pregnancy is a ground of nullity (see a case in the *Journal du Droit International Privé*, 1895, vol. 22, p. 171, and editor's note at p. 173, as to French authorities). It is thought this would not be a ground of nullity in Scotland. It is not so in England (see cases cited under ADHERENCE, and *Moss*, 4 June 1897, 13 T. L. R. 459). Ld. Redesdale in the debate on the Matrimonial Causes Act, 1860, proposed a clause making this a ground of nullity, but the clause was not accepted (Hansard, 3rd series, vol. clviii. p. 217).

In most of the cases several of the elements of force, fraud, and error are mingled (and see, *supra*, *Insanity or Intoxication*).

Supervening Consent.—The challenge must be made with all reasonable promptness, or the Court may infer that although there may have been a want of free consent at the date of the celebration, the parties have afterwards accepted each other as husband and wife. It will be an important element whether there was *copula* (see, *supra*, under *Force*).

In countries, *e.g* England, where a ceremony is essential to the constitution of marriage, continuance of cohabitation may not be enough to perfect a marriage not consented to at the date of the solemnisation But in Scotland, where matrimonial consent is sufficient, the marriage would be validated by subsequent consent, evidenced by continual cohabitation (Fraser, *H. & W.* i. 446 and 456; Bishop, *Marriage and Divorce*, new ed., s. 547; Brouwer, *De Jure Connubiorum*, 1. 17. 10; Carpzovius, *Opus Definitionum Ecclesiasticarum*, 2. 2. 29. 12; Crawley, *H. & W.* p. 9, note; see *Johnston*, 1823, 2 S. 495; and cf. cases such as *Campbell*, 1867, 5 M. (H. L.) 115).

No Third Party has a Title to Sue.—Although there was at first no genuine consent, it is clear that if the parties acquiesce in the marriage, no third person is entitled to raise any question as to its validity (Fraser, *H. & W.* i. 435; Eversley, *Domestic Relations*, 2nd ed., p. 67).

Jurisdiction in Actions of Nullity.—The law as to this head is not clearly settled. The Court has jurisdiction to declare a marriage null if it was celebrated within the territory though neither party is domiciled there (*Sottomayor*, 1877, 3 P. D. 1; *Simonin*, 1860, 2 S. & T. 67; *Niboyet*, 1878, 4 P. D. 1; *Linke*, 1894, 10 T. L. R. 426). In the case of *Linke* the

jurisdiction was expressly put upon the ground that the ceremony was performed in England. This is accepted by Mr. Dicey as the sound principle (*Conflict of Laws*, p. 276). On the other hand, Mr. Westlake thinks there is jurisdiction when the defender is resident within the territory "not on a visit or as a traveller, and not having taken up that residence for the purpose of the suit" (*Priv. Int. Law*, p. 82). Where the parties are both domiciled in the territory, the Court has jurisdiction to declare a marriage null which was celebrated abroad (*Bonaparte*, [1892] P. 402; *Lawford*, 1878, 4 P. D. 61; see *Beattie*, 1866, 5 M. 181). And it is submitted with great deference that a woman who goes through a ceremony of marriage in the *bonâ fide* belief that it is valid, and afterwards goes to reside with the man, has acquired his domicile and may sue an action of nullity in its Courts. For the reason that at marriage the wife takes the husband's domicile is that she shows an *animus* to live with him, and carries this intention into effect. This reason is not affected by the fact that she may afterwards discover the supposed marriage was invalid (see *Turner*, 1888, 13 P. D. 37; but see *Niboyet*, *ut supra*, per James, L. J., at p. 9, and Westlake, *l.c.* It is not stated in the report of *A. B.*, 1884, 11 R. 1060, 12 R. (H. L.) 36, if the woman's domicile was Scottish before the alleged marriage).

Effects of Decree of Nullity.—Between the parties there is, so far as possible, a *restitutio in integrum* (Stair, i. 4. 20; Ersk. i. 6. 43; Fraser, *H. & W.* i. 149; per Ld. Pres. Inglis in *Wright*, 1880, 7 R. at p. 464). But where the ground of nullity is adultery, there are certain statutory disabilities (see ADULTERY, *supra*, under *Impediments as to Marriage*). Where one of the parties was in *bonâ fide*, *e.g.* was not aware that the other party was already married, it is said the children are legitimate. The question is not conclusively settled by authority (see in *Liber Officialis S. Andreæ*, Nos. 12, 133, 116, 117, 126, 161, 163, 135, 136, 138, 142, 147, 151, 153, 159; Sanchez, *De Sancto Matrimonio*, 3. 42. 43, and 8. 34. 46; and authorities cited in *Purves' Trs.*, 1895, 22 R. at p. 524 and p. 534; Fraser, *P. & C.* 22; *Petrie*, 1896, 4 S. L. T. No. 94 (Ld. Pearson); and see BONA FIDES. The *bona fides* must spring from an error as to fact and not as to law, *e.g.* it would not be relevant to aver that there was *bona fides* because the parties honestly believed that they might lawfully marry each other, although the woman was the sister or niece of the man's deceased wife, and they were aware of their relationship by marriage. But a man would be in *bonâ fide* if he went through a ceremony of marriage with a woman, not knowing her to be the sister or niece of his deceased wife (*Purves' Trs.*, 22 R. 513; and cf. *Whitworth*, [1893] P. 85). The general doctrine that *bona fides* of the parents, or one of them, will prevent the children being illegitimate, is admitted in France (*Code Civil*, 201, 202), in Germany (*Bürgerliches Gesetzbuch*, s. 1699), in Spain (*Codigo Civil*, s. 69, in vol. i. of the *Collection de Codes Étrangers*), in Italy (*Codice Civil*, s. 116; see note at p. 39 of vol. xviii. of the *Collection de Codes Étrangers*), in Belgium (*Code Civil*, 201), and, with certain limitations, in Austria (*Allgemeines Bürgerliches Gesetzbuch*, 160). It was formerly the law of England, but is not so now (Pollock and Maitland, *History of English Law*, ii. 374).

III. CONSTITUTION OF MARRIAGE.

A marriage in Scotland may be either regular or irregular. And among irregular marriages it is convenient to distinguish one class by the name of clandestine (see *infra*). It is a criminal offence to "celebrate" a clandestine marriage, *i.e.* for a minister, or any person assuming the

office of a minister, to marry persons without previous proclamation of banns or publication of a registrar's notice (see *infra*). But other irregular marriages involve no penal consequences (Fraser, *H. & W.* i. 254; Macdonald, *Crim. Law*, 195; see 19 & 20 Vict. c. 96). Subject to 19 & 20 Vict. c. 96, two foreigners may contract either a regular or irregular marriage in Scotland (*Longworth*, 1862, 1 M. at p. 169, per Ld. Curriehill at p. 170, per Ld. Deas, 2 M. (H. L.), per Ld. Westbury at p. 63; *Dysart Peerage* case, 1881, 6 App. Ca. at p. 512, per Ld. Blackburn; *Brook*, 1861, 9 H. L. C. at p. 215; *Mackenzie*, 8 Mar. 1810, 15 F. C. 613; see, *supra*, *Non-Residence in Scotland*: and see Banns).

Marriage is equally valid to all effects in whatever way—regular or irregular—it may be entered into. And it is in truth always constituted by the present consent of the parties to take each other as husband and wife. The different modes of constituting marriage are only so many ways recognised by law of interchanging the mutual present consent, which is the only essential (Ersk. i. 6. 2; Bell, *Prin.* ii. 1508; Brouwer, *De Jure Connubiorum*, ii. 27. 21 and 22).

1. *Regular Marriage.*—A regular marriage is one celebrated by a minister before at least two witnesses (Bell, *Prin.* ii. 1512; Fraser, *H. & W.* i. 289; 17 & 18 Vict. c. 80, s. 46), and after due proclamation of banns, or publication of a notice by the registrar. See Banns and Registrar's Certificate.

A minister of any church can perform a regular marriage; and for this purpose a Jewish Rabbi, or the person to whom the Quakers assign the duty of celebrating a marriage, is a minister (4 & 5 Will. iv. c. 28; 17 & 18 Vict. c. 80, s. 46; *Ballantyne*, 3 Irv. 386). No form, place, or hour is prescribed by law. There are no canonical hours for marriage, as in England (Fraser, *H. & W.* i. 282 and 289; Fergusson, *Consistorial Law*, iii.; Report Royal Com. on Marriage Laws, 1868, p. 17). It is assumed that the minister will solemnly ask the parties if they take each other for husband and wife, and, on their replying in the affirmative, that he will declare them to be married. And a marriage, if performed by a minister before two witnesses, after banns or notice to the registrar, is regular and *in facie ecclesiæ* though the ceremony takes place in a private house or in the public street (Bell, *Prin.* 1511; Van Espen, *Jus Ecclesiasticum Universum*, ii. 1. 12. 4). A regular Presbyterian marriage is in fact generally celebrated in the house of the bride's parents, though in the upper classes there is a tendency to return to the earlier practice of celebration in the church (Fraser, *H. & W.* i. 293). The marriage is complete when the consent has been exchanged. Consummation is not necessary. If the man were to die on leaving the church, he would leave a widow (Hume, i. 456; *Walker*, 1813, 5 Pat. 675; *Leslie*, 1860, 22 D. 993).

The minister is liable to penalties if he performs the ceremony without having produced to him a certificate that banns have been duly proclaimed or notice duly given (see, *infra*, *Clandestine Marriage*). And the marriage must be registered, under penalties (see, *infra*, *Registration of Marriages*).

2. *Clandestine Marriage.*—This term is sometimes used with perfect correctness to include all irregular marriages (Hume, *Crimes*, i. 463; Ersk. i. 6. 10; *Queen* v. *Millis*, 1844, 10 Cl. & Fin. at pp. 543, 548; Brouwer, *De Jure Connubiorum*, lib. i. 21. 19; i. 27. 21; Ld. Stowell in *Sullivan*, 1818, 2 Hag. Con. at p. 250; Sanchez, iii. 1. 1. 3; and see lib. 3. 2). Van Espen even uses it specially of marriages at which a minister is not present. *Clandestinitas quæ nihil aliud est quam defectus præsentiæ parochi et testium* (*Jus Ecclesiasticum Universum*, ii. 1. 12. 29, note). It is, however, convenient

to confine it, as a term of Scots law, to marriages constituted with a religious ceremony, but not satisfying the requirements of the law. For the Acts against clandestine marriages do not strike at irregular marriages by *verba de præsenti* or *verba de futuro cum copula* (Hume, i. 465; Bell, *Prin.* ii. 1514; Fraser, *H. & W.* i. 254; opinion of Sir Ilay Campbell cited in *Dalrymple*, 1811, 2 Hag. Con. at p. 72; Fergusson, *Consist. Law*, 113, 126; Macdonald, *Crim. Law*, 3rd ed., 199; see *Ballantyne*, 1859, 3 Irv. 352). The collusive prosecutions before a magistrate, in order to prove a marriage, charged the parties with having "celebrated" a clandestine and inorderly marriage, contrary to 1661, c. 34, and other Acts, and this was admitted (see *h.t. infra, Registration of Marriages*). These Acts are 1661, c. 34, and 1698, c. 6. The Act 1695, c. 12, only strikes at "outed ministers," and is virtually repealed by 4 & 5 Will. IV. c. 28. And the Act 1672, c. 9, which declared that the parties should forfeit their *jus mariti* and *jus relictæ*, was repealed by the general Act 1690, c. 27 (see *Carruthers*, 1705, Mor. 2252). The offence against which these Acts were mainly directed was the celebration of marriage by a minister not belonging to the Church then by law established.

But since the Act 4 & 5 Will. IV. c. 28, any minister of religion can celebrate marriages (see, *supra, Regular Marriage*). Several other kinds of clandestinity, formerly recognised as contraventions of law, have now dropped into oblivion (see Fraser, *H. & W.* i. 232; Sanchez, iii. 1. 1. 3).

The only clandestine marriages now penal under the above Acts are (1) marriages celebrated by a minister without due proclamation of banns or notice by the registrar (see *Ballantyne*, 1859, 3 Irv. at p. 369; BANNS AND REGISTRAR'S CERIFICATE); (2) marriages celebrated by a layman assuming the character of a minister (Fraser, *H. & W.* i. 251; *Ballantyne*, 1859, 3 Irv. 352).

In addition to the old Acts against clandestine marriage, the Marriage Notice (Scotland) Act, 1878 (41 & 42 Vict. c. 43), s. 12, provides that "any person otherwise entitled to celebrate a marriage, who does so without certificates of due proclamation of banns or of registrar's certificates of notice . . . or one certificate of each kind, as the case may be, is liable to a penalty of £50." It is probable that any prosecution of a minister for marrying persons without banns or notice would now be brought under this Act. The only case in which the old Acts might be expected to be enforced would be a prosecution of a layman for assuming the office of a minister in the celebration of marriage.

By 1661, c. 34, the parties to a clandestine marriage may be imprisoned for three months, and are liable to certain fines, according to their rank.

By 1698, c. 6, the witnesses are each liable to a fine of £100 Scots.

But it does not appear that any person except the celebrator has, in modern times, ever been criminally prosecuted under these Acts, except in the cases of collusive prosecution before a Justice of Peace for the purpose of proving the marriage (Hume, i. 464; see *Brown*, 1823, Ferg. 229, and, *infra, Registration of Marriages*). The sentence in these cases was really illegal, as there was no "celebration," and consequently no breach of the Acts (Fraser, *H. & W.* i. 303). There is no illegality in a magistrate or any other person acting as a witness of the interchange of matrimonial consent. Nor would there be anything criminal in a witness to the marriage offering a prayer for the happiness of the parties, unless, as in some of the cases, he was a person who took payment for marrying people, and made a trade of it (see *Ballantyne, ut supra*, per Ld. Deas at p. 375, per Lord Neaves at p. 385). There must be "an assumption to some

extent of the proper functions of a minister of religion" (per Ld. J.-C. Inglis, *ib.* at p. 373). What amounts to this assumption or to "celebration" depends on the particular circumstances of each case (*ib.*).

By 1661, c. 34, the celebrator is liable to "be banished the kingdom, never to return therein under the pain of death." The capital penalty for return could not now be enforced (Crim. Proc. Act, 1887, s. 56).

By 1698, c. 6, he is liable to "such pecuniary or corporal pain as the Lords of the Privy Council shall think fit to inflict." The Court of Justiciary, if it has succeeded to this discretionary power of the Privy Council, has at least not exercised it (Hume, i. 463; Alison, i. 544; Bell, *Prin.* 1514; Fraser, *H. & W.* i. 229). The celebration of clandestine marriage is not an offence at common law (*Ballantyne, ut supra*).

3. *Irregular Marriage.*—(*a*) By Declaration de præsenti.—Marriage is constituted in Scotland by mere interchange of consent. All that is required is that the parties, being capable of marriage, and there being no impediment between them, should express their mutual consent to take each other then and there for husband and wife. In the case of persons non-resident in Scotland the provisions of Lord Brougham's Act (19 & 20 Vict. c. 96) must be complied with (see, *supra, Non-Residence in Scotland*). No precise form of words is required. If the Court is satisfied, from the whole circumstances and the conduct of the parties before and after, that they have given genuine consent to present marriage, it will be held that marriage has been validly constituted (*Walker*, 1807, Mor. App. *voce* "Proof," No. 4, 1813, 5 Pat. 675; see *Dysart Peerage* case, 1881, 6 App. Ca.; *Aitchison*, 1838, 1 D. 42; *Ballantyne*, 1859, 3 Irv. per Ld. J.-C. Inglis at p. 360, per Ld. Deas at p. 374; *Hamilton*, 1842, 1 Bell's App. 736; *Forster*, 1872, 10 M. (H. L.) 68; *Leslie*, 1860, 22 D. 993; *Imrie*, 1891, 19 R. 185; Sir G. Mackenzie, *Institutes*, i. 6; Report Royal Commission, 1868, p. xviii; Ersk. i. 6. 11; Bell, *Prin.* ii. 1513; Fraser, *H. & W.* i. 294; Walton, *H. & W.* 16).

It is not necessary that witnesses should be present at the declaration of mutual consent, though where there is no acknowledgment in writing, and the parties never cohabited, it may be impossible in the absence of witnesses to prove the marriage (*Leslie*, 22 D., per Ld. Deas at p. 993; Report Royal Commission, 1868, p. xvi; Fraser, *H. & W.* i. 294; per Lyndhurst, L. C., in *Q.* v. *Millis*, 10 Cl. & Fin. at p. 848; per Willes, J., in *Beamish*, 1861, 9 H. L. C. at p. 308; *Decret.* Greg. IX. 4. 3. 93; Swinburne on *Sponsals*, p. 87; Pothier, *Traité du Contrat de Mariage*, part 4, c. 1, s. 3, subs. 3).

It was the law of Catholic Europe before the Council of Trent that *sponsalis per verba de præsenti, i.e.* the declared consent of the parties to take each other there and then for husband and wife, constituted at once *ipsum matrimonium* (*Decret.* 4. 1, c. 25, and 4. 3, c. 2; Brouwer, *De Jure Connubiorum*, i. 23. 12; i. 24. 19; Bœhmer, *Jus Ecclesiasticum Protestantium*, 6th ed., 4. 1. 10; 4. 1. 53; Sanchez, *De Sancto Matrimonio*, 1. 20. 1; Van Espen, *Jus Ecclesiasticum Universum*, 2. 1. 12. 4. 7; 2. 1. 12. 29, note; 2. 1. 12. 5. 29; Swinburne, *Sponsals*, p. 14; Friedberg, *Das Recht der Eheschliessung*, p. 11; Freisen, *Geschichte des Canonischen Eherechts*, p. 181; Walter, *Lehrbuch des Kirchenrechts*, s. 307; Friedberg, *Lehrbuch des Kirchenrechts*, 4th ed., 412; Pothier, *ut supra*; authorities cited in *Q.* v. *Millis*, 1844, 10 Cl. & Fin. 534; in *Dalrymple*, 1811, 2 Hag. Con. 54; in *Beamish*, 1861, 9 H. L. C., 278; article by Sir H. W. Elphinstone, *Law Quarterly Rev.* vol. v. p. 44; Pollock and Maitland, *History of English Law*, ii. 382). In *Q.* v. *Millis, supra*, it was held that the law of England had

not accepted the general canon law on this point, but had always required the presence of a priest at the constitution of marriage. The opinion of Willes, J., in *Beamish, ut supra*, and the researches of Friedberg and others, have made it very doubtful if the view which prevailed in *Q.* v. *Millis* is historically sound. It was not followed in *Maclean* (Perry's *Oriental Cases*, 75), and has been repudiated in America (Bishop, *Marriage and Divorce*, i. s. 401 and s. 409; and see *Catterall*, 1 Rob. E. 580; see other authorities in preceding note). Ld. Fraser accepted it as accurate both for England and Scotland (see his evidence before the Royal Commission of 1868, and *H. & W.* i. 181). In his view the cases of *Dalrymple* and *Walker* had first introduced the doctrine into Scotland that mere present consent constituted marriage. It was too late to challenge that principle, but Fraser declines to admit, what appears to be logically involved in it, viz. that marriage is constituted by promise *subsequente copula* even before declarator (see *infra*).

It is, however, submitted that there is no authority for the view that the law of Scotland broke off from this cardinal doctrine of the general canon law of Europe, and that this is in itself highly improbable. (As to the *onus* upon such a question, cf. Fraser, *H. & W.* i. 23 *seq.*, with the articles by Professor Maitland in *English Historical Review*, 1896, pp. 446 *seq.* and 641 *seq.*; and see *Collins*, 11 R. (H. L.) 19). It is thought that *Dalrymple* and *Walker* declared the ancient law of marriage in Scotland (see Stair, i. 4. 6; iv. 45. 19; Ersk. i. 6. 5; Mackenzie, *Institutes*, i. tit. 6; opinions of Scots counsel in *Dalrymple*, esp. of Baron Hume at p. 73 of the App. to 2 Hag. Con., and of Sir Ilay Campbell (ex-Ld. Pres.) at p. 139; *Ballantyne*, 1859, 3 Irv. at p. 360, per Ld. J.-C. Inglis; and the authorities cited *infra*, for the view that promise *subsequente copula* makes marriage).

How Consent is Proved.—Consent may be proved by parole (*M'Adam*, 1813, 5 Pat. 675; *Maloy*, 1885, 12 R. 431; Stair, iv. 45. 19; Fraser, *H. & W.* i. 297; Dickson, *Evid.* i. 5. 543) or by writing. The writing may be in the form of an express acknowledgment or declaration, and need not be holograph or tested (*Wycke*, 1801, Mor. App. "*Forum Competens*," 2; *Mackenzie*, 1848, 10 D. 611; *Fleming*, 1859, 21 D 1034; *Imrie*, 1891, 19 R. 185). But even where there is no precise and definite written acknowledgment, the Court may infer from the tenor of a correspondence that matrimonial consent must have been interchanged (*Leslie*, 1860, 22 D. 993; *Campbell*, 1866, 4 M. 867, 5 M. (H. L.) 115). In such a case it is not necessary for the pursuer to pin herself (or himself) down to a particular time and place at which the marriage was constituted (*Leslie, ut supra*; *Longworth*, 1862, 1 M. 161, 4 Macq. 745; Fraser, *H. & W.* i. 314). In a recent case the parties had exchanged written acknowledgments of marriage. These documents were afterwards destroyed. At the proof the defender admitted that they had existed, and had been expressed in the terms stated. He maintained, however, that they were given for a collateral purpose, and not to make marriage. The marriage was held proved (*Imrie*, 1891, 19 R. 185). It is very doubtful if reference to oath is competent in declarators of marriage since 11 Geo. IV. and 1 Will. IV. c. 69, s. 36. It would certainly not be allowed where it might prejudice the interests of third parties, *e.g.* of a wife whom the defender had regularly married since the alleged *de præsenti* declaration to the pursuer (*Longworth*, 1865, 3 M. 654; affd. 1866, 5 M. (H. L.) 144). The admission of the defender is not enough without corroboration (11 Geo. IV. and 1 Will. IV. c. 69, s. 36; 13 & 14 Vict. c. 36, s. 16; *Muirhead*, 8 D. 786; *Longworth*, 1867, 5 M. (H. L.) 144). In a recent case the defender lodged a minute of admission that he and the pursuer had been lawfully married by declaration *de præsenti*. Ld. Stormonth

Darling accepted the evidence of the pursuer alone as sufficient corroboration (*Macdonald*, 18 July 1894 (*Scotsman*), N. R.). But this would not be held where the interests of third parties might be prejudiced by fixing the marriage as at a particular date (Stair, iv. 45. 19; Fraser, *H. & W.* i. 302).

It is not enough to table an acknowledgment of marriage or to produce witnesses to the interchange of consent. The Court must be satisfied, on a view of the whole circumstances and the conduct of parties, that there was genuine consent to present marriage (*Maloy*, 1885, 12 R. 431; *Imrie*, *ut supra*; and see, *supra*, *No Genuine Consent*).

It is not necessary to aver and prove *copula* (*Leslie*, *Walker*, *ut supra*). But where the acknowledgments are ambiguous, the presence or absence of *copula* will be an important element in deciding whether there was genuine present consent. And if one of the parties led the other to permit *copula* by declaring in plain language consent to marriage, he will be barred from proving that his consent was feigned (*supra*, *No Genuine Consent*). It is not settled if marriage can be constituted by consent exchanged in letters. In all the cases letters have been read to prove that the parties had previously exchanged verbal consent (Fraser, *H. & W.* i. 315; Bishop, *Marriage and Divorce*, c. 15; Swinburne, *Spousals*, p. 182; Brouwer, *De Jure Connubiorum*, i. 20. 9; passage cited from Erasmus by Friedberg, *Recht der Eheschliessung*, p. 102; see *Sassen*, 1824, 3 S. 159, 2 W. & S. 309; evidence of Mr. Craigie in *Dalrymple*, 2 Hag. Con. App. p. 40, of Mr. Hamilton at p. 56, of Mr. Hume at p. 71, and of Mr. Clerk at p. 109).

(*b*) By Promise Subsequente copula.—When a woman proves by writ of the defender (as to oath, see *infra*) that he promised to marry her, and proves *prout de jure* that, in reliance on the promise, she permitted sexual intercourse, the Court will hold marriage constituted as at the date of the *copula*. This rests on the ground that the parties must be presumed to have converted their engagement into marriage by exchange of present consent, and so to have made their intercourse lawful. In the language of the canon law, *verba de futuro, subsequente copula*, are equivalent to *verba de præsenti*. Brouwer says: "Non quod vis copulæ sit, per se, et sui natura vertere sponsalia in nuptias; sed quod creduntur consponsi, novo quasi consensu a conditione recessise, et sponsalia in matrimonium mutasse. Quam sententiam, præter favorem matrimonii, suadet et hæc ratio; ut animabus Christianorum consulatur, ne commississe consponsi dicantar mortale pecatum quod operatur extra matrimonium coitus. . . . Est que hæc presumptio juris et de jure" (*De Jure Connubiorum* (1665), i. 23. 2; and see *Decret.* Greg. IX. 4. 1, c. 15, c. 30 and c. 32, and authorities *infra*). If a woman raised the action and died during the dependence, it seems that it could be insisted in by her executors (*Green* or *Borthwick*, 1896, 24 R. 211).

It has not been decided that the action would be incompetent at the instance of the man. But there is hardly the same natural presumption that he consented to *copula* only on the faith of the promise, and in the absence of any modern instance it is unlikely that the competency would be sustained (Fraser, *H. & W.* i. 363, 322). It was, however, competent by the canon law (*Decret.* Greg. IX. iv. 2, c. vi. xii.; Esmein, *Le Mariage en Droit Canonique*, i. 201; Brouwer, i. 23. 26–28).

It is not yet settled if declarator is necessary to the *constitution* of marriage in this mode. If this should be so held, it would be impossible to establish or complete the marriage after the death of the defender. In the Report of the Royal Commission, 1868, p. xix, the point is said to be

open, and in *Maloy*, 1885, 12 R. 431, the Court (First Div.) reserved their opinion upon it.

Ld. Fraser discusses the question with great fulness, and comes to the conclusion that promise *cum copula* does not constitute marriage, but forms a very peculiar relation. The woman has, during the man's lifetime, the right to a declarator turning this relation into marriage, and that even though in the meantime the man has gone through a ceremony of regular marriage with another woman (*H. & W.* i. 322 *seq.*). He relies very much on *The Queen* v. *Millis* (Dix's Rep. and 10 Cl. & Fin. 534), and says that the opinion of Ld. Lyndhurst is a correct exposition of the law of Scotland on promise *cum copula* (*H. & W.* i. 326, note). In that case the Lords were equally divided. By a technical rule of the House, the view which prevailed was that of three learned lords who held, against an equal number, that by the law of England complete marriage could never be constituted without the presence of a priest. Many high authorities doubt the historical soundness of this, though of course it is a conclusive authority in England. (Contrast the opinion of Ld. Campbell, L. C., in *Att.-Gen.* v. *Dean of Windsor*, 1860, 6 Jur. N. S. at p. 834, with that of Willes, J., in *R.* v. *Manwaring*, 1856, Dears. & B. at p. 139; and see *Beamish*, 1861, 9 H. L. C. 278, and authorities under *Declaration de præsenti, supra*.) The argument which prevailed was that the law of England had departed upon this point from the old canon law, and the law of Catholic Europe prior to the Council of Trent. It had never admitted any irregular marriage without a religious ceremony. It was not suggested that promise *subsequente copula* produced any less effect than declaration *per verba de præsenti*. On the contrary, Ld. Lyndhurst says the one is equivalent to the other (10 Cl. & Fin. at p. 832; and see Bishop, *Marriage and Divorce*, i. s. 379).

The law of Scotland allows marriage to be completely constituted, without the intervention of a priest or minister, by declaration of present consent, either expressed or inferred from cohabitation and habit and repute. Nor is it easy to see how, in the case of promise *cum copula*, a decree of declarator can supply the place of the priest whose presence was said in *The Queen* v. *Millis* to be indispensable Fraser thinks the decree of declarator comes in place of a decree ordaining the parties to solemnise the marriage. In his view, a petition for solemnisation was the older form of action, and it implied that the marriage was not already complete. But the soundness of this reasoning is doubted. In the *Liber Officialis S. Andree*, contracts *per verba de præsenti* and *per verba de futuro* are both called *sponsalia—e.g. Johnsoune*, No. 33. This is according to the universal practice of canon-law writers, and no argument can be drawn from it. Brouwer says of that law: "nimis laxo significatu, imo invita jurisprudentia ipsas nuptias postea sponsalia appellavit" (*De Jure Connubiorum*, i. 1. 6; see also Bœhmer, iv. 1. 10; Swinburne on *Spousals*, p. 232; Freisen, *Geschichte des Canonischen Eherechts*, 208 *seq.*). The old form of a petition to have the parties ordained to solemnise the marriage *in facie ecclesiæ petitio solemnizationis* (see the cases of *Crawforde* and *Thomsone* in the M. S. S. Com. Court, cited by Fraser, *H. & W.* i. 363) was not at all confined to Scotland. Secret marriages, though lawful, were never approved of by the Church.

"Everything was presumed to be complete and consummated in substance but not in ceremony, and the ceremony was enjoined to be undergone as matter of order" (per Ld. Stowell in *Dalrymple*, 2 Hag. Con. at p. 65; evidence of Mr. Hume in App. at p. 73).

In this there was no distinction between contracts *per verba de præsenti* and those *per verba de futuro cum copula*. In either case the parties might be ordained to celebrate the marriage *in facie ecclesiæ* (see Friedberg, *Recht der Eheschliessung*, p. 57; Brouwer, i. 24. 19). In *Baptie*, 1665, Mor. 8413, it is said in the first report that the pursuer got decree ordaining defender to solemnise the marriage. The second report calls it an action for *adherence*. In *Harvie*, 1732, Mor. 12388, the woman pursues for *adherence*, founding on promise *cum copula* (*Geddy, Liber Officialis S. Andreæ*, No. 166; *Mutto, ib.* No. 168, in neither of which is *copula* averred; in *Watt, ib.* No. 134, where there had been *sponsalia, copula subsecuta*, the *woman* is ordained to *adhere* as well as to solemnise the marriage, and the parties are styled in the rubric *conjuges* (see evidence of Mr. Cay in *Dalrymple*, App. to 2 Hag. Con. at p. 94; *Goole*, cited in *Beamish*, 9 H. L. C. at p. 299; *Holmes, ib.* at p. 301. Both these were contracts *de præsenti*, and the form of decree is to find that the parties were already married, but to order solemnisation). The law laid down in *Millis* that *sponsalia* were not *ipsum matrimonium* was followed in *Beamish*, and colours the account of these cases. Other English cases are *Jesson*, 2 Salk. 437; *Baxter*, 1 Lee, 42. See Blackstone, 1 Com. 439; Oughton, *Ordo Judiciorum*, Lond. 1738, tit. 193 and tit. 210; Friedberg, 53 and 208; 2 & 3 Edw. VI. c. 23, s. 2; Bishop, *Marriage and Divorce*, s. 280; Eversley, *Domestic Relations*, 2nd ed., p. 16). Solemnisation of irregular marriages, whether *per verba de præsenti* or *per verba de futuro cum copula*, was also enforced in France (see in *Beamish, ut supra*, at p. 277, and art. by Sir H. W. Elphinstone, *Law Quarterly Rev.* p. 44). In Germany the practice was similar (see the decree cited by Carpzovius, *Opus Definitionum Ecclesiasticarum*, 2. 8. 142. 19). The parties are ordered to celebrate the marriage *again* (*nochmals*) (also *ib.* 2. 8. 135. 7 and 15; Carpzovius was a strong advocate of marriage *in facie ecclesiæ*, and his language is not always consistent (see on him, Friedberg, *Recht der Eheschliessung*, pp. 194 and 252)).

It is submitted that neither in principle nor on authority is there sufficient ground for the view that promise *cum copula* produces a different effect from words of present consent. If the latter make marriage without more, so also must the former. Moreover, it is inconsistent with the nature of a declarator to do anything but declare a right which already exists. This view is supported by at least one direct decision, by many judicial *dicta*, and by almost all the text writers. The argument is too long to be fully stated here, but the following authorities may be referred to:—

For Ld. Fraser's theory: *H. & W.* i. 322–365; Bell, *Prin.* ii. s. 1515; Kames, *Elucid.* Art. 5; as to which last, see evidence of Mr. D. Craigie in *Dalrymple*, 2 Hag. Con. App. p. 45; and More's *Note on Stair*, i. 4. 6; per Ld. Moncreiff, *primus*, in *Browne*, 1843, 5 D. 1288; see also in *Lowrie*, 1840, 2 D. at p. 960; Ld. M'Laren, Ord., in *Maloy*, 1885, 12 R. 431, where many authorities are collected; evidence of Ld. Adv. Moncreiff before Royal Comm. 1868, in App. at p. 62 and p. 69).

For the theory that promise *subsequente copula constitutes* marriage, and therefore can be declared after the death of the defender: *Pennycook*, 1752, Mor. 12677, more fully in Ferg. p. 95; *Sibbauld*, 1545, *Lib Off. S. And.* No. 145, where the tie formed by *sponsalia per verba de futuro carnali copula subsecuta* is expressly called *vinculum matrimonii*; Stair, i. 4. 6, iii. 3. 42, and iv. 45. 19; More's *Notes*, xiii; Bankt. i. 5. 2; Mackenzie, *Inst.* 1, tit. 6; Ersk. i. 6. 4; *Prin.* i. 6. 2; Fergusson, *Consist. Law*, 115; Lothian, *Consist. Law*, 53; Wallace, *Prin.* 163; *dicta* per Ld. Pres. Dundas in *Forbes*,

1750, Elchies, *voce* "Proof," ii. 365; Ld. Pres. Campbell in *Kennedy*, 1796, Ferg. *Con. Law Rep.* p. 181; Ld. Stowell in *Dalrymple*, 1811, 2 Hag. Con. at p. 66; and see the evidence of Scots counsel in App. to 2 Hag. Con., especially that of Mr. Hume at p. 73, and Sir Ilay Campbell, ex-Ld. Pres., at p. 139; Ld. Eldon in *M'Adam*, 1813, 1 Dow, at p. 181; Ld. Meadowbank, *s.c.* 5 Pat. at p. 685; Ld. Cockburn in *Harvie*, 1837, 15 S. at p. 970; Ld. Gillies in *Aitchison*, 1838, 1 D. at p. 51; Ld. Chanc. Cottenham in *Stewart*, 1841, 2 Rob. at p. 591; Ld. Curriehill in *Ross*, 1861, 23 D. at p. 987; Ld. Deas, *ib.* at p. 992; Ld. Westbury in *Yelverton*, 1864, 4 Macq. at p. 856; Ld. Chelmsford, *s.c.*, 2 M. (H L.) at p. 74; Ld. Ardmillan in *Surtees*, 1873, 11 M. 388; Ld. Pres. Inglis in *Maloy*, 1888, 12 R. at p. 467. The opinion of Ld. Young, that where the pursuer dies pending the process, her executors can proceed with the action, is plainly inconsistent with Ld. Fraser's theory, that declarator can only be obtained when solemnisation is a possibility (*Green* or *Borthwick*, 1896, 24 R. 211; see Fraser, *H. & W.* i. 344, ii. 1241). The cases cited by Mr. Cay in his evid., App. to *Dalrymple*, 2 Hag. Con. at p. 94, in which declarator was pronounced after the death of the defender, are none of them cases of promise *subsequente copula*.

They were cases of clandestine marriage, or marriage by declaration *de præsenti*. They are: *Barclay*, 1611, Mor. 6115; *Anderson*, 1714, Mor. 12676; and *Murray* v. *Smith*, for which see the prints in *Hamilton Gordon Collection*, vol. v. letter M, No. 41. For the canon law, see authorities cited in *Dalrymple*, *R.* v. *Millis*, and *Maloy*, *supra*, and *Decret.* Greg. IX. 4. 1, c. 15, c. 30, and c. 32; 4. 1. 26; 4. 5. 3; 4. 5. 6; c. 27, c. 45, qu. 2 (Gratian); Brouwer, *De Jure Connubiorum*, 1. 13. 2–4, p. 214 of ed. of 1665; *ib.* 1. 23. 12; Bœhmer, *Jus Ecclesiasticum Protestantium*, 4. 1. 12. (11); 4. 1. 56; 4. 5. 6; Carpzovius, *Opus Definitionum Ecclesiasticarum*, 2. 3. 36. 7; 2. 8. 135. 7; 2. 8. 131. 8; Sanchez, *De Sancto Matrimonio*, 1. 40. 3; 1. 26. 7, 8; 3. 40. 2; Swinburne on *Spousals*, pp. 73, 224, 236. As to the high authority of Swinburne, see per Ld. Chanc. Lyndhurst in *Q.* v. *Millis*, 10 Cl. & Fin. at p. 833; Freisen, *Geschichte des Canonischen Eherechts*, 208 *seq.*, esp. p. 215; Friedberg, *Das Recht der Eheschliessung*, 48 *seq.*; Sohm, *Recht der Eheschliessung*, 142; Friedberg, *Lehrbuch des Kirchenrechts*, 4th ed., 412; Esmein, *Le Mariage en Droit Canonique*, 1. 142; Pollock and Maitland, *Hist. of Eng. Law*, ii. 366, 370; art. by Sir H. W. Elphinstone in *Law Quart. Rev.* vol. v. 44; Bishop, *Marriage and Divorce*, i. ss. 355, 377; Walton, *H. & W.* 29.

Nature of Proof.—It was early settled that in a declarator of marriage, though not in an action of damages for BREACH OF PROMISE (*q.v.*), the promise must be proved by writ or oath of the defender (Stair, i. 10. 4; Bell, *Prin.* 1518; Fraser, *H. & W.* i. 386). It is a defence that since the promise and *copula* founded on the pursuer has had sexual intercourse with another man (Bankt. i. 5. 2; *Barclay*, June 1729, in Lothian, *Consist. Law*, p. 50; authorities in *Maloy*, 12 R. 453). The plea was taken in that case (Fraser, *H. & W.* i. 342). Bankton's reason, that it would be absurd to declare a marriage which the defender could at once get the Court to dissolve, would extend logically to declarator of marriage on any ground. And this seems to have been the canon-law practice. In the Metropolitan Court of Rheims an action to have an irregular marriage declared, and the defender ordained to solemnise *in facie ecclesiæ*, might be met by an *exceptio fornicationis*. If this defence was sustained, the Court declared the marriage, but did not ordain the defender to solemnise and adhere. This placed him in the same position as if he had obtained a *divortium quoad torum*, which was of course the only divorce then admitted (Esmein, *Le Mariage en Droit Canonique*, i. 185).

(*a*) *Oath.*—Opinions have been expressed in the House of Lords that

since 11 Geo. IV. and 1 Will. IV. c. 69, a reference to oath in a declarator of marriage is incompetent. For the oath, if affirmative, would not be "sufficient evidence" in the sense of sec. 36. On a less strict view, reference to oath is still competent, but is in the discretion of the Court. It will be refused where, after the promise and *copula* founded on, the defender has gone through a ceremony of marriage with another woman, whose rights would be prejudiced by an oath affirmative of the reference (*Longworth*, 1865, 3 M. 645, 5 M. (H. L.) 144; see per Ld. Blackburn in *Dysart Peerage* case, 1881, 6 App. Ca. at p. 512; Report Royal Comm. 1868, p. xix; Dickson on *Evid.* s. 1415; Fraser, *H. & W.* ii. 1242; and see *Surtees*, 1872, 10 M. 886).

(*b*) *Writ.*—A distinct promise in writing is not essential, if there is writing signed by the defender which amounts to an acknowledgment that a promise has been given (*Campbell*, 1831, 2 Dow & Cl. 265; *Yelverton*, 1864, 4 Macq. at p. 856; *Morrison*, 1869, 8 M. at p. 853; *Ross*, 1861, 23 D. 972; *Mackenzie*, 1848, 10 D. 638; see *Maloy*, 1885, 12 R. 431).

Conditional Promise.—When the promise was conditional, the condition will be presumed to have been passed from at the *copula*. But this will not be so when the condition itself presupposes *copula*, as in the case of a promise to marry a woman if she becomes pregnant (*Stewart*, 1841, 2 Rob. at p. 590; *Kennedy*, 1794; Ferg. 163; Fraser, *H. & W.* i. 381; Brouwer, 1. 21. 19; Bœhmer, 4. 5. 6).

When the promise is proved or admitted, the *copula* may be proved *prout de jure* (*Harvie*, 1732, Mor. 12388; *Maloy*, *ut supra*).

Copula presumed to be on Faith of Promise.—The *copula* will be presumed to have been permitted on the faith of the promise. But this presumption may be rebutted, and if it is proved that the *copula* was unconnected with the promise, it will be held that marriage was not constituted thereby (*Morrison*, 1869, 8 M. 347; *Maloy*, *ut supra*).

If there has been *copula* before the promise, it lies on the pursuer to prove that a *copula* subsequent thereto was only granted on the faith of the promise (*Craigie*, 1838, 16 S. 584; M'L. & R. 942; *Ross*, 1861, 23 D. at p. 994; *Surtees*, 1873, 11 M. at p. 389; *Sim*, 1829, 8 S. 89).

If the *copula* was on the faith of the promise, it is immaterial that the woman did not know that marriage would be constituted by it (*Sim*, *ut supra*; *Elder*, 1829, 8 S. 56; per Ld. Eldon in *Laing*, 1823, 1 Sh. App. at p. 451; per Ld. Westbury in *Longworth*, 1864, 4 Macq. at pp. 854, 855; per Ld. Deas in *Leslie*, 1860, 22 D. 1011; Report Royal Comm. 1868, p. xix; see per Ld. M'Laren in *Maloy*, 12 R. at p. 447).

Promise and Copula must be in Scotland.—The promise and the *copula* must both take place in Scotland, or at least in a country where this is a mode of constituting marriage (per Ld. Chelmsford in *Longworth*, 4 Macq. at p. 879; per Ld. Kingsdown, *ib.* at p. 902; Fraser, *H. & W.* i. 384; Walton, *H. & W.* 28).

By Cohabitation and Habite and Repute.—*Definition.*—It may be held that a man and woman, by living together and holding themselves out as married persons, have sufficiently declared their matrimonial consent; and in that case they will be declared to be married, although no specific promise of marriage or of *de præsenti* acknowledgment has been proved (Fraser, *H. & W.* i. 391; Bishop, *Marriage and Divorce*, i. s. 378; Walton, *H. & W.* 20). The words "habite and repute" are past participles, equivalent to "held and reputed." The old phrase seems to have been "*et tanquam conjuges fuerunt habiti, tenti et reputate*," as in *Johnston*, 1522, *Liber Offic. S. Andree*, No. 33. The presumption in favour of marriage in such a case is grounded wholly or partly on the Act

1503, c. 77 (Ersk. *Prin.* i. 6. 3; Fraser, *H. & W.* i. 393). But this Act was no doubt based on the canon law, according to which marriage could be proved by evidence that the woman bore the man's name, was treated by him as a wife and reputed to be such—*nomen, trattatus, fama* (*Decret.* Greg. IX. 2. 23, c. 11; Esmein, *Le Mariage en Droit Canonique*, 1. 189).

"It is the holding forth to the world by the manner of daily life, by conduct, demeanour, and habit, that the man and the woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relations, neighbours, friends, and acquaintances, to these representations and this continued conduct, then habite and repute arise and attend upon the cohabitation" (per Ld. Westbury in *Campbell*, L. R. 1 H. L. Sc. at p. 211, cited by Ld. Watson in *Dysart Peerage* case, 1881, 6 App. Ca. at p. 549; and see per Ld. Glenlee in *Elder*, 1829, 8 S. at p. 62).

Nature of Proof.—The repute cannot make the parties married if the evidence does not point to their matrimonial intention (per Ld. J.-C. Hope in *Lapsley*, 1845, 8 D. at p. 4).

The repute, to be of value, must be among the friends and equals of the parties, among whom it is unlikely that a man will wish to pass off a mistress as a wife. "Where a man takes his mistress with him to an hotel, or goes with her to a shop to buy baby linen, the probability is that he will prefer describing her as his wife to explaining her true position" (per Ld. Watson in *Dysart Peerage* case, 1881, 6 App. Ca. at p. 552). Evidence of this kind is therefore of little or no value as throwing light on the real character of the relation (see *Hamilton*, 1839, 2 D. 89; *Thomas*, 1829, 7 S. 872). The circumstances must not be so equivocal that persons who had good grounds of judging did not believe the parties to be married (*Lowrie*, 1840, 2 D. 961). There must be cohabitation at bed and board as well as repute (*Lowrie, ut supra*; Fraser, *H. & W.* i. 401). The cohabitation and repute must be in Scotland, or at least in a country where marriage can be proved in this way and no ceremony is required for its constitution (*M'Culloch*, 1759, Mor. 4591; rev. 2 Pat. 33; *Dysart Peerage* case, 1881, 6 App. Ca. 489; see *Longworth*, 1864, 4 Macq. 834; Walton, *H. & W.* 372).

There is no period of cohabitation fixed by law; but in all the cases hitherto where marriage has been declared, the cohabitation has extended over several years (Fraser, *H. & W.* i. 400; see per Ld. Blackburn in *Dysart Peerage* case, 6 App. Ca. at p. 513).

Where there is an impediment to marriage at the commencement of the intercourse, as, *e.g.*, where one of the parties is already married and the impediment is removed, there is a presumption that the intercourse continues to be illicit (*Dysart Peerage* case, 6 App. Ca., per Ld. Watson at p. 539). This presumption may be rebutted (*Campbell*, 1867, 5 M. (H. L.) 115; see *Hill*, 1870, 25 L. T. 183; *Cunningham*, 1814, 2 Dow, 482; *Lapsley*, 1845, 8 D. 34, 1 H. of L. Ca. 498). And it does not exist when the parties were never aware of the impediment (*De Thoren*, 1876, 3 R. (H. L.) 28).

In England marriage may be held proved in this way, where the want of a record of the ceremony can be explained. But as marriage cannot be constituted there by the private consent of the parties, the evidence must point to their having gone through a formal ceremony (*Read*, 1794, 1 Esp. 212; *Collins*, 1878, 48 L. J. Ch. 31; *Barclay*, 1893, 1 S. L. T. Nos. 338, 550).

4. *How Question of Marriage can be Tried.*—The proper way for raising the question between the alleged spouses is for one of them to bring

an action of declarator of marriage. It seems that the Court would not, as between them, decide the question of marriage incidentally in a patrimonial action (Fraser, *H. & W.* ii. 1241).

The action may be brought after the death of the defender (*Leslie*, 1860, 22 D. 993). Fraser thinks a declarator founded on promise *subsequente copula* is incompetent after the death of either party, as it is then too late to solemnise the marriage (*H. & W.* i. 344, ii. 1241). This, for the reasons stated in discussing marriage by promise *subsequente copula*, is believed to be erroneous (see per Ld. Young in *Green* or *Borthwick*, 1896, 24 R. 211).

When the pursuer of an action of declarator of marriage dies pending the process, it is thought that his or her executors would be entitled to sist themselves and carry on the action (*Green, ut supra*; *Neilson*, 1853, 16 D. 325; *Darling*, 1892, 19 R. (H. L.) 31). And Ld. Young recently expressed an opinion that after the death of either or both of the parties the action might be raised by anyone having a legitimate interest (*Green, ut supra*).

During the lifetime of the alleged spouses a third party cannot raise a declarator of their marriage (Fraser, *H. & W.* ii. 1242). But the question may be raised by children in a declarator of legitimacy (*Petrie*, 1896, 4 S. L. T. No. 94). It may be raised and decided incidentally in any action at the instance of a third party having an interest (*Beattie*, 1863, 1 M. 263, question as to pauper settlement; *Rudland*, 16 Sc. Jur. 97, question as to liability of the man for debt to tradesman incurred by the woman; *Purves' Trs.*, 1895, 22 R. 513, claim by child in M. P. against father's trustees).

IV. International Aspect of Marriage.

Capacity to Contract Marriage.—Incapacity to marry is either absolute, as, *e.g.*, where a person is under the age at which marriage is lawful, or relative, as where a person is prohibited from intermarriage with those within certain degrees of consanguinity or affinity. In Scotland the prohibition by the Act 1600, c. 20, of marriage between a spouse divorced for adultery and the paramour named in the decree is another case of relative incapacity. See Adultery. For an enumeration of the impediments to marriage, see *supra*. Although the use of the term "capacity," in the relative as well as the absolute sense, is sanctioned by custom, it is thought that it has been a source of confusion. It is hardly correct to say that a person is subject to any incapacity because he is prohibited from marrying his aunt. Incapacity in its true sense denotes a limitation of status (see Walton, *H. & W.* 349 *et seq.*). In order to contract a valid marriage, each of the parties must be capable of marriage, and they must not be prohibited from marrying each other. In both these respects the *lex loci actus* must be satisfied, for no marriage is valid anywhere which was not valid in the country in which it was entered into (*Brook*, 1861, 9 H. L. C. 193; *Bell*, 1859, 13 Moo. P. C. C. 242; *Lacon*, 1822, 3 Stark. N. P. C. 178; *Butler*, 1756, Amb. at p. 303; *Dalrymple*, 1811, 2 Hag. Con. 54; *Scrimshire*, 1752, *ib.* 395; *Middleton*, 1802, *ib.* 443; *Beattie*, 1866, 5 M. 181; *MacCulloch*, 1759, 2 Pat. 33; Fraser, *H. & W.* ii. 1309; Westlake, *Priv. Int. Law*, s. 15; Walton, *H. & W.* 372 *et seq.*).

Where the parties are not prohibited from marrying each other by the *lex loci actus*, but are prohibited by the law of their domicile, the marriage is invalid (*Brook, ut supra*; *Sottomayor*, 1877, 3 P. D. 1, 5 P. D. 94; Westlake, *Priv. Int. Law*, s. 17; Huber, *De Conf. Leg.* bk. i. tit. 3, s. 10. Mr. Dicey considers it still open, *Conflict of Laws*, p. 626; but see Fraser, *H. & W.* Supp. ii. 1535; Bishop, *Marriage and Divorce*, i. s. 849). And it is thought that the same result must be arrived at when the domicile of the parties is different and the disability only exists by the personal law of one of

them (*Metle*, 1859, 1 S. & T. 416; Westlake, *cit.* s. 17; Walton, *cit.* 363; but see *Sottomayor*, 5 P. D. 94). But prohibitions by the *lex domicilii* of a penal character, or such as are contrary to the settled policy of our law, will not prevent a marriage celebrated in Scotland from being recognised there as valid (see per Hannen, J., in *Sottomayor*, 5 P. D. at p. 104; Westlake, ss. 18, 19; Dicey, *Conflict of Laws*, p. 628; Story, *Conflict of Laws*, s. 94; Fraser, *H. & W.* ii. 1305; Walton, *H. & W.* 398).

It has not been decided whether a marriage between a guilty spouse domiciled in Scotland and a paramour named in the decree would be valid if celebrated, *e.g.*, in England, where such a marriage is not prohibited. It is probable that it would be recognised as valid by the *lex loci*, on the ground that penal statutes have no effect outside the territory (*Scott*, 1886, 11 P. D. 128; Westlake, s. 18; *Pennegar*, 1888, 10 Amer. State Rep. 648; Walton, *H. & W.* 394; see *Kynnaird*, L. R. 1 C. P. 389). But in Scotland it would seem to be invalid. This was held in an unreported case by Ld. Craighill (see Mackay, *Manual*, 474; see *Stewart* v. *De Voto*, April 1878; *Beattie*, 1866, 5 M. at p. 190; *Fenton*, 3 Macq. at p. 537 (Ld. Brougham)).

Where objection to the validity of the marriage is that certain consents of parents or others required by the *lex domicilii* had not been obtained, this objection will not be sustained. The necessity by the foreign law of obtaining such consents is not looked upon as affecting the capacity of the parties, and has been said to be part of the ceremony,—the sufficiency of which is always determined by the *lex loci*. This ground is not very intelligible, but the law may be regarded as settled. The validity of the Gretna Green marriages was admitted both in England and Scotland (*Compton*, 1769, 2 Hag. Con. 444, note; *Brook*, 9 H. L. C. at p. 215; *Fenton*, 1859, 3 Macq. at p. 535; *Steele*, 1838, Milw. 1 (Irish); see Walton, *H. & W.* 351). And the same principle has been applied in England as to marriages of foreigners celebrated in that country without consents required by the *lex domicilii* (*Simonin*, 1860, 2 S. & T. 67; see *Sottomayor*, 2 P. D. 81, 3 P. D. 1, 5 P. D. 94; *Brook*, 1861, 9 H. L. C. 193). See DOMICILE.

Forms and Ceremonies.—Subject to the exceptions after mentioned, no marriage celebrated abroad will be treated in Scotland as valid if it was not constituted with such forms as satisfied the *lex loci actus* (*Butler*, 1756, Amb. 303; *Lacon*, 1822, 3 Stark. N. P. C. 178; *Brook*, 1861, 9 H. L. C. 193; Dicey, *Conflict of Laws*; see article by Sir H. W. Elphinstone in *Law Quart. Rev.* vol. v. 44; Fraser, *H. & W.* ii. 1309; Walton, *H. & W.* 372).

It is thought, on this principle, that a Scotsman and a Scotswoman could not contract a marriage abroad in any of the modes in which an irregular marriage can be constituted in Scotland, unless this mode of constituting marriage was admitted also by the *lex loci actus* (Fraser, *H. & W.* ii. 1309; Walton, *l.c.*; Bishop, *Marriage and Divorce*, i. s. 856; but see Gillespie's Bar, 2nd ed., p. 371; art. by M. Laurent in *Journal du Droit Internat. Privé*, 1895, vol. xxii. p. 268).

Exceptions.—British subjects abroad may lawfully marry each other in the presence of a British ambassador, or other official authorised in that behalf. The validity of such marriages depends on compliance with the provisions of the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), and the relative Order in Council of 28 October 1892 (Statutory Rules and Orders, 1892, p. 625). In certain cases marriages between a British subject and a foreigner are valid under this Act (ss. 4, 5).

A marriage celebrated abroad in other places which are subject to the doctrine of exterritoriality, if one of the parties is domiciled in Scotland, would, it is thought, be valid if constituted in any form sufficient to make

marriage in Scotland (Walton, *H. & W.* 379 *seq.*; but see Dicey, *Conflict of Laws*, 633; *Seagrove*, [1891] 1 Q. B. 551; note in *Law Quart. Rev.* vol. xii. p. 211; and as to a marriage on a British man-of-war at a foreign station, see *Culling*, [1896] P. 116).

Where there is no *lex loci*, or it is impossible for the parties to avail themselves of it, a marriage would be valid if it satisfied the requirements of Scots law as to form (*Ruding*, 1821, 2 Hag. Con. 371; see Walton, *H. & W.* 386).

Not every marriage which satisfies the *lex loci actus* is valid in Scotland.

A marriage to which one of the parties at least is domiciled in Scotland will not be valid in that country if it is regarded by Scots law as incestuous or contrary to public morals. And this prohibition cannot be evaded by celebrating the marriage in a foreign country where the prohibition does not exist. So a marriage of a Scotsman in Denmark with his deceased wife's sister is invalid, though marriage with a deceased wife's sister is permitted by Danish law (*Fenton*, 1859, 3 Macq. 497; *Purves' Trs.*, 1895, 22 R. 513; *Brook*, 1861, 9 H. L. C. 193; see, *supra*, *Capacity*).

Essentials of Marriage.—The personal rights and duties of the spouses, and their rights *stante matrimonio* in each other's moveable estate, depend on the husband's domicile at the marriage (*Harvie*, 1882, 8 App. Ca. at p. 50, per Ld. Selborne; Dicey, *Conflict of Laws*, 650).

Where the domicile of the spouses is changed during the marriage, it is not settled if the patrimonial rights of the spouses as to moveables *stante matrimonio* are thereby changed (see Walton, *H. & W.* 401 *seq.*; Dicey, *Conflict of Laws*, p. 655, and authorities under ADMINISTRATION, HUSBAND'S RIGHT OF, at p. 122 of vol. i.). Mutual rights as to heritage depend on the *lex rei sitæ*, and are not altered by the change of domicile (Dicey, *Conflict of Laws*, 519; Story, *Conflict of Laws*, ss. 448–454; *Harrison*, 1872, L. R. 8 Ch. 342).

It is thought that a domiciled Scotsman who marries a foreigner abroad is protected by the Married Women's Property (Scotland) Act, 1877 (40 & 41 Vict. c. 29, s. 4), from liability for her antenuptial debts, except to the amount of property received by him through the marriage (see Walton, *H. & W.* 417; ANTENUPTIAL DEBTS OF A MARRIED WOMAN).

V. REGISTRATION OF MARRIAGES.

Regular Marriages.—Regular marriages must be registered, and penalties are imposed for failure to do so. A copy of Sched. C appended to 17 & 18 Vict. c. 80 must be procured by the parties from the registrar of the parish (or district) within which they intend to solemnise the marriage. It is filled in by the registrar, and produced to the minister at the marriage. After the ceremony it must be signed by the minister, by the parties, and by two witnesses, and is then handed back to the parties, by whom it must be transmitted, within three days after the marriage, to the registrar of the parish (or district) within which the marriage was solemnised. On failure to do so the husband, and, failing him, the wife, is liable to a penalty of £10 (see 18 Vict. c. 29; 23 & 24 Vict. c. 85). For registration of marriages abroad, see 23 & 24 Vict. c. 85, s. 10, and 42 Vict. c. 8, s. 2 (Army).

Irregular Marriages.—An old practice was for the parties to an irregular marriage, who wished their marriage to be registered, to get themselves convicted before a magistrate or justice of the peace, on a complaint by the procurator-fiscal, of having celebrated a clandestine and irregular marriage, contrary to the Act 1661, c. 34, and other statutes (see *Brown*, 1823, Ferg. 229; *Hamilton*, 1827, 5 S. 716; Hume, i. 465; Fraser, *H. & W.* 303, i. 257). The extract conviction was then sent to the registrar. This procedure was not forbidden by 19 & 20 Vict. c. 96, if the conditions as to residence in Scotland had been satisfied; but an alternative mode was

introduced, which it is believed is now the only one known in practice. The parties, within three months of the marriage, may present a petition to the Sheriff to certify that they have been married, and that one of them had his or her usual residence in Scotland before the marriage, or had resided there for twenty-one days preceding it (see for the procedure, Walton, *H. & W.* App. 451).

When a marriage has been established by declarator, the Clerk of Court must transmit a notice of the decree to the registrar of the parish, or parishes, of the domicile or usual residence of the parties (17 & 18 Vict. c. 80, s. 49).

For the effect of marriage on personal and patrimonial rights during the lifetime of the spouses, see ADMINISTRATION, HUSBAND'S RIGHT OF; ALIMENT; ANTENUPTIAL DEBTS OF A MARRIED WOMAN; DONATIONS INTER VIRUM ET UXOREM; HUSBAND; JUS MARITI; MARRIED WOMEN'S PROPERTY ACTS; PARAPHERNALIA; MARRIED WOMAN; WIFE. For effects of marriage on rights of succession, see COURTESY; JUS RELICTÆ and JUS RELICTI; TERCE; and see DIVORCE; JUDICIAL SEPARATION.

Marriage (Registration of).—See REGISTRATION OF BIRTHS, ETC.; MARRIAGE; BANNS AND REGISTRAR'S CERTIFICATE.

Marriage Contract.—1. *INTRODUCTORY.*—"Marriage contract" is the legal term given to a contract in writing executed between parties who are either about to enter into the relationship of husband and wife, or are already married to each other. In the former case the deed is termed an antenuptial contract, and in the latter a postnuptial contract of marriage; but there are material differences between the legal effect given to the two deeds, and the results which flow from them respectively. These will be more particularly noticed hereafter. The general objects of both are, however, the same, viz.: To make provision for the wife and the children of the marriage, if any, and to secure, so far as practicable, the estate of the wife from being squandered by the husband, or carried off by his creditors in the event of bankruptcy; as also to regulate the rights of the children in the estates of the husband and wife respectively, and to supersede, so far as competent, the legal rights of the parties and of the children at common law.

Where the parties are both of full age and in a position themselves to make the requisite provisions for each other, and for the children of the marriage, the consent of any third parties is not required. But where either party is in minority, the legal guardians of that party should, as a matter of expediency, concur in the deed. The want of such consent, however, will not of itself invalidate the deed, and a contract by a minor having curators, but entered into without their consent, has been held good where lesion was not proved (*Bruce*, 1854, 17 D. 265).

Before proceeding to consider the form and effect of the contract as regards the parties to it, or those claiming benefit under it, and the obligations which it imports, it will be convenient briefly to state the legal rights of the husband and wife, and of the children of the marriage respectively, (1) at common law, and (2) under statute; and also to show in what respects these may be modified (*a*) by the antenuptial contract, and (*b*) by the postnuptial contract respectively.

2. *LEGAL RIGHTS OF SPOUSES AND CHILDREN.*—The legal rights of the *husband* at common law consist of—

(*a*) *The Jus mariti.*—This is defined by Erskine as "that right or interest

accruing from the marriage to the husband in the moveable estate which either belonged to the wife at the marriage or which shall be acquired by her standing the marriage." It infers an unqualified power of administration of the goods in communion in the person of the husband, including an unlimited right of management and disposal of the moveable estate of the wife, under which the husband is entitled to sue for, recover, and discharge for his own behoof all sums forming part of that estate. Marriage thus implies, at common law, and apart from the statutory limitations now imposed upon it by the special legislation to be afterwards noticed, a legal assignation by the wife in favour of the husband of her whole moveable estate, including rent of lands, interest of money secured by heritable bond, and annuities. The *jus mariti* does not, however, give the husband any right of property in his wife's heritable estate, nor in the capital sums contained in heritable securities, nor in the wife's paraphernalia.

(*b*) *The Right of Administration.*—The husband has also, by operation of law and in so far as not excluded by statute, the right, as curator of his wife during the marriage, to administer her whole estate, so far as not falling to him in virtue of the *jus mariti*. It is defined by Fraser (*Husband and Wife*, vol. i. p. 676) as "not a right of property, but a right of managing property whereby the husband's consent must be obtained to every act of administration."

(*c*) *Courtesy* is the right which the husband has to the liferent use of all the heritable estate, including superiorities (*Lord Clinton*, 1869, 8 M. 370), to which his wife acquired right by succession and in which she died infeft, provided there has been a living child born of the marriage who is the mother's heir. This right the husband takes up without service.

(*d*) Under the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21), the provisions of which will be afterwards more fully referred to, the husband takes, by operation of law, the same share and interest in his deceased wife's moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law of Scotland,—that is, one-third if there are surviving children of the marriage, and one-half if there are no surviving children. This right is also declared by the Act to be subject to the same rules, in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as are applicable to the wife's right of succession in her husband's moveable estate (see *Poe*, 1882, 10 R. 356; affd. 1883, 10 R. H. L. 73; *Hogarth and Another* (*Fotheringham's Trs.*), 1889, 16 R. 873; *Simon's Tr.*, 1890, 18 R. 135; and *Buntine*, 1894, 21 R. 714). But on the other hand, see *Eddington*, 1895, 22 R. 430, as to the effect of a decree of divorce at the instance of the husband. In that case it was decided, against the ordinary rule of law that divorce is equivalent to the death of the offending spouse, that the husband was not entitled to claim the right conferred by the Act, notwithstanding the divorce, during the life of the wife.

The legal rights of the *wife* are as follows:—

(*a*) *The Jus relictæ*, which is the wife's share of the husband's moveable estate falling to her on the dissolution of the marriage by the death of the husband. This right extends, as already indicated, to one-half of that estate if there be no children alive at the dissolution of the marriage, and to one-third, if there be children. The wife is not barred from claiming the *jus relictæ* by accepting a conventional provision from her husband under a marriage contract, provided she has not, in accepting such provision, expressly renounced her legal rights. If there are children of the marriage, and they have all discharged their right to legitim, the wife takes one-half of the husband's moveable estate, in the same way as if there were no children

alive at the dissolution of the marriage. A discharge by one child during the father's lifetime operates like the death of that child (*M'Gill*, 1671, Mor. 8179; *Buchanan*, 1876, 3 R. 556; *Douglas*, 1876, 4 R. 105; and *Jack, etc.*, 1879, 6 R. 543); and the same result follows the virtual discharge by the heir of any right to legitim on a refusal to collate (*M. of Breadalbane*, 1841, 3 D. 357; *Peat*, 1839, 1 D. 508).

(*b*) *Terce*, which is the right arising to a wife by operation of law, if she shall survive her husband, to the liferent of one-third part of the heritable estate (including heritable securities) in which he shall have died infeft, but subject to such burdens as shall have been properly created thereon during the husband's life. Under the Act 1681, c. 10, it is declared that wherever a particular provision is granted by a husband to his wife, either under an antenuptial or postnuptial contract of marriage or other deed, the wife is thereby excluded from claiming her terce, unless the contract of marriage or other deed making the provision contains a stipulation to the contrary,—that is to say, the wife cannot, in the case of this right, claim both the conventional and the legal provision.

The only legal right which the *children* of the marriage possess is *legitim*, which is the share belonging to them of the free moveable estate of the father at his death (and also, in virtue of the Married Women's Property Act as after mentioned, of the mother at her death). Under it the children acquire the position of *quasi* creditors; for although they are not entitled to rank therefor with creditors of the father, he cannot, on the other hand, defeat their right by will. The claim may, however, be effectually excluded by the grant of a provision contained in an antenuptial contract of marriage, even although this provision should be of small amount (*Maitland*, 1843, 6 D. 244). But the contract must declare that such provision is to come in place of the legitim. If the husband dies survived by his wife, the children's legitim is one-third of the moveable estate of their father, but if the wife has predeceased, it is one-half; and the same result follows where the widow has discharged her *jus relictæ*.

Prior to the passing of the Married Women's Property (Scotland) Act, 1881, the children had no right of legitim in their mother's estate, but sec. 7 of that Act conferred this right upon them, subject to the same rules of law in relation to the character and extent of the right, and the exclusion, discharge, or satisfaction thereof, as previously existed with reference to the moveable estate of their father.

3. *Modification of Legal Rights by Statute.*—These various legal rights in the husband, wife, and children respectively have, particularly as regards the two former, been modified by a series of Statutes, the general object of the legislation under which has been the protection of the wife from the acts of her husband or the diligence of his creditors. These Statutes are, therefore, properly noticed chronologically before proceeding to deal with the marriage contract as a deed, which may, *ex contractu*, alter the common-law and statutory rights of the parties.

By the Conjugal Rights (Scotland) Amendment Act, 1861 (24 & 25 Vict. c. 86), various provisions are made by which a wife, deserted by her husband, may apply for an order to protect any property which she has acquired or may acquire by the exercise of her own industry, or to which she may succeed; and no action of adherence at the instance of the husband is to be competent while this order of protection subsists; but the husband or a creditor may apply by petition for recall of the order, subject to the conditions stated in sec. 2 of the Act. The effect of an order of protection is to cause the property of the wife, acquired as above mentioned, to belong

to her as if she were unmarried; and it has also the force of a decree of separation as regards the property, rights, and obligations of the husband and wife, and the wife's capacity to sue and be sued.

Sec. 6 provides that after a decree of separation *a mensa et thoro* has been obtained at the instance of the wife, the property of the wife is to belong to her, exclusive of the *jus mariti* and right of administration of her husband, as if she were unmarried; and on her death the same is to pass to her heirs and representatives, in case she shall die intestate, as if her husband had predeceased her.

Sec. 16 provides that when a married woman succeeds to property, or acquires right to it by donation, bequest, or by any other means than by the exercise of her own industry, the husband, or his creditors, or any person claiming through him, is not to be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* and right of administration, except on the condition of making therefrom a reasonable provision for the support of the wife, if a claim therefor shall be made on her behalf, and provided that complete legal possession or attachment of the property has not, in the meantime, been obtained by the husband or his creditors.

The other provisions of this Statute do not require to be noticed here.

The Conjugal Rights (Scotland) Amendment Act, 1874 (37 & 38 Vict. c. 31), merely extended, under certain conditions, the power to apply for such orders of protection, or for their recall, and to make this competent in the Sheriff Court.

The provisions of these Statutes were further extended by the Married Women's Property (Scotland) Act, 1877 (40 & 41 Vict. c. 29), which excluded the *jus mariti* and right of administration of the husband from the earnings of any married woman acquired or gained by her, after the commencement of the Act, in any employment in which she should be engaged, or in any business which she should carry on under her own name, as also from any money or property acquired by her by the exercise of any literary, artistic, or scientific skill. On the other hand, the liability of the husband for the antenuptial debts of a wife were by this Statute (s. 4) limited, as regards any marriage contracted after the commencement of the Act, to the amount or value of any property received through her.

Although not strictly falling within the scope of this article, it may be right also to notice here, as part of the legislation for the benefit of married women, the terms of the Married Women's Policies of Assurance (Scotland) Act, 1880 (43 & 44 Vict. c. 26), by which it was made competent for a married woman to effect a policy of assurance on her own life, or on the life of her husband, for her separate use, exclusive of her husband's marital rights, and to assign such policy either *inter viros* or *mortis causa* without the consent of her husband. A husband is also authorised to effect a policy of assurance on his own life for the benefit of his wife, or of his children, or of his wife and children, and the same is to be deemed a trust for their benefit under the conditions and subject to the proviso set forth in sec. 2 of the Act, to which reference is made.

The effect of the earlier of these Statutes (The Conjugal Rights Amendment Act, 1861) and the necessity for a married woman applying for a protection order have to a large extent been superseded by the provisions of the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21), which contains various important provisions:—

(*a*) Where a marriage is contracted after the passing of the Act, and the husband is, at the time of the marriage, a domiciled Scotsman,

the whole moveable estate of the wife, whether acquired before or during the marriage, is to be vested in her as her separate estate, exclusive of the *jus mariti*; any income of such estate is to be payable on her individual receipt, and the husband's right of administration is to that extent excluded; but the wife is not at liberty to assign the prospective income or, unless with her husband's consent, to dispose of such estate (s. 1, subss. 1 and 2).

(*b*) The wife's moveable estate (other than corporeal moveables) is excluded from arrestment or other diligence for her husband's debts, provided it has been invested in her own name or in such a manner as to distinguish it from the estate of the husband; but any money belonging to the wife which has been lent or intrusted to the husband, or is immixed with his funds, is to be treated as assets of the husband's estate in bankruptcy,—under reservation of the wife's right to claim a dividend as a creditor in respect thereof, postponed to the other creditors of her husband (s. 1, subss. 3 and 4).

(*c*) The Act does not exclude or abridge the power of settlement by *antenuptial* contract of marriage (s. 1, subs. 5).

(*d*) The rents of heritable property in Scotland belonging to the wife are excluded from the *jus mariti* and right of administration of the husband; but this provision, as in the case of the wife's moveable estate, is limited to marriages contracted *after* the passing of the Act (s. 2).

(*e*) Sec. 3 deals with marriages contracted before the date of the Act (18 July 1881). Subsec. 1 thereof provides that the Act shall not apply where the husband shall have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him. Subsec. 2 enacts that in other cases the provisions of the Act shall not apply, except that the husband's marital rights shall be excluded, to the extent before specified, from all moveable and heritable estate and income thereof to which the wife may acquire right after the passing of the Act.

(*f*) Sec. 4 enables persons married before the date of the Act to come under its provisions by mutual deed, subject to the conditions set forth in the section.

(*g*) Sec. 5 makes provision for the husband's consent being dispensed with to any deed relating to the wife's estate where the wife has been deserted by the husband, or is living apart from him with his consent.

(*h*) The provisions of sec. 6, which give to a husband a right of succession in his wife's moveable estate, have already been noticed.

(*i*) Sec. 7, which deals with the right of children to legitim out of the moveable estate of their mother, has also been previously referred to.

(*j*) Sec. 8 declares that the Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or to donations between married persons, or a wife's non-liability to diligence against her person, or any of the rights of married women under the Act of 1877.

Having thus set forth (*a*) the legal rights at common law, and (*b*) the statutory rights of the husband, wife, and children of the marriage respectively, we proceed to indicate, 1st, the general form and provisions of the marriage contract itself; 2nd, the respects in which it has been usual to modify the common-law rights of the spouses and children by contract, and 3rd, the various rights and obligations of parties under or incident to the deed, and special questions arising out of such contracts which have formed the subject of decisions of the Court. In doing so it will be proper to deal separately with (*a*) the Antenuptial Contract; and (*b*) the Postnuptial Contract.

I. Antenuptial Contract.

1. *General Form and Provisions.*—It is unnecessary in the present article to refer in detail to the form and clauses of this deed. The Juridical Styles (*Heritable Rights*, 5th ed., pp. 174 *et seq.*) seem to afford all necessary information and guidance as to its various clauses, and reference is made to them. The terms of such contracts vary considerably, and are in each case dependent in large measure upon the particular circumstances of the parties to them; but the following may be referred to as the more usual provisions in deeds of this class:—

(*a*) Provisions by Husband.—(1) *To Wife.*—If the husband be possessed of heritable estate, and is a fee-simple proprietor, he may make a provision for his wife (1) By granting her a *locality* in certain lands, *i.e.* a right to her to receive the rents thereof during her life. Under the clause of locality the husband accordingly dispones these lands to his wife in liferent; and a feudal title thereto may be completed in her person by expeding and recording in the Register of Sasines a notarial instrument on the contract, or by so recording the contract itself, or part of it, under any clause of direction therein. (2) By granting her an *annuity or jointure* payable in the event of her surviving her husband, and to take effect after his death, the annuity being either made upliftable from the whole estate, or from such part thereof as may be described or pointed out in the contract.

If, however, the husband possesses no heritable estate in which he can grant to his wife a right of locality or a jointure, the contract usually contains either (1st) a simple personal obligation to pay her an annuity of a specified amount as from the date of his death, or from the first term of Whitsunday or Martinmas thereafter, during her life in the event of her survivance, and which may be secured either (*a*) by the *de præsenti* payment or transfer of adequate funds to the trustees named in the contract, (*b*) by effecting policies of assurance on his life and assigning them to these trustees coupled with an obligation to pay the premiums thereon, or (*c*) by an obligation to provide sufficient security to the satisfaction of the trustees within a certain specified time,—or the annuity may be left unsecured otherwise than by the husband's personal obligation; or (2nd) by the provision of a capital sum, of which the widow is to receive the liferent, and the capital is to pass at her death to the children of the marriage, if any, as afterwards explained.

In addition to the annual or other provision to the wife above mentioned, it is usual to give to her under the contract a right either of liferent or of fee (the latter is the better practice) in the *household furniture* and *effects* belonging to the husband at his death, or to insert an obligation to pay to her at his death a specified sum in lieu thereof. This, however, will confer in either case no right of preference on the wife over the creditors of the husband during the subsistence of the marriage, seeing that the furniture remains in the natural possession of the husband (*Campbell*, 1848, 10 D. 1280). But, on the other hand, the provision of a specific sum enables the wife to claim as a creditor to that amount in the event of the bankruptcy of her husband, although the same is not payable until his death (Bell, *Lect.* vol. ii. p. 872). As to what is included in a provision of "Household Furniture," see *Tod's Trs.*, 1872, 10 M. 422. See also as to effect of delivery in security, and possession, *Hewat's Trs.*, 1892, 19 R. 403, and *Mitchell's Trs.*, 1894, 21 R. 586.

The contract also usually contains an obligation to pay to the wife a sum for *mournings and aliment* up to the date from which the jointure, annuity, or other provision is to take effect. As to the amount of such aliment

where no sum is specified, see *Palmer*, 27 June 1811, F. C., and *Baroness de Lonay & Others*, 1863, 1 M. 1147.

(2) *To Children.*—The nature of the provisions to the children of the marriage will also vary according as the husband is possessed of heritable estate or not, and also according to whether, even if so possessed, he desires to destine the estate under the settlement, or to secure provisions to his children over it. If he is an heritable proprietor in fee-simple, the heritable estate may be settled on the eldest son or heir of the marriage and his heirs, whom failing the second son, and so on, in a form or forms which will be hereafter referred to more fully under the head of destinations and vesting; or the husband may confine himself to making provisions out of the estate for behoof of the whole children of the marriage, including the eldest son, by burdening it with a specific sum. If the husband desires to destine the estate to the eldest son, and is not possessed of other means out of which adequate provision can be made for his younger children, such provision may be constituted by burdening the right of succession of the heir with the provision of a capital sum, or of annuities, to such younger children as may not succeed to the estate (*Leslie*, 1868, 6 M. 445: affd. 1870, 8 M. H. L. 99). On the other hand, if the husband does not desire specially to destine the estate to the heir of the marriage, he may, as before mentioned, bind himself to secure a certain provision to the whole children of the marriage, varying in amount according to the number of these; and this may be done either in the contract itself or by a separate bond of provision granted *unico contextu* therewith.

If, however, the husband is not possessed of heritable estate the usual course is, as in the case of provisions for the wife, (1) to bind himself personally by the contract to pay over to the trustees named therein, either within a specified time, or during his life, or at his death, a specific or maximum sum as a provision for the children of the marriage, and this obligation may be secured (*a*) either by the conveyance of heritable bonds, stocks, or other securities to a sufficient amount, or of policies of assurance on the husband's life, to the trustees, or partly by the one and partly by the other, or (*b*) it may be allowed to stand upon the husband's personal obligation merely. (2) If, however, the husband is possessed of the necessary means at the time, he may *de præsenti* place the requisite funds in trust, either in order to secure the provisions to the widow and children respectively, or for behoof of the widow in liferent, in the event of her survivance, and of the children of the marriage in fee.

It will thus be seen that the forms in which provisions for the wife and children, of the nature indicated, may be made are extremely various; but in the event of the insolvency of the husband it becomes, as in a question with his creditors, a matter of the first importance to the person or persons claiming the beneficial interest, whether the provisions so made have been adequately secured, or, if not, are obligations prestable during the life of the husband. In this way it falls to be determined whether the wife and children (1) hold the position of secured or preferable creditors: (2) have a proper but unsecured *jus crediti* against the husband; or (3) have merely a *spes successionis*. In the first case they are creditors with a preference to the value of their security; in the second, creditors ranking with creditors; while in the third case they are merely heirs among creditors as between them and the other creditors of the husband, although creditors *quoad* him.

(*b*) Provisions to Widows and Children under Entail Acts.—If the husband is proprietor of an estate held under entail, and the deed of entail itself contains no special powers to grant provisions to the wife or children of the heir of entail in possession, he is entitled under the Aberdeen

Act (5 Geo. IV. c. 87) to make provisions for his wife and children as follows:—

(*a*) To grant his wife an annuity out of the estate to an extent not exceeding one-third part of the free yearly rent thereof so far as let, and the free yearly value so far as unlet, as the same shall exist at the granter's death,—and after deducting taxes and public burdens, subsisting liferent provisions, and the yearly interest of debts and provisions, including provisions to children.

(*b*) To grant provisions to his children (other than the child succeeding to the entailed estate) as follows:—

For one such child, one year's free rent or value; for two such children, two years' free rent or value; and for three or more such children, three years' free rent or value, after deduction in each case of public burdens and other yearly charges. But the provision so far as granted to any child who shall afterwards succeed to the entailed estate is to be extinguished, so far as not previously paid.

The same statutory powers apply to a wife who is heiress of entail in possession of an entailed estate. These provisions of the Aberdeen Act will therefore be properly given effect to in the contract of marriage of the heir or heiress of entail, as the case may be.

The Act contains various additional stipulations affecting the granting of such provisions, which cannot be here referred to in detail; and numerous decisions of the Court have followed upon this Statute, as to which see ENTAIL, vol. v. pp. 49–51, and cases there cited. When the heir apparent or presumptive to an entailed estate enters into a marriage contract, a usual obligation is that he shall grant provisions for his widow and children under the Entail Acts on his succession.

2. *EXCLUSION OF LEGAL RIGHTS OF HUSBAND, WIFE, AND CHILDREN; SECURITY FOR PROVISIONS; AND PROVISIONS BY WIFE.*—(1) EXCLUSION OF LEGAL RIGHTS.—Where provisions to the husband, wife, and children, made by the contract, are intended to supersede and come in place of their legal rights respectively, this ought to be expressly set forth in the deed; and in framing the necessary clause, the terms of secs. 5 and 7 of the Married Women's Property Act, 1881, as affecting the rights of the husband and children, will fall to be kept specially in view. In the case of the wife, the contract should contain an express acceptance by her of the conventional provisions as in lieu of her rights, both of terce and *jus relictæ*. As has been already pointed out, however, where a particular provision has been granted to a wife by marriage contract or other deed, the wife is thereby precluded, under the provisions of the Act 1681, c. 10, from also claiming her terce, unless the contrary be stipulated. As regards the children, the contract should likewise embrace a declaration by the spouses that the provisions in their favour thereby made by the husband and wife respectively, shall be in full satisfaction to them of their right of *legitim* and all other claims competent to them against the estates of their father and mother respectively, either by statute or at common law. The right to legitim requires to be clearly discharged by the parents in order to be effectually excluded, and this must be done before the parents' marriage (*Clark*, 1835, 13 S. 326; *Marquis of Breadalbane*, 1836, 14 S. 309; affd. 16 Aug. 1836, 2 S. & M'L. App. 377. See also *Darling's Executor* (opinion per Ld. Barcaple), 1869, 41 Jur. 545; *Trevelyan*, 1873, 11 M. 516; *Earl of Kintore*, 1884, 11 R. 1013; affd. 1886, 13 R. H. L. 93; *Rait*, 1892, 19 R. 688). As to discharge of legitim by a married woman without her husband's consent, *Miller*, 1886, 13 R. 764. As to valuation and realisation of estate for ascertainment of legitim, *Gilchrist*, 1889, 16 R. 1118. As to the amount of the legitim fund, see *Pringle's Trs.*, 1872, 10 M. 621; *Chalmers' Trs.*, 1882, 9 R. 743; *Morrison*, 1888, 16 R. 247; *Bishop's Trs.*, 1894, 21 R. 728).

In the case of *Nisbet*, 18 January 1726, Mor. 8181, and Robertson's App. 594, it was decided by the House of Lords that legitim was not excluded by the mere granting of a special provision in an antenuptial contract of marriage, but that the amount drawn as legitim was to be imputed towards the special provision.

(2) Security for Provisions.—As has been already indicated, it is a question of importance under such contracts whether the provisions thereby granted in favour of the wife and the children of the marriage have been so conceived as to give to them respectively (1) a *jus crediti*, which shall either be preferable in competition with the ordinary creditors of the husband in the event of his bankruptcy, or shall rank *pari passu* with such creditors, or (2) merely a *spes successionis*. Such a *jus crediti* may be given in various ways—

(*a*) Where the provision is granted directly in favour of the wife and is payable out of heritable estate, or is secured by the conveyance of heritable estate or of funds to trustees, the wife has a proper *jus crediti* for her annuity or jointure, which is *preferable* in competition with the other creditors of the husband to the extent of the security. But where there is merely a personal obligation upon the husband to pay an annuity or jointure of specific amount in the event of his predecease, which is unsecured by the conveyance of such estate or the placing of funds in the hands of third parties for this purpose, the wife's right is limited to this extent, that she is in that case merely entitled to rank as a creditor for her provision along with other creditors. In the former case her provision is held to have been fortified by a real security,—which includes security either heritable or moveable in its nature,—and such fortification creates a preference in her favour over other unsecured creditors of her husband (see *Grant*, 1872, 10 M. 804; *Learmonth*, 1875, 2 R. H. L. 62 (postnuptial contract); *Forrest*, 1876, 4 R. 22; *Muirhead*, 1877, 4 R. 1139 (arrears of alimentary annuity); *Newlands*, 1882, 2 R. 1104; *Eliott*, 1895, 22 R. H. L. 26; *Whittall*, 1894, 22 R. 91).

(*b*) As regards children, where the property is settled directly on the children *nascituri* in fee, or the provisions are only made exigible after the death of the father, the claim of the children in respect thereof is ineffectual in competition with the claims of onerous creditors. They are, however, entitled to set aside any alienations in prejudice of their provisions granted gratuitously or without onerous consideration by the father. In order to confer a proper *jus crediti* upon the children during their father's lifetime, the father's conveyance in security or obligation must be either (1) a conveyance or obligation which shall or may take effect during his own lifetime, or be capable of being enforced against him without any further consent upon his part or the granting of any additional obligation by him; (2) one which shall place him under restraint as regards dealing with his property to the prejudice of the children; (or 3) one which, when carried into effect, divests him of the estate or fund forming the subject of the provision, *e.g.* by the conveyance thereof to trustees for behoof of the children.

The general presumption is that children are not creditors during their father's lifetime, unless the contract is expressed in such terms as clearly to confer this right upon them, but they have a proper *jus crediti* where the payment of the provision must or may happen during the father's lifetime, such as where the provision is payable at majority or marriage (*Cruickshank's Trs.*, 1853, 16 D. 7), or where the interest of the provision is made so payable (*Mackenzie's Creditors*, 2 Feb. 1792, Mor. 12924; *Herries, Farquhar, & Co.*, 16 S. 967), or where the provision is payable at the dissolution of the marriage (*Goddard*, 1844, 6 D. 1018). But where the provision is made payable at the majority or marriage of the children, and is followed by a declaration that if either of these terms should arrive during the

lifetime of the father the provision shall not be payable until after his death, such provision, unless preferably secured by the conveyance of funds or estate to trustees, will make the children only heirs among creditors (*Brown*, 1 Feb. 1820, F. C.). If the obligation be so expressed as not to constitute a proper *jus crediti*, such right cannot be inferred from the use of different terms in granting the security for the obligation,—the latter right being merely accessory to the first (*Brown, supra*). See also *Forrest, supra*; *Corbet*, 1879, 7 R. 200; *Newlands, supra*.

The forms in which the security for provisions to children may be granted are various, but the more usual are—

(1) By bond of provision and disposition in security over heritable estate for a specified *maximum* amount, or a conveyance of the estate to trustees in security of the provisions contained in the contract itself.

(2) By conveying funds to trustees for this purpose; or,

(3) By assigning policies of assurance on the life of the father coupled with an obligation upon him for payment of the premiums, and with security therefor out of the rents of the father's heritable estate, or without such security.

The provisions to a wife and children may be constituted either—

(*a*) By direct grant in favour of the wife and of the children *nascituri*, coupled with the nomination of third parties at whose instance execution is to pass for implement of the obligations contained in the contract.

(*b*) By direct grant in their favour, coupled with the conveyance of heritable or moveable estate to trustees for securing payment thereof.

(*c*) By an obligation for payment of the provisions to trustees for behoof of the wife and children, either during the father's life or after his death, and either with or without corresponding security in any of the forms previously mentioned; or

(*d*) By the *de præsenti* conveyance of an estate or funds to trustees for these purposes, as before referred to. This latter course is usually followed where a fund is to be liferented by the wife and the fee is to be held for behoof of the children at her death, or where an annuity is to be paid to her out of such fund.

(3) Provisions by the Wife.—Where the wife is possessed of heritable or moveable estate, the usual and appropriate arrangement is (notwithstanding the protecting provisions of the Married Women's Property Act, 1881) for her to convey it to trustees named in the contract, for the following purposes:—

(*a*) For payment of the income thereof to herself during her life, exclusive of the *jus mariti* and right of administration of her husband.

(*b*) For payment, in the case of moveable estate, of either the whole or a part of the income thereof to the husband during his life in the event of his surviving her, or of an annuity therefrom.

(*c*) Where, however, the wife's estate consists entirely or chiefly of heritage, and she is proprietrix thereof in fee-simple, it is usual either to confer on the husband a direct liferent thereof, to take effect in the event of his surviving her, or to convey the estate to the marriage trustees, or to a separate body of trustees, subject to a similar right; or otherwise to grant to the husband directly an annuity out of it payable during his life after her decease.

Such rights of liferent and annuity are usually made subject, in the case both of husband and wife, to forfeiture or restriction in the event of remarriage. If it is also intended that they should be alimentary in character and incapable of being anticipated, charged, or assigned, this should be expressly declared. It is also not inappropriate to provide that, if there shall be an heir of the marriage, any liferent right in heritable

estate which may by the contract be granted to a husband or wife shall be terminable upon the heir attaining majority, and that such right shall thereafter be restricted to an annuity or jointure payable from the estate.

(*d*) If there are children of the marriage, the heritable estate may be appropriately destined to the eldest son or heir of the marriage, subject to the father's liferent therein, or under burden of the payment of any annuity provided to him therefrom if he survive, and also of payment of provisions to the younger children, if there should be no other fund out of which it is desired or is possible to provide for these. The trustees under the contract may be vested in the estate, with powers of administration and management, until the majority of the heir in the event of the predecease of the wife, unless it shall be desired to confer such powers on the husband during his survivance.

Where the estate is moveable, the usual course is to provide the capital of the fund to the children of the marriage under burden of a right of liferent in the father, and subject to a *power of appointment* either in (1) the wife, (2) the parents jointly, (3) the father, or (4) the survivor of the husband and wife, as the case may be.

(*e*) The contract should also contain a conveyance to the trustees of all property, heritable or moveable, which the wife may acquire during the subsistence of the marriage, and a declaration that such *acquirenda* shall, if beyond a specified *minimum* sum, fall under the destinations in the contract. As to the effect of such conveyances of *acquirenda*, see *Ramsay*, 1871, 10 M. 120; *Boyd's Trs.*, 1877, 4 R. 1082, where such conveyance, expressed in general terms, held not to include annuities and liferent provisions. But see *per contra*, *Young's Trs.*, 1892, 20 R. 22, as regards effect of a general conveyance in embracing all property acquired by the wife *stante matrimonio*. See also *Thomson's Trs.*, 1879, 6 R. 1227; *Grant's Trs.*, 1886, 13 R. 646; *Sparks*, 1890, 17 R. 997; *Simson's Trs.*, 1890, 17 R. 581, following *Douglas' Trs.*, 1879, 7 R. 295; *Wyllie's Trs.*, 1891, 18 R. 1121; *Hagart's Trs.*, 1895, 22 R. 625; *Newlands, supra*; *Laidlaws*, 1884, 11 R. 481.

(*f*) Where there are no children of the marriage, the husband and wife will, subject to the mutual rights of liferent, jointure, or annuity provided by the contract, have power given them by the latter to dispose of their respective estates by will or other *mortis causa* deed; and failing either doing so, a declaration will be inserted that the same shall upon their respective deaths pass to their own next of kin.

It is, further, a usual and proper stipulation that, in the event of the dissolution of the marriage without issue, the estate or funds contributed by the survivor of the husband and wife shall, immediately upon the happening of that event, return to him or her, as the case may be, and that the trustees shall be bound and entitled to denude thereof accordingly. But as to the right of the surviving spouse, even where there is no such declaration, and the trustees' obligation to denude, see *M'Lean's Trs.*, 1878, 5 R. 679; also *Laidlaws, supra*, as to exhaustion of matrimonial trust purposes; *Macdonald*, 1893, 20 R. H. L. 88, as to protection of issue of a predeceasing child; *Ferguson's Curator Bonis*, 1893, 20 R. 835, as to effect to be given to a provision in favour of next of kin of the spouses, failing issue, and whether same contractual in character; and *Montgomerie's Trs.*, 1895, 22 R. 824, as to radical right existing in contributing spouse on failure of trust purposes.

Where the parties have not by the contract renounced their legal rights of succession in the estate of the other, and where the children's right of legitim has not been effectually excluded, they will respectively be entitled to claim such legal rights in preference to the conventional

provisions, as these legal rights have previously been explained, and subject to the limitations and rules before mentioned (see *Fotheringham's Trs., supra*).

(*g*) The powers of an heiress of entail in regard to granting provisions to her husband and children in virtue of the Entail Acts have already been noticed under the head of "Provisions by the Husband," and they apply with equal force to such heiress of entail *mutatis mutandis* (see also ENTAIL).

(4) MISCELLANEOUS.—(*a*) A husband becomes liable by the marriage for the personal debts of the wife contracted *stante matrimonio*, and for the interest of heritable debts forming burdens on her estate. This liability continues during the subsistence of the marriage.

(*b*) Power is occasionally granted to the spouses jointly, with or without the consent of the trustees, to withdraw a portion of the capital of the estate either at will or for a specific purpose, such as the purchase of a dwelling-house.

(*c*) Power is also frequently conferred upon trustees, with the consent of the parents or the survivor during their lives, and afterwards at the discretion of the former, to make advances to the children to account of their prospective shares of the estate, for the purpose of fitting them out in the world, or as a marriage portion for daughters. Such powers should be expressed in general terms.

(*d*) If there is heritage, the eldest son or heir of the marriage taking it will be excluded from any share of the moveable estate, unless he shall collate; but if he shall exercise his right of collation, the whole estate, heritable and moveable, will, failing appointment by the parents, be divided equally among the children,—the issue of any predeceasing child taking their parent's share (*Panmure*, 1856, 18 D. 713; *Napier*, 1868, 6 M. 264).

(*e*) It has been held that a conveyance by a wife in favour of her husband and his heirs and assignees was subject to the implied condition that he should survive her (*Russell's Trs.*, 1887, 14 R. 849). A contract which may have been improperly executed may be validated *rei interventus* by the subsequent marriage of the parties (*Lang*, 1889, 16 R. 590).

(*f*) As to the effect to be given to a deed in the form of an antenuptial marriage settlement, but executed immediately after the marriage ceremony, see *Cooper*, 1888, 15 R. H. L. 21. As to what may constitute an antenuptial contract of marriage, see *Williamson*, 1890, 17 R. 927. As to the rights of the spouses on the dissolution of the marriage by divorce, see DIVORCE; and also *Johnstone-Beattie*, 1868, 6 M. 333; *Stewart*, 1872, 10 M. 472; *Harvey*, 1872, 10 M. H. L. 26; Harvey's *Judicial Factor*, 1893, 20 R. 1016. As to the power to assume new trustees where the right to nominate is in the spouses or the survivor, see *Munro's Trs.*, 1887, 14 R. 574.

(*g*) *Stamp Duty.*—Marriage contracts are liable to a settlement duty of five shillings for every £100 or part of £100 settled or agreed to be settled (see 54 & 55 Vict. c. 39, s. 6). This duty falls to be assessed upon each separate obligation undertaken, or sum provided in the contract, *e.g.* upon a jointure to the wife and provisions to the children, the former being capitalised at twenty years' purchase. If settlement estate duty is subsequently payable in respect of the property settled, the amount of the *ad valorem* stamp duty may be deducted on payment of the estate duty (Finance Act, 1894, s. 5, subs. 4).

Under sec. 104 special provision is made as to the ascertainment of stamp duty payable in respect of policies of life insurance forming the subject of settlement.

Deeds for effectuating the appointment of a new trustee are liable to a duty of ten shillings only; but if these also contain a conveyance of the trust property, a further duty of the same amount is exigible.

An appointment in execution of a power of any property, or of any use,

share, or interest in any property, by any instrument not being a Will, is also liable to a duty of ten shillings.

(*h*) *Government Duties.*—Prior to the passing of the Finance Act, 1894 (57 & 58 Vict. c. 30), funds settled by marriage contract were subject to succession duty, but not to inventory or probate duty. Now all funds and estate passing under such deeds are subject to the "estate duties" imposed by that Act in the same way as funds or estate falling under an ordinary *mortis causa* settlement.

3. *Mutual Rights and Obligations of Husband, Wife, and Children.*—1. As between Husband and Wife.—(*a*) *Right of Rejection of Conventional Provisions by Wife.*—The legal claims of the wife may be excluded by her homologation of any deed containing a provision in her favour which is inconsistent with such claims. If, however, homologation be pleaded against her, it must not have taken place in ignorance of her legal rights or the position of her husband's affairs (*Hope*, 1833, 12 Shaw, 222; *Ross*, 1847, 5 D. 483). But see *Cooper's Trs.*, 1885, 12 R. 473, as to effect of wife's discharge of legal rights for an inadequate conventional provision where same granted in ignorance of the law of Scotland relative to the legal rights of a widow. This case also decided that the law of the place in which the contract is to be fulfilled, and not that of the execution of the contract or of the domicile of the minor contracting party, is to determine the validity of the deed.

Unless the wife's legal claims have been excluded by the marriage contract, she is, as has been already shown, entitled to claim her *jus relictæ* in addition to any provisions thereby made for her. But in the case of *Keith's Trs.*, 1859, 19 D. 1040, it was held that the widow was bound to elect between her legal rights and testamentary provisions made for her under a universal settlement left by her husband. It was, however, further decided in that case that in the event of her electing to claim her *jus relictæ*, the amount thereof was not to be reduced by imputing thereto any sums provided in her marriage contract, but that these, in so far as not already satisfied, must form a deduction from her husband's whole moveable estate. Further, unless the wife's legal claims have been effectually excluded by antenuptial deed, she has always a right of rejection of conventional provisions as in lieu of these.

(*b*) *Right of Wife to renounce Security for Provisions* Stante matrimonio, *or of Husband and Wife to recoke Antenuptial Provisions with Mutual Consent, etc.*—The question whether a wife is entitled, *stante matrimonio*, to renounce her security for provisions granted to her, or whether a husband and wife are entitled by mutual consent to revoke or alter these provisions, or to require the trustees to denude of the trust and pay over to the wife the capital sums settled by her under the contract, is an important one, and has been the subject of numerous recent decisions of the Court. The general result of these decisions is as follows:—

(1) If it shall be apparent from the contract that the trust was created primarily for the wife's protection, and in order to secure her provisions, it must continue to subsist during the marriage, whether it is expressly declared "irrevocable" or not, and the spouses are not entitled to revoke it, or to call upon the trustees to denude (*Pringle*, 1868, 6 M. 982; *Hope*, 1870, 8 M. 699; *Menzies*, 1875, 2 R. 507).

(2) But if it shall appear that the principal object of the trust was merely administration, and not for the protection of the wife, and that the radical right to the funds remains with her, and her right is uncontrolled, she is entitled to call upon the trustees to denude (*Ramsay*, 1871, 10 M. 120).

(3) If no trust has been interposed for the protection of the wife, and

her security is constituted by simple infeftment in her own favour, she is entitled to renounce her security, and to consent to an alienation by her husband for onerous causes of the security-subjects, and such consent, judicially ratified, is not revocable by her as a donation *inter virum et uxorem* (*Standard Property Investment Co.*, 1877, 4 R. 695). But this right will not be available to her where the annuity or liferent provision in her favour has been declared alimentary (*Cosens*, 1873, 11 M. 761).

(4) It has further been decided that a marriage having been dissolved without children, the parties were not entitled by mutual settlement to revoke an antenuptial marriage contract, under which the husband would have taken the capital of the estate settled by the wife instead of a liferent thereof allenarly given to him by the contract (*Grant*, 1873, 10 S. L. R. 245). See also as to limitation of powers of revocation in the husband and wife, or in the latter alone, *Mackenzie*, 1878, 5 R. 1027; *Smith*, 1882, 9 R. 866; *Mackie*, 1884, 11 R. H. L. 10.

With regard to the conveyance of property acquired by the wife *stante matrimonio*, and the question whether the spouses are entitled to keep it out of the marriage contract trust, reference may be made to the important cases of *Newlands*, 1882, 9 R. 1104 and 10 R. 374, and *Laidlaws*, 1884, 11 R. 481, where it was held (*a*) that the spouses were entitled to keep certain *aequirenda* by the wife out of the marriage-contract trust, and (*b*) that the spouses were entitled to require from the trustees the reconveyance of certain trust funds derived from the wife, in respect that there was no matrimonial purpose for which the funds required to be retained in trust.

With reference to the right of the spouses jointly to require the reconveyance of trust funds, in so far as retained in security of a liferent right to the wife which is not alimentary, see *Halkett*, 1890, 17 R. 719: and with regard to the wife's power to assign in security of her husband's debts the income of her estate, which had been conveyed to trustees for payment of such income to her, exclusive of the *jus mariti* and right of administration of her husband, see *Reliance Mutual Life Assurance Society*, 1891, 18 R. 615. In the former case it was held that the spouses could not, in the circumstances which had there emerged, require a reconveyance of the trust funds; while in the latter case, which was a sequel to the other, it was held that the wife might, *stante matrimonio*, grant an effectual assignation.

Reference may also be made to the case of *Watt*, 1897, 24 R. 330, where it was decided that an antenuptial trust deed executed by a wife in contemplation of marriage, and under which certain funds were settled for behoof of the spouses in liferent and the children, if any, in fee, was revocable by her with consent of her husband after marriage, in respect that the deed was unilateral and executed without reference to any contract of marriage, and that there were at the time of revocation no children in existence. See also opinion of Ld. M'Laren as to effect of the Married Women's Property Act, 1881, upon question of revocability of antenuptial deeds by a wife.

With regard to the renunciation of liferent rights which are declared alimentary, the right of a widow to discharge an alimentary annuity for payment of a sum of money, and the power of spouses jointly to recall, by mutual deed, an alimentary liferent to the widow, the rule of law is that it cannot be discharged or recalled, see *Cosens*, *supra*; *Montgomery's Trs.*, 1888, 15 R. 369, and *Elliot's Tr.*, 1894, 21 R. 975; also as to the right of a surviving husband and the only child of the marriage to require trustees to denude where the husband had an alimentary liferent, *Hughes*, 1892, 19 R. H. L. 33; and where such alimentary character did not attach to provision, *Crawford*, 1873, 11 S. L. R. 2. Reference may also be made to the case of *Grant*, 1876, 3 R. 280 (following *Pretty*, 16 D. 667), where

trustees were held bound to denude upon the widow, who was likewise liferentrix, renouncing her interest, and all the beneficiaries concurring in a full discharge, and to *Gillon's Trs.*, 1890, 17 R. 435, and *Macdonald*, 1893, 20 R. H. L. 88, where the questions of the protection of the succession of children of the marriage from a gratuitous deed by the father, and of remoter issue, arose. See also *M'Murdo's Trs.*, 1897, 24 R. 458, where it was held that the words "issue of the marriage" as used in a marriage contract applied exclusively to children, and did not include grandchildren.

Where there are no children of the marriage, and the husband has predeceased, the widow is entitled to have funds, in which she takes the sole beneficial interest under the contract, paid over to her absolutely, even although these funds have been settled for her behoof in liferent "for her liferent use allenarly" (*M'Lean's Trs.*, 1878, 5 R. 679).

As regards the radical right remaining in a spouse where the trust fund or part thereof is not directed to be applied for trust purposes, see *Higginbotham's Trs.*, 1886, 13 R. 1016.

Within the compass of the present article it is impossible to notice these various decisions in further detail, but the result of them does not affect the general principles with reference to the renunciation or revocation of provisions made in antenuptial contracts which have been stated above, or the exclusion of funds acquired *stante matrimonio* from the settlement.

(*c*) *Donations inter virum et uxorem.*—All deeds entered into during the subsistence of the marriage, between husband and wife, by which donations or gifts are conferred by the one upon the other, are revocable by the donor at any time during his or her life, and the same rule applies although the deed should be granted in trust to a third party. Therefore although the spouses may enter into contracts with each other, yet, in so far as these are gratuitous or without equivalent consideration, donation is presumed unless the contrary be proved, and the deed is revocable. But mutual remuneratory grants between husband and wife are not revocable when there is an equitable proportion between them (see *Shaw's Trs.*, 1870, 8 M. 419). If, however, there be gross inequality, the donation will be set aside (*Hepburn*, 1814, 2 Dow, 342; *Beattie's Trs.*, 1884, 11 R. 846, where the revocation of a mutual settlement by the husband only was sustained in circumstances stated). As to a *mortis causa* donation by a husband to a wife, see *Gibson*, 1872, 10 M. 923, and *Smith*, 1884, 12 R. 186.

Grants made under a postnuptial settlement, where there has been no antenuptial contract between the parties, will be sustained in so far as reasonable, in respect of the natural obligation which they import, but they will be reducible *quoad excessum*: and if there has been no marriage contract between the parties, any renunciation by the wife of her legal rights *stante matrimonio*, without the grant of an adequate provision in exchange, is a donation which is revocable. But see case of *Watt*, *supra*, as to the revocation of a voluntary trust created by herself before marriage. In the case of postnuptial provisions, the husband must also have been solvent at the date of the deed by which the provision is created (*Craig*, 1860, 22 D. 1211; reversed 1861, 4 Macl. & R. 267).

The donation may be revoked at any time, even after the death of the donee (*Rae*, 1875, 2 R. 676: *Melville*, 1879, 6 R. 1286); but this right of revocation does not extend to the executors or other representatives of the donor (*Dunlop*, 1863, 2 M. 1; *Edward*, 1888, 15 R. H. L. 37). The creditors of the donor may, however, revoke either during his life or on his death (*Honeyman & Wilson*, 1886, 14 R. 163).

As to the effect of the renunciation of a husband's *jus mariti* as constituting a revocable donation between husband and wife, see *Forbes*, 1879, 6 R.

1122; *Wright's Exrs.*, 1880, 7 R. 527; *Thomas*, 1879, 6 R. 607; and *Steedman*, 1879, 7 R. 111.

As to the grant of a deposit receipt to the spouses jointly and the survivor as not *per se* sufficient to constitute a donation *inter virum et uxorem*, see *Jamieson*, 1880, 7 R. 1131.

Donations inter virum et uxorem may be revoked by the donor either expressly or by implication, as by the execution of a subsequent conveyance or grant of the subject to another; but where the donation is constituted by writing it ought to be revoked in a similar manner. The granting of a general disposition of subsequent date by the donor in favour of a third party does not presume revocation (*Handyside*, 1699, Mor. 11349); or evacuate a special destination contained in a deed in favour of the husband and wife and the survivor of prior date (*Walker's Exrs.*, 1878, 5 R. 965). A donation between husband and wife is valid so long as unrevoked; but the donee takes the subject of the donation under burden of the donor's right of revocation, and cannot alienate or charge it so as to evacuate or prejudice that right. Meliorations by a husband on a wife's heritable property are not of the nature of a donation, or revocable, so as to entitle him to recover the sum expended from his wife's representatives (*Rankin*, 1886, 13 R. 903).

The right of revocation may be barred by homologation after the dissolution of the marriage (*Rae, supra*): and while decree of divorce for adultery has the effect of the revocation of all donations made in favour of the offending spouse, it is also a bar to revocation *by* the offending spouse. A judicial ratification by a wife will not *per se* bar her from revoking a donation made to a husband if such revocation be otherwise competent (Fraser, *Husband and Wife*). But see *Standard Property Investment Co., supra.* See also DONATIONS, vol. iv. p. 336, and further cases there cited.

(*d*) *Provisions to Husband and Wife or Children of a Second Marriage.*— Where a husband in executing an antenuptial contract of marriage practically settles his whole estate under it, it is usual and proper expressly to reserve power to him to grant suitable provisions out of the same estate in favour of the wife and children of a subsequent marriage, provided he shall have at the date of such subsequent marriage no other estate out of which the same can properly be made; but this reserved power is usually subject to express restriction, such as that the husband shall not be entitled to settle in this way more than one-third or one-half of the estate dealt with in his first contract. Where, however, the children of the marriage have no proper *jus crediti* in the settled fund during the lifetime of their father, the latter has been held entitled, even without such express reservation, to make reasonable provisions in favour of his wife and children of a second marriage, although these shall have the effect of diminishing the provisions contained in his first settlement. The provisions so made must, however, be reasonable, and they will be reduced in so far as excessive (*Bruce*, 1761, Mor. 13036: *Haldane*, 1885, 13 R. 179). The same principle has been applied in the case of a postnuptial contract made under a second marriage (*Wood*, 1823, 2 S. 549). As to the case where the children of the first marriage have a proper *jus crediti* or right of fee, see *Guthrie*, 1846, 9 D. 124; *Arthur & Seymour*, 1870, 8 M. 928. Reference may also be made to the important cases of *Smith Cuninghame*, and *Mercer*, 1872, 10 M. H. L. 39.

As to the right of a second wife to a reasonable provision in competition with the children of a first marriage, see *Walkinshaw's Trs.*, 1872, 10 M. 763.

The same rules apply, conversely, to the case of provisions made by a wife upon entering into a second marriage.

It is also a competent and usual provision where an annuity or jointure

is granted by the husband to the wife, or *vice versâ*, to make it restrictable to a specified amount in the event of a second marriage being entered into; but this must be a matter of express stipulation in the contract itself.

As regards the rights of children of first and second marriages respectively, and the question whether the legitim of the former can be diminished by provisions to the latter under an antenuptial contract of second marriage, see *Bishop's Trs.*, 1894, 21 R. 728.

2. As between Parents and Children.—(1) *Rights of Husband and Heir of Marriage under Special Destinations.*—Where the husband is possessed of heritable estate and desires to settle it under the contract upon the children of the marriage, the settlement is usually intended to take effect only upon his death, and accordingly the conveyance will be to the husband himself and to the sons of the marriage in their order of seniority, unless there should be any special reason for altering the usual order of succession (*e.g.* where the eldest son will succeed to an entailed estate on the death of the father). Under such a destination the father remains the heritable proprietor of the lands both in virtue of the feudal title in his person existing at the date of the contract and of the latter itself, which does not divest him. The father is accordingly the institute and fiar, and the issue of the marriage only heirs of provision. He is therefore entitled, at any time during his life, to burden the lands for onerous causes, and even to sell them, without any obligation to reinvest the price as a surrogatum (*Cunynghame*, 1804, Mor. 13029). But he is not entitled gratuitously to defeat the right of the children, except in so far as he has expressly reserved power to himself to do so under the contract: nor is he at liberty to exclude the heir of the marriage on account of bankruptcy or insanity (*Spiers*, 1778, Mor. 13026); nor to restrict the right of the heir to an annuity or liferent, and to settle the estate on the children of the heir (*Ormiston*, 1809; Hume, 531); nor to execute an entail of the estate unless power to that effect has been expressly reserved (*Watson*, 1801, Mor. App. "Provisions to Heirs, etc.," No. 4).

The heir first entitled to take under a marriage contract is a creditor among heirs, but those who take failing him are merely heirs of provision (Bell, *Lect.* i. 249). It is the heir of the marriage alone, therefore, who can object to gratuitous deeds granted by the father to his prejudice (see *Earl of Glasgow's Tr.*, 1872, 11 M. 218). In that case a husband in his antenuptial contract of marriage had disponed lands in favour of himself and the heirs to be procreated of his body, and his or their assignees, and the Court held that the heir of the marriage had a protected right of succession which his father was not entitled gratuitously to defeat. The father is entitled to convey such estate to the heir, by propelling the fee thereof during his life, and to call such heirs-substitute as he may think fit; and the other children of the marriage, if any, are not entitled to object thereto (*Kirk*, 1728, Mor. 12984; *Trail*, 1737, Mor. 12985). The granting of such disposition confers on the heir an absolute right of disposal of the estate (*Edgar*, 1736, Mor. 4325; *Reid*, 1827, 6 S. 198). The heir-expectant is therefore entitled validly to transact with his father, and to grant a discharge of the destination and other obligations contained in the contract in favour of the heirs of the marriage, and such a deed is effectual even although the granter of it should predecease the father and without having acquired the character of heir of the marriage (*Routledge*, 19 May 1812, F. C., and *Majendie*, 6 December 1819, F. C.; affd. June 1820, 2 Bligh's App. 692). The heir-expectant has, however, no active title or proper *jus crediti* as in a question with his father during the lifetime of the latter,

unless the father shall confer such right upon him, and the father remains the fiar (*Gordon*, 1748, Mor. 4398; affd. 7 March 1751). But after the father's death the heir becomes a creditor with an active title, and can reduce gratuitous deeds granted to his prejudice by his father without the necessity of service (Ersk. bk. iii. 873; *Earl of Glasgow's Tr., supra*).

Where it is intended to make the heirs of the marriage creditors or fiars during the lifetime of the father, it is necessary, as has been already shown, to make the father's conveyance or obligation in their favour either (*a*) one which shall take effect, or may be enforced against him, during his life without his concurrence, (*b*) one which shall place him under restraint or limitation in favour of the heirs, or (*c*) one which, when made effectual, shall divest him of the estate; see *Douglas*, 1724, Mor. 12910, where it was also held that inhibition used by the eldest son of the marriage against his father was effectual to prevent him from dealing with the estate to the prejudice of the heir.

Where lands are settled under a marriage contract, it remains the ruling settlement of the estate, in preference to any prior investiture under which the heir may be also entitled to take; and although it is competent to possess upon both titles, so long as the destination in the contract remains unaltered and there is no divergence of the lines of succession, the contract will prevail over the prior investiture if such divergence should afterwards take place (*Gray*, 1751, Elchies, "Provisions to Heirs, etc.," No. 14).

The cases referred to above are those where the contract contains a direct destination from the father to the children, the fee or property remaining in the former; but where it is intended at once to divest the father of the fee, this may be done either (1) by a conveyance of the lands to trustees for behoof of the father in liferent and the heirs of the marriage in fee, under burden of any jointure or annuity provided to the wife, and provisions, if any, to the younger children: or (2) by the father conveying the estate to himself in liferent for his liferent use only and to the heirs of the marriage in fee under the like burdens. Infeftment upon the contract in either form effectually divests the father of the fee. As to the effect, as in a question with creditors of the husband, of a conveyance of heritage by him to himself and his wife in conjunct liferent for her liferent use allenarly and the children of the marriage in fee, reserving to the husband full power to burden and dispose of the subjects during his life either onerously or gratuitously, and where no other provision had been made for the wife by antenuptial contract or otherwise, see *Honeyman & Wilson, supra*. See also (*a*) *Brough*, 1887, 14 R. 858, and (*b*) *Bryson*, 1893, 20 R. 986,—as to the effect of a destination in conjunct fee and liferent, in circumstances stated, the property coming through the wife, and of a conveyance by a husband in conjunct fee and liferent for the spouses' liferent alimentary use allenarly and children *nominatim* in fee, as preventing the husband, who was the survivor, from revoking the deed.

(2) *Rights of Apportionment and Division.*—It is usual for the father expressly to reserve to himself by the contract a power of appointment or division of the fund provided to his children, as he shall think proper. But even without such reserved power the father has a right of apportionment at common law. It is also not infrequent for the father to reserve power to limit the interest of any child in his or her share of the funds to a liferent, and to give the fee to the issue of such child, or, in the event of failure of issue, to dispose of it among his surviving children at discretion. Unless, however, the father has reserved this power under the contract, he is not entitled so to limit the interest of any child in his or her share of the capital of the fund. But where he had reserved power

to apportion in such shares "and under such conditions" as he should appoint, it was held a good exercise of the power where a father directed his trustees to purchase an annuity for one child who was insane, and to divide the remainder of the funds among his other children (*Moir's Trs.*, 1871, 9 M. 848).

Power may further be reserved by the contract to exclude the *jus mariti* and right of administration of the husband of any daughter from such daughter's share of the fund provided to the children, but a stipulation of this nature is now of less importance in view of the provisions of sec. 1, subsec. 1, of the Married Women's Property (Scotland) Act, 1881, before referred to. A proper stipulation is that the issue of any child who shall have died leaving issue before acquiring a vested right in his or her share of the fund shall take their parent's share, and that the shares of any children dying without issue, and before vesting shall have taken place, shall accresce to the surviving children or the issue of such children *per stirpes*.

Where any reserved power of apportionment has not been exercised, or if no such power has been reserved by the contract, and none has been exercised at common law, the division is equal among the children surviving at the dissolution of the marriage, and the issue of any who have predeceased leaving issue, unless the contract shall have contained any stipulation to the contrary. But see case of *M'Murdo's Trs., supra.*

Where a power is reserved by the contract, it supersedes the common-law right, and the exercise of such reserved power must be in accordance with the terms of the contract (*Watson*, 1837, 15 S. 586: *Baikie's Trs.*, 1862, 24 D. 589). The power may be given to the spouses jointly, or to the husband or the survivor. Where the power was given jointly, and was exercised by the husband alone, and the wife granted her concurrence therein after his death, the appointment was held to be valid (*Wilson*, 1761, Mor. 13006). Where power has been reserved to limit the interest of a child to a liferent and to convey the fee to the issue of such child, this implies the power to create a trust for these purposes (*Kippen's Trs.*, 1856, 18 D. 1137, opinion per Ld. Deas).

The father has, at common law, not only a power of appointment and division, but the right to delegate such power to others (*Campbell*, 1739, Mor. 6849).

Formerly the rule of law was that the division by the father must not be purely illusory (*Marder's Trs.*, 1853, 15 D. 633), and that no object of the power could be entirely excluded. But by the Act 37 & 38 Vict. c. 37 (30 July 1874), which extends to Scotland, it is provided (s. 1) that no appointment made after the passing of the Act in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power. This enactment is, however, qualified (s. 2) to the effect that nothing in the Act shall prejudice or affect any provision in any deed, will, or other instrument creating any power which shall declare the amount or share from which no object of the power shall be excluded, or that any object of such power shall not be excluded. See also the Act 11 Geo. IV. and 1 Will. IV. c. 46, and observations thereon in *Marder's Trs., supra*, as to the exercise of a power of appointment over funds derived from third parties, as distinguished from powers reserved by parents in regard to funds provided by themselves.

The exercise of powers of appointment given by third parties (as where

the husband in a marriage contract confers such power upon the trustees thereunder) will be more strictly interpreted than where the power is exercised by the person who has himself conferred it (see *Baikie's Trs., supra*, and *Mackie*, 1885, 12 R. 1230).

A posthumous child is entitled to take equally with children born before the death of the father (*Oliphant*, 1793, Mor. 6603); and the condition *si sine liberis decesserit* is applicable to the case of provisions by parents to their children under marriage contracts (*Wood*, 1789, Mor. 13043; *Hughes*, 1892, 19 R. H. L. 33).

Where, in exercising a power of appointment, conditions are attached which are not within the terms of the deed creating the power, these conditions are inept, and the beneficiaries take the provision unconditionally (*Macdonald*, 1875, 2 R. H. L. 125; *Lennock's Trs.*, 1880, 8 R. 14; *Wallace*, 1891, 18 R. 921). But where the power authorises the donee of it to attach conditions in exercising the power, it is competent to the party making the appointment to attach such conditions (*e.g.* restriction to a liferent and the disposal of the fee otherwise) as are authorised by the deed conferring the right of appointment.

Where there is a reserved power of appointment in the father, he may make partial appointments of the fund from time to time in favour of his children, or any of them, and any unappointed balance will at his death be divided among the children equally. It will not bar a child's right to participate in the unappointed balance that he had previously, under a deed containing a partial appointment, accepted the sum so appointed in full satisfaction of his share under the contract (*Smith Cuninghame*, 1872, 10 M. H. L. 39).

Where the person making the appointment exercises the right in favour of persons who are not proper objects of the power, and otherwise acts *ultra vires*, the appointment is ineffectual, and the division of the fund among the beneficiaries is equal (*Gillon's Trs., supra*). But the right of challenge is in the person injured by its exercise; and if such person concurs therein, such concurrence will make the appointment effectual (*Mackie, supra*). *Gillon's* case also decided that an obligation by a father in a child's marriage contract to pay a specific sum at his death was a debt which must be satisfied before an equal division of the trust funds among the children,—in default of any appointment,—could take place. Where only one of several children survives and there are no issue of predeceasing children, the power of appointment falls, and the surviving child is entitled to take up the whole amount of the settlement fund without any right of restriction in the father (*Brodie's Trs.*, 1840, 3 D. 3). But this rule does not, of course, hold where the amount of the provisions settled on the children is made expressly dependent upon the number of children in existence at the dissolution of the marriage.

The holder of a power of appointment in a marriage contract is disqualified from purchasing for his own behoof the interest in the fund of one of the objects of the power, and a purchase so made from creditors of the beneficiary was held to have been made in trust for him (*M'Donald*, 1874, 1 R. 817). See also *Smith Cuninghame, supra*, as to the valid exercise of a power of appointment, and *Darling's Executor*, 1869, 41 Jur. 545, and *Whyte*, 1888, 16 R. 95, as to the implied exercise of such power by a father in a general settlement executed by him.

The effect to be given to a power of apportionment is the same whether the person who is to exercise the power be the original contributor of the fund or merely the donee of the power, and the same rules apply whether

the power is given with reference to a *universitas* or a specific sum (*Gillon's Trs., supra*; see also *Best's Trs.*, 1885, 13 R. 121; *Bowie's Trs.*, 1889, 16 R. 983; *Wright's Trs.*, 1894, 21 R. 568; *Donaldson's Trs.*, 1894, 21 R. 1095; *Montgomery's Trs.*, 1895, 22 R. 824).

See also APPOINTMENT, POWER OF, vol i. p. 281, and further cases there cited.

(3) *Provisions to Children of Husband's Second Marriage.*—These have been already dealt with *supra.*

(4) *Conventional and Legal Provisions.*—The marriage contract should, as has been already indicated, contain a declaration that the provisions in favour of the children shall be in full satisfaction and discharge to them of their right of legitim and of all they can claim by law through the death of their father or mother, but it is usual to add the exception of any provisions which may be made for them by the will of their parents.

The right to legitim requires to be explicitly discharged in order to be effectually excluded (*Clark, supra*; *Countess-Dowager of Kintore*, 1886, 13 R. H. L. 93; *Rait, supra*); and it cannot be affected by any postnuptial deed executed by the parents (*Hog*, 1791, Mor. 4619).

Where a child has discharged his legitim during the life of his father, such discharge operates in favour of the other surviving children as if such child had predeceased (*Hog, supra*; *Lord Panmure*, 1856, 18 D. 703). But a discharge by one of several children of a conventional provision payable under the father's marriage contract does not operate so as to enlarge the shares of the other children in the fund, but in favour of the father himself (*Allardiee*, 1721, Robert. App. 399, and *Routledge, supra*). The same result follows where the child, upon the father's death, has accepted a special provision in a general settlement which is declared to be in lieu of the child's legitim, *i.e.* it does not increase the legal claim of the other children.

A father has no power to divide the share of legitim falling to a child among the issue of such child, or to substitute the child's issue therein (*Morton*, 11 February 1813, F. C.).

A married woman is not entitled, either under the Married Women's Property Act, 1881, or at common law, to discharge a claim to legitim without her husband's consent (*Miller*, 1886, 13 R. 764).

In the case of *Neish's Trs.*, 1897, 24 R. 306, it was held that a deed of discharge by the daughters of a marriage, under which they gratuitously renounced a share of the marriage trust funds in absolute fee, and in lieu thereof accepted a liferent of the share, with a fee to their issue, whom failing to their brothers, was irrevocable.

(5) *Vesting.*—Questions which most frequently arise under marriage contracts and similar settlements are whether the vesting of the children's provisions takes place (*a*) from their birth, (*b*) at majority or on marriage, (*c*) from the date of the dissolution of the marriage of their parents, or (*d*) from the death of the survivor of the latter; and also (*e*) whether the vesting is in the children as a class; whether there is what is called a "destination over" to survivors in the event of any child of the marriage predeceasing its parents, and what is the effect of such destination over. The answers to these questions depend in every case upon the terms in which the contract itself has been expressed, and the period of payment set forth in the deed, or, if no term or period of vesting has been expressly pointed out in the deed, then the intention of the spouses as to vesting (as this may be gathered from the words used, or inferred from the terms of the deed as a whole).

An interest or right of succession is said to *vest* in a beneficiary when he is possessed of a *jus crediti* or indefeasible right to it, and this right is transmissible to his heirs and assignees. On the other hand, an interest does not vest so long as the beneficiary's right remains contingent or defeasible; and therefore if a beneficiary should die before the happening of the event on which his right of succession is made contingent, his interest lapses and does not pass to his representatives—M'Laren on *Wills*, vol. ii. p. 782. (As to vesting "subject to defeasance," see *infra*).

With regard to provisions to children contained in marriage contracts, the rule is that a provision in favour of a *family of children* vests in the family as a class from the time when the settlement comes into operation, —the right of the individual members of the class being provisional and subject to the claims of other members who may afterwards come into existence (M'Laren on *Wills*, vol. ii. p. 786).

Keeping the leading principles above mentioned in view, the following are the further rules which may be stated for determining the vesting of antenuptial marriage-contract provisions in favour of children:—

(*a*) Where these are unsecured or the period of payment is either left indefinite or can only emerge after the dissolution of the marriage, vesting takes place as at the latter date (*Rogerson's Trs.*, 1865, 3 M. 684; *Grant's Trs.*, 1866, 4 M. 336).

(*b*) Where the provisions to the children are secured by the conveyance of estate or funds to trustees for behoof of the parents and survivor in liferent and the children in fee,—such security or conveyance being taken for behoof of "the children of the marriage,"—vesting takes place in the children as a class at the birth of the eldest, and the liferent right reserved to the parents, or either of them, does not suspend vesting (*Falconar*, 3 S. 455; *Beattie's Trs.*, 1862, 24 D. 519–535).

(*c*) Where the conveyance in the marriage contract is taken direct to the spouses in liferent, for their liferent use allenarly, and the children in fee, the same rule applies, the liferenters being in that case fiduciary fiars for the children *nascituri* (see cases quoted above, and also *Fyffe*, 1841, 3 D. 1205).

(*d*) Provisions to individual children granted in terms of any obligation in the marriage contract, and contained in any delivered or irrevocable deed of provision, vest as at the date of the deed (*Napier*, 1864 3 M. 57).

(*e*) Where the right has vested in the children as a class during the subsistence of the marriage, the representatives, legal or testamentary, of children who have predeceased the period of division are entitled to share in the distribution of the estate (*Beattie's Trs.*, *supra*; *Forbes*, 1838, 16 S. 374).

(*f*) Where the father has bound himself by antenuptial contract of marriage to provide and secure certain sums for the child or children to be procreated of the marriage, each child takes a vested interest in the provision from its birth, and this right transmits to the representatives of such child, even although he should predecease his parents (*Walkinshaw*, *supra*).

The foregoing rules may of course be modified by the terms of the contract itself, or any declaration therein that vesting in the children is to take place at a particular time, or the happening of a particular event; but where the period of distribution has been fixed by the spouses at a time while there is a possibility of the birth of other children, the children in existence at the time fixed by the contract are entitled to call upon the trustees to denude in their favour (*Biggar's Trs.*, 1858, 21 D. 4). If no

period of division is prescribed, the presumption is that it takes place at the dissolution of the marriage, but subject to any liferent right conferred by the contract on the surviving parent.

Vesting in favour of children as a class may be suspended by a destination over to survivors. The existence of a liferent right over part of the fund will not, however, of itself suspend vesting; and in the case of an annuity charged over the whole fund, vesting is likewise not postponed; but where the liferent right extends over the whole fund or subject, the presumption will be in favour of postponement of vesting until the termination of the liferent (unless the contrary must be inferred from the terms of the contract otherwise), and vesting will accordingly in that case take place as at the death of the surviving parent, and not at the dissolution of the marriage (*Broomfield*, 1835, 14 S. 51; *Boyle*, 1858, 20 D. 925; *Pursell*, 1855, 2 Macq. 273; see also *Provan*, 1840, 2 D. 298; and *Johnston*, 1840, 2 D. 1038).

It is a usual provision in a marriage contract, that in the event of any children dying and leaving issue, such issue shall succeed to the parent's share of the fund provided; but such clause of substitution of issue is not required in order to vest a right of succession in their favour where the provision has been so conceived as to vest in the children as a class from their birth. On the other hand, where the term of vesting has been postponed, and a child predeceases that term, leaving issue, the legal effect of the clause is equivalent to the implied condition *si sine liberis decesserit* (see M'Laren on *Wills*, vol. ii. p. 789; *Hughes*, 1892, 20 R. H. L. 33; and *M'Murdo's Trs.*, *supra*).

The existence of a power of appointment or division in the parents or the survivor does not suspend vesting in the objects of the power where these are a family or fixed number of persons (*Sivright*, 1824, 2 S. 643; *Wood*, 1861, 23 D. 338; *Romanes*, 1865, 3 M. 348).

Vesting may, however, take place subject to defeasance (*Robertson*, 1869, 7 M. 1114). See VESTING and SUCCESSION for references to numerous later cases where this doctrine has been applied by the Court, but which cannot be properly dealt with within the limits of this article.

Although provisions are made payable to the children on majority or marriage, this will not vest these provisions in the children on the happening of these events during the life of their parents, if from other clauses in the contract the intention appears that vesting should be postponed until either the dissolution of the marriage or the death of the surviving parent; but it is usual to adject an express stipulation that although such events shall happen *stante matrimonio*, this shall not infer a vested right in the children.

Where, in exercise of a power of appointment reserved to the parents or survivor, an irrevocable deed of appointment is executed in favour of any child, vesting of the sum appointed takes place as at the date of the deed, but subject to the further rights of such child in the unappointed funds as before explained.

Where the contract confers a proper *jus crediti* upon the children,—as, for instance, where the provisions are made expressly payable, or the period of payment thereof may arrive during the father's lifetime, or where they are to bear interest from the majority or marriage of each child,—vesting will take place from the date when the provision or the interest thereon respectively becomes exigible. See VESTING and SUCCESSION, and cases there cited.

3. *MISCELLANEOUS.*—A contract usually contains *inter alia* the following powers:—(*a*) Power to the spouses or the survivor to appoint new trustees;

(*b*) to advance part of the capital of the prospective share of any child for his or her outfit or advancement in life, and to apply the income of the prospective share of such child for his or her benefit during minority; (*c*) special powers of investment of the trust funds, in addition to the statutory powers conferred upon gratuitous trustees in Scotland under the TRUSTS ACTS (*q.v.*); (*d*) declarations as to the non-liability of the trustees for loss or depreciation arising on investments, or omissions in management; and (*e*) power to appoint one of their own number as factor or agent in the trust, with the usual remuneration for acting in that capacity; as also a declaration that parties transacting with the trustees shall have no concern with the purposes of the trust, or be entitled to inquire as to their fulfilment.

II. POSTNUPTIAL CONTRACTS AND SETTLEMENTS.

A contract made after marriage need not differ materially in its terms from an antenuptial contract, except in the narrative part; but, as has been already indicated, there is an important difference between the legal effect which falls to be given to the two deeds, inasmuch as the one is regarded as an onerous contract, while the other is a settlement executed between parties who already occupy a conjunct relation towards each other. For this reason, therefore, postnuptial contracts are, speaking generally, subject to the rules of law affecting donations *inter virum et uxorem*, and postnuptial provisions in favour of a wife or children will only be sustained in so far as reasonable, and if the husband was solvent at the date of entering into the deed. To the extent to which these provisions are excessive or unsuitable they will be reduced (*Campbell*, 1744, Mor. 988; *Jeffrey*, 1825, 4 S. 32; *Sharp*, 1839, 1 D. 396; *Kemp*, 1842, 4 D. 558; *Craig*, 1864, 4 Macq. 267; see also *Mackenzie*, 1878, 5 R. 1027, where a wife was held entitled to revoke an antenuptial trust conveyance, and to substitute for it a postnuptial contract of marriage creating a new trust; and *Nicol's Executors*, 1887, 14 R. 384, as to the right of a surviving spouse to revoke a mutual settlement executed *stante matrimonio*).

Postnuptial settlements are, in accordance with the general rule above stated, revocable by either party in so far as granted without proper mutual or remuneratory consideration (*Kemp, supra*; *MacNeil*, 1829, 8 S. 210). But if the provisions are reasonable and equivalent or remuneratory in amount, the mutual considerations render the contract onerous and irrevocable as between the spouses (*Hepburn*, 1814, 2 Dow's App. 342; see also *Law*, 1877, 5 R. 185, where, in the circumstances set forth, the right of revocation was denied to the husband, even with the consent of the wife; *Buchanan's Trs.*, 1890, 7 R. H. L. 53, as to the effect of a postnuptial deed in creating a binding contract between the spouses; also *Ferguson's Curator Bonis*, 1893, 20 R. 835; *Croll's Trs.*, 1895, 22 R. 677; and *Hagart's Trs., supra*, as to the effect falling to be given to mutual settlements following upon antenuptial contracts of marriage as regards (*a*) the spouses themselves, and (*b*) the children of the marriage).

As regards the rights of children, their claim of legitim cannot be excluded by a postnuptial contract. On the other hand, postnuptial provisions granted in their favour may be so constituted as to be irrevocable by the spouses, subject to the rule previously stated as to the solvency of the granter at the time of granting (*Smitton*, 1839, 2 D. 225; see also *Allan*, 1869, 8 M. 34, where right of revocation refused to spouses although sought to be exercised with consent of an only existing child of full age; and *Peddie*, 1891, 18 R. 491).

Where the parties seek by a postnuptial deed to alter or diminish provisions made by an antenuptial contract without adequate consideration, such deed is revocable by either party (*Jardine*, 1830, 8 S. 937). But where in a postnuptial deed the provision to either spouse is enlarged or improved, this constitutes a donation *inter virum et uxorem*, and creditors are only bound by the terms of the antenuptial deed (*M'Lachlan*, 1879, 1 D. 1177).

On the grounds previously stated, provisions to children contained in a postnuptial contract are, as in a question with creditors, deemed gratuitous, and they will therefore be set aside if the father was insolvent at the date of the deed, and in any case will only be sustained so far as reasonable in amount. But, as in a question with children, the spouses' right of revocation is limited, and the provisions will be sustained so far as reasonable (see *Allan* and *Peddie*, *supra*.)

[See M'Laren on *Wills and Successions*; Fraser on *Husband and Wife* and *Parent and Child*; Walton on *Husband and Wife*; Bell, *Lectures on Conveyancing*; Menzies, *Lectures on Conveyancing*.]

Married Woman.—By the common law of Scotland the legal *persona* of a married woman is so merged in that of her husband as to leave her incapable of independent legal action (Ersk. i. 6. 19; Bell, *Prin.* 1609; Fraser, *H. & W.* i. 507). The husband is the wife's curator, and all obligations undertaken and deeds granted by her require his consent and concurrence, unless they deal with her separate estate, from which the *jus mariti* and right of administration are excluded, or are in his own favour (*Rennie*, 1845, 4 Bell's App. 221; *Dickson*, 1871, 10 M. 41). Even when in security for the husband's debts, or in favour of his relations, the wife's deeds require his consent (Bell, *Prin.* 1610; *Rennie*, *cit.*; *Brownlee*, 1831, 10 S. 39). In the case of the wife's *personal* obligations, the principle is carried further, for they cannot be rendered valid even by the husband's consent; and this does not arise from any *privilege* attaching to the married state of the wife, but from an absolute disability to personally bind herself, with or without the consent of her husband (Fraser, *H. & W.* i. 520). There are numerous and important exceptions, both statutory and at common law, but the principle remains unaffected, and the latest Act expressly reserves the wife's exemption from personal diligence, and leaves untouched the curatorial power of the husband (see Married Women's Property Act, 1881).

The husband's curatory is an office *sui generis*, and differs in important particulars from the curatory of a minor, not the least important of the differences being, as already indicated, that the husband's consent is ineffectual to validate the wife's personal obligations (see Ersk. i. 6. 23; Fraser, *H. & W.* i. 515). If the wife is a minor with curators, their place is taken by the husband. But it has been suggested that if, in such a case, the husband is himself a minor with curators, the wife's curators should continue to act, with concurrence of those of the husband, in the management of the wife's separate estate (Fraser, *H & W.* i. 517; More's *Notes to Stair*, p. xviii; Bankt. i. 7. 61; Walton, *H. & W.* 164). The wife being thus under curatory, it follows at common law that she cannot be tutor or curator to another (but see Guardianship of Infants Act, 1892). She can, however, with consent of her husband, act as executrix or trustee (Fraser, *H. & W.* i. 514; Walton, *H. & W.* 162). In such cases the husband becomes liable for the wife's obligations if she has no separate estate, but apparently it is not necessary that he should expressly

authorise every act of administration (*Pattisson*, 1886, 13 R. 550; *Hill*, 1879, 7 R. 68; *Stoddart*, 30 June 1812, F. C.; Fraser, i. 514). It has, however, been suggested that the liability being the husband's and not the wife's, his approval should be necessary in the case of the wife's acts of administration as well as of her acceptance of the office (Walton, *H. & W.* 163).

"The obligations which the wife has been found incapable of granting, and which are intrinsically null and void, comprehend the whole class of personal obligations known in the law of Scotland, but the decisions have been most numerous as to bonds, bills, and promissory notes" (Fraser, *H. & W.* i. 523 *et seq.*, where the cases are summarised; and see *Jackson*, 1892, 19 R. 528, "cash-credit bond"). The wife's incapacity being an absolute disability in law, her property cannot be attached following on a *personal* obligation, even if she possess the property exclusive of the *jus mariti* and right of administration of her husband, and can assign or dispone it without his consent. And even in the exceptional cases to be noticed, where the wife's personal obligation does found diligence against her separate estate, her person can seldom be attached. After dissolution of the marriage the wife may ratify or homologate a personal obligation; but the effect is to make a new contract, not to set up the old, which was null (Fraser, *H. & W.* i. 530). A married woman cannot—any more than a person under no disability—plead the nullity of a contract and at the same time profit by it; and if she obtains property on a condition, the condition must be fulfilled or the property returned (Fraser, *H. & W.* i. 538; *Cahill*, 1883, 8 App. Ca. 426).

Exceptions to the Doctrine of the Incapacity of a Married Woman.

To the general rule that a married woman's personal obligations are null there are important exceptions at common law, and recent legislation has further modified the doctrine. The common-law exceptions are detailed below; the statutory modifications will be found particularly dealt with under the titles of the statutes (see Conjugal Rights (Scotland) Amendment Act, 1861; Married Women's Property Act, 1877; Married Women's Policies of Assurance Act, 1880; Married Women's Property Act, 1881); but as the common-law doctrine must be read in the light of the modifications introduced by these Acts, a summary of their effect on the capacity of a married woman may be given here.

(*a*) Statutory Modifications.—The Married Women's Property Acts are important as securing much of a wife's estate for her own separate use, but they give her no greater capacity to contract than she formerly possessed as regarded property from which both the *jus mariti* and right of administration were excluded. These two rights have been thus distinguished: "A husband's *jus mariti* and a husband's right of administration or curatorial power are different things, and the exclusion of the one does not necessarily imply the exclusion of the other. It is always a question of intention. The husband's *jus mariti* virtually makes him proprietor of his wife's moveables, but his curatorial power is quite different, and must be exercised solely for her behoof, and to save her from being hurt by her own acts. In the present case, as only the *jus mariti* is mentioned, and not the right of administration, I think the husband's curatorial power still subsists, and that he must, simply as curator, concur in his wife's acts. But as his *jus mariti* is expressly cut off and as the annuity is not subject to his debts and deeds, he cannot use his curatorial power for the purpose of getting the annuity, or any part of it into his own hands, or under his own power" (per Ld. Gifford in *Bryce's Tr.*, 1878, 5 R. p. 728).

The Conjugal Rights Act, 1861, frees from the *jus mariti* and *jus administrationis* the products of a married woman's own industry and any property acquired by her after obtaining a protection order or being judicially separated. While so separated she has the same capacity and is liable to the same diligence as regards her person and estate as an unmarried woman.

The Married Women's Property Act, 1877, provides that a wife shall hold, exclusive of the *jus mariti* and right of administration, the earnings of any business carried on by her under her own name, and her gains through the exercise of literary, artistic, or scientific skill. But the Act gives a married woman no power to personally bind herself, save in matters connected with her own business or separate estate (*Biggart*, 1879, 6 R. 470).

The Married Women's Property Act, 1881, excludes from the *jus mariti*, but not from the right of administration, the whole moveable estate of the wife, and provides that the income shall be paid to her on her own receipt. The annual produce of her heritable estate is freed from both *jus mariti* and *jus administrationis*. Under the Act, therefore, a married woman has full power to contract in connection with the income of her estate, but has no greater capacity than formerly to deal with the *corpus*, heritable or moveable; as regards it, the husband retains his curatorial power, and his consent is necessary to all deeds or obligations affecting it.

The Married Women's Policies of Assurance (Scotland) Act, 1880, provides that a married woman may effect a policy of assurance on her own life or on the life of her husband for her separate use, which shall vest in her exclusive of the *jus mariti* and right of administration of the husband, and shall be assignable either *inter viros* or *mortis causa* without his consent.

(*b*) Exceptions at Common Law.—A wife's personal obligation is valid when

(1) It is *de in rem verso* of the wife.

(2) The wife is living separate from the husband in circumstances which negative the idea of her having a mandate from him.

(3) It is an obligation *ad factum præstandum*.

(4) The husband is imprisoned or civilly dead; and, Ld. Fraser adds,

(5) The wife fraudulently holds herself out as unmarried (Fraser, *H. & W.* i. 535; Walton, *H. & W.* 166).

(1) *Obligations in rem versum of the Wife.*—"The general rule of the law is that a married woman can grant no personal obligation; such obligation is null and void, because in law a wife has no person. It is said that when she has a separate stock the case is different, but this is erroneous. She may indeed convey that estate, but the only way in which a personal obligation can be made good is by showing that the money has been *in rem versum* of the wife" (Ld. J.-C. M'Queen in *Harvey*, Bell, *Oct. Cases*, i. 255). If the husband is alive, furnishings for his wife and family are strictly *in rem versum* of him; but the furnishings must be suitable to his income: otherwise he is not liable, if they have been supplied to the order and for the use of the wife (Fraser, *H. & W.* i. 540; *Buie*, 1831, 9 S. 923). Debts incurred in the management of the wife's separate property, or to clear away burdens from it, are *in rem versum* of her; and, on the same principle, the expenses of recovering her separate estate are a good debt against a married woman (Fraser, *H. & W.* i. 537; *Brown*, 1830, 8 S. 834). When a married woman possesses estate exclusive of the *jus mariti* and right of administration of the husband, she may, with her husband's consent, engage in trade with it, and thereby incur personal obligations—as on bills or promissory notes—which will be effectual against her separate estate (*Biggart*, 1879, 6 R. 470). She may not grant bills or promissory notes as cautioner for a debt (Bell, *Prin.*

1612; *M'Lean*, 1887, 14 R. 448). The wife's separate property is liable for debts contracted by her before marriage; and a creditor may sue her and her husband, and recover out of her estate, if she have any, or from the husband to the extent that he has benefited by the marriage (Married Women's Property Act, 1877, s. 4; Fraser, *H. & W.* i. 536; *Primrose*, 1610, Mor. 5982; *Sinclair*, 1677 Mor. 5984). It is not necessary that a married woman should actually profit by an obligation, to make it binding upon her; if the obligation is undertaken with the intention of benefiting her separate estate, it is binding upon her although benefit does not result (*Henderson*, 1895, 22 R. 895). Professor Bell (*Prin.* 1613) says that a bond by a married woman to take effect after her death is good; but in a modern case the doctrine was seriously questioned (*Miller*, 1854, 21 D. 377; and see Fraser, *H. & W.* i. 544). A married woman is, however, free to dispose of both her heritable and moveable estate by *mortis causa* deed.

(2) *Wife living Separate.*—If the husband is abroad, or the wife is living separate from him in circumstances which do not entitle her to pledge his credit,—*e.g.* when she is in desertion, or is supplied with adequate aliment by him (*Robins*, 1688, Mor. 5955), — her estate is liable for her personal obligations for *necessaries*. Further, if a woman's husband is abroad and she engages in business or trade, obligations in relation to her business may be enforced not only against her estate, but against her person—the latter liability marking the difference between this case and that of a wife who is a trader, but not separated from her husband. In *Orme*, 1833, 12 S. 149 (following *Churnside*, 1789, Mor. 6082), a married woman whose husband resided in England, and who carried on business on her own account in Scotland, was held liable to personal diligence on a bill which she accepted, although not in the course of her trade. It may be remarked that the statement on this point in Bell's *Principles*, 1612, is apt to mislead, as inferring that in no case is a married-woman trader liable to personal diligence.

(3) *Obligations ad factum præstandum.*—Personal diligence may be used against a married woman to compel the performance of what is in her own power, and cannot be validly performed by anyone else (Ersk. i. 6. 19). "Where the act to be performed is something in which the obligant's work alone is concerned, *quæ in nudis finibus faciendi consistunt*" (*e.g.* to sing at a concert or act in a play), "then specific performance will not be enforced, but damages alone will be given. But if it include anything more than this,—*e.g.* where delivery of a stipulated article is to be made, or anything analogous to delivery, such as the execution of a deed,—the creditor may enforce specific implement so far as that can be indirectly enforced by imprisonment" (Fraser *H. & W.* i. 555).

(4) *Husband imprisoned or civilly dead.*—If the husband is imprisoned or in penal servitude, at least if it be for a long term, the wife's disability is removed (Fraser, *H. & W.* i. 546; Walton, *H. & W.* 168; *Anderson*, 1833, 11 S. 688; *Farquhar*, 1753, Mor. 4669). And the same if he be "civilly dead." No precise meaning seems to have been attached to the phrase in either Scotland or England; but a wife's obligations are binding if, for instance, her husband has fled from trial for a crime (Fraser, *H. & W.* i. 546). *Insanity of the husband* does not affect a married woman's incapacity as to *personal* obligations.

(5) *Married Woman fraudulently holds herself out as unmarried.*—"If a married woman assert herself to be unmarried, and so induce any person to enter into a contract with her, the other party may insist on the contract being implemented, and may use diligence on the wife's obligation" (Fraser, *H. & W.* i. 544; and see Bankt. i. 5. 74). But liability arises only if it is

difficult or impossible for the other party to ascertain the true facts of the case, as when the marriage has been secret; and it has been suggested that the rule must not be carried further than this, that a wife who has induced a third party to contract with her by representing herself as unmarried, cannot repudiate and at the same time take benefit under the contract (Walton, *H. & W.* 171).

Delicts and Quasi-delicts of a Married Woman.—A married woman is responsible for her own delicts and *quasi*-delicts, and may be imprisoned or fined, or found liable in damages (Fraser, *H. & W.* i. 537; Walton, *H. & W.* 273). So a husband is not liable in damages for his wife's slander (*Barr*, 1868, 6 M. 651; *Milne*, 1892, 20 R. 95). But in civil actions he must be called as defender along with his wife. *Stante matrimonio* a fine imposed on a married woman cannot be exacted if she has no separate estate exempt from the *jus mariti*, and diligence will be suspended until the dissolution of the marriage. And a wife cannot during marriage be imprisoned for failure to pay a fine imposed for delict (Bell, *Prin.* 1613; *Chalmers*, 1790, Mor. 6083; *M'Luckie*, 1796, Hume, 204). But if the sentence is one partly of corporal punishment and partly of payment of a fine, the former will be enforced, although the latter may have to await the dissolution of the marriage (Fraser, *H. & W.* i. 560).

Married Woman's Heritable Estate.—A married woman who holds heritable property exclusive of the *jus mariti* and right of administration can deal with it exactly as if unmarried (*Annand*, 1775, 2 Pat. 369; *Standard Property Investment Co.*, 1877, 4 R. at p. 704), and the same if she be judicially separated or have a protection order. Otherwise, at common law, she cannot, without her husband's consent, burden or dispose of her heritage, or "do any act of administration relative to it" (Fraser *H. & W.* i. 804; Ersk. i. 6. 27; *Boyle*, 1822, 1 S. 372). So it would appear that she cannot grant leases or remove tenants (Ersk. *supra*; *Cockburn*, 1679, Mor. 5795 and 5998; Bell, *Prin.* 1884 (*c*)). But the Married Women's Property Act, 1881 (ss. 2 and 3), provides that when a marriage is 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; and this applies to heritage acquired by any married woman after the Act, unless the husband "have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him." So a married woman's receipt for rents of her property would now probably be sufficient, but the husband's rights as to the *corpus* of the estate still subsist, and a wife cannot alienate or burden it without his consent. By sec. 5 of the 1881 Act, when a wife is deserted by her husband, or living separate from him with his consent, a judge of the Court of Session or Sheriff Court may, on petition, dispense with the husband's consent to any deed relating to her estate. For a discussion of the wife's power under the Act to grant a lease or perform other acts of administration not affecting the *corpus*, see the article on Married Women's Property Act, 1881. The question whether the husband's subsequent consent will validate a deed seems to be open (Ld. Kinloch in *Dickson*, 1871, 10 M. 46). Erskine says that if the husband is insane the wife has power to grant deeds affecting her heritage without his consent, if they are rational (Ersk. i. 6. 27); but Bankton (i. 5. 67) limits the wife's power in such a case to deeds which are to take effect after the dissolution of the marriage; and the point seems to be undecided (Fraser, *H. & W.* i. 548; Walton, *H. & W.* 251).

Married Woman as Partner.—At common law the marriage of a

female partner dissolves the firm. "The dissolution of a business by the marriage of a female partner has the same effect as if it had been dissolved by the death of a partner. The female partner drops out of the firm just as if she were dead, because she is incapacitated from continuing. She cannot continue in the firm without her husband, and she cannot bring him in" (Ld. Pres. Inglis in *Russell*, 1879, 2 R. 94; Bell, *Com.* ii. 634). There has been no decision on the point since the 1881 Act (see Walton, *H. & W.* 235). A married woman cannot carry on a separate business of any kind without her husband's consent (*Ferguson's Trs.*, 1883, 11 R. 268); and the same is true of her becoming a partner, unless the recent Statutes have touched this disability, which does not appear to be the case. Even if the husband does consent, the wife's separate estate is alone liable, and he incurs no personal responsibility. A wife with separate estate cannot enter into a trading partnership with her husband (*Macara*, 1848, 10 D. 707; Fraser, *H. & W.* i. 513). See PARTNERSHIP.

MARRIED WOMAN AS SHAREHOLDER.—In accordance with the common-law rule that marriage operates as a universal assignation to the husband of the wife's moveable estate, shares in a joint-stock company pass to him, and he alone becomes liable on account of them, the wife being considered as merely the husband's agent (*Thomas*, 1879, 6 R. 607; *Steedman*, 1879, 7 R. 111; *Carmichael*, 1879, 7 R. 118). But if a married woman possesses or is bequeathed shares which are excluded from the *jus mariti*, either by convention or the operation of Statute, she continues to be a shareholder and alone liable on the shares (*Forbes*, 1879, 6 R. 1122; *Biggart*, 1879, 6 R. 470). Separate estate may probably be invested by a wife in shares, even against her husband's wish (*Biggart*, *supra*). But this can only apply to estate from which the right of administration, as well as the *jus mariti*, is excluded; and it has been suggested that even in this case the liability imposed on a husband by sec. 78 of the Companies Act, 1862, makes it doubtful whether a wife is entitled so to invest without her husband's consent (Walton, *H. & W.* 242).

MARRIED WOMAN AS PURSUER OR DEFENDER.—For a particular statement of a married woman's capacity to pursue and defend actions, reference may be made to the articles on DEFENDER; INSTANCE; PURSUER. It may, however, be said generally, that at common law a married woman cannot by herself sue or defend any action, even relating to her separate property (from which the *jus mariti* and right of administration are not excluded), rights, or injuries (Mackay, *Manual*, 144; Fraser, *H. & W.* i. 566; Bell, *Prin.* 1610). But the rule is subject to much the same exceptions as have been dealt with in considering a married woman's capacity in other directions. Thus when a wife was living apart from her husband and he refused to concur, she was held entitled to sue without him an action of damages for slander (*Cullen*, 1830, 6 W. & S. 566; and see *Smith*, 1850, 12 D. 1185). And a wife has sued without her husband when he had an adverse interest; when he had gone abroad and not been heard of for some years (*M'Quillan*, 1892, 19 R. 375); when he had been transported (*Paul*, 1834, 7 W. & S. 462); and when he had unreasonably refused his consent (*Blair*, 1829, 8 S. 264; *Cullen*, *supra*).

Since the 1881 Act a married woman may appear in actions relating to the income of her personal estate or the annual produce of her heritage without the husband's consent or concurrence; and even where the Act does not apply, the same is the rule if the action is connected with separate estate from which the *jus mariti* and right of administration are excluded (*Biggart*, 1879, 6 R. 470; Walton, *H. & W.* 312).

When a married woman is defender, her husband must generally be called as her curator, and for his interest. For exceptions to the rule, see DEFENDER. Even when the wife has a separate income under the 1881 Act, it is usual and safer to call the husband (Mackay, *Manual*, 166).

MARRIED WOMAN AS WITNESS.—Apart from special Statutes, a married woman cannot give evidence for or against her husband when standing his trial for a crime, unless he be accused of injuring her personally, when her evidence is admissible against him (Macdonald, 449). But bigamy is not such a personal wrong as to admit the evidence of the injured spouse (*Armstrong*, 1844, 2 Broun, 251).

The following list of Statutes under which a husband or wife is a competent or compellable witness is given by Mr. Walton (*H. & W.* p. 282):—

The husband or wife is a competent and compellable witness under—

The Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86, s. 11), where the charge is of maliciously breaking a contract of service, whereby the inhabitants of a place are deprived of gas or water; or whereby injury is caused to persons or property (ss. 4 and 5); or where a master, legally bound to provide a servant or apprentice with necessary food, clothing, etc., has neglected to do so, to the danger of the servant's health (s. 6).

40 Vict. c. 14, where the charge is for non-repair of a public highway or bridge, or nuisance to a public highway, or river, or bridge; or where any *quasi*-criminal proceeding is instituted for trying or enforcing a civil right only.

The Army Act, 1881 (44 & 45 Vict. c. 58, s. 156, subs. 3).

The husband or wife of the accused is a competent but not a compellable witness under—

The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69, s. 20) (offences against young girls).

The Corrupt Practices Prevention Act, 1883 (46 & 47 Vict. c. 51, s. 53, subs. 2).

The Prevention of Cruelty to Children Act, 1889 (52 & 53 Vict. c. 44, s. 7).

The husband or wife may be tendered as a witness for the defence under—

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63, s. 21).

The Explosive Substances Act, 1883 (46 Vict. c. 3, s. 4 (2)) (making or possessing explosives under suspicious circumstances).

The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28, s. 10).

MARRIED WOMAN AS VOTER (see FRANCHISE).—Women, married or unmarried, do not possess the parliamentary franchise.

The Municipal Elections Amendment (Scotland) Act, 1881, s. 2, provides that married females not living in family with their husbands shall be registered as voters as if they were males, but they are not eligible for election to the town council.

The Local Government (Scotland) Act, 1889, provides that a married woman not living in family with her husband, and who would be qualified as a parliamentary voter if she were a man, may vote in county council elections.

The Local Government (Scotland) Act, 1894, s. 11, allows any married woman to vote in a county council, municipal, or parish register, provided that husband and wife are not registered for the same property. Married women may vote in school board elections, and sit on school boards

but their right to do so is not established by Statute (see Walton, *H. & W.* 307).

See HUSBAND; WIFE: MARRIAGE; etc.

Married Women's Policies of Assurance (Scotland) Act, 1880 (43 & 44 Vict. c. 26).—The preamble was repealed by the Statute Law Revision Act, 1894. This Act extends to Scotland facilities for effecting policies of assurance for the benefit of married women and children conferred in England by the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93) (see now the English Act of 1882, 45 & 46 Vict. c. 75, s. 11). Sec. 1 gives power to a married woman to effect a policy on her own life or the life of her husband, and directs that the same, if expressed to be for her separate use, shall vest in her, exclusive of her husband's rights, and shall be assignable by her without his consent. Sec. 2 provides that a policy effected by a married man on his own life, and expressed upon the face of it to be for the benefit of his wife or children, shall be a trust for the wife or the children, or both, and shall not be liable to the diligence of his creditors, or revocable by him as a donation, or reducible on any ground of excess or insolvency. But if it shall be proved that the policy was effected, and premiums 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 its date, creditors may claim repayment of the premiums so paid out of the proceeds of the policy. It has been held that a widower is a "married man" in the sense of sec. 2 (*Kennedy's Tr.*, 1895, 23 R. 146). A policy effected under sec. 2 for the benefit of the wife may be surrendered at any time by the trustee, with the concurrence of the wife (*Shumann*, 1886, 13 R. 678). No right vests in the wife or children unless there has been actual or constructive delivery of the policy (*Jarvie's Tr.*, 1887, 14 R. 411). A policy may be effected under this section by a "married man" not domiciled in Scotland (*Shumann, ut supra*). Where the policy is expressed to be for the benefit of "wife and children," it seems that the mother and the children would share equally (*Jarvie's Tr., ut supra*, per Ld. M'Laren, Ordinary). In England inconsistent views have been taken (see *Adam's Policy*, 23 Ch. D. 525; *Mellor's Policy*, 6 Ch. D. 127; *in re Seyton*, 1887, 34 Ch. D. 511; *in re Davies' Policy*, [1892] 1 Ch. 90). Where a husband who effected a policy on his life for the benefit of his wife was murdered by her, it was held in England that the insurance money formed part of the estate of the insured (*Cleaver*, [1892] 1 Q. B. 147). In another English case it was held that the husband's creditors could not claim repayment of premiums on a policy settled by him on his wife and children when it was proved that the premiums had been paid by the wife out of her separate estate (*Halt*, 1876, 2 Ch. D. 266). It is to be observed that the Act gives no power to a married woman to effect a policy on her husband's life for his benefit or that of the children.—[See Walton, *H. & W.* 301.]

Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21).—The preamble was repealed by the Statute Law Revision Act, 1894 (see *infra*, 6 and 7). The main objects of this Act are, *inter alia*: (1) to abolish the JUS MARITI (*q.v.*) over the wife's moveable estate; (2) to confer upon the husband a right, which may be called JUS RELICTI (*q.v.*); and (3) to give to children a right of LEGITIM (*q.v.*) in their

mother's moveable estate. In the case of marriages contracted before the Act, the provisions relating to *jus mariti* do not apply where the husband has by irrevocable deed made a reasonable provision for his wife in the event of her surviving him. Where he has not done so, the provisions as to *jus mariti* apply only to estate acquired by the wife after the Act (s. 3) (as to "reasonable provision," see sec. 3, *infra*). But sec. 3, though very awkwardly expressed, does not apply to the sections following, so as, *e.g.*, to limit the provisions dealing with *jus relicti* and legitim to marriages contracted after the passing of the Act (*Poë*, 10 R. 356, 10 R. H. L. 73). Sec. 1 provides that where a marriage is contracted after the passing of the Act (18 July 1881), and the husband shall be at the time of the marriage domiciled in Scotland, the wife's moveable estate acquired before or during the marriage shall be vested in her as her separate estate, and shall not be subject to the *jus mariti* (subs. 1). As to the nature of the wife's interest, see observations by Ld. M'Laren in *Cochrane*, 1891, 18 R. at p. 455. The income of such estate is to be payable to the wife on her individual receipt, and to this extent the husband's right of administration is excluded, but the wife is not entitled to assign the prospective income, or, unless with the husband's consent, to dispose of such estate (subs. 2). It is to be observed that the husband's right of administration is only excluded to this very limited extent. The wife's moveable capital is in the position of estate from which, by an antenuptial marriage contract or other deed, the *jus mariti* has been excluded, but not the right of administration. As to estate in this position, see *Bryce's Tr.*, 1878, 5 R. 722, and ADMINISTRATION, HUSBAND'S RIGHT OF). If a husband acquires a Scottish domicile after the marriage, sec. 1 does not apply. What his rights would be is not stated, but it is thought that estate which was the wife's before the change of domicile will remain hers. Acquirenda by her thereafter, if there is no marriage contract, will fall to him *jure mariti*, unless the view taken is that there is a tacit contract at marriage that the law of the domicile at that time shall be the law which shall regulate the matrimonial rights of the spouses so long as the marriage shall subsist (see Walton, *H. & W.* 408, and authorities there cited; ADMINISTRATION, HUSBAND'S RIGHT OF, at vol. i. p. 122; Dicey, *Conflict of Laws*, p. 655). Upon the construction of the section it has been held that it does not give power to a married woman to discharge a claim of legitim without her husband's consent (*Miller*, 1886, 13 R. 764), nor give her capacity to grant a promissory note (*M'Lean*, 1887, 14 R. 448; see *Burnett*, 1888, 25 S. L. R. 356). If the wife has no separate estate, the Act does not affect her right to interim decree against her husband for expenses to enable her to defend an action of divorce (*Milne*, 1885, 13 R. 304). The wife's moveable estate is not to be subject to diligence for the husband's debts if it is clearly earmarked or invested in such a way as to be distinguished from the husband's estate. This earmarking is not necessary as to such corporeal moveables as are generally possessed without a written title. Such, *e.g.*, would be jewellery or furniture (subs. 3). Money or other estate of the wife lent or intrusted to the husband or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, but the wife shall have a claim to a dividend after the claims of creditors are satisfied (subs. 4). On this it has been held that money of the wife's placed with money of the husband's, on deposit receipts payable to either spouse or the survivor, is "immixed" with the husband's funds (*National Bank*, 1893, 21 R. 4). It has been said that furniture belonging to the wife might be so "immixed" with furniture belonging to the husband (*Anderson*, 1892, 19 R. 684). But furniture which belonged to a wife before marriage,

and was taken by her to the husband's house, is not "lent or intrusted" to him (*Adam*, 1894, 21 R. 676).

The case of *Anderson* was said, in *Adam*, to be very special, and the decision was really based on the belief that a sale of furniture by the husband to the wife, seven months before his sequestration, was not a *bonâ fide* transaction. It is thought that in the ordinary case, where part of the furniture in the house occupied by the spouses belongs to the wife, either because it was acquired by her after the passing of this Act, or under a deed excluding the *jus mariti*, it is not lent or intrusted to the husband, or immixed with his funds. For the only way in which she can put it to its natural use is to keep it in the house where she resides with her husband (see two Sheriff Court cases, *Allan*, 1890, 6 S. L. Rev. 185; *Robertson*, 1893, 9 S. L. Rev. 50; and see also *Orr's Tr.*, 1870, 8 M. at p. 947; *Mitchell's Trs.*, 1894, 21 R. 586; and compare the English cases, *Ramsay*, [1894] 2 Q. B. 19; *in re Genese*, 16 Q. B. D. 700; *in re Leng*, [1895] Ch. 652). It must be noticed that the corresponding section of the English Act (s. 3 of 45 & 46 Vict. c. 75) says "lent or intrusted," but does not add "or immixed with his funds." Where the wife has only this postponed claim, her assignee can have no higher right (*Cochrane*, 1891, 18 R. 451). The Act is not to affect the power to make settlements by antenuptial contract (subs. 5).

Sec. 2. 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. This does not apply to the income of heritage the fee of which was vested in the wife prior to the passing of the Act (*Scott's Trs.*, 1889, 16 R. 507). The section applies though the husband is not domiciled in Scotland. Nothing is said as to the rents of heritable property not in Scotland. The husband's rights in such rents, where there is no contract, will fall to be determined by the law of the country in which the property is situated, just as this section itself determines the rights of a foreign husband in his wife's Scots heritage (see Fraser, *H. & W.* ii. 1324; Dicey, *Conflict of Laws*, p. 519).

Sec. 3. As to marriages prior to this Act, the "provisions of this Act," *i.e.* "the foregoing provisions" (*Poë, ut supra*), do not apply when the husband has made a reasonable provision for his widow by an irrevocable deed; and where he has not done so, they apply only to property acquired by the wife after the passing of the Act. No cases have as yet arisen to illustrate what will be considered a "reasonable provision." Some light may be derived from the cases in which an alleged donation by the husband has been held irrevocable, so far as being a reasonable provision for the wife (see DONATIONS INTER VIRUM ET UXOREM; Fraser, *H. & W.* ii. 943; Walton, *H. & W.* 131). The cases as to a wife's right, under sec. 16 of the CONJUGAL RIGHTS ACT, 1861 (*q.v.*), to a "reasonable provision," and moneys which would otherwise have fallen under the *jus mariti*, may be also referred to (*Somner*, 1871, 9 M. 594; *Taylor*, 1871, 10 M. 23; *Kinnear*, 1871, 10 M. 54; *Clark*, 1881, 8 R. 723; *Reid*, 1878, 5 R. 630; *Mudie*, 23 R. 1074). In some of the cases as to donation, the Court has held that what was "reasonable" would depend on the husband's means at the dissolution of the marriage. But it is thought, in construing this section, the date regarded would be that of the deed. The question in the cases upon donation has naturally arisen on the death of the husband, when it was possible to compare the widow's provision under the deed with what would, but for it, be her legal rights. But under this section the question would generally be raised at a time when it was impossible to determine what the husband's means might be at his death, as, *e.g.*, if the trustee in

his sequestration claimed funds vested in the wife as falling under the *jus mariti*. A husband who has merely insured his life for his wife's benefit, but has not secured any fund out of which to pay future premiums, has not, it is submitted, made a "reasonable provision" in the sense of the section.

Sec. 4 gives power to spouses married before the Act to declare by a registered deed that the wife's estate shall be regulated by the Act. Such a deed is not to prejudice the rights of creditors of the husband for debts contracted by him before the deed. In considering whether a husband, married before the Act, had shown *rebus et factis* his intention to abandon his *jus mariti*, it was regarded as a material circumstance that no deed had been executed under this section (*Henderson*, 1889, 17 R. 18).

Sec. 5 provides that where a wife is deserted by her husband or is living apart from him with his consent, a judge of the Court of Session or Sheriff Court may, on a petition, dispense with the husband's consent to any deed relating to her estate (see *Niven*, 1883, 20 S. L. R. 587; *Gibson*, 1893, 1 S. L. T. No. 336).

Sec. 6 provides that the husband of any woman who may die domiciled in Scotland shall have the same share in her moveable estate as is taken by a widow in her deceased husband's moveable estate. This applies to marriages prior to the Act (*Poë*, 1882, 10 R. 356, 10 R. H. L. 73; see sec. 3, *supra*). It applies to estate of the wife from which the *jus mariti* has been excluded (*Fotheringham's Trs.*, 1889, 16 R. 873; *Simon's Tr.*, 1890, 18 R. 135). The words "after the passing of this Act" were repealed by the Statute Law Revision Act, 1894. The husband cannot take this share in circumstances in which a wife could not take her *jus relictæ* (*Buntine*, 1894, 21 R. 714; see JUS RELICTÆ and JUS RELICTI). The words "may die" are not equivalent to "may die or be divorced" (*Eddington*, 1895, 22 R. 431; see DIVORCE).

Sec. 7 gives the children of any woman who may die domiciled in Scotland a right of legitim in her moveable estate. This applies to marriages prior to the Act (*Poë, ut supra*; and see remarks on sec. 1 and sec. 3, *supra*). The words "after the passing of this Act" were repealed by the Statute Law Revision Act, 1894.

Sec. 8. The Act is not to affect contracts made or to be made between married persons before or during marriage (see *Buntine, ut supra*); or Donations (see DONATIONS INTER VIRUM ET UXOREM); or a wife's non-liability to personal diligence (see WIFE); or the rights of married women under the MARRIED WOMEN'S PROPERTY (SCOTLAND) ACT, 1877 (*q.v.*). It appears that the Act has not made it possible for the wife effectually to place her estate under trust on the eve of marriage unless the intended husband is a party to the deed (*Watt*, 1897, 34 S. L. R. 267).

[Walton, *H. & W.* 173-181, 233, 236, 242, 252, 309, 311, 408].

See ADMINISTRATION, HUSBAND'S RIGHT OF; CONJUGAL RIGHTS ACT; MARRIED WOMEN'S PROPERTY ACT, 1877; JUS MARITI; WIFE.

Married Women's Property (Scotland) Act, 1877 (40 & 41 Vict. c. 29).—The preamble was repealed by the Statute Law Revision Act, 1894. The purposes of this Act are: (1) to protect the earnings of a married woman from her husband; (2) to limit his liability for her antenuptial debts.

Sec. 3 excludes the *jus mariti* and right of administration of the husband from the wages and earnings of a married woman "in any employment, occupation, or trade in which she is engaged," *i.e.* as a servant or manager (see *Ferguson*, 1883, 12 R. at p. 266; *M'Ginty*, 1892, 19 R. at p. 940), "or

in any business which she carries on under her own name," *i.e.* for herself (*Ferguson, M'Ginty, ut supra*). It also excludes the husband's rights from money acquired by her through the exercise of any literary, artistic, or scientific skill, from and after 1 January 1878. As to the effect of the exclusion of the husband's rights, see ADMINISTRATION, HUSBAND'S RIGHT OF, at vol. i. p. 123). Such a separate business may be carried on by the wife when she is living with the husband, and even in the house occupied by the spouses jointly (*Morrison*, 1888, 16 R. 247). Where the husband does not interfere with the wife's management, it is thought that he will not be personally liable on her trade contracts (see Fraser, *H. & W.* ii. 1514, and a Sheriff Court case, *Palliser*, 1888, 4 S. L. Rev. 323). When the wife's capital is only separate estate under the MARRIED WOMEN'S PROPERTY ACT, 1881 (*q.v.*), which does not entirely exclude the husband's right of administration, it is by no means clear if she can personally bind herself or be made bankrupt for trade debts (see Fraser, *ut supra*; ADMINISTRATION, HUSBAND'S RIGHT OF; WIFE). Mr. Goudy states too broadly the effect of the Act of 1881 (*Bankruptcy*, 2nd ed., p. 75). In one case the husband and the wife put their separate earnings, which were of about equal amount, into a common purse, out of which the expenses of the household were defrayed. The wife placed the savings from their joint earnings on deposit receipts repayable "to either of them and the survivor." The husband predeceased, and it was held that one half of the sum so deposited belonged to the wife (*Morrison*, 1888, 16 R. 247). But a wife acquires no right to earnings of a business in which she is engaged merely as her husband's agent (*M'Ginty*, 1892, 19 R. 935). In a case before the Act of 1881 it was held that the section did not by implication re-transfer to the wife her stock in trade, which had passed to the husband *jure mariti* (*Ferguson's Tr.*, 1883, 11 R. 261). A wife earning small wages of varying amount has not such separate estate as to disentitle her to an interim decree for expenses to enable her to defend an action of divorce (*Milne*, 1885, 13 R. 304). Investments of her earnings are protected, and this would, it is thought, cover accumulations of interest (see *Young's Trs.*, 1892, 20 R. 22; Walton, *H. & W.* 174).

Sec. 4 limits the husband's liability for the antenuptial debts of his wife to the value of any property which he has received through her, and gives the Court power to direct an inquiry to ascertain the nature and value of such property (see ANTENUPTIAL DEBTS OF A MARRIED WOMAN; *Wishart*, 1879, 6 R. 823; *M'Allan*, 1888, 15 R. 863).

See MARRIED WOMEN'S PROPERTY ACT, 1881; MARRIED WOMAN; WIFE.

Martial Law.—The expression martial law is very commonly used as the equivalent of MILITARY LAW (*q.v.*). The proper sense of the expression implies the suspension of the ordinary law and the substitution of government by military tribunals. This is the state of siege of the continental jurists, and in this sense martial law is unknown to our law, though it has at times been established for a limited time by temporary Statutes (Hale, *History of the Common Law*, 6th ed., p. 42; Halleck, *International Law*, i. 544, ii. 439; Dicey, *Law of the Constitution*, p. 265; *Manual of Military Law*, War Office, 1894, p. 4).

Master and Servant.—The general rules of law regulating a contract of service have already been discussed in the article on HIRING,

under the title *Locatio operis* (see vol. vi. p. 203). Consideration was there given to the constitution and effect of the contract under the following heads:—

1. *The Parties to the Contract*, especially with reference to the power of pupils, minors, and married women to bind themselves by entering into the contract.

2. *The Constitution of the Contract.*—The validity of the contract depends, on its completion in so far as there is full assent given by both parties to its terms, on the nature of the service, which must not be opposed to the rules of morality or the law of the land, and on its form, which may be oral or implied in certain circumstances, and must be written in others.

3. *Duration.*—The latest authorities hold there is no restriction by law to the period to which a contract of service may extend. The parties are bound by the terms of the contract when the period of service is expressed in it. When no period is fixed by the contract, the law will presume the period from the relations of parties, the circumstances of the case, and the custom of the district as applied to that kind of service. The contract may be renewed by tacit relocation or terminated by due warning.

4. *Obligations of the Parties.*—The servant is bound to enter the service and continue therein for the period agreed on. He must know his work and do it carefully. He must be respectful to his master, and obedient to his orders. He must act morally, and must do nothing to hurt his master's business. The ordinary remedies of the master for the servant's misconduct are dismissal, forfeiture of wages, and damages. The master's obligations to the servant are that he must receive the servant into his employment. He must treat the servant properly and with due forbearance and toleration. He is bound to be careful not to injure the servant's character. He must pay the servant his wages. In relation to the last subject, the law of workman's lien for his wages, counter claims and answers to demand for wages, the prescription of wages, and arrestment of wages was considered. The servant's remedy for the master's breach of contract is that he may leave the service and raise an action for damages. The contract may be terminated by the expiration of the period of service, accompanied by due warning from one of the parties, by consent, express or implied, by death or prolonged illness of servant, by imprisonment of the servant, by the marriage of a female servant, by enlistment, by the death of the master, by the dissolution of the firm, by the course of events, and by breach of the contract. The consequences of termination of the contract were also considered. In the case of a female servant's marriage, the master cannot claim specific performance of the contract of service, and if, on account of the marriage, she does not fulfil her contract, the master will be entitled to damages from her and (under the old law) from her husband (Bell, *Prin.* s. 181), but under the Married Women's Property Act, 1887, only so far as he is *lucratus* by the marriage (40 & 41 Vict. c. 29, s. 4).

It is not proposed to deal at any greater length with the common law of the contract of service, but there are certain Statutes which modify the ordinary rules of law regulating the relations of master and servant to which reference must be made.

Employers and Workmen Act, 1875.

By the Act 4 Geo. IV. c. 34, masters had the power of enforcing by imprisonment the contract of service against their workmen. This Statute was largely resorted to, hence the common-law power of imprisonment fell into desuetude. This Statute and others amending it were all repealed by

the Act 38 & 39 Vict. c. 86, s. 17, and the Employers and Workmen Act (38 & 39 Vict c. 90), passed in the same session.

Powers conferred on Court by Act.—In any proceeding before a County Court (Sheriff Court) in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the Court may, in addition to any jurisdiction it might have exercised if this Act had not passed, exercise all or any of the following powers, that is to say—

1. It may adjust or set off, the one against the other, all such claims on the part either of the employer or the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise; and

2. If, having regard to all the circumstances of the case, it thinks it just to do so, it may rescind any contract between the employer and the workman upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages or other sums due, as it thinks just; and

3. Where the Court might otherwise award damages for any breach of contract, it may, if the defendant be willing to give security to the satisfaction of the Court for the performance by him of so much of the contract as remains unperformed, with the consent of the plaintiff, accept such security and order performance of the contract accordingly, in place either of the whole of the damages which would otherwise have been awarded or some part of such damages (s. 3).

By sec. 4 a Court of summary jurisdiction, defined to be the Sheriff's Small Debt Court, may, in a proceeding in relation to any dispute under the Act between an employer and a workman, order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a County Court. Provided that the Court of summary jurisdiction (1) shall not exercise any jurisdiction where the amount claimed exceeds £10, and (2) shall not make an order for the payment of any sum exceeding £10 exclusive of the costs incurred in the case, and (3) shall not require security to an amount exceeding £10 from any defendant or his surety or sureties.

What is a Dispute?—The powers are only to be exercised by the Court in the event of a dispute between master and workman arising out of the contract, and this has been interpreted by the English Courts to mean any claim by either party arising out of the contract (*Clemson*, 1876, 1 Ex. D. 179).

Rescission of Contract.—The Court has power to rescind any contract between the employer and the workman, and the question has been raised whether that extends to an arbitration clause in the contract. In the case of *Wilson* (1878, 5 R. 981) the Court did not decide the point, although it was there raised. But Ld. Adam on Circuit decided that as the clause of arbitration was a part of the contract of service, it was competent for the Sheriff to rescind it as well as the rest of the contract, and to decide the case on the equities (*Glasgow Tramways Co.*, 1877, 3 Coup. 440).

The Persons under the Act.—Sec. 10 defines a workman in this Act The expression workman does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-five years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this

Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour. It is not necessary that the contract be actually subsisting at the time the action is raised (*Hindley*, 1878, 3 Q. B. D. 481; *Reg.* v. *Proud*, 1867, L. R. 1 C. C. R. 71); but there must be a contract which is legally binding on the parties (Fraser, *M. and S.* 385). A contractor does not fall within the scope of the Act, but a person who has subordinate workmen under him whom he pays, may, provided he is himself engaged in manual labour (*Grainger*, 1880, 6 Q. B. D. 182).

Domestic servants are excluded from the Act; but a woman who is employed with a view to the discharge of duties connected with husbandry, but also performs domestic duties auxiliary to those which she was employed to discharge, may fall within the scope of the Act (*ex parte Hughes*, 23 L. J. M. C. 138). A woman who was employed as a "kitchen-woman and byre-woman" by a farmer was held to be an agricultural and not a domestic servant (*Clark*, Arkley, 33).

With reference to the other classes of workmen who fall under the Act, Ld. Ormidale said: "He (the servant) may not belong to any of the classes specially enumerated, but I can see no sufficient reason for holding that he does not fall under the general description of persons being servants engaged in manual labour; and I feel myself confirmed in this view by the circumstance that domestic or menial servants are expressly saved or excluded from the operations of the Act, the inference being thereby rendered irresistible, as it appears to me, that all other servants engaged in manual labour are comprehended." Accordingly, in this case a tramway-car conductor was held to be a labourer (*Wilson*, 5 R. 981).

The test whether an employee is engaged in manual labour within the meaning of the Employers and Workmen Act, 1875, is whether such labour is his real and substantial employment, or whether it is incidental and accessory to such employment. A grocer's assistant whose duty it was to serve customers in a shop, had also other duties involving manual labour, such as making up parcels for customers, carrying parcels from the shop to the cart at the door, and bringing up goods from the cellar to the shop, was held not to be engaged in manual labour within the meaning of the Act (*Bound*, [1892] L. R. 1 Q. B. 226). Again, a man with a knowledge of mechanics employed by a firm "to assist them as a practical working mechanic in developing the ideas they, the firm, might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm, if such inventions were approved by them," was held not to be a mechanic or workman within the meaning of the Act (*Jackson*, 13 Q. B. D. 618). See also cases referred to by Fraser, *Master and Servant*, pp. 387, 388.

Sec. 11 of the Act lays down that in the case of a child, young person, or woman subject to the Factory Acts 1833 to 1874, any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work. This clause seems to limit the extensive powers given to the Court by clauses 3 and 4.

There is no power given by this Act to the Court to order the imprisonment of the workman for breach of contract, or, in default of finding caution, to complete the contract. As a Statute passed in the same session repeals all previous Statutes, and this Statute declares that the Court shall have only the powers mentioned in clause 3 in dealing with disputes between

employer and workman, it seems to abolish imprisonment for breach of this contract both by statute and common law. Ld. Fraser (*Master and Servant*, 374 and 382) argues in favour of the view that the power to order imprisonment for breach of this contract is abolished.

Conciliation Act, 1896.

The method of settling disputes by arbitration has been introduced by Statute into various departments of the law. Thus the Merchant Shipping Act with regard to apprentices, and the Friendly Societies Act, have clauses by which disputes may be settled in this way, and from an early date Statutes have been passed to enable disputes between masters and workmen to be referred to arbitration. Previous to 1896 the three main Statutes regulating such a reference were the Masters and Workmen Arbitration Act, 1824, the Councils of Conciliation Act, 1867, and the Arbitration (Masters and Workman) Act, 1872. The provisions of these Statutes were modified as to particular trades—by 8 & 9 Vict. c. 77 as to hosiery, and by 8 & 9 Vict. c. 128 as to silkweavers. In 1896 the Conciliation Act (59 & 60 Vict. c. 30) was passed, by which the three principal Acts above referred to were repealed and the following provisions enacted in their place: Sec. 1 sets forth that any board established either before or after the passing of this Act, which is constituted for the purpose of settling disputes between employers and workmen by conciliation or arbitration, or any association or body authorised by an agreement in writing made between employers and workmen to deal with such disputes (in this Act referred to as a conciliation board), may apply to the Board of Trade for registration under this Act. The remainder of the clause directs that the application to be registered must be accompanied by certain information, that the Board of Trade must keep a register of conciliation boards and enter therein certain particulars, that each registered conciliation board must send returns, reports, etc., as the Board of Trade may require, that the Board of Trade may strike off the name of any conciliation board that has ceased to exist or act, and that, subject to any agreement to the contrary, proceedings for conciliation before a registered conciliation board shall be conducted in accordance with the regulations of the Board in that behalf. Sec. 2 gives the powers of the Board of Trade as to trade disputes. Where a difference exists or is apprehended between an employer, or any class of employers, and workmen, or between different classes of workmen, the Board of Trade may, if they think fit, exercise all or any of the following powers, namely: (*a*) inquire into the causes and circumstances of the difference; (*b*) take such steps as to the Board may seem expedient for the purpose of enabling the parties to the difference to meet together, by themselves or their representatives, under the presidency of a chairman appointed as therein described, with a view to the amicable settlement of the difference; (*c*) on the application of employers or workmen interested, and after taking into consideration the existence and adequacy of means available for conciliation in the district or trade, and the circumstances of the case, appoint a person or persons to act as conciliator, or as a board of conciliation; (*d*) on the application of both parties to the difference, appoint an arbitrator. The section goes on to direct (2) that a person appointed to act as a conciliator shall enter into communication with the parties, endeavour to bring about a settlement of the difference, and report to the Board of Trade; and (3) if a settlement is effected in any of these ways, a memorandum of the terms thereof shall be drawn up and signed by the parties or their representatives, and a copy thereof delivered to and kept by the Board of Trade. Sec. 3 provides for

the exclusion of 52 & 53 Vict. c. 49, the Arbitration Act, 1889, which, however does not apply to Scotland. Sec. 4 gives power to the Board of Trade to aid in establishing conciliation boards. Sec. 5 provides for the Board of Trade making a report to Parliament of their proceedings under this Act, and sec. 6 provides for the expenses incurred by the Board of Trade.

Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86).

This Act changes the common law, by which it was a crime for workmen to enter into a combination for the purpose of compelling an increase of wages, or to compel men to join a trades union. These combinations were held to be criminal because they were in restraint of trade. Sec. 3 provides that an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime. Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by Act of Parliament. Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace or sedition, or any offence against the State or the Sovereign. A crime, for the purposes of this section, means an offence punishable on indictment or on summary conviction, and for the commission of which the defender is liable, under the Statute making the offence punishable, to be imprisoned, either absolutely or at the discretion of the Court, as an alternative for some other punishment. The section further provides what punishment shall be inflicted where an offence has been committed. This section must be read along with sec. 2 of the Trade Union Act, 1871, which declares that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to prosecution for conspiracy or otherwise." Accordingly, the result of these two Statutes seems to be that no possible combination of workmen can be considered unlawful, unless it has for its object to do that which it would be criminal for one person to do. The ground of criminality, that it is in restraint of trade, has been abolished.

Sec. 4 of the Conspiracy and Protection of Property Act makes it an offence to break a contract of service with anyone who supplies any city, borough, town, or place with gas or water, knowing that the effect of such breach will be to deprive such city, etc., of their supply of gas or water. The punishment of such offence may be a penalty not exceeding £20, or imprisonment not exceeding three months. Sec. 5 makes it an offence, punishable with a like penalty, to commit a breach of a contract of service or of hiring, when the person committing the breach knows that the consequences will be to endanger human life, or cause serious bodily injury, or to expose valuable property, real or personal, to destruction or serious injury. Sec. 6 enacts a penalty of like nature and amount upon a master who is legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, and who fails to provide the same.

Sec. 7 enacts a penalty for intimidation or annoyance by violence or otherwise. Every person who, with a view to compel any person to abstain from doing, or to do, any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority (1) uses violence to or intimidates such other person, or his wife or children, or injures his property; or (2) persistently follows such other person about

from place to place; or (3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or (4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or (5) follows such other person with two or more other persons in a disorderly manner in or through any street or road;—shall, on conviction thereof by a Court of summary jurisdiction (Sheriff of the county or his substitutes), or on indictment as thereinafter mentioned, be liable either to pay a penalty not exceeding £20, or to be imprisoned for a term of three months with or without hard labour. Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this Act.

Sec. 8. Where in any Act relating to employers and workmen a pecuniary penalty is imposed in respect of any offence under such Act, and no power is given to reduce such penalty, the justices or Court . . . may, if they think proper so to do, impose by way of penalty any sum not less than one-fourth of the penalty by such Act.

There is, further, a clause declaring that nothing in this Act shall apply to seamen or to apprentices to sea service (s. 16). The rest of the Act is devoted to the regulations as to legal proceedings, the repeal of former Acts, and to definitions of the expressions used in the Act.

There are Statutes making special provisions for certain trades, as, *e.g.*, 22 Geo. II. c. 27, and 17 Geo. III. c. 56, as to embezzlement of materials by workmen in the felt or hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, or silk manufactures, but these are not of general interest, and are not here given in detail. As to miners, see COAL MINES REGULATION ACTS; and seamen, see SEAMEN. For the Statutes as to factory and workshop regulation, see FACTORY AND WORKSHOP ACTS, 1878 to 1895; as to trades unions, see TRADES UNION; and as to the system of dealing called truck, see under the heading TRUCK ACTS.

[See REPARATION; WORKMEN'S COMPENSATION ACT.]

Master of a Ship.—See SHIP; BILL OF LADING; BOTTOMRY; RESPONDENTIA; CHARTER PARTY.

Matrimonium.—Marriage in Roman law is defined in Justinian's *Institutes* as follows: *Nuptiæ sive matrimonium est viri et mulieris conjunctio, individuam consuetudinem vitæ continens* (*Inst.* i. 9. 1; cf. the celebrated definition by Modestinus, *D.* 23. 2. 1).

The only marriage recognised in early Roman law was that which was conformable to the *jus civile*, and which was called *justæ nuptiæ*. In the old Roman marriage the wife came into the power or *manus* of her husband. She passed into his family, and was to him *in loco filiæ* (Gai. ii. 159). All the property which she had at the date of the marriage, and anything she acquired afterwards, passed to her husband *per universitatem*.

Marriage *cum manu* was entered into by *confarreatio*, *coemptio*, and *usus*—forms which were important as modes of creating *manus* rather than as modes of constituting marriage. *Confarreatio* was the old Patrician mode of concluding a marriage, the ceremony being at once religious and civil,

and requiring the presence of the *pontifex maximus* and *flamen dialis* as well as of ten citizen witnesses. *Coemptio* was a civil ceremony, an adaptation of mancipation by the Plebeians in order to enable them to acquire *manus* over their wives. It was a formal or fictitious mutual sale concluded between man and wife with the authority of their respective *patres familiæ*. *Usus* was a mode of acquiring *manus* by the application of the principle of *usucapio*. If a woman lived with a man continuously for a whole year as his wife, she came *in manum viri* in virtue of this matrimonial cohabitation, just as ownership of a moveable thing was acquired by a year's possession.

It was through the form of marriage, *usu*, that marriage was freed from the *manus*, which in early times accompanied it. The Twelve Tables provided that a woman, by absenting herself from her husband's house for three consecutive nights (*trinoctium*) in the year, could interrupt the *usus*, and so prevent *manus* arising in respect of the cohabitation. Such a *trinoctium* of absence, repeated year by year, was recognised not to be inconsistent with the existence of an intention on the part of the woman to marry the man. In this way marriage *sine manu*, *i.e.* marriage dissociated from *manus*, had become usual in Rome before the fall of the republic. Early in the empire *manus*, and the subjection it involved, were so repugnant to women that a difficulty arose in finding persons, qualified by birth in a confarreate marriage, to fill the higher priesthoods, and it was found necessary to decree that *confarreatio* should for the future be productive of *manus* only *quoad sacra*. In the time of Gaius *manus* was practically out of date.

In a marriage *sine manu*, a married woman enjoyed a remarkable degree of liberty. Her legal status remained as it was before marriage. If she were not in the *potestas* of her father, she was *sui juris*, could acquire and hold property distinct from her husband, and could bring and defend actions as if she were a single woman. Marriage was now constituted simply by the mutual consent of parties—*Nuptias non concubitus, sed consensus, facit* (Ulpian in *Dig.* 50. 17. 30. 1). While, however, consent alone was necessary, the law required for many purposes some outward sign or public manifestation of the consent. The *consensus nuptialis* might be declared by a formal *deductio in domum*, the bringing of the bride to the bridegroom's house; or by the drawing up of *dotalia instrumenta;* or, under the Christian emperors, by a ceremony *in facie ecclesiæ*.

Other unions, falling short of *justæ nuptiæ*, received legal recognition to some extent. Thus while a Roman citizen and a peregrine could not enter into *justæ nuptiæ*, owing to the want of *connubium*, they could contract a *non justum matrimonium*, which was recognised by the *jus gentium*. The issue of such a marriage were not in their father's *potestas*, and, not being citizens, could not be instituted heirs in his testament, or succeed him *ab intestato*. At the same time they were legitimate, *justi* as opposed to *naturales liberi*, could compel their father to aliment them, and were cognates, though not agnates, *inter se*. In the time of Justinian, when all free inhabitants of the empire were citizens, and the *jus civile* and *jus gentium* were fused in one system, the distinction between a union of this kind and *justæ nuptiæ* had ceased to exist. Again, *concubinatus*, a permanent quasi-matrimonal relation between an unmarried man and an unmarried woman, though without the *affectio maritalis*, was for some purposes recognised and regulated by law (see *Concubinatus*).

In order to constitute a valid marriage the following conditions were necessary:—

1. Both the parties must be physically capable. The marriageable age was fourteen years in case of males, twelve years in case of females.

2. In the earlier law the right of intermarriage (*connubium*) must exist between the parties. Originally, *connubium*, or, as Ulpian defines it, *facultas uxoris jure ducendæ*, was confined to Patricians. It was, however, gradually extended, and in the time of Justinian, when all free inhabitants of the empire were citizens, it had lost its former importance.

3. The consent not only of the parties themselves, but of their respective *patres familias* must be given.

4. There must be no impediment on the ground either of kinship or *affinitas*. The marriage of persons in the relation of ascendant and descendant is prohibited, whether the relation is by blood or purely civil, *i.e.* the result of adoption. Even where the civil relation has been destroyed by *emancipatio*, the prohibition still exists if the civil relation had been that of ascendant and descendant, *e.g.* a man could not marry a woman who had once been his adopted daughter. Collaterals within the third or nearer degrees could not intermarry. Collaterals beyond the third degree might intermarry with one exception, viz. a man could not intermarry the granddaughter of his brother or sister, though she is in the fourth degree to him, "for where we may not marry the daughter, marriage with the granddaughter is also prohibited" (Just. *Inst.* i. 10. 3). Up to a late period of the law doubts were thrown on the marriage of first cousins, but in Justinian's time first cousins were free to marry. Among collaterals, also, civil relationship within the prohibited degrees is a bar to marriage, so long as the civil relationship subsists. Kinship even through slaves—*servilis cognatio*—was a bar to marriage no less than the kinship of free persons. The question how far *affinitas*, *i.e.* the relation subsisting between a person and the cognates of his or her spouse, was a bar to marriage is discussed *sub voce* AFFINITAS (*q.v.*).

5. In the earlier law there had existed certain impediments to marriage due to a difference in the respective ranks of the parties: but such impediments were swept away by Justinian (Nov. 117, cap. 6). Other impediments were due to public policy, *e.g.* a provincial governor, or his son, could not marry a woman domiciled in his province during his term of office; a tutor or curator, or his son, could not marry the ward; and a woman accused of adultery, if she were not acquitted, could not marry her paramour.

In a marriage *sine manu*, the wife, though not in a position of subjection to her husband, owes him *reverentia et obsequium*. The husband has a right to the companionship of his wife, and if a third party deprives him of her society—though it be the wife's own father acting in virtue of his *potestas*—the husband has the *interdictum de uxore exhibendâ ac ducendâ*. It is the province of the husband to determine the place of residence, and regulate the education and expenditure of the family. The wife takes her husband's name, shares his rank, and is entitled to his protection. As regards patrimonial relations, there is no *communio bonorum*; the property of each spouse is kept quite distinct. The wife keeps her antenuptial property, and, during the subsistence of the marriage, may acquire property for herself by her labour, by gift, by succession, or otherwise. Property thus belonging to the wife, distinct from the *dos*, is *bona paraphernalia*. During the marriage the husband administers this property as his wife's procurator under mandate, and, without special mandate, he may draw its revenues and apply them to defray household expenses. Until the prætors granted *bonorum possessio unde vir et uxor* there was no mutual right of succession

whatever between a husband and wife in a marriage *sine manu*; and, even under the prætorian *ordines*, any cognate of the deceased spouse up to the seventh degree of relationship excluded the other spouse altogether from the succession. In the later empire this was somewhat relaxed, an indigent widow being allowed, by way of maintenance, a certain limited claim upon the property left by her husband. The respective rights of the spouses in the *dos* are described *sub voce* Dos. The law regarding mutual gifts between husband and wife, and the *donatio propter nuptias*, is discussed *sub voce* Donation in Roman Law.

A marriage was dissolved by the death of either spouse, by either spouse becoming a slave, or by divorce. From the earliest times Roman law recognised the right of one of the spouses to bring the marriage to an end, on the ground of certain grave offences committed by the other. To this end it was necessary in early times that the injured spouse should secure the sanction of the family council, consisting of the blood relations of both the parties, and the divorce was regarded as a punishment of the guilty spouse. Where the marriage had been by *confarreatio*, an equally solemn ceremony, *diffarreatio*, had to be performed in order to put an end to the sacred union and its accompanying *manus*. Where the marriage had been by *coemptio* or *usus*, the ceremony of *remancipatio*—analogous to *emancipatio*—was required to free the wife from her husband's *manus*. Under the system of marriage *sine manu*, no formal ceremony was necessary for divorce. As consent made the marriage, so it was held for a time that the mere withdrawal of consent (*renuntiatio*) by one of the parties was sufficient to terminate it. In *repudiis, id est, renuntiatione, comprobata sunt hæc verba: tuas res tibi habeto* (*Dig.* 24. 2. 2. 1). The perilous ease with which the marriage tie could be broken was fraught with disastrous results to society. Accordingly, by *lex Julia de adulteriis*, and by various constitutions issued by Diocletian and other emperors, attempts were made to diminish the frequency of divorce by the requirement of certain formalities and the imposition of penalties. In the time of Justinian four varieties of divorce were recognised. (1) In divorce *communi consensu* the parties mutually consented to the dissolution of the marriage. (2) In divorce *bonâ gratiâ* the active step was taken by one spouse, the other not dissenting. It implied a sufficient, though innocent, cause, *e.g.* sterility or captivity, and entailed no penalty. (3) Divorce *ex justâ causâ* proceeded on some grave misconduct, and involved for the guilty spouse the forfeiture of the matrimonial provisions and other penalties. (4) Divorce *sine ullâ causâ*, causeless repudiation, while not prohibited, involved penalties, including the forfeiture of the matrimonial provisions by the spouse bringing it about (Just. *Inst.* i. 10; Gai. i. 56–65; *Dig.* 23. 2).

Maxims.—In legal discussions reference is constantly being made to certain principles of common sense and justice, which are necessarily the same in the legal systems of all nations. Many of these fundamental principles and rules, founded on experience and reason, have found expression in legal maxims, most of which are derived directly or indirectly from the Roman law. Nowhere is the faculty of clear and terse statement of legal principles more conspicuously exhibited than in the texts of the civil law. Accordingly, while the legal systems of modern civilised nations differ greatly in their technical rules and forms, all of them recognise the value of the simple and apposite statements of fundamental principles embodied in the maxims of Roman jurisprudence. The purposes served by the use

of maxims in legal discussions are numerous. "Not only," observes Ld. Bacon, in the preface to his collection of maxims, "will the use of maxims be in deciding doubt and helping soundness of judgment, but, further, in gracing argument, in correcting unprofitable subtlety and reducing the same to a more sound and substantial sense of law, in reclaiming vulgar errors, and, generally, in the amendment in some measure of the very nature and complexion of the whole law."

A glance at the pages of Morrison's *Dictionary* or at other early reports will show how frequently, in the older Scots law, questions respecting the rights, remedies, and liabilities of individuals were determined by an immediate reference to legal maxims. In modern times the multiplication of authorities and the increase in the number of sources of law in the shape of statutes, decided cases, and text-books, have introduced many qualifications and distinctions, both in legal reasoning and in the application of legal principles, which were previously unknown. In one way this increase in the range and subtlety of modern law has really added to the value of legal maxims, which, in concise terms, set forth the simple and fundamental principles underlying the heterogeneous authorities, and thereby oppose a barrier to ingenious refinements and sophistry. On the other hand, the increased complexity of modern law renders it a dangerous matter to apply general maxims without an accurate investigation of their bearing and qualifications. If incautiously used they are likely to be misleading, for, as observed by Ld. Esher, M. R., in *Yarmouth* (1887, 19 Q. B. D. 647, at 653), the maxims "are for the most part so large and general in their language that they always include something which really is not intended to be included in them."

The compilations of legal maxims are numerous, but the two most valuable modern selections, for the purposes of a Scottish lawyer, are Broom's *Legal Maxims*, 6th ed., 1884, and Trayner's *Maxims*, 4th ed., 1894. A valuable collection of the maxims referred to by Ld. Stair in his *Institutes*, will be found in the index to More's Stair, *sub voce* "Maxims."

Measurement.—Bounding Charter; Sale.

Measures.—See Weights and Measures.

Medical Jurisprudence.—This inaccurate term is used to denote the application of the ascertained facts of medical science to the administration of justice. Hitherto it has been very generally used also to include the application of medical science to the preservation of public health; but now the two are more commonly distinguished.

Medical Officer of Health.—The local authority of every district, charged with the administration of its sanitary affairs, must appoint a skilled adviser, who is called the medical officer of health. A complete view of this subject must necessarily include a statement of the duties of the local authority, which fall, in most cases, to be performed on the advice of their medical officer; but, so far as possible, the regulations regarding the appointment and duties of the medical officer are here dealt with, reference being made to the article Public Health, where the constitution

and powers of the local authority are fully considered. It will be convenient to deal with the subject in the following order: I. *Appointment and Qualification.* II. *Tenure.* III. *Powers and Duties.*

I. *Appointment.*—(i.) *In Burghs.*—The Burgh Police Act, 1892 (s. 77 (1)), imposes the duty of appointing a medical officer of health upon every burgh to which the Act applies; and the Public Health Act, 1897 (s. 12), extends this obligation to all burghs without exception.

Qualification.—Every medical officer must be a registered medical practitioner, and must also hold a diploma in sanitary science, public health, or State medicine under sec. 21 of the Medical Act, 1886 (Burgh Police Act, s. 77 (1)).

(ii.) *In Counties.*—(*a*) The council of every county must appoint a medical officer or officers of health, who may not hold any other appointment or engage in private practice without the written consent of the council (Local Government Act, s. 52 (1)). (*b*) Each district committee (where the county is divided into districts), as the local authority for administering the Public Health Acts, must appoint a medical officer or officers of health (L. G. Act, s. 17 (1, 2): Public Health Act, s. 12). But the district committee may, by arrangement with the county council, avail themselves of the services of the county medical officer, contributing such proportion of his salary as may be agreed on (L. G. Act, s. 52 (2)).

Qualification.—The medical officer appointed by a county council or district committee must in every case be a registered medical practitioner; and must also hold a diploma in sanitary science, public health, or State medicine under sec. 21 of the Medical Act, 1886 (L. G. Act, s. 54 (1, 2); P. H. Act, s. 15).

The following provisions of the Public Health Act are applicable to all such appointments made after 1 January 1898, whether in burghs or rural districts, viz.: The local authority must allow every medical officer a suitable salary, and immediately report to the Local Government Board his name and address, and the amount of salary fixed. Further, they may, and if required by the Board must, provide suitable offices.

II. *Tenure.*—A medical officer appointed under any of the Acts above mentioned, or under any of the former Acts, can be removed from office only by the Local Government Board or with their sanction (L. G. Act, s. 54 (4); B. P. Act, s. 77 (3); P. H. Act, s. 15).

III. *Powers and Duties.*—Generally the duties of the medical officer are to keep himself informed regarding the sanitary condition of the burgh or district over which he is appointed, with special reference to the origin and causes of disease occurring therein, the existence of nuisances, etc., and to advise the local authority on all matters affecting the public health.

Under the Public Health Act, 1897.—The ruling statutory provisions on the subject are to be found in the Public Health Act, 1897 (which came into force on 1 January 1898); they are applicable to all medical officers appointed by the local authority of any district, whether burghal or rural. They would appear not to apply to the medical officer appointed by a county council, that body not being a local authority for the administration of the Public Health Acts; but as in most counties the various district committees have adopted the county medical officer under sec. 52 of the L. G. Act, it is thought that no great inconvenience is likely to arise. By sec. 15 the local authority is required to regulate the duties of the medical officer and sanitary inspector, and their relations to each other, whether appointed before or after the commencement of the Act, but

subject to the approval of the Local Government Board. (In the case of a burgh local authority, regulations so made and approved appear to supersede the provisions of sec. 77 (2) of the B. P. Act) (P. H. Act, s. 15).

The code of bye-laws for regulating the duties of medical officers, which is recommended by the Local Government Board, may be referred to for more detailed information (Skelton, *Handbook*, 155). The medical officer, if required by the local authority, must appoint a duly qualified substitute, to be approved of by them; such substitute may exercise all the powers and duties of the medical officer during his absence or illness. The local authority, with consent of the Board, may withdraw their approval of such substitute, and require the medical officer to name another (s. 15).

It is the duty of the medical officer to make such returns and special reports to the Board as they may require (s. 15). And by the Local Government Act (s. 53 (1)), every district medical officer must send to the county council a copy of every report which, by the regulations in force at the time he is required to send to the Board. By the existing regulations every district medical officer is required to report on the sanitary condition of his district not later than 31 January in each year.

The medical officer may, when authorised by the local authority, exercise any of the powers of the sanitary inspector (s. 15).

In order to facilitate him in his investigations regarding the existence and causes of disease, the Act furnishes the medical officer with large powers to enter upon and interfere with property in the interest of the health of the community. The most important of these are the following: (1) He may enter any premises, where he has reasonable grounds for suspecting the existence of a nuisance, at any time between 9 a.m. and 6 p.m.; and may open up ground or drains for examination. If admission is refused him, he can obtain judicial warrant to enter (s. 18). (2) He may enter any premises, or search any vehicle, etc., in order to examine any animal, alive or dead, or any article intended for food, which is exposed for sale; and may seize the same, if unfit for food, in order to have it dealt with by a magistrate. In the case of examination of a living animal he must be accompanied by a certificated veterinary surgeon (s. 43). (3) He may enter by day any premises where he has reason to suspect the present or recent existence of infectious disease, and examine any person therein; if admission is refused, he can obtain judicial warrant to enter (s. 45). (4) Where the milk supply from any dairy is suspected of causing, or being likely to cause, infectious disease, he must inspect the dairy and all persons connected therewith; and, if accompanied by a veterinary surgeon, examine all the animals therein, and report to the local authority. Where the suspected dairy is within another district, he must give notice to the local authority of that district; and the medical officer thereof must examine the dairy, as above mentioned, due notice being given of the time of examination to the first-named local authority; and report to the local authority of his own district (s. 60). (5) He may enter any tent, van, etc., which he has reasonable cause to believe is a nuisance, or dangerous to health, or so overcrowded as to be injurious or dangerous to the health of the inmates; or that there is or recently has been therein any person suffering from infectious disease; and may examine any person therein (s. 73).

Besides the specific powers and duties above enumerated, there are many other matters regarding which the medical officer may and ought to inform and advise the local authority—*e.g.* the suppression of offensive trades (s. 36); precautions against the spread of infectious disease, by

disinfection of premises and articles (ss. 47, 51, 53, 56): precautions in the case of persons who make a living by washing clothes (s. 49); removal to hospital of persons suffering from infectious disease (s. 54); precautions where infectious disease is caused by milk supply (s. 61); precautions where a person has died of infectious disease (ss. 62, 63, 68, 69); and removal of persons suffering from infectious disease from common lodging-houses (ss. 96, 97).

Under the Burgh Police Act, 1892.—In addition to the powers and duties above mentioned, which are possessed by medical officers alike in burghs and in rural districts, certain clauses of the Burgh Police Act may be noted as specially applicable to the case of burghs. By sec. 118 of that Act, the medical officer may enter all dwelling-houses and other premises where he has reason to believe they are not in a cleanly condition, and may cleanse and purify the same, and remove any filth therefrom, at the expense of the occupier, or owner if unoccupied. If admission is refused, he can obtain judicial warrant to enter. With respect to the sanitary condition of slaughter-houses, he must report to the commissioners twice a year, and may have free access thereto at all reasonable times (s. 280).

He may certify that any accumulation of manure within the burgh is offensive or prejudicial to health, with a view to its removal by order of a magistrate (s. 126). He may request the burgh surveyor to inspect any drains (s. 243), and may certify any privy, etc., to be prejudicial to health (s. 255).

Various Statutes, which affect more or less directly the health of the community, impose certain duties upon the medical officer.

Adulteration of Food, etc.—(1) The Food and Drugs Act, 1875 (s. 13), empowers the medical officer to procure any sample of food or drugs, and if he suspect the same to have been sold contrary to the Act, he must submit it to the district analyst; and the Sale of Food and Drugs (Amendment) Act, 1879, contains (s. 3) a similar provision regarding milk, empowering him to procure a sample of any milk in course of delivery to a purchaser, and to submit it for analysis. (2) The Margarine Act, 1887, empowers the medical officer to take samples from any package, or samples of any substance, exposed for sale as butter, where he has reason to believe that the Act is infringed, and submit the same for analysis (ss. 8, 10). (3) Under the Sale of Horseflesh, etc., Regulation Act, 1889, the medical officer may examine, and if necessary seize, horseflesh exposed for sale contrary to the Act (s. 3); and may obtain judicial warrant to enter any premises where he suspects that horseflesh is illegally concealed (s. 4).

Housing of Working Classes.—By the Housing of the Working Classes Act, 1890, the medical officer (in burghs) is required to make an official representation to the local authority regarding the existence of unhealthy areas, with a view to an improvement scheme (s. 5); and similarly, with respect to dwelling-houses (whether in burghs or rural districts) which are so dangerous to health as to be unfit for human habitation (ss. 30, 31); and to obstructive buildings (s. 38). See Housing of Working Classes.

Factories and Workshops.—(*a*) The various duties imposed upon local authorities with respect to the sanitary condition of these establishments are fully dealt with in the article on the Factory and Workshop Acts, 1878 to 1895, to which reference may be made. The provisions which specially deal with the duties of a medical officer will alone be noticed here.

By the Factory and Workshop Act, 1891 (s. 3 (3)), the medical officer is required to give notice to the district factory inspector whenever it comes to his knowledge that any child, young person, or woman is employed in a workshop. By sec. 4 (2) of the same Act, the local authority, on a certificate by the medical officer that the lime-washing or cleansing of any workshop is necessary for the health of the workers, must give notice to the owner or occupier to do so.

(*b*) *Bakehouses.*—Under the Factory and Workshop Act, 1883 (s. 17 (1)), the duty of inspection of retail bakehouses with regard to their compliance with the provisions of that Act, and also of the Act of 1878 (which relate to cleanliness, ventilation, overcrowding, etc.), are devolved upon the local authority: and the medical officer has for that purpose all the powers of entry, inspection, and prosecution, of an inspector under the Factory Acts.

Infectious Disease (Notification) Act, 1889.—This Act came into force in every district (where not already adopted) on 1 January 1898 (Public Health Act, s. 44). In every case of infectious disease the head of the house in which it occurs, and also every medical practitioner called in to visit the patient, must forthwith notify the case to the medical officer (s. 3 (1)). Where the latter is himself the practitioner attending the patient, he is entitled to the fee payable for notification (s. 11).

[Macdougall and Murray's *Handbook of Public Health.*]

Medical Practitioners.—The Acts regulating qualification, registration, etc., of medical practitioners are: 21 & 22 Vict. c. 90; 22 Vict. c. 21; 23 & 24 Vict. c. 7; 25 & 26 Vict. c. 91; 39 & 40 Vict. cc. 40, 41; 49 & 50 Vict. c. 48; 52 & 53 Vict. c. 55, s. 6 (9); 52 & 53 Vict. c. 72, s. 11.

Meditatio fugæ.—In cases where imprisonment for debt is competent, a creditor is entitled to obtain a warrant for the detention in this country of his debtor, whom he has just ground to suspect of being about to abscond or *in meditatione fugæ*. Prior to 1880 such warrants were common in practice, but since the abolition of imprisonment for debt in the case of all ordinary civil debts by the Debtors Act, 1880 (43 & 44 Vict. c. 34), they have become very infrequent. The proceedings under a "fugæ warrant" are not criminal in character, but are a part of the machinery of imprisonment as a creditor's diligence in civil debts. The object of the warrant is to secure "the presentment of the debtor in order to enable his creditor to have *parata executio* for his debt, and thereby secure execution of ultimate diligence against his person" (*Marshall*, 1844, 7 D. 232). The granting of such warrants seems to have originated partly in a custom to that effect prevailing on the Borders, where facility of flight beyond the arm of the law was exceptional (*Bell*, Mor. 12631), and partly in the privileges anciently accorded to those within burghs of attaching, in security of debt due to them, the goods or persons of those resident beyond the burgh when found within its bounds (M'Kenzie's *Observations*; Bell, *Com.* ii. 449). As a remedy competent to creditors generally, it seems to have been adopted about the middle of the seventeenth century (*ib.*; *Mason*, Mor. 8547).

The application for a *fugæ* warrant is necessarily of a summary nature. The warrant may be issued by any civil judge or magistrate; but where the debtor is outwith the jurisdiction of the magistrate who grants the warrant, it must be endorsed by a magistrate of the jurisdiction within which the

debtor is to be apprehended. A Sheriff's warrant, however, does not require such endorsation (1 & 2 Vict. c. 119, s. 25). No notice of the application is given to the debtor. The application is by petition (which, when presented to the Sheriff, is in the form prescribed by the Sheriff Court Act, 1876, s. 6; see *M'Dermott*, 1876, 4 R. 217), in which the creditor sets forth his debt and the grounds of his belief that the debtor means to leave the country, and craves that his oath may be taken as to the truth of his averments, and that thereon the debtor may be apprehended and brought up for examination, and thereafter be committed to prison until he find caution *de judicio sisti* (see form appended). It is not necessary to aver in the petition that the debtor's object in meditating departure from the country is to defeat the petitioner's claim (*Jackson*, 1865, 4 M. 72). The creditor's oath must set forth some special ground for his belief as to the debtor's *meditatio fugæ*; a general oath of credulity not being enough (Bell, *Com.* ii. 452; see *Laing*, Mor. 8555). If the creditor be outwith the jurisdiction, he may take the oath before any magistrate in the form of an affidavit, it being customary in such cases to require a corroborative oath by a mandatary (Bell, *Com.*, *ut supra*; Dove Wilson, *Sheriff Court Practice*, 640). An oath by a firm is taken by one of its partners.

The debt founding the petition need not be one constituted by document or decree (Bell, *Com.* ii. 451. As to contingent debts, see *Pratt*, 1826, 4 S. 788; *Thom*, 1828, 7 S. 158; *M'Gill*, 1837, 15 S. 882; 1838, 16 S. 934; and doubts expressed in *Hart*, 1890, 18 R. 169). The grounds of debt must, however, be fully stated by the creditor (Bell, *Com.* ii. 451; see *Robertson*, 1847, 10 D. 125; cf. *Davies*, 1861, 23 D. 532); and where the debt is unconstituted, an action to constitute it must be raised forthwith (Bell, *Com.*, *ut supra*). An obligation *ad factum præstandum* is a competent ground for a warrant, as, *e.g.*, where an apprentice was apprehended and incarcerated till he should find caution *de judicio sisti* in an action to be brought by his master to have him ordained to return to his service (*M'Dermott*, 1876, 4 R. 217). It is no answer to an application that the debtor has sufficient estate in hand to meet the claim, it being in the option of the creditor to use whichever kind of competent diligence he pleases (*Heron*, Mor. 8550; *Blair*, 1821, 1 S. 107).

On the warrant being granted, the debtor is at once apprehended and brought before the judge, who, after inquiry, either (1) liberates him if not satisfied of the existence of *meditatio fugæ*, or (2) authorises his imprisonment until he finds caution for his appearance in an action to be raised against him within a certain time (usually six months); or, if there be diligence against him, to abide the course of it. It is largely a matter for the discretion of the judge or magistrate what evidence of *meditatio fugæ* shall be deemed sufficient; and in cases of difficulty his proper course is to put the creditor under bail for payment of any damages that may ultimately be found due on the ground of the proceedings being unwarranted. He is bound to examine the debtor as part of the inquiry (*Service*, 25 May 1811, F. C.; *Robertson*, 20 June 1812, F. C.). He is entitled to take into consideration in support of the charge facts capable of being instantly verified, and must, similarly, hear any evidence instantly adduced in refutation by the debtor (see *Scudamore*, Mor. 8559; *Tasker*, 1801, Mor. App. "*Med. Fugæ*," 1).

It is not enough to justify a warrant that the debtor is going to another part of Scotland, however remote (*Laing*, Mor. 8555; Bell, *Com.* ii. 453); nor that he intends to retire to the Sanctuary, since this is a privilege permitted by law (*Place*, 2 July 1814, F. C.); nor that he is going abroad for a short

time, in the ordinary course of his business (Bell, *Com.* ii. 454; see *Gorman*, 1827, 5 S. 271; *M'Kinnon*, 1831, 9 S. 615; *Anderson*, 1848, 11 D. 118); nor, if an officer in the army, that he is going abroad along with or to join his regiment (*Service*, 25 May 1811, F. C. As to soldiers and sailors generally, see Bell, *Com.*, *ut supra*). A person not in the public service who shows a just cause of absence, may be indulged with a reasonable time to make his appearance. Thus where a person who had come to this country from America, was returning thither in pursuance of his ordinary avocation of a factor, the Court allowed him to find caution for his appearance within six months after requisition by the pursuer (*Wright*, Mor. 8553). The debtor who is the subject of the warrant may be a foreigner, and that whether the debt has been contracted in Scotland or not, and whether the pursuing creditor be a Scotsman or a foreigner who has followed the debtor to this country (Ersk. i. 2. 21; Bell, *Com.* ii. 455; *Ray*, Mor. 2051; *Tasker*, Mor. App. "*Cautio jud. sisti*," 2; *Scudamore*, Mor. 8559). But it seems to be otherwise in the case of a foreign debtor temporarily here for some legitimate purpose (*Scott*, Mor. 2057; Bell, *Com.* ii. 455).

A *meditatio fugæ* warrant, unlike ordinary diligence, may be executed on Sunday (*Kempt*, Mor. 8554). It may also be executed within the Sanctuary under warrant or with the concurrence of the baron bailie, although not to the effect of carrying the debtor outside its precincts. And it is no bar to it that the debtor is under personal protection. But a person exempt from imprisonment is, of course, not liable to such a warrant (*A. B.*, 1843, 5 D. 1116; *Marshall*, 1844, 7 D. 232; *Hart*, 1890, 18 R. 169). And where the creditor holds a decree on which imprisonment on execution may at once proceed, he is not entitled to obtain a *fugæ* warrant, unless it be to secure the person of his debtor under circumstances (*e.g.* on a Sunday) when ordinary personal diligence cannot be done.

The warrant authorises the imprisonment of the debtor until he finds caution to answer the creditor's claim in any action to be brought by him within a period specified, according to the circumstances of the case, the time which was generally in use to be specified having been six months. Failing proceedings within the period named, the debtor is entitled to obtain liberation or to have his caution discharged. The creditor is not answerable for delay within the period fixed (*Gorman*, 1827, 5 S. 271). Where the debtor is within the Sanctuary, his imprisonment is in the jail belonging to the Abbey.

A debtor imprisoned under a *fugæ* warrant is entitled to aliment under the Act of Grace.

The caution which the debtor is required to find as an alternative to imprisonment is caution *de judicio sisti*. Caution *judicatum solvi* cannot be required. The bond of caution binds the cautioner to produce the debtor at any time when required during the progress of the action. If he be not produced, the cautioners incur liability for all that is found due in the action (*Muir*, 1866, 5 M. 47). If he is once produced, the cautioners are freed of their bond; and should the creditor desire to apprehend and imprison the debtor anew, he must obtain a fresh warrant (*Clark*, 1881, 9 R. 372).

A creditor who obtains and enforces a *fugæ* warrant is liable in damages if the proceedings are wrongful, as, *e.g.*, where no debt is due, or where the warrant is obtained on a misstatement, or under circumstances where the creditor has no reasonable ground for suspecting the debtor of being *in meditatione fugæ* (*Ford*, 1858, 20 D. 949; *Swayne*, 1835, 13 S. 1003; *Battersby*, 1828, 6 S. 667; *Laing*, Mor. 8555; *Scudamore*, Mor. 8559; *Scot*, Mor.

8549). The reduction of the warrant is not necessary in order to open the door to an action of damages (*Maclean*, 1865, 3 M. 719). As against the magistrate who grants the warrant, it is necessary to show malice and want of probable cause in order to found a claim of damages (Glegg on *Reparation*, 173, 174; *Carne*, 1851, 13 D. 1253; *Laing, supra*), unless there be some gross irregularity in the proceedings (*Laing, supra*; 3 Pat. App. 219).

The competency of the proceedings may be challenged by a suspension and liberation (see Mackay, *Pract.* p. 463). The grounds of suspension may be an objection to the petition as not sufficiently specifying the debt (*Pratt*, 1826, 4 S. 788; *Campbell*, 1847, 10 D. 125; *Jackson*, 1865, 4 M. 72), or to the warrant itself as *ultra petita* (*Garrioch*, 1851, 13 D. 1377; *M'Cubbin*, 1852, 14 D. 908), or as wanting in specification (*Muir*, 1849, 11 D. 487), or as incompetently granted (*ib.*), or to irregularities in the execution of the warrant.

The Debtors Act, 1880 (43 & 44 Vict. c. 34), which abolished imprisonment for debt in the case of all ordinary civil debts, contains the following provision as to *fugæ* warrants: "Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*" (s. 4). Considerable doubt was entertained after the passing of the Act as to the effect of this provision (see *Kidd*, 1882, 9 R. 803). It has, however, been decided that it only conserves the general rule of law which gives the remedy of *meditatione fugæ* warrants in cases where diligence by imprisonment may competently be done, and that accordingly, in all cases where imprisonment for debt is not now competent, such warrants cannot be used (*Hart*, 1890, 18 R. 169). The only classes of debtors, therefore, who can now be apprehended and imprisoned as *in meditatione fugæ* are the following: (1) debtors for taxes, fines, or penalties due to Her Majesty; (2) debtors for rates and assessments lawfully imposed; (3) debtors under decrees or obligations *ad factum præstandum* (43 & 44 Vict. c. 34, s. 4). The power to imprison for failure to pay sums decerned for aliment under 45 & 46 Vict. c. 42, s. 4, is a discretionary power in the Sheriff, and not a creditor's right of diligence, and it accordingly does not seem to infer the competency of *fugæ* warrants in such cases.

[Stair, iv. 47. 23; Ersk. i. 2. 21; Bell, *Com.* ii. 449 *et seq.*; Barclay on *Med. Fugæ*; Barclay's *Digest*; Goudy on *Bankruptcy*, 623 *et seq.*; Glegg on *Reparation*, 173 *et seq.*; Dove Wilson, *Sheriff Court Practice*, 455 *et seq.*]

(1) Form of Petition.

Unto the Honourable Her Majesty's Justices of the Peace for the County of ,

The Petition of *A. B.*;

Humbly Sheweth,—

That *C. D.*, merchant in *X.*, and presently within your jurisdiction, is justly due and owing to the petitioner the sum of £ , being the amount of [specify particularly the bond, bill, or other ground of debt, whether documentary or otherwise, and if constituted by document, add] herewith produced.

That the petitioner has raised [*or*, intends immediately to raise] an action against the said *C. D.* for payment and recovery of the said debt and expenses of prosecution.

That the petitioner has been credibly informed, and in his conscience believes, that the said *C. D.* is presently *in meditatione fugæ* and about to leave Scotland, whereby the petitioner will be defrauded or disappointed of his said debt and consequents.

May it therefore please your Honours to take the petitioner's oath to the verity of the averments made in this petition, and thereon to grant warrant to apprehend

and bring the said *C. D.* before you for examination, and thereafter to commit him to the prison of , therein to be detained until he find sufficient caution, acted in your Courts books *de judicio sisti* in any action for payment of said debt and consequents which may be raised against him at the instance of the petitioner (*or* in the said depending action); and in case the said named party has left your jurisdiction, to recommend to all other judges and magistrates to concur in your said warrant (*and in case of a foreigner without a domicile*, further to appoint your clerk's office as a domicile for the said named party, where a citation may be left for him, and to appoint the same to be sisted as such in the bail-bond to be granted under said warrant).

According to Justice.

[*Subscribed by the Creditor or his Procurator.*]

Note.—Where diligence is not ripe for execution, the prayer is that the debtor shall find caution that he shall continue within Scotland for a certain time, or be presented at a certain time and place to abide ultimate diligence.

(2) Creditor's Deposition.

Compeared the within-designed *A. B.*, and he, being solemnly sworn and examined, depones: That what is contained in the within petition is truth; and specially that the debt therein mentioned is justly due by the said *C. D.* to the deponent: That the deponent has been credibly informed, and believes in his conscience, that the said named party is *in meditatione fugæ*, and about immediately to leave Scotland and go to or some other place abroad, whereby the deponent will be defrauded or disappointed of his said debt; and being specially interrogated on the grounds of his belief, depones that he has received the information above-deponed to from [*state shortly the facts on which the petitioner grounds his belief*]. All which is truth as the deponent shall answer to God.

[*Subscribed by the Creditor and the Magistrate.*]

Meetings.—Meetings may be divided into two classes: (1) those convened for political, social, or other purposes, by persons on whom no legal duty to hold such meetings rests; and (2) meetings of corporate bodies held for the purpose of discharging the duties resting on them by law. Two persons are necessary to constitute a meeting (*Sharp*, 2 Q. B. D. 26); and a shareholder holding a proxy from another does not constitute a meeting. (As in England a "committee" may consist of one person, one person may, in that sense, constitute a meeting of committee.)

(1) A meeting may be convened for any lawful purpose, and the conduct and control of such meetings are (when these are not of the second class above specified) entirely in the discretion of the conveners. Persons, other than the conveners, attending are present by licence of the conveners, —whether the meeting be open to the public at large, without charge for admission or on payment of a charge, or open only to a particular class, without or with payment,—and the licence may be recalled at any time, even without return of the charge. If the licence to be present is recalled, the person must withdraw; and should he, after a reasonable time, fail to leave the meeting, he may be put out by such force as is reasonably necessary for his removal. If he uses violence towards those ejecting him, he commits a breach of the peace (*Wood*, 13 M. & W. 838). A person who has paid for admission cannot insist upon the return of his money as a condition of his withdrawal; his proper remedy is an action for breach of contract (*Kerrison*, [1897] 2 Q. B. 445, Collins, J., at p. 448). It would appear that conveners of public meetings are not bound to afford an opportunity of speaking to any person who dissents from their views (Blackwell, *Law of Meetings*, 4). In the ordinary case, a chairman does not have a double vote (*Campbell*, 1816, 6 Pat. 238).

(2) In the case of bodies charged with public or statutory duties, the power to convene is usually defined. The chairman has a general control over the proceedings, and all duly qualified members have a right to be present, and to express their views on the questions properly before the meeting. But any member who persists in disorderly interruption may be ordered by the chairman to withdraw, and, on failure to comply with the order, may be removed by such force as is reasonably necessary. The principle on which this rests is expressed in the maxim, *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa non potest* (Blackwell, p. 5). If the chairman leave, a new chairman must be chosen before further business (*Anderson*, 1827, 6 S. 235).

In the case of meetings of the first class, the occasion is not privileged as regards defamation (cf. *Thom*, 1835, 13 S. 1129); but in the case of meetings of the second class, it is privileged. Ld. Esher, M. R., has thus stated the law (*Royal Aquarium, etc., Society*, [1892] 1 Q. B. 443): "Where, as in this case, a body of persons (London County Council) are engaged in the performance of the duty imposed upon them of deciding a matter of public administration which interests not themselves, but the parties concerned and the public, it seems to me clear that the occasion is privileged. Therefore, though what is said amounts to a slander, it is privileged, provided the person who utters it is acting *bonâ fide*, in the sense that he is using the privileged occasion for the proper purpose, and is not abusing it. It is sometimes said that he must be acting *bonâ fide* and not maliciously; but I do not think that that way of expressing the rule is quite exhaustive or correct. I think the question is, whether he is using the occasion honestly or abusing it. . . . There is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held to have abused the occasion, and in that sense to have spoken maliciously. If a person, from anger or some other improper motive, has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion." (See also *Pittard*, [1891] 1 Q. B. 474.)

A person attending a public meeting and taking part in the proceedings is subject to criticism in the press, etc., on his public conduct; but his private character is protected (*Aiton*, 1823, 3 Mur. 284).

[Blackwell, *Law of Meetings* (1898); Chambers, *Public Meetings*.]

See also AMENDMENT; MOTION; PREVIOUS QUESTION; MINUTES; MOBBING; BREACH OF THE PEACE.

Melior est conditio possidentis vel defendentis.—This maxim means that the position of the possessor of a subject, concerning the right to which there is a dispute, is better than that of the person who challenges his right of possession by claiming the subject. The onus is on the challenger to establish a title to the subject; the possessor need not do so; and the title established by the challenger must be better than that on which the possessor holds.

Meliorations.—The term melioration is sometimes used to denote improvements on land. When these are effected by anyone in temporary possession, or with limited ownership, questions as to the expense of their execution, or compensation therefor, frequently arise. The circumstances

in which these questions most frequently occur are in the cases of a tenant under a lease; of a liferenter; and of on heir in possession under a deed of entail.

See LEASES; AGRICULTURAL HOLDINGS ACT; LIFERENT AND FEE; ENTAIL.

Member of Parliament.—See PARLIAMENT, MEMBER OF.

Memorandum of Association.—See JOINT STOCK COMPANY.

Mercantile Writings.—See IN RE MERCATORIA WRITINGS.

Mercatoria, In re.—See IN RE MERCATORIA WRITINGS.

Merchandise Marks Acts, 1887 and 1891 (50 & 51 Vict. c. 28, and 54 Vict. c. 15).—The Merchandise Marks Act, 1862, declared offences certain acts in connection with the fraudulent marking of merchandise, and the sale of merchandise falsely marked for the purpose of fraud. The Act of 1887 repeals that of 1862, and its provisions are substituted. The Act of 1891 amends that of 1887. A parliamentary committee has been (1897) inquiring into their working, and an amending Statute may be expected. The references below are, unless where otherwise stated, to the Act of 1887.

The following are declared offences:—

1. Forging a trade mark (s. 2 (1) (*a*)), which is defined as a trade mark registered in the Register of Trade Marks, or protected in any British possession or foreign State to which sec. 103 of the Patents, Designs, and Trade Marks Act, 1883, has been made applicable (s. 3 (1)). "Forging" may be either (*a*) by making a trade mark, or a mark so similar as to be calculated to deceive, without the proprietor's assent, which assent must be proved by the defender, or (*b*) by falsifying a trade mark by alteration, addition, effacement, or otherwise (s. 4).

2. Making a die, block, machine, or other instrument for forging or for being used for forging a trade mark (s. 2 (1) (*c*)).

3. Disposing of or possessing such die (s. 2 (1) (*c*)).

4. Falsely applying to goods any trade mark, or mark so similar as to be calculated to deceive (s. 2 (1) (*b*)). "Applying" may be either (*a*) by applying such trade mark or mark to the goods themselves, or (*b*) by applying it to any covering, label, or thing with which the goods are sold, kept, or exposed, or (*c*) by placing or annexing goods which are sold, kept, or exposed for trade purposes in or to any covering, label, or thing to which it has been applied, or (*d*) by using it in a way calculated to lead to the belief that the goods are designated or described by it (s. 5 (1)). Applying without the assent of the proprietor, which assent must be proved by the defender, is "falsely applying" (s. 5 (3)). Delivery of an invoice with the goods may be a sufficient application (*Budd*, [1891] 1 Q. B. 408).

5. Applying to goods any false trade description (s. 2 (1) (*d*)), *i.e.* a description or indication as to number, quantity, measure, gauge, or

weight, place or country of production, mode of production, material, or their being the subject of an existing patent, privilege, or copyright (s. 3 (1)). The use, however, of the word "patent" in a description after the patent has expired is not necessarily an offence (*Gridley*, 1888, 5 T. L. R. 71). A false customs entry is a false trade description (Act 1891, s. 1). Any figure or mark commonly taken to indicate any of the above matters is a trade description, and such description may be false although a trade mark or part of a trade mark (s. 3 (1)). This offence includes (*a*) the application of any figure, word, mark, or arrangement, or combination of these, whether including a trade mark or not, as may lead to the belief that the goods are the manufacture or merchandise of a person other than the person whose manufacture or merchandise they really are (s. 3 (2)), and (*b*) the application of any false name or initials of a person, *i.e.* a name or initials which are not a trade mark, and are identical with or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and are those of a fictitious person or one not *bonâ fide* carrying on business in connection with the goods (s. 3 (2)).

6. Causing any of these things to be done (s. 2 (1) (*f*)). Being accessory from within, to the commission outwith, the United Kingdom of any deed which is an offence under the Acts is equivalent to the commission of the principal deed (s. 11).

7. Selling or exposing or keeping for sale or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark, or mark so similar as to be calculated to deceive, is falsely applied (s. 2 (2)).

8. Falsely representing that any goods are made by a person holding a royal warrant, or for the service of Her Majesty, or of any of the Royal Family, or of any Government department (s. 20).

The prosecution may be by a private party qualifying an interest, with the concurrence of the procurator-fiscal (*Burns*, 1897, 35 S. L. R. 265); but in a case of offence 8, it was held in the Sheriff Court that being a competing trader was not sufficient interest (*Tiffen*, 4 S. L. T. 514).

Special provision is made for the application of the Acts in the case of watches and watch-cases (s. 7), for the stamping of the latter at the Assay Office (s. 8), and for the prohibition of the importation of goods which, if sold, would be liable to forfeiture (s. 16). A vendor of marked goods is held to warrant the marks as genuine, not forged or falsely applied, and the trade description as not false, unless the contrary is stated in a signed writing delivered and accepted at the time by the vendee (s. 17).

The following are declared defences :—

To a charge of one of the offences 1 to 6, the defender may prove he acted without intent to defraud. Intent to make a purchaser take something he does not mean to take, although it may be equally as good as what he desires, is intent to defraud (*Starey*, 24 Q. B. D. 90).

To a charge of offence 7, the defender may prove that, having taken all reasonable precautions against committing an offence, he had no reason to suspect the genuineness of the trade mark, mark, or trade description, and on demand gave to the prosecutor all the information in his power with respect to the persons from whom he obtained the goods; or, alternatively, that otherwise he acted innocently (s. 2 (2)). Intent to defraud is not an ingredient of the offence (*Wood*, 24 Q. B. D. 162).

To a charge of one of the offences 2, 4, 5, or under 6 of having caused one of these to be committed, the defender may prove that he is employed by

other persons in the ordinary course of his business to do work of the kind, and, having no interest by way of profit or commission on sale, was so employed by some person resident in the United Kingdom in the particular case, and, having taken all reasonable precautions, had no reason to suspect the genuineness of the trade mark, mark, or trade description, and has given to the prosecutor all the information in his power as to the persons on whose behalf it was applied. He, however, will remain liable for the expenses of the prosecution, unless he has given notice that he intends to rely on this defence (s. 6).

To a charge of offence 5, or, so far as applicable, offences 6 and 7, the defender may prove that the trade description in question was generally and lawfully applied at the passing of the Act to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method. If, however, the name of a place or country be included in such trade description in such a manner as to mislead as to the place of origin, then there must also be given the place of origin, and a statement that it is the place of origin (s. 18).

To a charge of any of the offences, the defender may prove that he is a servant of a master resident in the United Kingdom, acting under instructions, and has given all information as to his master (s. 19 (3)).

The penalty for offences 1 to 7 is, (*a*) on conviction on indictment, imprisonment with or without hard labour for a term not exceeding two years, or a fine, or imprisonment and fine; (*b*) on summary conviction, imprisonment with or without hard labour for a term not exceeding four months, or a fine not exceeding £20, and in the case of a second or subsequent conviction, imprisonment with or without hard labour for a period not exceeding six months, or to a fine not exceeding £50, and in every case the forfeiture of every article or instrument by means of or in relation to which the offence was committed (s. 2 (3)). The penalty for offence 8 is, on summary conviction, a fine not exceeding £20 (s. 20).

The Court of summary jurisdiction is the Sheriff Court. A defender charged there with one of the offences 1 to 7, on appearing before the Court and before the charge is gone into, is to be informed of his right to be tried on indictment, and if he requires, be so tried (s. 2 (6)). No facsimile or description is required in any indictment or document in mentioning a trade mark or trade description, but a statement that it is a trade mark or trade description is sufficient (s. 9). A defender, his wife or her husband, may, in the defender's option, be called as a witness (s. 10 (1)), and evidence of the port of shipment is *primâ facie* evidence of the place of origin of imported goods (s. 6 (2)). Provision is made for the issuing of a search warrant (s. 12 (1)), the forfeiture of goods or things the owner of which is unknown (s. 12 (2)), and the disposal of all forfeited goods (s. 2 (4)), s. 12 (3)). The prosecution of an offence must be commenced within three years of its commission and one year of its being discovered by the prosecutor (s. 15). Expenses may be granted to either party by the Court (s. 14).

Merchant Shipping.—See Ship; Seamen.

Messengers-at-arms are the officers employed to execute all writs proceeding from the Courts of Session and Justiciary. It has been maintained that, but it is uncertain whether, messengers can execute writs

issuing from the Sheriff Courts (Wilson's *Sheriff Court Practice*, p. 45). A messenger cannot be a procurator before the Sheriff Court (*Bowhill*, 1825, 4 S. 61). Although thus subservient to these Supreme Courts, they are nevertheless appointed by, and directly under the control of, the Lyon King-of-Arms. It is uncertain at what precise period messengers came to discharge these functions, but it is probable that the office dates from the time of the institution of the Court of Session. The name first appears in our Statute books in 1587, ch. 46; but that Statute gives evidence of their prior existence, for its object was to regulate the office and diminish the number of messengers. There seems to have been at one time much abuse of the office, and we find that between 1587 and 1672 Statutes were passed for the admission and control of messengers by the Lyon King-of-Arms.

Jurisdiction of the Lyon King-of-Arms.—(1) With regard to the *admission of messengers*, the Lyon's authority is undoubted. He alone has the power of appointment. The applicant has to comply with certain regulations, and he must find caution for the due exercise of his office. Any messenger may object to the applicant's admission. Such objection must be taken before the Lyon himself, under right of appeal to the Court of Session. It is incompetent even after appointment to bring an action on such grounds directly to the Court of Session without first going before the Lyon Court (*Lindsay*, 1744, Mor. 8889).

If the applicant be found fit for admission, the Lyon or his depute administers the oaths of allegiance and *de fideli administratione officii*. There is then delivered to him his commission, and at the same time he receives his blazon and wand or baton. It was from the impression of the King's Arms on this blazon that "messenger-*at-arms*" derived its name. Besides these *insignia*, the officer had formerly a horn, the blowing of which was necessary in discharging his office. The exhibition of these insignia is of practical importance (1) so as to constitute the crime of "deforcement" if the officer be resisted; (2) in apprehensions where imprisonment for civil debt is still competent. The use of the "wand of peace" is necessary in order to constitute "imprisonment" in the sense of the Act 1696, c. 5 (Ross, *Lect.* i. 338; Bell, *Com.* ii. 436).

(2) While it is thus clear that the appointment of messengers rests exclusively with the Lyon King-of-Arms, it is not easy to state with preciseness the nature and extent of his jurisdiction over them in the discharge of their duties.

The Lyon can competently judge of deprivation of messengers, and the penalties in their bonds of caution, but actions of damages for abuse of office are not competent in his Court (*Grierson*, 1668, Mor. 7651; *Heriots*, 1666, Mor. 7649).

Formerly there was doubt as to the Lyon's power to punish messengers for malversation without the concurrence of the Court of Session, but it may be held established as the intention of the Statutes, supported by custom, that the Lyon has power to fine, suspend, or deprive of office messengers for certain acts of malversation. Such proceedings are liable to review in the Court of Session in ordinary form (*Campbell-Hook*, 1766, Mor. 7652; *Lindsay, supra; Clyne*, 1831, 9 S. 338).

Executions made by messengers after their proper removal from office are null. But publication in accordance with the regulations issued from the Lyon Court must have been made. Before these regulations were issued there was doubt as to what publication was sufficient.

Jurisdiction of Court of Session.—The jurisdiction of the Court of Session

over messengers is not limited to review of proceedings of the Lyon Court. The Lords of Session have always entertained an original and concurrent jurisdiction in all that relates to the duties of messengers-at-arms naturally arising out of the relations in which these officers stand towards them as the executors of writs and process issuing from their Court. The Court of Session, on presentation of a summary complaint, possesses power, in common with the Lyon Court, to fine, suspend, or deprive of office.

The Court of Session has on several occasions, in the exercise of its *nobile officium*, authorised sheriff officers to act as messengers in districts where no messenger-at-arms resided. Under the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 19), service of summonses and citations of witnesses may be made by sheriff officers in such circumstances, but no provision is made for execution of diligences by them (*Robertson*, 1893, 20 R. 712; *North of Scotland Bank*, 1891, 18 R. 460; *Schweitzer*, 1868, 7 M. 24).

Liability of Messengers and their Cautioners.—"A messenger, in undertaking his office, becomes bound as it were by special contract to discharge its duties in any way, or again at whomsoever he may be employed to do so" (per Ld. Gillies in *Glen*, 1841, 4 D. p. 42). He must be able to apply the necessary skill under the ordinary rule of professional men (Bell, *Com.* ii. 489.) It is incompetent for a messenger to execute diligence for his own behoof and that of another on a bill which he has indorsed (*Dalgleish*, 1822, 1 S. 544).

Both the messenger and the cautioner are liable not only to the employer but to any person suffering damage "through the negligence, fraudful or informal execution of the messenger" (*Clason*, 1842, 4 D. 743; *Glen, supra; Kennedy*, 1821, 1 S. 210; *Struthers*, 1847, 9 D. 1437; affd. 1850; 7 Bell's App. 390; *Petersen*, 1868, 6 M. 218; *Couper*, 1868, 7 M. 102). But they would not be liable to pay the debt until it had been constituted against the debtor (*Wright*, 1827, 5 S. 311). And a messenger is not liable in damages for executing diligence for a sum larger than was actually due, unless he was cognisant, or ought to have been cognisant, of the charge (*Henderson*, 1871, 10 M. 104). The cautioner is liable only for what the messenger does or neglects to do in his proper office of messenger (Bell, *Com.* ii. 382). Thus a messenger occasionally acts also as an agent, and the cautioner is not liable for his actings in that capacity (*Welsh*, 1781, Mor. 8893; and see *Hamilton* 1817, 19 F. C. 291; *Wilson & Co.*, 1817, 19 F. C. 268).

The messenger, as such, has no discretionary power. If his instructions are direct and unambiguous, he is bound to follow them. But if they give a discretionary power, duly exercised by him, he is not liable (*Cullen*, 1847, 9 D. 606). It has been settled in many cases that the measure of damages to the employer is the full amount of the debt. It has, however, been pointed out that, now that diligence is against the property and not against the person, it would appear more reasonable that the measure of loss should be the amount actually recoverable.

Liability of Employer.—It has always been held that the employer (being a private party) of a messenger or sheriff officer is liable for his actings in executing the diligence (*Beattie*, 1846, 8 D. 930). But he will not be liable for an entirely unauthorised proceeding, such as executing diligence a second time (*Stewart*, 1784, Mor. 13989). This liability of the employer has been questioned in later years (*Le Conte*, 1880, 8 R. 175), but the case of *Beattie*, *supra*, has never been overruled.

[Stair, iv. 47. 14; Ersk. i. 4. 33; Bankt. ii. 503–507; Bell, *Com.* ii. 160,

435; Bell, *Prin.* 154, 219, 296, 297, 2041; Ross, *Lect.* i. 286, 302, 338, 429, 446; Campbell on *Citation*, chap. ii.]

See EXECUTION BY MESSENGER; DEFORCEMENT; LYON KING-OF-ARMS; SHERIFF OFFICER.

Messis sementem sequitur.—The doctrine that the person who sows the crop is entitled to reap it is expressed by the Latin maxim, *Messis sementem sequitur*. This maxim is chiefly applicable in questions between owner and *bonâ fide* possessor, heir and executor, fiar and liferenter's representative. In cases of *bonâ fide* possession it implies that, if the possessor have sown the ground while his *bona fides* continued, he has the right to reap the crop, even if he should discover before reaping it that another has a preferable title to the land (Ersk. *Inst.* ii. 1. 26; Rankine, *Landownership*, 78). On the same principle, the crop which a deceased person has sown belongs not to his heirs, but to his executors (Stair, ii. 1. 2). Similarly, if a liferenter had sown land of which he was in the natural possession, his representatives are, on his death, entitled to the whole crop without payment of any rent to the fiar (Ersk. *Inst.* ii. 9. 65; Bell, *Prin.* 1045; Rankine, *Landownership*, 643; *M'Math*, 1621, Mor. 15877; *Guthrie*, 1671, Mor. 15891; *Cockburn*, 1748, Mor. 15911). In the case of a liferent lease, if the liferenter die between the sowing and the reaping of the ground, his representatives will be entitled to the crop on paying a proportion of the rent (Rankine, *Leases*, 527; *Stewart*, 1796, Mor. 13853). The maxim holds good in parochial law where the glebe has been sown prior to the minister's death, for in this case his representatives are entitled to the crop. On the same principle, in cases of translation or deprivation, the minister who has *bonâ fide* sown the crop has the right to reap it. Where a glebe, which has been let, is sown prior to the vacancy, or at least prior to the induction of the new incumbent, the tenant is entitled to the crop (Rankine, *Leases*, 32; Connell, *Parishes*, 435; Duncan, *Par. Eec. Law*, x. 70; *Colvil*, 1665, Mor. 464); and the late minister's representatives are entitled to the rent (*Taylor*, 1853, 2 Stuart, 538).

What is included under the term "*messis*" is not quite certain. The maxim undoubtedly applies to annual industrial fruits which require yearly seed and industry, as wheat, barley, and artificial hay of the first crop. Just as certainly it does *not* apply to trees and natural fruits not requiring seed and cultivation. But it is doubtful how far it applies to hay of the second crop and to nursery plants. These two kinds of crop would certainly be treated as industrial fruits in questions between landlord and tenant, but in a question of succession authorities differ as to whether heir or executor would be preferred (Ersk. *Inst.* ii. 2. 4; Bell, *Prin.* 1473; Rankine, *Landownership*, 79. Contrast *Sinclair*, 1744, Mor. 5422; *Wight*, 1796, Mor. 5446; *M. of Tweeddale*, 19 Nov. 1816, F. C., with *Gordon*, 1806, Hume, 188; *Keith*, 1825, 4 S. 267; *Lyall*, 1832, 11 S. 96).

Metus.—Civilians distinguish two kinds of *vis*—*vis absoluta*, the use of physical force, and *vis compulsiva*, which operates by means of threats inspiring fear. The latter kind of *vis* is practically identical with *metus*. Under the strict *jus civile* a transaction, although induced by threats, was nevertheless valid and effectual. The prætor, however, corrected this by affording the person intimidated the means of cancelling the transaction which had been forced upon him. Under the prætorian law

intimidation (*metus*) was the ground of an *actio* (or *exceptio*) *quo metus causâ*, and also was recognised as a *justa causa* for the granting of *restituti in integrum*. To produce such effects the *metus* required to be (1) illegal *i.e.* exercised by a person who had no right to do so; (2) of such a nature as to affect not only some nervous persons (*vani homines*), but a person of ordinary strength of character; and (3) must threaten an immediately impending evil (*metus præsens seu opinio imprendentis mali*). The subject is fully discussed in *Dig.* 4. 2, in which title may be found many examples of what did, or did not, constitute *metus* in Roman law.

For the Scots law on this subject, and its relation to the Roman law, see Stair, i. 9. 8; i. 17. 14; More's *Notes to Stair*, lviii; Ersk. iii. 1. 16; iv. 1. 26; Bell, *Com.* i. 314.

See EXTORTION; REDUCTION.

Mid - Superiority. — See SUPERIORITY; FEUDAL SYSTEM; DOMINIUM DIRECTUM.

Military Lands Act, 1892.—This Act (55 & 56 Vict. c. 43) gives power to the Secretary of State, to volunteer and yeomanry (s. 19) corps with his consent, and to county or town councils at the request of one or more volunteer corps, to purchase land for military purposes (s. 1). The machinery for making the purchase is to be the Lands Clauses Acts with certain modifications (ss. 2 and 20). Any expenses incurred by the council of a county or borough for the purposes of this Act are to be paid out of the county fund or borough fund or borough rate. Secs. 5, 6, 7 and 25 give certain borrowing powers to volunteer corps and burgh councils, and the case of the disbandment of a volunteer corps is dealt with by sec. 8. Sec. 25 (6) gives power to any person or body of persons or authority holding land for ecclesiastical or public purposes to lease such land to a Secretary of State or to a volunteer corps for military purposes for any term not exceeding twenty years, subject to certain provisions. Part II. of the Act gives power to a Secretary of State to make bye-laws as to the use of lands held for military purposes, and for securing the safety of the public. No bye-law made in pursuance of these powers may take away or prejudicially affect any right of common (s. 14 (1)). "A bye-law made under this Act shall not interfere with any highway, unless made with the consent of the authority having the control of the repair of the roads of the town, district, or parish or other area in which the highway is situate; but where it appears to the authority that any highway crosses or runs inconveniently or dangerously near to any land the use of which can be regulated by bye-laws under this Act, the authority may consent to a bye-law providing, to such extent as seems reasonable, for the temporary diversion from time to time of the highway, or for the restriction from time to time of the use thereof" (s. 16 (1)). "Any such highway, if a footpath, may (without prejudice to any other form of stopping or diverting the same) be stopped up or diverted in the manner in which a footpath, crossing or running inconveniently or dangerously near to any land leased under Part I. of this Act, may be stopped up or diverted" (s. 16 (2)). The proposed bye-laws must first be made known in the locality, and objections, if any, received and considered; and when any such bye-laws are made, the area affected must be marked out, and the bye-laws published in such manner as appears to the Secretary of State necessary to make them

known to all persons in the locality (s. 17 (1)). Persons offending against any bye-law under the Act are liable on summary conviction to a fine not exceeding £5, and may be removed by any constable or officer, authorised in manner provided by the bye-law, from the area, whether land or water, to which the bye-law applies, and taken into custody without warrant, and brought before any Court of summary jurisdiction, to be dealt with according to law; and any vehicle, animal, vessel, or thing found in any area in contravention of any bye-law may be removed by any constable or officer, and, on due proof of such contravention, be declared by a Court of summary jurisdiction to be forfeited to Her Majesty (s. 17 (2)). In the case of leased lands the bye-laws must not be inconsistent with anything contained in the lease, and the lessor may stipulate in the lease that his consent must be obtained before any bye-law is made, or power may be granted to him under the lease to make bye-laws himself, with the consent of the Secretary of State. Sec. 21 gives power to the Secretary of State to authorise any person to enter on any lands for the purpose of erecting, repairing, or replacing alignment works for the purposes of coast defence, and the owner of the land may claim compensation for any damage done. The expression "military purposes" includes rifle or artillery practice; the building and enlarging of barracks and camps; the erection of butts, targets, batteries, and other accommodation; the storing of arms; military drill and any other purpose connected with military matters approved by the Secretary of State.

Military Law.—The law relating to and administered by military Courts, and dealing with the discipline and administration of the army, and persons forming part of or following an army, and who are declared by the Army Act to be subject to military law. See ARMY; MARTIAL LAW.

Military Manœuvres Act, 1897.—The Act of 1897 (60 & 61 Vict. c. 43) now regulates the carrying out of military manœuvres. Sec. 1 (1) provides that Her Majesty may, by Order in Council, authorise the execution of military manœuvres within specified limits and during a specified period not exceeding three months. The same limits, or any part thereof, must not be specified more than once in any period of five years. (2) A draft of the order must be sent, not less than six months before the order is to come into force, to each county council, county borough council (defined to mean in Scotland royal burgh, parliamentary burgh, or burgh under the Burgh Police (Scotland) Act, 1892 (s. 8 (1)), district council (in Scotland the district committee acting under the Local Government (Scotland) Act, 1889, or the county council, where no such district committee exists (s. 8 (1)), and parish council wholly or partly within the specific limits. Notice of intention to make the order must be advertised for three months in at least two newspapers circulating in the district. (3) The draft, before being submitted to Her Majesty in Council, must be laid before each House of Parliament for thirty days on which the House is sitting, and it cannot be submitted unless both Houses present an address to Her Majesty praying that the order may be made. Under sec. 2, where an Order in Council has been made authorising the execution of military manœuvres, the authorised forces may, under the direction of the Secretary of State and within the specified period and limits: (*a*) pass over and encamp, construct military works, not of a permanent character, and execute

military manœuvres on any authorised land; (*b*) supply themselves with water, but not so as to interfere with any industry or deprive any private owner of a water supply, or public authority of the supply shown to be required by those entitled to use such water supply. Provided as follows: "(1) Nothing in this Act shall authorise entry on or interference with (except to the extent of using authorised roads) any dwelling-place, place of worship, school, factory, workshop, store, or premises used for the carrying on of any trade, business, or manufacture, farmyard, garden, orchard, pleasure-ground or nursery-ground, burial-ground, ground attached to any place of worship or school, or any premises enclosed within the curtilage of or attached to any dwelling-house, or any enclosed wood or plantation. (2) The officer in command of the authorised forces shall take care that there is no interference with earthworks, ruins, or other remains of antiquarian or historical interest, or with any picturesque or valuable timber, or other natural features of exceptional interest or beauty, and shall be empowered to prevent trespass or damage to property by persons not belonging to the forces, and shall cause all lands used under the powers conferred by this Act to be restored as soon and as far as practicable to their previous condition."

Sec. 3 gives power to two justices, not being military officers in command of the forces, on the application of a commissioned officer in command of the authorised forces or part thereof, to close for forty-eight hours any right-of-way, and to close for any period not exceeding twelve hours any county, main, or parish road, under certain formalities and restrictions. Sec. 4 provides for the appointment of a Military Manœuvres Commission, consisting of two persons appointed by the council of each county, and one by the council of each burgh wholly or partly within the specific limits, together with such other persons, being resident owners or occupiers of land within the limits, as the Secretary of State may appoint, but such persons must be less in number than the county and burgh representatives. Three members form a quorum, and the chairman has a second or casting vote. Sec. 5 authorises the Commission to make certain orders and regulations, and lays down the procedure under which they are to be made and published. Under sec. 6 compensation is to be made, out of money to be provided by Parliament, "for any damage done to person or property, or interference with rights or privileges, arising from putting in force any of the provisions of this Act, and whether or not occasioned by the acts or defaults of the authorised forces, including therein all expenses reasonably incurred in protecting person, property, rights and privileges, and any damage, by reason of excessive weight or extraordinary traffic, to any highway for the repair of which any public body or any individual is responsible." The Commission may appoint compensation officers with the concurrence of the Treasury, and make regulations for the determination and payment of claims (s. 6 (2) and (3)); and "cases of compensation not settled by agreement shall be settled as questions of disputed compensation under subsec. 10, sec. 25, of the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58)." Sec. 7 provides: "(1) If within the limits and during the period specified in an order authorising military manœuvres under this Act any person (*a*) wilfully and unlawfully obstructs or interferes with the execution of the manœuvres, or (*b*) without due authority enters or remains in any camp, he shall be liable on summary conviction to a fine not exceeding forty shillings, and he and any animal or vehicle under his charge may be removed by any constable, or by or by order of any commissioned officer of the authorised forces. (2) If within the limits and

during the period aforesaid any person (*a*) without due authority moves any flag or other mark distinguishing, for the purposes of the manœuvres, any lands, or (*b*) maliciously cuts or damages any telegraph wire laid down by or for the use of the authorised forces, he shall be liable on summary conviction to a fine not exceeding five pounds."

Military Testament.—An officer or soldier on actual military service may make, as to his personal property, a nuncupative will without writing, and declared before a sufficient number of witnesses (7 Will. IV. and 1 Vict. c. 26).—[Stephen, *Com.* ii. 588: Williams, *Exrs.* p. 104, and cases there cited; Williams, *Personal Property*, i. 409.]

Militia.—The principal Statutes regulating the militia are 42 Geo. III. c. 90 (England), c. 91 (Scotland), and 45 & 46 Vict. c. 49. The two former Acts consolidated the laws relating to the militia which is raised by ballot. A quota of men is appointed for each county, and this quota is divided among the parishes, under the supervision of the Lieutenant of the county and Deputy-Lieutenants. All males between eighteen and thirty (23 & 24 Vict. c. 120) are liable for five years' service, with the following exceptions: Men under 5 feet 4 inches or medically certified unfit, peers, commissioned officers of the forces on full pay or half pay, non-commissioned officers and privates in other forces, persons serving or who have served for four years as commissioned officers in the militia, persons serving in yeomanry or volunteers, resident members of universities, clergymen of the Established Church and registered Dissenting clergymen, parish schoolmasters, articled clerks and apprentices, seafaring men, persons employed in the royal docks and certain other specified public works, any poor man in England with more than one lawful child, in Scotland any man with more than two lawful children and not possessing property to the value of £50, and in Ireland having more than three children under the age of fourteen and not worth £10 or paying £5 a year rent.

In practice the ballot has been suspended for many years, unless ordered by an Order in Council (28 & 29 Vict. c. 46, which is renewed annually by the Expiring Laws Continuance Act). The regular militia force is now kept up by voluntary enlistment, and is chiefly regulated by the Militia Act, 1882 (45 & 46 Vict. c. 49). The numbers are fixed annually by Parliament (s. 3); and the Queen, by Order under the hand of a Secretary of State, can make orders as to the government, discipline, pay, and all other matters respecting the militia (s. 4). Men are enlisted for such period not exceeding six years as the orders and regulations fix, and may re-engage in the same way for a period not exceeding six years (s. 8). At present the first period is six years and the period for re-engagement four years, up to forty-five years of age. The mode of enlistment and attestation is practically the same as in the regular army (s. 9). (See ARMY.) Recruits have to undergo a preliminary training for a period not exceeding six months (s. 14), and the militia must be annually trained for a period not less than twenty-one nor more than twenty-eight days, at such times and at such places in any part of the United Kingdom as may be prescribed (s. 16). The period of annual training may be varied within limits by Her Majesty in Council (s. 17). Sec. 18 (1) provides: "In case of imminent national danger or of great emergency it shall be lawful for Her Majesty in Council, by proclamation (the occasion being first communicated

to Parliament, if Parliament be then sitting, or declared in Council and notified by the proclamation if Parliament be not sitting), to order the militia to be embodied." Parliament, if not sitting, must meet within ten days (s. 19). Her Majesty may in like manner disembody the militia (s. 20). Any part of the militia is liable to serve in any part of the United Kingdom, but not out of the United Kingdom, provided that, if any part of the militia make a voluntary offer to extend their services to the Islands of Guernsey, Jersey, Alderney, and Sark, the Isle of Man, Malta, and the garrison of Gibraltar, Her Majesty may, if she thinks fit, accept such offer, and employ such part of the militia accordingly (s. 12).

Officers in the militia are at all times subject to the Army Act, and non-commissioned officers and men are subject to it during their preliminary training, during their annual training, when attached to or acting as part of the regular forces, or when embodied.

Fraudulent enlistment and making a false answer are dealt with by sec. 26. A militiaman who, when embodied, enlists in the regular, reserve, or auxiliary forces, or enters the navy without fulfilling the necessary conditions, is guilty of fraudulent enlistment; if he does the same thing when not embodied, without fulfilling the necessary conditions, he is guilty of making a false answer. Any man belonging to the reserve, yeomanry, volunteers, or navy who, without fulfilling the necessary conditions, enlists in the militia, is guilty of fraudulent enlistment or of making a false answer, according as he is or is not at the time called out on permanent service or actual military service. A man committing an offence under this section is liable to be tried by court-martial, or "to be convicted by a Court of summary jurisdiction, and to be sentenced to imprisonment, with or without hard labour, for any term not less than one month and not more than three months, or to a fine of not less than £5 and not more than £25, and in default of payment to imprisonment, with or without hard labour, for any term not less than one month and not more than the maximum term allowed by law for non-payment of the fine; and in the case of a second or any subsequent conviction, to be sentenced to imprisonment, with or without hard labour, for any term not less than two and not more than six months."

A militiaman is guilty of absence without leave within the meaning of sec. 15 of the Army Act, 1881 (44 & 45 Vict. c. 58), if he fails, without excuse allowed by the regulations, to come up for the preliminary or annual training. If he fails to come up for embodiment without excuse, he is guilty, according to the circumstances, of deserting within the meaning of sec. 12, or with absenting himself without leave within the meaning of sec. 15 of the Army Act, 1881 (s. 23). The acceptance of a commission as militia officer does not vacate the seat of a Member of Parliament (s. 38), and a militiaman cannot be punished for absence while voting at a Parliamentary election, or during the time he is going to or returning from such voting (s. 39). In England, if a Sheriff is a militia officer, he is during embodiment relieved from personally performing his duties as Sheriff, which must be performed by the Under-Sheriff (s. 40); and no militiamen can be compelled to serve as a peace officer or a parish officer (s. 41).

[See Stephen, *Com.* ii. 583; *Manual of Military Law* (War Office, 1894); Reserve Forces Act, 1882, 45 & 46 Vict. c. 48 (for Militia Reserve).]

See ARMY.

Mill.—Mills received special treatment in Scots law, owing to the practice of astricting lands to a specified mill, known as thirlage,—a prac-

tice which, arising from the necessity of guaranteeing a return on the large outlay involved in the erection of improved mills, was at first beneficial, though it became afterwards, as Craig remarks, "res quæ a modicis initiis orta in magnum prejudicium excrevit" (ii. 8. 6). As the mill-owner's exactions from the thirle came to be a source of profit out of all proportion to the expense of erecting and maintaining the mill, questions as to what title was sufficient to convey mills assumed considerable importance.

Stair's statement that "a mill is a distinct tenement, and is not comprehended under the name of part and pertinent thereof, unless there be an erection in a barony, lordship, etc." (ii. 7. 5), is too broad. It is founded on the case of *Lord Fleming*, 1566, Mor. 8895, the reason, according to the report, being "because ane miln requires ane speciall and severall sasine." This reasoning does not apply to a barony, etc., because barony is *nomen universitatis* (*Countess of Home*, 1667, Mor. 8895). But it was held that a mill built by the fiar during the currency of a liferent accresced to the lands, so as to entitle the liferenter to the multures of the liferent lands (*Campbell*, 1666, Mor. 8241; *Lady Halliburton*, 1670, Mor. 8896),—decisions not reconcilable in principle with the broad doctrine as stated by Stair. And in *Rose*, 1777, Mor. App. *voce* "Part and Pertinent"), the Court "found that mills could be carried by a disposition of the lands with parts and pertinents." The law rather seems to be as stated by Erskine (*Inst.* ii. 6. 5), that a mill is capable of being made a separate tenement from the land, sasine being given by clap and happer. Where this has been done, it will not be carried by the clause of parts and pertinents. But in other cases it is a question of construing the titles; and the case of *Rose* (*supra*) establishes that where, after a mill is built, no change is made in the titles, a general disposition of the lands with parts and pertinents is sufficient to carry the mill, in the same manner as other buildings. Craig, ii. 8. 5, gives as a reason for requiring mills to be expressly conveyed, that a grant *cum molendinis et multuris* liberates from liability for multures to the grantor; which, however, is a consideration relating rather to the right to erect mills than to the method of conveying existing mills.

The right to erect mills was among the general uses to which a proprietor might put his property (cf. *Cunningham*, 1713, Mor. 8903). But it was subject to certain exceptions—

(1) A mill cannot be erected in a public stream without consent of the Crown, and not even with such consent if its erection impedes navigation (Craig, ii. 8. 5; Bankt. ii. 3. 108).

(2) On a private stream a mill cannot be erected in such a way as to prejudice an existing mill (Craig, ii. 8. 5).

(3) Where lands are subject to thirlage, there is implied a prohibition against erecting mills thereon, or using even hand-mills or curns (querns) for grinding the grain thirled (*Crawford*, 1695, Mor. 8898). Hence the importance (as Craig points out, *supra*) of a clause *cum molendinis, etc.*, since this liberates the lands disponed from thirlage to the disponer, and, in a question with the disponer, entitles the disponee to erect mills.

See THIRLAGE; BARONY, MILL OF.

Mineral.—The precise signification of the word "mineral" depends upon the context (Glasgow Mags. in *Glasgow Mags.*, 1888, 15 R. (H. L.) 94, 99). The widest signification is to be attached to it unless there is something in the context to control or restrict its meaning (*ib.* 99, 108). Primarily, it signifies what is dug out of a mine (*Proud*, 1865, 34 L. J.

406, 411), but in its popular sense it includes many substances as are obtained by quarrying, and has been held to embrace "all substances (other than the agricultural surface of the ground) which may be got for manufacturing or mercantile purposes, whether from a mine, as the word would seem to signify, or such as stone and clay, which are got by open working" (*Midland Rwy. Co.*, 1882, 20 Ch. D. 555; *Miles*, 1886, 30 Ch. D. 634, 33 *ib.* 632). The term "mineral" is usually wide enough to cover coal, ironstone, and ordinary metals; and has been held to cover freestone (*Glasgow and S. W. Rwy. Co.*, 1893, 21 R. 134; *Bell*, 1866, 1 Ch. 303; *Mawson*, 1870, 6 *ib.* 91; *Haunchwood*, 1882, 20 Ch. D. 552), limestone (*Hext*, 1872, 7 Ch. 699; *Fishbourne*, 1890, 25 L. R. Ir. 483; *Glasgow Mags., cit.*; *Robinson*, 1889, 15 App. Ca. 19), clay (*Hext, cit.*; *Cheekley*, 1867, 4 Eq. 19–25; *Errington*, 1882, 19 Ch. D. 571–578; *Robinson, cit.*), porcelain or china and clay (*Hext* and *Errington, cit.*), stones (*Rosse*, 1845, 14 M. & W. 859; *Winter*, 1851, 6 Ex. 644), granite (*Welsh Granite Co.*, 1887, 35 W. R. 617), flint (*Tucker*, 1883, 8 App. Ca. 508), shale (*Lord Hopetoun*, 1893, 20 R. 711), slate (*Cleveland*, 1867, 37 L. J. Ch. 125), and even coprolites (*Tomline*, 1877, 5 Ch. D. 750). But where the relative positions of parties interested, their intention, or the substance of the transaction so indicate, the meaning of the term "mineral" may be restricted. Thus a reservation of the "haill mines and minerals," of whatsoever nature and quality, was held not to include freestone (*Menzies*, 1818, F. C.; affd. 1822, 1 Sh. App. 225), which substance was also excluded from a reservation of "liberty of working coal and other metals, fossils, and minerals" (*D. Hamilton*, 1841, 3 D. 1121). Freestone, however, was regarded as a mineral in a question relating to a claim of a railway company having only a *primâ facie* right to the surface (*Jamieson*, 1868, 6 S. L. R. 188; *Fishbourne, cit.*). Blackband ironstone was held not to be embraced in a reservation of the whole quarries, with full power to search and dig for stone quarries and coal, and to win coal and stones (*Forth and Clyde Navigation Co.*, 1848, 11 D. 122). Where land is granted excepting the minerals thereunder, and not excepting anything else, the space or chamber containing the minerals is comprised in the grant, and not in the exception, the grantor having no interest in the space which the workings have created (*Ramsay*, 1875, 3 R. 25; affd. 1876, *ib.* (H. L.) 41; see also *Harrison*, 1873, 5 P. C. 49, 62; *Eardley*, 1876, 3 Ch. D. 834). An exception of "all and sundry" the coal and limestone" is interpreted as meaning mines of coal and mines of quarries of stone (*Graham*, 1871, 9 M. (H. L.) 98). A reservation of "the whole coal, stone quarries, and other metals and minerals" means the whole of the land under the surface (*Ramsay, cit.*). A reservation of the property of the whole coal, and liberty to work, etc., to make aqueducts, and to do everything necessary thereanent, does not give the right to quarry stones for making a new road from one of the coal works for transporting the coal when worked (*Harrowar's Trs.*, 1827, 5 S. 307). An intention to restrict the meaning will be inferred where effect cannot be given to a particular clause of a deed or a statute without destroying the meaning of a previous clause (*Attorney-General*, 1887, 35 W. R. 617; *Bell*, 1866, 1 Ch. 307). In doubtful cases the meaning of the term may be limited by local custom, or such usage without which a deed or statute would be inconsistent (*Darvill*, 1855, 3 Drew. 294; *Tucker*, 1883, 8 App. Ca. 508; *Attorney-General*, 1879, 4 App. Ca. 294). When the terms "mines" and "minerals" are both used in the same Act or deed, the word "minerals" is not on that account to suffer a limitation of its meaning (*Glasgow Mags. cit.*; *Ruabon Brick Co.* [1892] 1 Ch. 427). The word minerals,

when contrased with mines in the Mining Code, signifies minerals other than those got from underground workings; and where the context so indicates, mines is equivalent to "mines and minerals" (Kay, J., in *Midland Rwy.*, 1882, 20 Ch. D. 557; *Glasgow Mags. cit.*; *Halliday*, [1891] App. Ca. 81, 100, 101).—[Ross Stewart on *Mines and Minerals*, 1894.] See MINES, *Reservations.*

Mines.—*MEANING OF MINE.*—The term "mine" is susceptible of limitation or expansion, according to the context; and in construing it regard must be had not only to the deed or statute in which it occurs, but to the relative position of the parties, and the substance of the transaction or arrangment which the deed or statute embodies (*Faric*, 1888, 15 R. (H. L.) 94–99; *Haunchwood*, 1882, 20 Ch. D. 552–555). The primary meaning of mine standing alone is an underground excavation for the purpose of getting minerals (*Haunchwood, cit.*; *Bell*, 1866, L. R. 1 Ch. App. 303; *Sedgely*, 1831, 2 B. & Ad. 65; *Brettell*, 1832, 3 B. & Ad. 422). It then began to be applied to the place where excavation occurs, and finally is now applied to the place only without regard to excavation, in which sense it is generally understood in deeds and Acts of Parliament. In the phrase "all that mine, vein, or seam of coal," the word "mine" includes the stratum as well as the excavation. As a rule, the widest signification of the term is to be given to it, unless it is controlled by the context; but it will yield if the relative position of the parties, their intention, or the substance of the transaction so indicates (*Faric, cit.*; and see MINERAL and cases there cited). When used in contradistinction to other mining terms, such as "vein," "seam," "lode," the meaning may vary (*Astry*, 1672, 2 M. 193). The distinction between a mine and a quarry depends on the method of working (*Jones*, 1879, 5 Ex. D. 95). Where the substance is obtained by underground workings, the place it is taken from is a "mine"; but if it is got by workings and excavation upon the surface of the ground, the place is designated a "quarry" (*Brettell, cit.* 426; *Darvill*, 1855, 3 Drew. 299; *Bell*, 1865, 2 Drew. & Sm. 400). Directly you cease to excavate from the surface, and carry on subterranean work, it ceases to be a quarry (*Brown*, 1857, 7 Ir. C. L. R. 108; *Listowel*, 1858, 9 *ib.* 233; *Clevcland*, 1867, 16 W. R. 105). The question whether a mine or quarry is "open" in the sense of being a going concern is of importance. In such cases the test is whether the mine or quarry has been legally set apart by one lawfully entitled to it for the purpose of making a profit from the produce; and to constitute a mine "open," working must have actually commenced, and not been abandoned. Dedication to profit may be proved either by actual working or by letting the mine for the purpose of working (*Griffiths*, 1878, 8 Ch. D. 532; *Snowdon*, 1879, L. R. 4 App. Ca. 454). Working must actually have commenced—mere preparation for opening is not sufficient (*Viner*, 1840, 2 Beav. 469), nor is trial-boring (*Snowdon, cit.*; *Stepney*, 1866, W. N. 401; *Huntley*, 1849, 13 Q. B. 572). A new seam in an open mine is open if it can be worked by the old shaft (Romilly, M. R., in *Spencer*, 1862, 31 Beav. 334.) Mines are considered abandoned or dormant when working has ceased with a view to permanent advantage of the estate to which they belong, and not from inability to carry them on at a profit. If relinquished from inability to work profitably, the length of time since abandonment generally determines whether the mine is still open (*Baillie's Trs.*, 19 R. 220; *Bagot*, 1863, 32 Beav. 509–517). In the Mining Code, where the term mine is not specially defined it is capable

of variation, according to the context (*Farie, cit.*). Clay was held excepted from the conveyance to the railway company under sec. 77 of the English Railway Clauses Consolidation Act (*Haunchwood, cit.*). Those sections of the Railway Clauses Consolidation and Water Works Clauses Acts prefaced by the words "and with respect mines lying under or near" the railway or canal, have recently received close judicial examination (*Haunchwood, cit.*; *Farie, cit.*; *Robinson*, 1889, 15 App, Ca. 19; and the *Ruabon Brick Co.*, [1893] 1 Ch. 427), the result of which appears to be that, in the section by which the undertakers are, except on express purchase, "not entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works," the term "mines" includes quarries (*Robinson*, 1889, 15 App. Ca. 19); that when "minerals" is contrasted with "mines" it means minerals other than those got by underground working; and that where the context so indicates, "mines" is equivalent to "mines and minerals." In the clause providing for giving notice of intention to work, "minerals" is contrasted with "mines," and means minerals other than those got by underground working (*Haunchwood*). In construing sec. 18 of the Water Works Clauses Act, Ld. Watson said (*Farie, cit.*): "In these enactments the word 'mines' must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got. If coal, ironstone, or slate crops out at any part of the surface taken for waterworks or railway purposes, the undertakers or the company acquire, in my opinion, no right save to use that part of the surface,—they acquire no right to the minerals themselves, except in so far as these are dug out or excavated in order to construct their works. The important question still remains: What are the minerals referred to, other than coal, ironstone, and slate? My present impression is, that 'other minerals' must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated."

Mines, Royal and Base.—It was enacted by the original Act of Annexation of Mines (1424, c. 12), that if any mine of gold or silver be found in "onie lordis landes" of the realm, and it may be proved that three half-pennies may be fined out of the pound of lead, the Lords of Parliament "consentis that sick mine be the King's, as is usual of other realms." This Act indicates the only mines *inter regalia* at that time were those specified. Base mines have been regarded as a part and pertinent of lands under a Crown grant (*Anstruther*, 1796, 3 Pat. 483). The next Act, that of 1592, c. 31, assumed the right of the Crown to obtain with respect to all mines, and gave power to it to let the mines on payment of a tenth of the produce. The effect of the Act was not to give the Crown a greater right to base mines than it had formerly, but merely that gold and silver mines, until feued out, are the property of the Crown, and that when feued out the *reddendo* is to be a tenth of the produce (Ld. Curriehill in *E. Breadalbane*, 1875, 2 R. 826). The Crown was bound to grant the minerals if required (*Officers of State*, 1750, Mor. 13527), and so was a subject-superior (*D. Argyle*, 1739, Mor. 13526); and where a grant of lands has once been made, an adjudication of the lands without mention of the mines carries the mine, in preference to a subsequent adjudication of lands with express mention of them (*Ochterlony*, 1755, Mor. 164). In *Ld. Breadalbane's* case (1875, 2 R. 826) a proprietor of lands obtained from the Crown, in terms of the Act 1592, c. 31, a separate charter of the mines of gold and silver and other metals and minerals in his lands. Subsequently he executed an entail, without mention of the mines and minerals. It was

held that they were brought under the entail; but this on account of the vassal's intention in taking the grant, not by consolidation *ipso jure* by the Crown grant.

Reservations of Mines and Minerals.—When a superior feus lands and retains the minerals, these are excepted both from the transmission and the warrant to infeft the vassal—they continue vested in the superior by virtue of his own title (Menzies, *Feud. Convey.* 599). In such a case the mines are constituted a separate feudal estate. Where the surface and the underlying mines or the different strata are differently owned, they are separate tenements, with all the incidents of separate ownership (*D. Hamilton*, 1871, 9 M. (H. L.) 98, 103). In construing such reservations the rule obtains that everything passes which is not reserved (*Menzies*, 1822, 1 Sh. App. 225; *Ramsay*, 1876, 3 R. (H. L.) 41). When one mineral is reserved there is a presumption that the others pass in the grant (*Simson*, 1792, 3 Pat. 238–243). Therefore, if good stone (*Menzies*), freestone (*Bentley*, 1841, 3 D. 1121), or any other substance is to be reserved, it requires precise definition (*Forth and Clyde Navigation Co.*, 1848, 11 D. 122 (blackband ironstone)).

A reservation may be either a right of property or a right of servitude (*Graham*, 1869, 9 M. (H. L.) 98; see *Baird*, 1878, 6 R. 116 (common property)). A reservation of "all and singular the mines of coal . . . . with full power to search," etc., is a reservation of property (*Simson*, 1792, 3 Pat.), the powers of working being merely accessory (*Smith* 1768, Mor. 15266). A reservation expressed, "reserving . . . . the privilege and liberty of mining coals, digging shanks," etc., is a reservation of a servitude right (*Davidson*, 1822, 1 S. 411; see *Graham*, 1869, 9 M. (H. L.) 98, 104, and Ld. Brougham in *Turner*, 1834, 7 W. & S. 163). Its effect has been characterised as a re-grant by the disponee of the rights, privileges, and facilities of which the servitude is made up (*Graham, cit.* 102; *Heatheote*, [1891] 3 Ch. 504–516). A right of servitude only was instructed by a grant to a vassal of so much coal as would serve him and his family (*Harvie*, 1870, 9 M. 129–146). A declaration of a tenth of the output as a real burden on the lands was held a servitude right only (*Dixons*, 1825, 4 S. 355, 7 S. 324). But a reservation of full power to work, combined with a declaration that the vassal was not to have power to win, coals, etc., was held a right of property (*Bain*, 1865, 3 M. 821, 1867, 6 M. 1). It has also been held that, where there is no plain indication to the contrary, a reservation of liberty of working means a preservation of property, and not merely the privilege of working (*Dunlop*, 1884, 11 R. 963, 12 R. (H. L.) 65; *Livingstone*, 1776, 10 App. Ca, 816, note 6; *Mowbray*, 1778, 5 B. S. 559). Where lands are feued in different parcels, reserving minerals and without distinct specification of the boundaries, the *onus* is on the superior to prove to which lands the reservations apply (*Hamilton*, 1872, 10 S. L. R. 61). In construing reservations the dispositive is the ruling clause, but in cases of ambiguity others may interpret it (*Fleming*, 1868, 6 M. 782: *Orr*, 1893, 20 R. (H. L.) 27, 31, 32). The intention of parties is to be gathered from the deed as a whole (*Orr, cit.*), and in view of the circumstances at its date (*Bank of Scotland*, 1891, 18 R. 957). When reservations of mines and minerals have crept into or dropped out of a progress of titles, the Court has gone back to the original charter to ascertain the rights of superior and vassal (*Graham*, 1842, 4 D. 482; *Boyd*, 1872, 11 M. 243; *Ker*, 1840, 3 D. 154 (case of ambiguity)).

Ownership in Mines.—Mines and minerals not yet separated from the soil are *partes soli*. Where there has been no separation of surface and underground estate, the owner of the surface is owner *ad centrum* (*Glasgow*

City Railway Co., 1883, 10 R. 894–902). Accordingly, mines and minerals (with the exception of royal mines when not granted expressly in the first instance by the Crown (*Breadalbane*, 1875, 2 R. 826)) are included in a grant of "lands" from the Crown, and in a disposition from a subject-superior (*Mitchell*, 1777, 6 Pat. 795). They passed before 1850 (see *Gordon*, 1850, 13 D. 1) as part and pertinent of the lands (*Bruce*, 1716, Mor. 9642). Coals were held to have been carried by possession under a clause of parts and pertinents, against one infeft in the coal-heughs (*Burly*, 1662, Mor. 9630); but a mere grant of lands, and possession of the surface without possession of the coal, cannot prevail against a grant of the lands with the coal, followed by possession of the coal (*Anstruther*, 1796, 3 Pat. 483; *Anderson*, 1803, 4 Pat. 532). In the case of a title to mineral estate being ambiguous, it may be interpreted by prescriptive possession. Possession of the surface may be possession of the minerals, but is not always so (*Fleming*, 1868, 6 M. 782; *Orr*, 1893, 20 R. (H. L.) 27). Working of coal in one parcel of lands conveyed separately, though in the same charter and under the same *reddendo* with another parcel in the same barony, is no proof of possession in other parcels (*Forbes*, 1827, 6 S. 167; 1821, 1 S. 282, 1, W. & S. 657). The possession cannot establish a right which is contradictory to the terms of the grant (*Officers of State*, 1830, 5 W. & S. 570; *Kerr*, 1840, 3 D. 154; affd. 1 B. 499); and it must be full and continuous (*Forbes, cit.*; *Mitchell, cit.*; *Anderson, cit.*). Where a title contains an express grant of the minerals, possession of the surface alone is sufficient to complete a prescriptive right to the minerals, the working of them being *res meræ facultatis* (*Crawfurd*, 1821, 1 S. 111; *Crawford*, 1826, 4 S. 665).

Mines under highways belong to the owners of the adjacent lands, the middle line of the road being the boundary (*Wishart*, 1853, 1 Macq. 389). Road trustees do not acquire property in minerals unless expressly given (*Waddell*, 1868, 6 M. 690). Mines under a loch belong to the owner thereof. In case of different proprietors, if the titles are silent, each party owns the *solum ex adverso* of his lands to the middle (*Cochrane*, 1815, 6 Pat. 139; *Baird*, 1839, 1 D. 1051; *Scott*, 1867, 7 M. (H. L.) 35). Property in mines under rivers is determinable on the rule of *medium filum* (*Wishart, cit.*; *Bicket*, 1864, 2 M. 1082–1092); in non-tidal portions of navigable rivers this rule also holds (*Ewing*, 1877, 4 R. (H. L.) 116); in tidal portions it follows the law of foreshore. Mines under the foreshore have been occasionally granted by the Crown, and are capable of being possessed by a subject (*Agnew*, 1873, 11 M. 309; *Clyde Navigation Trs.*, 1891, 19 R. 174). They may be prescribed on a title if the description of the lands be flexible (*Agnew, cit.*: *Watson*, 1868, 6 M. 199; *Young*, 1887, 14 R. (H. L.) 53). A right of property in foreshore minerals is carried by grant of the foreshore unless specially reserved (*Agnew, cit.*; *Blantyre*, 1879, 6 R. (H. L.) 72); by prescriptive possession under title of lands bounded by the sea (*Agnew, cit.*; *Blantyre, cit.*; *Young, cit.*); or under a Crown charter which does not extend the vassal's right beyond high-water mark (*Buchanan*, 1882, 9 R. 1218); or by prescriptive possession under a title of lands *de facto*, though not expressly, bounded by the sea (*Agnew* and *Young*). Mines below the sea have frequently been regarded as belonging to the Crown (Ld. Campbell in *Smith*, 1847, 6 B. App. 487, 500; *Gammel*, 1851, 13 D. 854, 3 Macq. 419–465; *Hamilton*, 1852, 1 Macq. 46–49; *Forth Bridge* case, 1890, P. L. M. 1 N. S. 147; *Clyde Navigation Trs.*, 1891, 19 R. 174; *Cuninghame*, 1895, 22 R. 596; *Wemyss' Trs.*, 1896, 24 R. 216). A grant of a barony with parts and pertinents does not carry submarine minerals *ex adverso* of the barony lands without prescrip-

tion, but if the minerals under the bed of the sea have been openly worked from the barony lands for more than the prescriptive period, such possession may explain the grant as including them (*Wemyss' Trs., cit.*). Mines under glebes do not belong to the minister, though he may work them; the rents accumulate for the benefice, the interest being payable to the minister (*Newton*, 1807, Mor. App. "Glebe," No. 6; *Maddertv*, 1794, Mor. 5153; *Galbraith*, 1893, 21 R. 30; *Durward*, 1886, 23 S. L. R. 322). Mines under commonty belong to the commoners (*Johnson*, 1768, Mor. 2481; *Baird*, 1878, 6 R. 116; *Smyth*, 1831, 9 S. 401). Mineral rents must pay casualties of superiority (*Allan's Trs.*, 1878, 5 R. 510; as to the mode of calculation, see *Allan, cit.*; *Sivwright*, 1879, 6 R. 1208; *Sturrock*, 1880, 7 R. 799).

Limited Estate in Mines.—The tendency of the earlier law was to favour liferenters in mineral estate, but since it has become more valuable the tendency has been towards preservation of the fiars' rights. A tercer is not entitled to open new mines (*Lamington*, 1682, Mor. 8240; *Belschier*, 1779, Mor. 15863). A liferenter by constitution was held not entitled to profits and rents arising from stone and lime quarries in lands over which the liferents were constituted where no mention had been made of these in the deed, and the lands were held under a strict entail (*Swinton*, 1 Feb. 1814, F. C.). A fiar may work mines on payment of surface damage, and having a due regard to the amenity of a mansion-house and estate (*Dickson*, 1823, 2 S. 152). A universal liferent to a wife of the whole annual produce and rents of the residue of her husband's heritable and moveable estate does not include income derived from minerals not wrought till after her husband's death (*Campbell*, 1882, 10 R. (H. L.) 65). A similar doctrine of intention was applied to a case of liferent by reservation (*Eiston*, 1831, 9 S. 716). But though a simple liferenter cannot work unopened mines, unless expression be given of a contrary intention, he may work open mines to the extent of his own requirements, which includes coal for domestic use (*Lamington, cit.*), stones for the repair of dykes (*Dickson, cit.*), and lime for the fields (*Roxburgh*, 19 Jan. 1816, F. C.), for which he is entitled to break ground. A deed or contract, however, expressing or implying a contrary intention, alters this. Thus the grantee of a general liferent of nothing but mineral estate is entitled to work minerals (*Guild's Trs.*, 1872, 10 M. 911). A proprietor who has leased minerals during his life, and grants a liferent of all lands and heritages, is presumed to include the mineral rents in the liferent (*Waddell*, 21 Jan. 1812, 16 F. C. 485; see also *Wardlaw*, 1875, 2 R. 368; *Strain*, 1893, 20 R. 1025). Also when the estate is left as a *universitas*, rents of a clay pit were included (*Guild, cit.*). In another case an old-going colliery under a lease at the date of the grant, the deed being a universal settlement with no directions for accumulations, was included in a liferent to a granddaughter, the fee going to daughters of the testator (*Wardlaw*, 1875, 2 R. 368). The danger of exhaustion of the minerals has an important bearing on the question of intention (*Ferguson*, 1877, 4 R. 532; com. on in *Strain, cit.*). Though proceeds of unopened mines go to a fiar to the exclusion of the liferenter, the liferenter is entitled to them if the fiar has abandoned them as unworkable to profit (*Baillie's Trs.*, 1891, 19 R. 220).

An heir of entail in possession in excambing lands may reserve the minerals *hinc inde* (*Hamilton*, 1833, 12 S. 22). He may work the minerals in the absence of prohibition (*Gordon*, 24 Jan. 1811, F. C.); but it is very doubtful if such prohibition would be given effect to (*Muirhead*, 1855, 17 D. 875; 1858, 20 D. 592).

Where a provision to a widow and children is granted in virtue of powers under an entail, and the provision is a certain portion of the free rents of

the entailed estate, the rent of a coal and lime work must be taken into computation (*Douglas*, 1822, 1 S. 408). In fixing the free yearly rental of minerals the Courts in some recent cases (*Wellwood*, 1848, 11 D. 248; *Douglas*, 1869, 8 M. 360; *Christie*, 1878, 6 R. 301) adopted a different mode than that expressed in the Statute, and took the equitable view that mineral estate was in such a pecular position with regard to exhaustion as to warrant them taking an average rental over a period of years. But such rental is now to be calculated at the rate the mineral fields were let at the death of the grantor (*Belhaven*, 1896, 23 R. 423).

Mineral Leases.—Nature of Contract.—Possession under a mineral lease more nearly approaches property than it does under an agricultural lease (*Hamilton*, 1867, 5 M. 1086–1095). There is no periodic return, but rather a gradual consumption of the subject (Ld. Deas in *Weir*, 1870, 8 M. 725–728). The right conferred by such a lease resembles sale in respect that the minerals when excavated become the property of the lessee; but its true nature is that of an incorporeal-right privilege to the lessee to work the minerals for a limited period, or to exhaustion (*Fleeming*, 1871, 9 M. 730; *Gowans*, 1873, 11 M. (H. L.) 1–12: *Coltness Iron Co.*, 1881, 8 R. (H. L.) 67-76; *Campbell*, 1883, 10 R. H. L. 68). It thus resembles the mining licence of the English law, but differs from it in respect that where complete it becomes a real right, with all the privileges of the Act 1449, c. 17. A deed granting a privilege or licence to take minerals for a period of years does not amount to a lease if there be no obligation on the tenant to work (*Miller*, 1875, 3 R. 242; see also *Brand*, 1872, 11 M. 42). In mineral leases nothing is given which is not specified (*Menzies*, 1822, 1 Sh. App. 225); but if a lease is unintelligible without a word, such as "coal," which has been left out in advertently, it will be read as containing it (*Wight*, 1813, 1 Dow, 141). Where different minerals are to be wrought in the same mine by different parties, the rights of each must be clearly defined (*Hurlet Alum Co.*, 7 B. App. 100). The question whether a particular seam or mineral falls under the descriptive clause in a lease is one of fact, not of law (*Gillespie*, 1854, 17 D. 1, 18 D. 677, 19 D. 897, 21 D. (H. L.) 13). Homologation of a tenant's working by the landlord may entitle the tenant to retain what has been worked by him (*Stewart*, 1790, 3 Pat. 158 (slate quarries)).

Rent and Royalty.—Rent in mineral leases may consist of money, part of the produce, or services (*Walpole*, 1780, Mor. 15249; *Redpath*, 1737, Mor. 15196). It is usual to stipulate for a fixed rent as well as royalty, so that as long as workable mineral exists a specified sum is secured to the lessor, who will also under the royalty clause obtain a sum proportionate to the productivity of the mine. Royalty is the proper word to describe a payment on minerals won by a lessee (*Morgan*, 1883, 1 Cab. & El. 114–116). It is sometimes stipulated that the lessor shall have a certain part of the produce to be delivered in kind, or convertible into money at the selling price at the hill, wharf, or other place of delivery; or, more frequently, alternatively with a fixed money rent, the lessor stipulates for a portion of the output (*Dalgleish*, 1892, 30 S. L. R. 58), the rate varying with different minerals. The most common royalty clause stipulates for a fixed royalty upon the tonnage output, or, optionally to the lessor, a fixed rent. The royalty is often made to depend, by a "sliding-scale" lordship clause, on the market value of the minerals raised. (Cases on construction of royalty clauses: *Steuart*, 1850, 13 D. 434; *Carmichael*, 1823, 2 S. 485; *Johnston*, 1832, 10 S. 260; *Adam*, 1843, 5 D. 736; *Edwards*, 1836, 3 C. & F. 340; *Rokebey*, 1878, 9 Ch. D. 685, 13 Ch. D. 277, 7 App. Ca. 43.) It is usual to

insert a clause conferring power to make up short workings, providing for deficiency in one year's lordships being made up in so many succeeding years (*Bishop*, 1845, 14 M. & W. 260). Several phrases in royalty clauses have received judicial construction. To "win" mineral means to reach it and put it into condition for continuous working (*Lewis*, 1869, 5 Ch. 103–111); and a field is "won" when full access is given to the hewers (*Rokebey*, 1879, 13 Ch. D. 277, 9 *ib.* 689). To "raise" means *primâ facie* to get, not to bring to surface (*Senhouse*, 1862, 5 L. T., N. S., 635; *Kinsman*, 1880, 42 *ib.* 80). "Fairly wrought" does not refer to profitable working, but to working without extraordinary expense (*Griffiths*, 1851, 1 H. & N. 237; but see *Cartwright*, 1866, 7 B. & S. 247). A lordship on minerals "raised and carried off" was provided by a lease which contained also a clause proving for certain deductions where the tenants were prevented from raising the minerals. The tenants who had raised the minerals were held not entitled to the deductions, on the ground that they could not get them "carried off" (*Waugh*, 1870, 7 S. L. R. 222). "Getting" may mean only winning, and not carrying away (*Ramsden*, 1881, 6 Q. B. D. 583–585). Its signification in sec. 12 of the Coal Mines Regulation Act is far from clear (*Nethersea*l, 1889, 14 App. Ca. 228; *Brace*, [1891] 2 Q. B. 699; *Hynd*, 1884, 22 S. L. R. 702; *Mowat*, 1894, 21 R. (J. C.) 55; *Kearney*, [1893] 1 Q. B. 700; *Hastie*, 1894, 21 R. (J. C.) 62). "Found," whether gotten or not, was construed as meaning "ascertained to lie and be" (*Jowett*, 1847, 1 Ex. 647–650). "Annual output" refers to the whole coal brought to the surface (*Dalgleish*, 1892, 30 S. L. R. 58), but may be limited to what is disposed of (*Waugh*, 1870, 7 S. L. R. 222). "Selling price at the hill" excludes price of minerals sold elsewhere (*Guthrie*, 1846, 19 Sc. Jur. 69). A royalty "in respect of minerals which may be raised or obtained by or from or out of any mines or pits *in, upon, or under*" the property leased, does not entitle the lessor to payment on minerals brought up at the mouth of pits open, but not procured under the property leased (*Morgan*, 1883, 1 Cab. & El. 114; compare with *Rous*, 1870, L. R. 4 H. L. 650, where the words "through, over, and under" were construed). "Rents and profits" may mean what is due under a current lease (*Leppington*, 1891, 65 L. T., N. S., 145); but it varies with the construction of the deed or contract in which it occurs (*Anderson*, 1882, 10 R. 177).

Stipulations as to Management.—Stipulations as to the manner of working require clear expression in the lease, because powers not given are not readily implied (*Herriot*, 1804, Mor. 15255; *Fergusson*, 1821, 1 S. 1; *Robinson*, 1884, 53 L. J. Ch. 1070). A lessee of a pottery and ground adjoining it, with a privilege of working the clay for the pottery, was held not entitled to manufacture bricks for sale, nor to remove bricks without payment to the landlord (*Gordon*, 1837, 15 S. 549). A landlord frequently stipulates that his consent shall be required for the position of new shafts; but he cannot in all cases arbitrarily refuse his approval (*Montgomerie*, 1848, 10 D. 1387). When it is desired to make it compulsory on the lessee to work, proper provisions to this effect should be inserted in the lease (see an agreement to "work out" coal construed as applicable to method of working, not to exhaustion, *Convery*, 1884, 12 R. 191; see also *Aytoun*, 1890, 27 S. L. R. 657). The lessee is usually bound to work "regularly and in a proper and workmanlike manner." This means in such a manner as shall not be simply an attempt to get as much mineral as will serve the lessee's purpose, regardless of any ordinary or workmanlike proceeding (*Lewis*, 1869, 5 Ch. 103–108). Under a lease which did not impose on the tenants an obligation to work, they were bound to keep the whole "going

workings" secure, and leave them so at the end of the lease. They were held entitled to stop them at their pleasure if acting *bonâ fide*; and that if they did so they ceased to be going workings in the sense of the lease (*Aytoun, cit.*).

Surface damage is a flexible term. It signifies the damage which prevents the ordinary agricultural use of the subject. It may, however, extend to actual damage to crops or plantations, though injury to amenity is excluded (*Galbraith's Trs.*, 1868, 7 M. 167–171). The surface-damage clause, when taken along with the powers and other clauses, may be limited or extended. Thus it has been held to apply to damages occasioned by underground as well as surface operations, and to exclude damage by smoke from an engine (*Neill's Trs.*, 1880, 7 R. 141; *Oswald*, 1853, 16 D. 70), and injury occasioned by unauthorised trespassers (*Young*, 1832, 10 S. 666). The following cases have reference to surface damage arising from withdrawal of support: *White's Trs.*, 1887, 14 R. 597; *Baird's Trs.*, 1851, 13 D. 982; *Hamilton*, 1867, 5 M. 1086; *Bain*, 1867, 6 M. 1; *Waddell*, 1890, 17 R. 1077; *Hurlet Alum Co.*, 1850, 7 Bell's App. 1000. A surface-damage clause in a lease does not confer on the lessee a right to deliberately inflict an injury to the surface on payment of surface damages. The clause is intended to provide compensation caused by workings which would not necessarily result in injury (*Dixon*, 1881, 9 R. 375, 10 R. (H. L.) 45). A lessee may be liable for surface damages of a permanent character even though they have settled for temporary damages yearly (*Ogilvy*, 1845, 8 D. 241).

A tenant of a mineral field can only work so far toward the march as to leave a barrier to prevent the invasion of water from an adjacent mine, else he is laible for any damage that may ensue (*Wemyss*, 1809, 7 Feb. 1809, F. C.; *Wark*, 1856, 3 Macq. 467; *Mundy*, 1882, 23 Ch. D. 81). Express stipulation that he shall not be obliged to leave a barrier relieves him of this duty; and circumstances may arise which, by implication, render him not liable (*Crawfurd*, 1824, 2 S. 667). If there be no permission under a lease to communicate levels, the tenant of two adjacent coalfields has no right to communicate the drain of the one field to the other, but must leave a barrier. Nor can a lessee use either roads (*Mungle*, 1869, 6 S. L. R. 217) or levels in mines let to him for the benefit of his own mines except by agreement (*Halkett*, 1826, 5 S. 154, 1 S. & M'L. 629). If, however, there be a clause in a lease by which it is agreed that either party is to have power to communicate the level of the coal to any neighbouring coal-works, the right continues so long as the lessee has any interest in the neighbouring workings, and "neighbouring" in such a case is not limited in its meaning to contiguous (*Abercorn*, 1764, 6 Pat. 757). The right or obligation to erect miners' houses is usually matter of stipulation; but if there be no agreement under the lease, the lease itself does not necessarily imply the right or obligation to erect them (*Oswald*, 1858, 20 D. 440). And where a mineral tenant had right to use and occupy the miners' houses, for which he paid no rent, but was taken bound to relieve the landlord of taxes and feu-duties during his occupancy, the occupation of the houses was held as a separate right, and not an accessory of the mineral lease (*Dixon's Trs.*, 1894, 21 R. 441).

Sterility of a mine liberates the tenant from liability for rent on abandonment (*Wilson*, 1699, Mor. 10125; *Murdoch*, 1829, 7 S. 404): and if none of the minerals let ever existed in the mine, the lessee would be free, as a tenant is not at the risk of their "being and existence," but only of their quality and value (*Gowans*, 1873, 11 M. (H. L.) 4; *Fleeming*, 1871,

9 M. 730). A similar effect follows from a defect arising *ex natura rei*, *e.g.* where a seam was so thin as to be physically unworkable (*Gray*, 1706, 4 B. S. 635). But where the accidents preventing working are extrinsic and preventible, the tenant is bound, and is not entitled to abandon without proving that he could not work (*Edmiston*, 1675, Mor. 15172); and a mineral tenant is not entitled to abandon merely because he cannot work at a profit even though no rent were paid (*Gowans, cit.*). A mere allegation that minerals are unworkable is not a relevant defence to an action for arrears of rent. The fact of exhaustion must be proved as provided for in the lease (*Thomson*, 1869, 7 M. 687; *Merry*, 1859, 21 D. 1337; affd. 1 M. H. L. 14; *Waddell's Trs.*, 1885, 13 R. 237; see also *Shotts Iron Co.*, 1881, 8 R. 530, as distinguished from *Dixon*, 1824, 2 Sh. App. 175).

Measure of Damage for Trespass.—There are two methods of assessing damages for wrongful working and abstraction of minerals. First, the value of the minerals may be taken at the pit mouth, allowing for the expenses of bringing to bank, but not for the expenses of winning; or, secondly, the value may be taken with an allowance for both winning and raising. These methods were first applied in England, and arose from distinctions between law and equity. On that account they have been regarded as not applicable to Scotch law (see Ld. Stormonth Darling in *Davidson's Trs.*, 1895, 23 R. 45). The English Courts have recognised a wide distinction between abstraction which takes place in good faith and that which is theftuous and done under cover of fraud. Accordingly, when abstraction has been effected through pure inadvertence (*Hilton*, 1867, 4 Eq. 432), under a *bonâ fide* belief of title (*Jegon*, 1871, 6 Ch. 742), fairly and honestly (*Wood*, 1841, 3 Q. B. 440), under a mere mistake (*Livingstone, cit.*; *United Merthyr Co.*, 1872, 15 Eq. 46), the trespasser is allowed both the cost of severance and the cost of bringing to bank (*Trotter*, 1879, 13 Ch. D. 574). Where, however, the abstraction has been fraudulent (*Ecclesiastical Comms.*, 1877, 4 Ch. D. 845), negligent (*Wood, cit.*), wilful (*Martin*, 1839, 5 M. & W. 352; *Taylor*, 1886, 33 Ch. D. 226), unlawful (*Llynvi Co.*, 1870, L. R. 11 Eq. 188), or furtive (*Livingstone*, 1880, 7 R. (H. L.) 1–4), the costs of severance are not allowed to the wrong-doer. But the indemnification an injured party is entitled to in Scotland in such cases is measured strictly according to the loss he has sustained, whether it arise from *bonâ fide* or surreptitious working. And where the amount of damage done is definitely ascertainable, it is valued accordingly. Where a feu of lands extending to 1½ acre was granted, the superior not reserving the minerals (he having reserved the minerals in the surrounding lands and let them to tenants), both the tenants and the superior believed that the minerals in the 1½ acre were included in the mineral lease, and the tenants wrought them out. It was impossible for the superior to have wrought them profitably himself. The superior was found entitled to the value of the minerals to him at the date of abstraction, and this was calculated at the rate of royalty of the surrounding coal (*Livingstone*, 1880, 7 R. (H. L.) 1). The royalty itself was not the measure of the damages, bu only evidence of value (Ld. Blackburn, *ib.* p. 10). And where a railway company had wrongously excavated freestone reserved to the superiors, and done so in the face of their title and after warning, all that the superiors were held entitled to was the market value of the abstracted freestone, less the cost of working. In this case the superiors could not have worked or let the freestone to a profit, and the only market value was that created by the railway company themselves (*Davidson's Trs.*, 1895, 23 R. 45).

The Mining Code.

The Railway Clauses Consolidation Act and The Water Works Clauses Acts give the promoters of the undertaking power of acquiring lands for the construction of their works, and these Statutes contain important provisions with respect to the mines lying under or near the railway or canal. These relate to purchase, compensation for not working, mining communications, compensation for injury done to mines, damages for severance, and right of inspection. These two Statutes constitute what is known as the Mining Code, and may conveniently be considered together. The effect of some of these provisions is to invert the principles of the common law. The meaning of the words "mines" and "minerals" under these Acts has been considered, and been held to apply to everything except the agricultural surface (*Checkley*, 1867, 4 L. R. Eq. 19), and would thus include sand, gravel, etc. This meaning has been curtailed by the introduction of the idea of profitable working (*Hext*, 1872, L. R. 7 Ch. App. 699): and the context in many cases limits the meaning of these terms. [See Mineral and meaning of mine, *supra*; as to shale, see *E. Hopetoun*, 1893, 20 R. 704.]

Purchase.—The first common-law principle inverted by the Code is that a conveyance of land includes everything *ad centrum*. By sec. 70 the company shall not be entitled to any mines of coal, ironstone, slate (*Jones*, 1879, 4 Ex. D. 97), or other minerals under any land purchased by them, excepting only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and such mines shall be deemed excepted out of the conveyance unless expressly named and conveyed. It is to be observed that purchasers under the Lands Clauses Consolidation Act are in this respect in a different case. There the ordinary common-law rights obtain, and a purchase of lands includes the mines (*Clayton*, 1838, 11 Q. B. D. 820, 823). The words "necessary to be dug" may entitle a company who carry an embankment over one person's land to construct an embankment on the land of another person (*Loosemore*, 1882, 22 Ch. D. 33), but they do not permit a company to work a bed of freestone under the lands by means of an open quarry, and use it in constructing authorised work not situated on the ground purchased (*Jamieson*, 1868, 6 S. L. R. 188). What is necessary for the permanent safety of the line is part of its construction (*Nisbet Hamilton*, 1886, 13 R. 454, where it was held that the company were entitled to all the mineral in the lands conveyed to them down to foundation-level (see *E. Hopetoun*, 1893, 20 R. 704–710)).

The company's power of purchase extends to cases where the mines and the surface are held by different owners (*Errington*, 1882, 19 Ch. D. 559); and the fact that the provisions may apply does not detract from their power to purchase the mines (*Cartwright*, 1879, 11 Ch. D. 421; *Hooper*, 1877, 3 Q. B. D. 258; 1880, 5 App. Ca. 1, 23, 24). The words "expressly purchased" do not refer to purchases by agreement only, but include compulsory purchase (*Errington, cit.* 569). Another principle inverted by the Code is that a conveyance of land implies warrandice that the grantor shall do nothing to render the land unfit for the purpose for which it is sold: a principle which deprives the owner of reserved minerals of the right to work them to the detriment of the surface (*Sprot*, 1856, 2 Macq. 449; *Gt. Western Rwy.* 1867, 2 L. R. E. & I. App. 27–40; *Caledonian Rwy.*, 1857, 3 Macq. 56; *Wakefield*, 1866, 4 Eq. 613; *Elliot*, 1863, 10 H. L. C. 333; comp. *Cibber Brick Co.*, [1894] 2 Ch. 157; *Checkley, cit.*). The effect of secs. 71, 72 is to deprive the railway of their common-law rights, and to substitute a

power of purchase, and of preventing the working of the minerals if not purchased by payment of compensation (see also *Dudley Canal*, 1830, 1 B. & Ad. 59; *Ackroyd*, 1862, 31 L. J. Ch. 588). Hence if the company refuse to purchase or make compensation, the mineral-owner may work even though he bring down the surface (*Fletcher*, 1859, 28 L. J. Ex. 147; 29 *ib.* 253); and in such a case the company has no claim if the working has been proper (*Gt. Western Rwy., cit.*; *Dudley Canal Co.*, 1830, 1 B. & Ad. 59). Nor is such a case affected by a provision in a special Act, that minerals are to be worked so that "no injury shall be done," this meaning that no *unnecessary* injury shall be done by improper working (*Stourbridge Canal Co.*, 1860, 30 L. J. Q. B. 108; *Swindell*, 1860, 29 L. J. C. P. 364). The scheme of the provisions is that the owner of any subjacent mineral not purchased by the company may lawfully get his mineral by proper working, whatever the company may have bought, subject only to the due protection of the works of the undertaking; and if and in so far as such due protection prevents his getting his minerals, or renders it more costly, he is to be compensated when the time comes for working under or near the railway work arrives, and not before (Kennedy, J., in *Gerard*, [1894] 2 Q. B. 915, 922).

On a sale of lands with subjacent minerals as "superfluous land," the purchaser has no higher right than the company, and cannot maintain an action for damage to the surface by withdrawal of support (*Pountney*, 1883, L. R. 11 Q. B. D. 820). And where a proprietor conveyed to a railway company "the perpetual servitude and right to occupy and use so much" of certain ground "as is at present used and occupied by the piers or pillars of their viaduct," the private Act containing provisions similar to that of the Act of 1845 respecting minerals, it was held that the company's right was subject to the same conditions in regard to payment of compensation for minerals as a statutory conveyance in ordinary form (*Caledonian Rwy.*, 1876, 4 R. 140). Where a private Act is silent as to compensation for the exercise of powers to stop mineral workings, the Court is slow to enforce payment of compensation under a section making it payable for damage arising in the future (*Leeds Rwy.*, 1831, 3 Ad. & E. 683; *Aire Navigation Co.*, 1861, 30 L. J. Q. B. 337; *Gt. Laxey Mining Co.*, 1878, 4 App. Ca. 115).

Compensation for not Working.—If one in right of minerals under a railway or canal, or within 40 yards thereof, desires at any time to work them, he is to give 30 days' notice of his intention to the railway company. If the company desire that these minerals or any part of them should remain unworked, they shall give notice of such desire, and offer to make compensation for leaving them unworked. In such a case the "owner, lessee, or occupier" is deprived of the right to work them, and the company is under obligation to make compensation for them and for "all loss and damage occasioned by the non-working thereof: which may be settled by agreement, or, as in other cases of disputed compensation" (s. 71; *R.* v. *L. & N. W. Rwy. Co.*, [1894] 2 Q. B. 512). It is the person presently entitled to work the mine who can give notice of intention to work (*Miles*, 1886, 33 Ch. D. 632). There must be *bonâ fide* intention to work by the owner or those in his right, but not necessarily by the owner himself (*Robinson*, 1889, 15 App. Ca. 19; *Bain*, 1893, 31 S. L. R. 98). A notice of intention to work would not be considered invalid because it embraced minerals upon a long extent of railway (*Robinson, cit.*). Different minerals may require separate compensation (*Smith*, 1877, 3 App. Ca. 165–182). Compensation is only due when the time arrives for working the mineral (*Gerard*, [1894] 2 Q. B. 915; [1895] 1 Q. B. 459). Sec. 71 must be read

along with sec. 6, which provides for compensation to owners of lands injuriously affected. Hence the case of a lease falls under sec. 71, and that of an owner or reversioner under sec. 6 (*Smith, cit.*). It is not the intention of the Legislature that compensation be paid twice over (*Smith, cit.*). As to canal, see *Halliday*, [1891] App. Ca. 81. There is no time fixed for counter notice by the company to pay for minerals unwrought. They may do this whenever they find it necessary or desirable (*Dixons*, 7 R. (H. L.) 116). A mine-owner having given notice, does not lose his right to compensation by afterwards proceeding to work (*Dixons, cit.*); such working only entitles the company to damages, or interdict, or reduction in amount of compensation (*Swindell*, 1860, 9 C. B., N. S., 241–279). The mere fact that the usual mode of working surface minerals is by open workings does not entitle a company to prevent them being wrought by underground workings (*Haunchwood*, 1882, 20 Ch. D. 552–560; *Ruabon Brick Co.*, [1893] 1 Ch. 427). The distinction between the right to compensation and the right to sue for damages was brought out in *Bagnall*, 1862, 7 H. & N. 423.

Mining Communications.—When the company have prevented the working of minerals, air-ways and water-levels may still be cut through them, but only so as not to injure the line (s. 73). This section applies to mines lying more than 40 yards from the railway, and enables an owner to tunnel under the line when his access to minerals on the other side of it have been cut off by the company's preventing the working, and paying compensation. And it has been read as signifying that "prevention as aforesaid" applies to the case of a company who have purchased lands subsequently giving notice of purchase of minerals thereunder (*Midland Rwy.*, 1885, L. R. 30 Ch. D. 634). By sec. 74 such an owner is entitled to compensation for increased expenditure on account of his having to tunnel, his right of working upon or over the line having been cut off (*Midland Rwy., cit.*). It is only the owner, lessee, or occupier of land who can in these circumstances so connect his mines by tunnelling—one having a right of way only cannot do so; but if the owner, lessee, or occupier has established a lawful communication, he may work by open working if such be the proper and usual mode of working (*Miles*, 1886, L. R. 33 Ch. D. 632; and see *Nimmo*, 1895, 2 S. L. T. 538).

Severance Preventing Continuous Working.—In addition to the provisions giving the company power to stop working *in toto*, as dangerous to the railway line, sec. 74 provides for payment of compensation to one in right of minerals extending on both sides of the line, which, though capable of being worked on either side of the line, cannot be worked continuously. In such a case the company is bound to compensate the owner or lessee "from time to time" for all additional expense or loss arising from interruption of continuous working, or from the restrictions imposed so as to secure the line from injury. Under additional expenses there have been included the expense of sinking a new pit, of a new engine and shaft, the expense of working it during the time that it would be an extra expense, and the price of additional land for depositing soil (*Whitehouse*, 1869, L. R. 5 Ex. 6; *Cutts*, 1848, 5 Rail. C. 442). In another case the expenses of having to work by tunnelling were allowed (*Miles*, 1886, 33 Ch. D. 632). Baron Cleasby indicated the opinion that extra expenses should be allowed by an arbiter if they were necessarily incurred, and were capable of being immediately estimated (*Whitehouse, cit.* 14). Sec. 74 also provides for the case of compensation for minerals "not purchased by the railway company, which cannot be obtained by reason of making and maintaining

the railway." There is no provision as to notice of intention to work these, as occurs in sec. 71, which deals with minerals the owner is "desirous of working." Hence the owner does not need to give such notice to the company under sec. 74 to preserve his right to compensation (*Glasgow, etc. Ruy. Co.*, 1848, 11 D. 327). Under this section the mine-owner has been held entitled to profits (*Barnsley Canal Co.*, 1844, 13 L. J. Ch. 434). Purchase by the railway, not of land, but of the right to tunnel, places the parties in the same position *quoad* the minerals as if there had been a purchase of land (*Ackroyd*, 1862, 31 L. J. Ch. 588; *Crossland*, 1862, 32 L. J. Ch. 353). In a case in which compensation and prospective damage were claimed under the similar clauses in the Water Works Clauses Act, Ld. Watson was of opinion that compensation was to be made as often as in the course of working, and after there has been an opportunity of examining the workings, the undertakers notify their desire that the minerals shall be left unworked. Explaining sec. 27, which saves the undertakers' liability to action, he said it "was not meant to supersede the other clauses of the Act in cases where a full remedy is provided by these clauses, but was intended to cover every case of injury to mineral workings in which the mine-owner would otherwise have been deprived of his remedy. . . . Injury is done to the mine by the reservoir whenever, in due course of working, the minerals or part of them become either unworkable to profit or altogether unworkable by reason of the flooding which must accompany the working" (*Holliday*, [1891] App. Ca. 81. As to considerations in estimating the amount of compensation, see also *Bidder*, 1878, 4 Q. B. D. 412, 419, 432).

Right of Inspection.—The company is given power to enter and inspect the mines and make use of the mining machinery for the purpose of ascertaining whether, in the working, sufficient support is left for the railway. If it appear that the mines are being worked contrary to the Act, the company may compel the mine-owner to take all necessary steps for the protection of the railway.

Water in Mines.—A lower stratum is bound to receive water from a higher without the constitution of any servitude; but as this right may be overstretched in the use of it without necessity to the prejudice of the inferior ground, it is an arbitrary question how far it may be extended (*Campbell*, 1864, 3 M. 254). An upper heritor may make what use he pleases of surface water so long as he is making the natural use of his land (*Chalmers*, 1876, 3 R. 461–467). But he is not entitled to lead the water by drains so as to place upon his neighbour's field what would not naturally have reached it (*Montgomerie*, 1853, 15 D. 853); nor can he drain it into his neighbour's mine either by raising the surface of the land (*Hurdman*, 1878, 3 C. P. D. 168), or by obstructing an artificial watercourse (*Roberts*, 1864, 3 H. & C. 162), or by opening sluices in his dykes (*Whalley*, 1884, 13 Q. B. D. 131). If the result of draining be to flood a neighbouring mine, no liability will ensue therefor if it can be shown that the mining operations were carried on in good faith, truly for the benefit of the estate, and in the ordinary administration thereof (*Campbell, cit.*; *Rawstron*, 1855, 11 Ex. 369; *Broadbent*, 1856, 11 Ex. 602; *Murdoch*, 1881, 8 R. 855). When underground water exists naturally in a mine (it may be private property, *Blair*, 1870, 9 M. 204), a mine-owner is entitled to get rid of it the best way he can, except that he may not be allowed, in peculiar circumstances, to throw more water down into a common stream than has hitherto flowed into it

(Ld. J. C. Hope, *Irving*, 1856, 18 D. 833, 842); but he cannot pump it up and discharge it on the surface without consent of the surface-owner (*Turner*, 1832, 10 S. 415). Water is a common enemy, against which each man must defend himself (*Smith*, 1849, 7 C. B. 515–566), and no liability attaches to the escape of water by gravitation As each proprietor's right to work minerals extends to his march, if a coterminous proprietor is apprehensive of danger from an influx of water from an adjoining property it is his duty to leave a barrier unworked to protect himself therefrom (*Harvey*, 1824, 3 S. 322; *Durham*, 1871, 9 M. 474–479; see also Ld. Chan. Campbell in *Scots Mining Co.*, 1859, 31 Sc. Jur. 571, 576, and *Baird*, 1862, 24 D. 1418). If a man digs a well, and his neighbour, whose land is on a lower level, afterwards opens a mine and the water flows into it, the owner of the well incurs no liability (*Rylands*, 1868, L. R. 3 H. L. 338; for the converse case, *Acton*, 1843, 12 M. & W. 324). And if the workings of a mine-owner on a higher level are proper and usual, he is not liable for the descent of gravitation water into a lower mine (*Wilson*, 1876, 3 R. 288; affd. 4 R. (H. L.) 29; see Ld. Pres. Robertson in *Young*, 1892, 19 R. 1083). But if he work in an extraordinary way, or increase the burden on the owner to the dip by negligent working, he will be liable (*Durham, cit.*; *Firmstone*, 1844, 13 L. J. Ex. 361). And if he pump water from a lower part of his mine to a higher, and cause it to flow into his neighbour's mine, which would not otherwise have received it by gravitation, he incurs liability (*Baird*, 1858, 15 C. B., N. S., 376). An upper mine-owner is not entitled to conduct water to the weak part of his neighbour's mine, and shelter himself behind the plea that he should have left a barrier (*Clayton*, 1867, 36 L. J. Ch. 476–478). If the burden of water be thus suddenly increased, the lower heritor is entitled to protect himself by down-casts filled with clay from the inroad of infiltrating water through a porous barrier, even though the result be to cause water to collect in the upper heritor's mine (*Hope*, 1779, Mor. 14538). The removal of the surface by a higher owner, if contrary to the usual practice of mining, may be such an improper working as to give the injured party a remedy, but not on the mere ground that it is a breach of contract entered into between the higher owner and a third party (*Wilsons*, 4 R. (H. L.) 29–31). But though a lower proprietor may prevent an upper heritor from discharging water on his land, he cannot hinder him from making an open cast in the upper land to drive a level to his coal, on the pretence that such a collection of water might be hurtful to him, nor can he stop the natural course of the water from going through his lower grounds (*Aitken*, 1734, Elchies, *voce* "Property," No. 1). One bringing on his land water which would not have been there naturally, does so at his peril, and is *primâ facie* liable for injury due to its escape (*Ker*, 1857, 20 D. 298; *Rylands*, 1868, L. R. 3 H. L. 330). This rule, however, does not apply in the case of statutory powers (*Dunn*, 1872, L. R. 7 Q. B. 244–259); except those authorised are guilty of negligence (*Whitehouse*, 1861, 30 L. J. C. P. 305). In one case the question was raised whether a coal-owner to the rise is entitled to pierce a slip-dyke which, situated well within his march, had long prevented accumulated water from descending through his workings into his neighbour's mine to the dip, which was not protected by a barrier (*Baird*, 1862, 24 D. 1418; see also *Scots Mines Co.*, 31 Sc. Jur. 571). The question of right was not decided; but a bill for interim interdict was passed, which it would not, had the act not been one in the ordinary course of mining (*Baird, cit.* 1427; *Shaw*, 1858, 2 H. & N. 858, explained in *Harrison*, [1891] 2 Q. B. 680; see also *Clayton*, 1867, 36 L. J. Ch. 476).

Support.—Support, lateral or vertical (*Caledonian Rwy.*, 1856, 2 Macq. 449), is due land whether in its natural state or when encumbered with buildings or weakened by excavation, and it exists equally as between different strata, and as between the surface and immediately subjacent or adjacent strata (*Mundy*, 1882, 23 Ch. D. 81, 89–96; *White*, 1883, 10 R. (H. L.) 45–47). It is of the nature of a natural right when land is in its natural state (*Humphries*, 1848, 12 Q. B. 739; *Birmingham*, 1877, 6 Ch. D. 287; *Dalton*, 1881, 6 App. Ca. 740), and is absolute (*Wakefield*, 1867, L. R. 4 Eq. 613). It is independent of the character of the substance affording it (*Caledonian Rwy., cit.*; *Bald*, 1854, 16 D. 870), and must be afforded though the minerals have to be left unwrought (Malins, V. C., in *Wakefield, cit.*), and it is not affected by the fact that workings injurious to it have been conducted with reasonable skill (*Hunt*, 1860, John. 710), or according to the custom of the district (*Roberts*, 1856, 6 El. & Bl. 643; *Davis*, 1881, 6 App. Ca. 460), nor will the fact that reasonably strong props have been substituted relieve the excavator (*Darley Main Colliery*, 1886, 11 App. Ca. 127). When land is in a non-natural state the right is of the nature of a servitude, and must, like other servitudes, be constituted by grant, express or implied. In an ordinary conveyance of land, if there be no provision with respect to support, the right to it passes as an ordinary incident to the grantee (*Caledonian Rwy., cit.*; *Buchanan*, 1873, 11 M. (H. L.) 13), and that whether the grant be made in fee-simple or by way of lease (*Hurlet Alum Co.*, 1850, 12 D. 704; affd. 7 B. App. 100), by an instrument of severance granting lands and excepting the minerals (*Caledonian Rwy., cit.*; *Buchanan, cit.*), by a grant of mines excepting the surface (*White's Trs., cit.* 1887, 14 R. 597), or by a grant of mines with an exception of underlying mines (*Mundy, cit.*). When land is in a non-natural state the servitude right still remains for such support as it would have required if left in its natural state (*Neill's Trs.*, 1880, 7 R. 741; *Brown*, 1859, 4 H. & N. 186). The owner of subjacent lands is not entitled to prevent the owner of the surface from erecting buildings on the plea of these being an addition to his burden of support (*Dunlop's Trs.*, 20 June 1809, F. C.). But the right to support may be effectually excluded by apt words in the instrument of severance (*Buchanan, cit.*; *White, cit.*), or even by implication. A power of working either by stoop and room or long-wall, or otherwise as the tenant should find it to his advantage, entitles him to work it so as inevitably to bring down the surface (*Muirhead*, 1854, 16 D. 1106); and where a tenant takes out natural support, such as water, and substitutes artificial support, he will be liable (*Bald*, 1854, 16 D. 870). Similarly, in a question between two tenants, where a lease of a particular mineral, existing along with other minerals in the same mine, gives a tenant a right of working it in the most profitable manner for himself, he can so work it as to prejudice the right of a tenant of the other minerals under a lease entered into subsequently to his own (*Hurlet Alum Co.*, 1850, 12 D. 504; affd. 7 Bell's App. 100). Where a right of support has been excluded, an adjoining owner may be liable if he does injury to support by working negligently or maliciously, or contrary to the custom of the country (*Buchanan, cit.*; *Eadon*, 1872, L. R. Ex. 393; *Wilson*, 1856, 6 El. & Bl. 593). A clause binding a superior to pay the damage a feuar "should happen to sustain through leading or setting down shanks" was held not to import a discharge of the common-law right to reparation for damage caused by subsidence (*Bain*, 1867, 6 M. 1). An agreement by a lessee to work in the most usual and approved way, "according to the custom of the district," and compliance therewith, does not release him from liability

for withdrawing support if on other grounds he would have been liable (*Buchanan, cit.*). A deed which would otherwise be construed as excluding the right of support will not be construed as preserving it on the mere ground that it requires the minerals to be properly worked (*Buchanan, cit.*; *Bank of Scotland*, 1891, 18 R. 957). Surface-damage clauses have been held as covering damage to the surface caused by withdrawal of support (*Neill's Trs.*, 1880, 7 R. 741; *White's Trs.*, 1887, 14 R. 597). One cannot transmit a greater right to interfere with support than he presently possesses (*White's Trs., cit.*). Where a feu-disposition conveying a coalfield to three parties contained a condition that they and their heirs and disponees should pay for surface damages, it was held that singular successors were each liable for the damage occasioned by his own workings, and not for damage occasioned by the workings of former predecessors (*Baird's Trs.*, 1851, 13 D. 982); and where a proprietor let minerals underneath his estate with powers to sink pits, etc., and thereafter, during the currency of the lease, granted a feu of a piece of land, reserving the minerals, he paying all damages the feuar should sustain by the working, but declaring that should the minerals be let by him recourse should be had against the lessees, and not against him, it was held that this proviso applied to future leases only, and not to the existing lease (*Hamilton*, 1867, 5 M. 1086).

Between mineral-tenant and surface-owner, independent of lease or contract, the maxim *sic utere tuo ut alienum non lædas* applies (*Dunlop's Trs.*, 20 June 1809, F. C.). The mineral worker must use all reasonable precautions not to bring down the surface; and where the surface-owner is himself the seller of the minerals, he is not restrained from building, although no buildings may have existed at the time when the mineral lease was entered into. He is not, on the one hand, entitled so to occupy the ground by building large factories or towns so as to prevent the tenant from working with any profit; but the mineral tenant, on the other hand, must not restrain him beyond what is reasonable, and must use every care to protect his property from injury, whether it still remains an agricultural subject or is occupied by buildings (Ld. Pres. Inglis in *Hamilton*, 1867, 5 M. 1086, 1095; see Ld. Young in *Waddell*, 1890, 17 R. 1077, 1081 *et seq.*, and Ld. Adam in *Bank of Scotland*, 1891, 18 R. 957, 966). Mere damage from withdrawal of support gives no right of action: it is only when removal of support is wrongful that *damnum* and *injuria* combine and a ground of action arises (Ld. Selborne in *Buchanan, cit.*, 11 M. (H. L.) 13, 19; see *Thomson*, 1842, 5 D. 377; *Rankin*, 1847, 9 D. 1048; *Nisbett*, 1852, 14 D. 973); and the wrong-doer becomes liable for all the injurious consequences of his wrongful act, both past and present, and, as regards the same subsidence, future also (*Bonomi*, 1859, 9 H. L. C. 503). But a distinct subsequent subsidence, though arising from the same excavation, creates a new cause of action (*Darley Main Colliery*, 1886, L. R. 14 Q. B. D. 125, 11 App. Ca. 127; *Crombie*, [1891] 1 Q. B. 503).

[Ross Stewart on *Mines and Minerals.*]

See SUPPORT.

Minister.—There is no branch of Church law which does not touch directly upon the rights or duties of the clergy, and accordingly, as these matters are dealt with elsewhere throughout this work, there do not remain materials for any lengthy exposition of the subject in a separate article devoted to the ministerial office. Reference may be made to the articles upon different ecclesiastical and parochial topics.

Under the Patronage Abolition Act of 1874 every parish minister in Scotland is elected by the congregation of the parish church. It is thereby provided that—

"The right of electing and appointing ministers to vacant churches and parishes in Scotland is hereby declared to be vested in the congregations of such vacant churches and parishes respectively, subject to such regulations in regard to the mode of naming and proposing such ministers by means of a committee chosen by the congregation, and of conducting the election, and of making the appointment by the congregation, as may from time to time be passed by the General Assembly of the Church of Scotland: Provided always that, with respect to the admission and settlement of ministers appointed in terms of this Act, nothing herein contained shall affect or prejudice the right of the said Church, in the exercise of its undoubted powers, to try the qualifications of persons appointed to vacant parishes; and the Courts of the said Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church or parish of any person as minister thereof. The ministers appointed, admitted, and settled in terms of this Act are hereby declared to have in all respects the same rights, privileges, and duties which belong to or are incumbent on the ministers of the said Church."

By the 7th section of the Act it is provided that where the congregation fail to elect within six months of the occurrence of a vacancy, the appointment is to accrue to the Presbytery *tanquam jure devoluto*. This subject is discussed under the article JUS DEVOLUTUM.

A number of questions have arisen since the date of the Act with reference to the election and admission of ministers, but these have been settled by the Church Courts, except in certain cases under the *jus devolutum* provision, as explained in the article under that head.

After his election a minister must pass certain trials before the Presbytery, who may either reject him as unqualified or else sustain his trials and proceed to ordination, if he be not already an ordained person.

Induction.—The minister-elect is required to sign the Confession of Faith, and the formula thereto attached. Induction is the step which vests the minister with the benefice. A learned disquisition upon the subject of induction by the late Ld. Pres. Inglis will be found in the report of the case *Hastie* (16 R. 715). Except in the case of missionaries, the law and practice of the Church forbids the conferring of orders except upon someone appointed to a definite charge. A licentiate is simply a layman with a licence to preach, he is not a minister of the Church of Scotland, and the ascription to him of the title of reverend is merely a matter of courtesy.

The ministerial office and any benefice to which the minister may have been inducted are held *ad vitam aut culpam*. The Church Courts cannot deprive a minister of his office, or extrude him from his parish, except under the forms of process. Nor can they deprive him of his living, without depriving him of his ministerial office, by a sentence of deposition. They may, however, suspend him from the exercise of the duties of his office for a longer or shorter period; and during the term of suspension, if it be for a specified period, they may assign to a *locum tenens* a sum not exceeding one-half of the emoluments of the parish (26 & 27 Vict. c. 47, s. 3). The sentence, duly intimated to the titulars, is equivalent to a legal assignation by the minister of the proportion of the stipend specified.

Ministers are bound to reside within their parishes and to discharge personally the duties of their office, and a minister may be deposed for desertion or inefficiency. Pluralities are forbidden by the law of the

Church; and a minister appointed to a University chair must resign his ministerial charge, and the like in the converse case.

Under the Statute last above cited, which is known as the Belhaven Act, provision is made whereby, when a parish minister becomes of unsound mind, the Presbytery may appoint an assistant to discharge the duties of the ministerial office, and may assign to him a sum not exceeding one-half of the emoluments of the benefice.

The minister has free entry to the church for divine worship, and the control of the order and manner in which the services are conducted. He is the custodier of the baptismal and communion vessels and furniture, and is responsible for their safe keeping. He has the sole right of officiating at the public divine services in connection with the National Church, and except with his consent, or by order of the Presbytery or some superior Ecclesiastical Court, no other minister of the Established Church is entitled to officiate at such service in his parish, or to administer ordinances therein.

A minister of the Established Church cannot be a member of any civil judicatory, or a member of Parliament (Mair, 73).

A parish minister may act as a notary, for the purpose of subscribing a will, in his own parish. He is exempt from poor-rate for his manse and glebe, but he is liable in school-rate and other assessments.

The minister is moderator of his own kirk session, and he is a constituent member of the Presbytery and the Synod, and is eligible for election by the Presbytery as a commissioner to the General Assembly. He cannot, however, be elected as a commissioner for any other Presbytery, or as an elder to represent a royal burgh.

The rights of the minister of a Dissenting Church against his denomination or those who represent it are matters of civil contract, and have been so treated by the Court in a number of cases (*M'Millan*, 1859–1862, 22 D. 290, 24 D. 1282, 2 M. 1444; *Skerret*, 1896, 23 R. 468; *Brook*, 1893, 20 R. 470, 20 R. (H. L.) 104).

Ministers of religion, whether of the Established or of Dissenting Churches, are exempt from the duty of serving upon juries.

[Mair, *Digest*; Duncan, *Parochial Ecclesiastical Law*; Black, *Parochial Ecclesiastical Law*; Innes on *Creeds*.]

Minister's Man, known otherwise as *beadle*. This functionary is the church officer, and he generally discharges all the duties of doorkeeper, session officer, verger, sacristan, and sexton. The law with reference to this office is somewhat uncertain. The heritors, or in burghal parishes the magistrates, have undoubtedly the right to appoint the doorkeeper (the *ostiarius* of the Mediæval Church). But apparently it is not necessary that the kirk session should employ the same person as their officer, or as verger or sacristan, although in practice they generally do so. Whilst the heritors appoint the doorkeeper, apart from special arrangement or custom they are apparently under no obligation to pay him any salary. It does not appear that, in so far as he is the doorkeeper appointed by the heritors, the beadle has any claim for remuneration against the kirk session (unless it be for fees immemorially in use to be paid on the occasion of marriages and baptisms). On the other hand, in so far as the beadle is in the employment of the kirk session as their officer and as verger, etc., his claim for remuneration appears to rest on the ordinary principles of employment, either contract or *quantum meruit*. The tenure of the office, whether under the heritors or the kirk session, is at the pleasure of his

employers. The duties of the beadle, who, as is the almost universal practice, at least in country parishes, holds the full office, are multifarious. He has charge of the keys of the church, and it is his duty to open it upon all necessary occasions, and to close it again. He is also responsible, with or without assistance, as may be arranged, for the heating, cleaning, and lighting of the church, and frequently, though not always, for the bell-ringing. It is his duty to attend the minister in the vestry, both before and after public worship; to carry the Bible and Psalm-Book to the pulpit, and to remove them to the vestry after service; to allow egress to any person taken ill during service, and, in so far as possible, to attend to his wants; to provide water and lay out napkins for baptisms; to assist in arranging the communion table and in other arrangements for celebration of communion; to take charge of the moveable furnishings of the church. The beadle is also officer of the kirk session, and in that capacity discharges, when required, the ordinary duties of the officer of an ecclesiastical Court. He is also generally sexton, and has charge of grave-digging and other arrangements at the ground in connection with burials (Duncan, 689–694: Black, 167, 168).

Minor.—A minor, speaking generally, is a person under the age of twenty-one years. In a stricter sense, the term signifies a minor *pubes*,—an individual between pupillarity and majority,—that is, if a female, between the age of twelve and twenty-one years, and, if a male, between fourteen and twenty-one years complete. While the law holds minors, in the limited sense, capable of consent, and in many cases as fit to act as those who are *sui juris*, they are nevertheless treated as of inferior discretion and judgment, and specially entitled to protection. The position, rights, and powers of a minor *under guardianship* have been treated under the title of Curator (*q.v.*); see also Choosing Curators. It is proposed here to consider the position (1) of minors who have no curators; (2) of minors who, having curators, act without their consent; (3) the acts which a minor cannot effectually do even with the consent of curators; and (4) the privileges of minors.

Minors without Curators.

1. *Powers.*—Minors *puberes* are by the law of Scotland held capable of managing their own affairs without the authority or assistance of any third party; their deeds are as valid as those of majors, except that they may be reduced on the ground of *minority* and *lesion* within four years after majority (*see infra*) (Stair, i. 6. 32; Ersk. i. 7. 33; Ersk. *Prin.* i. 7. 6; Bell, *Prin.* s. 2088 *et seq*; *Harvey*, 1860, 22 D. 1208, Ld. J.-C. Inglis; *Hill*, 1879, 7 R. 68). Subject to this qualification, a minor without guardians may *inter alia*: "(1) Enter into marriage (Ersk. i. 7. 33; see *Cooper*, 1885, 12 R. 473), or other contracts (*Blythman*, 1649, 1 Bro. Supp. 405; *Wilkie*, 1834, 12 S. 506; *Argo*, 1853, 1 Irv. 250, Ld. J.-C. Hope); (2) become a partner of a company (*Duneanson*, 1715, Mor. 8928; *Hill*, 1879, 7 R. 68); (3) present to a church (Ersk. i. 7. 33, note); (4) grant bills, bonds, or other personal obligations (*Craig*, 1732, Mor. 9035; *Waddell*, 18 Jan. 1812, F. C.; *Campbell*, 1822, 1 S. 266; *Crawford*, 1827, 2 W. & S. 608); (5) borrow money and dispone his property in security of the payment (*Dempster*, 1837, 15 S. 364); (6) let his heritage on lease (Ersk. i. 7. 33; *Thomson*, 1666, Mor. 8982); (7) uplift his rents and interests (Ersk., *supra*); (8) be the petitioning creditor in a sequestration, or be himself rendered bankrupt

and sequestrated (*Miller*, 1840, 2 D. 1112); (9) sell his property, heritable and moveable, by his own deed, without judicial authority or the consent of his friends (Stair, i. 6. 44; Ersk. i. 7. 33; *Clark's Crs.*, 1699, Mor. 3668; *Thomson*, 1666, Mor. 8982); (10) institute or defend actions in his own name, but in such a case a curator *ad litem* will be forced upon him if he appear in the suit, but not if he do not enter appearance (see CURATOR *ad litem*; as to entails, see ENTAIL and CURATOR). He may also obtain decree of *cessio bonorum* (*Gray*, 1816, Hume, 411); make a testament (Ersk., *supra*); renounce a succession to which he is heir (*A. v. B.*, 1631, Mor. 8969; see, however, the Conveyancing (Scotland) Act, 1874, s. 12); gift all his moveable property to whomsoever he may please (Ersk., *supra*; *Kincaid*, 1561, Mor. 8979); and incur a passive title by *vitious intromission*, which neither a pupil nor his tutor can (*M'Eachern*, 1833, 11 S. 441)" (Fraser, *P. & C.* 336).

Although a minor may test on moveables, and dispose of his heritage for onerous causes, it is well settled that he cannot, even with consent of curators, alter the course of succession to his *heritage* by testing upon it (*Cunynghame*, 1797, Mor. 8966; Ersk. i. 7. 33), or gratuitously conveying it away, to the exclusion of his heir-at-law (*M'Culloch*, 1731, Mor. 8965; see *infra*, p. 360). It has also been held, that when moveable debts have been conveyed to a minor, with a substitution to near relatives of the granter, the minor is prohibited from altering the substitution (*Yorkston*, 1697, Mor. 8950; *Waddell*, 1739, Mor. 8965). The above-mentioned rule, however, has been said not to apply to subjects heritable merely *destinatione* (*Brand's Trs.*, 1874, 2 R. 258, 271), nor to the proceeds of heritage sold by a factor *loco tutoris* in virtue of special powers (*Brown*, 1897, 24 R. 962); and it seems clear that a minor may alter the succession to his heritage by an onerous transaction short of sale, such as a marriage contract (*Muirhead*, 1724, Mor. 8955).

Questions have been raised whether a minor without curators can compel his debtor to pay, without his giving some kind of security to indemnify the debtor (More's *Lect.* i. 110), and the decisions are contradictory (cf. *Watt*, 1697, Mor. 8971, and *Morison*, 1747, Mor. 8972; Mackay, *Pract.* ii. 127). It has been laid down that "no cautious debtor would venture to pay a minor without curator otherwise than *auctore prætore*" (*Hay*, 1749, Mor. 8973); and again, while it has been held that "a payment made to a minor without curators is a valid and effectual payment" (*Koeller*, 1772, Mor. 8975), it has, on the other hand, been subsequently decided that a minor could not uplift a principal sum without curators or judicial sanction, though he might uplift the interests and profits (*Kirkman*, 1782, Mor. 8977). As a party paying money to a minor must show, in the event of an action of reduction, that it was employed *in rem versum* of the minor, the safe rule "would be, never to pay without authority of the Court, which might be done under suspension of a threatened charge" (*Kirkman*, 1782, Mor. 8977; *Thomson*, 1666, Mor. 8982; *Ruthven*, 1672, Mor. 31), or unless a guardian is appointed to concur in the discharge.

In *Collins* (1882, 9 R. 500), *M'Avoy* (1882, 19 S. L. R. 441), *Sharp* (1885, 12 R. 574), the Court (Second Division) appointed guardians *de plano* in the original action to receive damages awarded to *pupil* children; while in *Anderson* (1884, 11 R. 870) (First Division) the Court held that a curator *ad litem* could not discharge a sum of damages, and refused to appoint a factor in the original action. Again, in *Jack* (1886, 14 R. 263) it was held that *minors* could themselves grant a valid discharge for damages paid, the sums being of the nature of alimentary payments, and not capital sums for investment.

Reference may competently be made to the oath of a minor (*Mar*, 1628,

Mor. 8918; *Maitland*, 1623, Mor. 8917), but apparently not where the matter relates to a debt incurred by him when a pupil (*Kinnear*, 1623, Mor. 8918; *Anderson*, 1826, 4 S. 424). Where there are curators, the reference is notwithstanding to the minor's oath (*Forbes*, 1628, Mor. 8920 and 12479; Dickson on *Evidence*, 2nd ed., s. 1407).

A minor may be imprisoned for non-implement of obligations *ad factum præstandum*, and formerly for non-payment of debts (Ersk. i. 7. 47; *Thomson*, 1747, Mor. 8910; *Wilkie*, 1834, 12 S. 506).

For the effect of decrees against a minor generally (*Craig*, 1583, Mor. 8980), and his powers to sue and defend, see CURATOR *ad litem*.

Again, while pupils are in some respects privileged (see PUPIL), minors under the criminal law are liable to the ordinary punishments, even capital.

2. *DISABILITIES.*—A minor is under disability mainly with reference to administrative duties, and cannot exercise any public right or franchise. He cannot, for example, be (1) a town councillor (*Kidd*, 1852, 15 D. 257); (2) trustee on a sequestrated estate (*Threshie*, 30 May 1815, F. C.); (3) a judge in any Court, and undoubtedly could be successfully objected to as arbiter or oversman (Fraser, *P. & C.* 344); (4) a juror (see *Glennan*, 1830, 2 Sc. Jur. 382); (5) a commissioner of supply (see *Hay*, 1735, Mor. 8929), or county councillor,—though it appears he may be a sheriff-clerk depute (*Heddell*, 5 June 1810, F. C.); (6) a tutor, or curator, or judicial factor (Ersk. i. 7. 12; *Montrose*, 1695, 4 Sup. 277), though he may be trustee on a private trust (see *Hill*, 1879, 7 R. 68). He cannot be a Member of Parliament, though, on the legal presumption of majority, he may sit till displaced (7 & 8 Will. III. c. 27, s. 7); nor can he claim to be enrolled as a voter (1681, c. 21; 1707, c. 8; Reform Act, 1868, s. 5; see *Macleod*, 1765, 5 Bro. Supp. 926); but if majority be reached before his qualification is considered in the Registration Court, it is enough (*Campbell*, 1879, 7 R. 32). See FRANCHISE. Various other disabilities are imposed by special Statutes and regulations.

MINORS WITH CURATORS.

POWERS WITHOUT CONSENT OF CURATORS.—1. The general rule is that all *inter vivos* deeds and transactions relative to the minor's estate, heritable or moveable, without the curator's consent, are null and void by way of exception, so far as the minor is concerned (Stair, i. 6. 33; Bankt. i. 7. 56; Ersk. i. 7. 33; see *Stevenson*, 1872, 10 M. 919). The nullity is not limited to the *quadriennium utile* (see *infra*), but may be pleaded during the long prescription (Ersk., *ut supra*; *Robertson*, 1584, Mor. 8980; *Bell*, 1728, Mor. 8985; *Thomson*, 1781, Mor. 8985; *Manuel*, 1853, 15 D. 284). The other party, however, may not plead the nullity, if, the deed being to his own benefit, the minor does not (Stair, Bankt., Ersk., *ut supra*). According to Fountainhall, whose view still prevails (Fraser, 386), the deed, "is an act absolutely null of the law, needs no reduction . . . imports lesion without any other probation" (2 Sup. 626).

The following acts done without the curator's consent have been found *ipso jure* null: "tacks (*Cardross*, 1708, Mor. 8951; rev. Rob. App. 1712, p. 37); bills, bonds, and dispositions or sales (*Hamilton*, 1587, Mor. 8981; *Campbell*, 1731, Mor. 9035; *Kincaid*, 1561, Mor. 8979); contracts (*Thomson*, 1781, Mor. 8985); cautionary obligations (*Watt*, 1724, Mor. 9035; *Drummond*, 1624, Mor. 3465); factories, commissions, or mandates (*Nisbet*, 1737, Elchies, 'Minor,' 5); and other deeds inferring an obligation against the minor's property, such as an obligation to pay money to his sister, constituted by her marriage contract (*Maxwell*, 1632, Mor. 8942; see *Bruce*,

1854, 17 D. 265, and *Cooper*, 1885, 12 R. 473); assignations (*Craig*, 1757, Mor. 8956); service and renunciation as heir (*Simpson*, 1627, Mor. 2729; *Bannatyne*, 1664, 2 Sup. 362); and a payment of a debt made to a minor without the consent of the curator would not be a valid payment, so that the money could again be demanded by the minor and curators from the debtor (Ersk. i. 7. 37; Stair, i. 6. 33; *Cunningham*, 1707, Mor. 16325), unless the latter prove that the money had been applied *de in rem verso* of the minor (*M'Adam*, 1605, Mor. 8939)" (Fraser, 386, 387). A receipt for payment of a debt ought to be signed by both minor and curator, though the money may competently be *paid* over to the latter. An indenture by a minor without consent of his father is thought to be not void, but only voidable on proof of lesion, and the cautioner is held bound (*Stevenson*, 1872, 10 M. 919; cf. *Low*, 1797, Hume, 422; *Kennedy*, 1675, 1 Sup. 747; Ersk. iii. 3. 64). The curators may interpone consent *ex intervallo* (*Learmonth*, 1586, Mor. 16235; see *Tolquhoun*, 1683, Mor. 16305).

2. But the doctrine above stated is not "so absolute as to undergo no qualification" (*Bruce*, 1854, 17 D. 265, per Ld. Ivory).

(1) It would appear that, without consent, a minor may do any act which does not affect the property under the curator's charge (Fraser, 381). He may accordingly choose his own residence (*Harvey*, 1860, 22 D. 1208), and may marry without the curator's (or his father's) consent (Ersk. i. 7. 33; see *Bruce*, 1854, 17 D. 265). He may also test on moveables (Ersk., *ut supra*, and 3. 9. 15; *Yorkston*, 1697, Mor. 8950), and, if no unfair means are used, may bequeath them to his curator (*Yorkston, supra*; *Stevenson*, 1680, Mor. 8949). This right, however, has been denied to the minor whose property, *e.g.* a bond, has been left with a substitution, and under a condition, express or implied, that he was not to alter the destination (*M'Culloch*, 1731, Mor. 8965; *Waddell*, 1739, Mor. 8965; *Yorkston*, 1697, Mor. 8950).

(2) Deeds remuneratory to the minor's advantage are upheld though his curators have not consented, and on this ground a marriage contract has been held a deed not to be set aside except on proof of lesion (*Bruce*, 1854, 17 D. 265; see *Stevenson*, 1872, 10 M. 919, and *Cooper*, 1885, 12 R. 473).

(3) Again, as a minor may become a merchant or tradesman, bills and other documents in the line of his business are usually held valid, though granted by himself alone (*Craig*, 1732, Mor. 8955 and 9035; *Galbraith*, 1676, Mor. 9027, Ersk. i. 7. 38; cf. *Gairdner*, 1636, Mor. 9024; *Corsar*, 1672, Mor. 9026). The minor can have such deeds set aside only on proof of lesion (*M'Donald*, 1789, Mor. 9038): but lesion is presumed in a case of loan, and the *onus* of proving employment *in rem versum* is on the lender.

(4) Further, the minor, by his own conduct, may be barred from pleading the want of his curator's consent as a nullity. Thus, (*a*) if he fraudulently holds himself out as major (*Wemyss*, 1637, Mor. 9025; *Borthwick*, 1681, Mor. 12433), or (*b*) if, looking like a person of full age, he does not inform the other party (*Wilkie*, 1834, 12 S. 506; *M'Michael*, 1840, 3 D. 279 (Ld. Moncreiff)), or (*c*) if he pretends that he has his curator's consent (*Harvie*, 1829, 7 S. 561), the minor's acts, though without consent, are binding. But in *Wilkie's* case (*supra*) it was held that diligence could not be used on the bill granted by the minor.

(5) If the creditor shows that the debt is for necessary furnishings (*Stuart*, 1639, Mor. 8943; *Inglis*, 1631, Mor. 8941; *Scoffier*, 1783, Mor. 8936), or that the money is applied *in rem versum* of the minor, this will obviate the want of curator's consent (*M'Adam*, 1605, Mor. 8939; *Corsar*, 1672, Mor. 8944; *Hamilton*, 1678, Mor. 8949; also *Drummond*, 1627,

Mor. 8939 (teacher's fees); *Brown*, 1629, Mor. 8940 (horse used by minor); *Stark*, 1846, 8 D. 1001 (acts by minor alone)). In transactions of small moment or when no great advantage is to be gained, the Court will not interfere (*Brown*, 1629, Mor. 8940; see Fraser, *P. & C.* 385).

The *effect* of the absence of the curator's consent is that the act is a nullity against the minor, who may set it aside within the long prescription (*Stevenson*, 1872, 10 M. 919; *Thomson*, 1781, Mor. 8985; *Bell*, 1728, Mor. 8985).

Since the minor is able to act for himself, and there is no act, for which urgent necessity can be alleged, which he is not entitled to perform, the Court will not confer special powers on him acting alone or with curators (*Wallace*, 8 March 1817, F. C.; *Morrison*, 1747, Mor. 8972; Bell, *Prin.* s. 2096); and no such powers would prevent a reduction (see *Vere*, 29 Feb. 1804, F. C.; Ersk. i. 7. 17, Ivory's Note).

Deeds which a Minor cannot do with Consent of Curators.

While a minor may alienate heritage *inter vivos* for onerous causes, he cannot, even with consent, alter the succession to his heritable estate by any *gratuitous* deed *inter vivos* or *mortis causa* (Ersk. i. 7. 33). No such consent can render valid a gratuitous alteration of the settlements of his estate (*Marquis of Clydesdale*, 1726, Mor. 8964 and 1265; Rob. App. 1726, 564), or a disposition of heritage *mortis causa* (*Cunynghame*, 1797, Mor. 8966; *Hunter*, 1728, Mor. 8964 (remuneratory donation to brother)). As before stated, the rule does not apply to subjects heritable *destinatione* merely (*Brand's Trs.*, 1874, 2 R. 258, 271; rev. on other points, 3 R. H. L. 16); nor to proceeds of heritage sold by factor *loco tutoris* under special powers (*Brown's Tr.*, 1897, 24 R. 962). The rule does not apply to changes of property from moveable to heritable effected by tutor or curator (Ersk. i. 7. 18 *in fin.*).

It has been held that a minor cannot, even with the consent of his curators, validly discharge debts gratuitously, or make donations (*Salteoats*, 1623, Mor. 8958; *Lockhart*, 1626, Mor. 8958; *M'Culloch*, 1731, Mor. 8965).

Privileges of Minors.

I. Restitution on ground of lesion.

1. *Who Entitled.*—Minors are entitled to certain privileges on account of their youth and partial capacity. One of the most important is their right to be restored within the *quadriennium utile* against deeds granted during minority to their great lesion, though no force, fear, or error exist. The remedy is only necessary in regard to deeds that are valid till reduced, and, accordingly, deeds which are *ipso jure* null, such as those of a pupil, or of a minor without consent of his curators, do not need the aid of this rule of law, and nullity may be pleaded by exception (see Mackay, *Practice*, ii. 127, s. 9, and authorities there). The privilege of reducing deeds to his prejudice is allowed solely on the ground of minority (Mackay, *Practice*, ii. 127), so that ability, education, position of the minor, are of no account (*Dundas*, 1711, Mor. 9034; *Corsar*, 1672, Mor. 8944). When the other conditions exist, the privilege is accorded against deeds (1) by a tutor (Ersk. i. 7. 34); (2) by a minor alone (*Morrison*, 1728, 1 Pat. App. 7; *Thomson*, 1781, Mor. 8985); (3) by a minor with consent (*a*) of curators (Ersk., *supra*; *Munro*, 1735, Elchies, "Minor," 1; *Blantyre*, 1667, Mor. 8991 and 2215; *Harkness*, 1833, 11 S. 760), and (*b*) of father (*Rose*, 1821, 1 S. 154); (4) by a minor wife with husband's consent (*Hamilton*, 1718,

Rob. App. 346; *Gibson*, 6 June 1809, F. C.). These are all reducible on proof of lesion. As to the result where the minor is joint owner of property sold, and seeks to reduce, see Bankt. i. 7. 99; Fraser, 394.

The heirs of the minor who is lesed are entitled to exercise the privilege (Stair, i. 6. 44; Ersk. i. 7. 42; *Hamilton*, 1630, Mor. 8981; *Forbes*, 1669, Mor. 10323; *Carnegie*, 1663, Mor. 8991 and 7732,—see *infra*), and so also are the minor's creditors or assignees, voluntary and legal (Stair, *supra*; *Bargenie*, 1623, Mor. 10418; *Hamilton*, 1630, Mor. 10419 and 8981; *Harkness*, 1833, 11 S. 760; Bell, *Com.* i. 130; see also *Balmerino*, 1669, Mor. 10421).

2. *Within what Period Competent, and how effected.*—(1) Restitution must be claimed within the *quadriennium utile* or *anni utiles*, *i.e.* within four years after majority is attained, otherwise the minor loses his right to challenge (Ersk. i. 7. 35). If, however, the minor is *non valens agere* during the period, the rule does not apply,—as where a minor wife grants a deed in her husband's favour. It would appear that the minor in such a case would be allowed a reasonable time after the dissolution of the marriage (*Gray*, 1714, Mor. 6059; see *Cooper*, 1885, 12 R. 473, where the marriage endured for almost forty years). This limitation of time does not apply to deeds *ipso jure* null, *e.g.* deeds by a pupil (Ersk. i. 7. 34; *Bruce*, 1577, Mor. 8979), by a minor without consent (*Kincaid*, 1561, Mor. 8979; *Bell*, 1728, Mor. 8985), by a minor in favour of curators without value (*Manuel*, 1853, 15 D. 284; *M'Gibbon*, 1852, 14 D. 605); or decree by an incompetent Court (*Rankine*, 1821, 1 S. 43); or where the guardian has been guilty of fraud (*Leiper*, 1822, 1 S. 552). In this last case the Court held that, as there was evidence *in gremio* of fraud, a posterior ratification could not set up the deed. If the minor omits to challenge within the *anni utiles*, he cannot have recourse against his tutors and curators (*Cunningham*, 1727, Mor. 16338; More's *Notes*, xlv).

Where reduction is sought by the *successor* of the minor lesed, the rules, based on the Roman law, seem to be as follows: (*a*) Where a minor succeeds a minor, he is entitled to the whole period yet to run of his minority, and the *quadriennium utile* (Ersk. i. 7. 42); (*b*) where a minor succeeds a major, he is allowed his own minority, and the unexpired period of his predecessor's *anni utiles* (Ersk., *supra*); (*c*) where a major succeeds a minor, he is entitled only to the *anni utiles* remaining intact to the predecessor (Ersk., *supra*); (*d*) where a major (though not twenty-four years of age) succeeds a major, the successor is only entitled to the period of his predecessor's *quadriennium utile* still unrun (*Ballantyne*, 1628, 1 Sup. 254; Ersk., *supra*).

(2) Revocation by the minor is not effectual to operate restitution (*Montrose*, 1697, Mor. 9046), nor is a plea of nullity by way of exception apparently enough in the ordinary case; the deed must be set aside by an action of reduction raised in the Court of Session during the *quadriennium utile* by the minor or those entitled: this "is the only thing that the law recognises as sufficient to restore him" (*Stewart*, 1860, 23 D. 187; Ersk. i. 7. 34, 32; see *Jurid. Styles*). The privilege is preserved for seven years by service of the summons (1669, c. 10; *Forfar*, 1699, Mor. 11324), and after the action has become a depending process it subsists for forty years (Bankt. i. 7. 75; see Fraser, 427). In some cases, however, apparently where there was a presumption of lesion, the Court have allowed the plea *ope exceptionis*, as in a suspension (see *Crawford*, 1827, 2 W. & S. 608; *Harkness*, 1833, 11 S. 760; *Telfer*, 30 Nov. 1844, Sc. Jur.). It has been held unnecessary to call tutors and curators as defenders (*Vernock*, 1637, Mor. 9047; *Blantyre*, 1667, Mor. 2215).

3. *Restitution only where Lesion.*—The lesion, to justify reduction, must be considerable or *enorm* (Ersk. i. 7. 36; Stair, i. 6. 44); but less will be enough where the transaction relates to land, or where ready money is handed over, or where there are no curators, than where curators have consented, or where judicial sanction has been given (Ersk. i. 7. 34), and all the relevant circumstances will in each case be carefully considered. The date of the transaction, and not of the reduction, is the time at which to estimate the lesion (see *Cooper*, 1885, 12 R. 473, and 15 R. (H. L.) 21). As a general rule, every kind of deed by which the minor is lesed may be set aside, *e.g.* "donations, sales, pledges, discharging an action, compromises, novations and discharges of debt, undue renunciations of profitable successions, contracts of all kinds, entering upon a burdened succession, and quasi-delicts" (Fraser, 396).

(1) In the case of certain deeds, lesion is *presumed*. The presumption is against the party founding on them, who must show that they are to the minor's advantage, and in such cases it appears to be competent for the minor to object *ope exceptionis* (see *Harkness*, 1833, 11 S. 760; *Crawford*, 1827, 2 W. & S. 608), or by way of suspension (*Nimmo*, 1667, 2 Bro. Supp. 431; *Blantyre*, 1667, Mor. 8991). Examples of such are: (*a*) *Donations* which are considerable in amount (*Heriot*, 1681, Mor. 8925). Here the presumption is so strong that it cannot be redargued, and restitution will at once be granted (Stair, i. 6. 44; Bell, *Prin.* s. 2101; *Seton*, 1665, 1 Bro. Supp. 511; *Wall*, 1724, Mor. 9035; *Scoffier*, 1783, Mor. 8936; *Sutherland*, 1825, 3 S. 449). The donation may be indirect, as an acknowledgment of money not received, or discharge of debt not paid (*Lockhart*, 1626, Mor. 8958; *Seaton*, 1633, Mor. 8959; *Moncrieff*, 1729, Mor. 8996; *Morrison*, 1716, Mor. 9487; 1728, 1 Pat. App. 7) (discharge of part of tocher). (*b*) *Cautionary obligations* are in the same position as donations. In one case the attestor was held liable, though the minor cautioner was freed (*Kinghorn*, 1672, Mor. 2075; see under *Omissions*, *infra*). (*c*) *Money borrowed* by tutors, or minors, even with consent, must be proved to have been expended beneficially for the minor, and not squandered, in order to prevent reduction of the deed granted for the loan, or to justify a demand for payment (Stair, i. 6. 44; Ersk. i. 7. 37; Bell, *Prin.* s. 2101; Bell, *Com.*, 5th ed., i. 135; *Blantyre*, 1667, Mor. 8991; *Scoffier*, 1783, Mor. 8936; *Harkness*, 1833, 11 S. 760). The creditor, however, is entitled to look after the expenditure, and to demand evidence that the money is being applied *in rem versum*, or repayment of the loan (*Ferguson*, 1835, 13 S. 886). (*d*) In *sales of the minor's heritage* (*Thomson*, 1666, Mor. 8991; *Harkness*, *supra*, per Ld. Balgray), and assignations of personal rights (*Ruthven*, 1672, Mor. 31; *Houston*, 1631, Mor. 8986), lesion is presumed and the purchaser must show application *in rem versum* of the price. Restitution may be granted though the sale has had the sanction of the Court (Stair, i. 6. 18; *Vere*, 1804, Mor. 16389; see *Eaton*, 1826, 1 S. 677; *Auld*, 1856, 18 D. 487, Ld. Pres. M'Neill).

(2) But in many cases this presumption does not exist, and the *onus* is on the minor to prove lesion at the date of granting the deed. (*a*) This applies to *bills*, *bonds*, or other personal obligations granted by the minor, who may be restored on proof that the proceeds were not applied to his full benefit (*Anderson*, 1832, 11 S. 10; *M'Michael*, 1840, 3 D. 279; *Harkness*, 1833, 11 S. 760; *Dundas*, 1711, Mor. 9034; *Rose*, 1821, 1 S. 124). (*b*) *Marriage contracts* securing exorbitant provisions, to the prejudice of one of the parties,—a minor,—may be reduced on the minor proving *enorm* lesion (Stair, i. 6. 44; Ersk. i. 7. 38; Bell, *Com.*, 5th ed., i. 636; *Bruce*, 1854, 17 D.

265; *Arbuthnot*, 1716, 1 Pat. App. 7; cf. *Boswell*, 1701, 4 Sup. 513; affd. Rob. App. 346). A provision, however, to one of the parties may be held good, while the contract is reduced in regard to those in favour of third parties (*Davidson*, 1632, Mor. 8988). In *Cooper* (1885, 12 R. 473: rev. on another ground, 1888, 15 R. (H. L.) 21) it was held, in considering a wife's renunciation of legal rights for alleged inadequate consideration, that the law only recognises considerable *positive loss*, and not that of a contingent opportunity of gain, as a ground of reduction, and that the date of the marriage is the date when lesion must be established (see also *M'Gill*, 1664, Mor. 5696; *Carmichael*, 1698, Mor. 8993; *Taylor's Trs.*, 1854, 16 D. 529; Fraser, 401, note (*d*), as to what constitute the necessary lesion). The rule is for the Court to restrict the provision, not to annul the contract (Stair, i. 6. 44; *M'Gill, supra*). The wife, however, cannot be restored against the legal effect of marriage on her moveable property (*Anderson*, 1824, 2 S. 662; *Byres*, 1708, Mor. 8995). (*e*) *Leases* by the minor, and his curators, to his lesion, may be set aside (*Munro*, 1735, Elchies, "Minor," 1; *Gibson*, 6 June 1809, F. C.). (*d*) Payment of a debt, which could not be the foundation of an action at law, may be redemanded on lesion (see Ersk. i. 7. 38, and iii. 1. 4), and a bond granted for a debt will be reduced if the minor might have proponed a sound defence (*Watson*, 1738, 5 Sup. 167). It is doubtful if this applies to payment of a prescribed account (Bankt. i. 7. 87). (*e*) *Judicial proceedings.* Where a correct defence in fact (Ersk. i. 7. 38: *Stuart*, 1638, Mor. 9008; *Gordon*, 1680, Mor. 8235; *Alexander*, 1697, Mor. 9016; see *Craven*, 1854, 16 D. 822), or law (*Seton*, 1665, 1 Sup. 511; *Purves*, 1698, Mor. 9016; *Watson*, 1738, 5 Sup. 167), or a good ground of action, is omitted to be stated, the minor may be restored against a decree *in foro* on the ground of "competent and omitted" (see *Annandale*, 1679, Mor. 9011, and *Anderson*, 1732, Mor. 9020, where the reduction was not sustained). But the process must be by or against the minor, not third parties (see *Anderson, supra*); and it has been stated that the minor is only restored against the findings by which he is lesed (Bankt. i. 7. 89). It has been held that though a reference to the adversary's oath was erroneously made, the minor will not be allowed to open up the decree following it (*Cuby*, 1699, Mor. 9017). But this plea of "competent and omitted" will not be allowed to found a reduction if the long lapse of years has clearly prejudiced the creditor's power to lead evidence (*Oakley*, 1705, Mor. 9019; see also *Shedden*, 1852, 14 D. 735 (Ld. Fullerton); rev. on other grounds, 1854, 1 Macq. 535). Again, the minor will not, on the ground of minority and lesion, be reponed against a decree for default to obtemper the orders of Court, or through allowing the reclaiming days to expire (*Newton*, 1683, Mor. 9012; *Badenoch*, 1769, Hailes 276). The minor's power to reduce a decree by an incompetent tribunal is not, of course, limited to the *quadriennium utile* (*Rankine*, 31 May 1821, F. C., and 1 S. 43). (*f*) Where the lesion is "flagrant," restitution will be granted against *submissions* by tutors, or minors, or curators, if the subject was not a fit one to refer, if the arbiters were unfit, or if the reference has been unskilfully conducted (Bankt. i. 7. 93; *Williamson*, 1739, Mor. 8965 and 665; Bell on *Arbitration*, p. 103; cf. More's *Notes*, xlvi). (*g*) It has been stated that a minor will be restored against all *omissions* which have prevented him acquiring an advantage (Fraser, 406, and authorities in note (*i*); but see *Cooper*, 1885, 12 R. 473); but this will not apply to the omission to obtain relief from a cautionary obligation undertaken by the minor's father, where the lesion arose indirectly from the unexpected bankruptcy of the principal (*Erskine*, 1739, Mor. 9002; *Kerr*, 1837, 2 S. & M'L. 895; 1839, 1 D. 618; 1842, 1 Bell's App. 280); and other exceptions to the rule will

depend on the circumstances of the case, and the interest of third parties who have intervened. (*h*) When a minor, who took up, whether directly or indirectly (*Tailors of Leith*, 1687, Mor. 9001; *Tailzifer*, 1631, Mor. 9000; *Murray*, 1705, Mor. 9001; *M'Dougall*, 1628, Mor. 8999, 1 Sup. 243; *Kerr, supra*), the succession of an ancestor burdened beyond its value, was willing to renounce all benefit from the succession, the Court restored him against liability for debts incurred by his representation (Stair, i. 6. 44; Ersk. i. 7. 38; *Aberdeen*, 1708, Mor. 9031). Where, however, the lesion arose indirectly through the mismanagement or squandering of the tutor, or curator, or minor, restitution was barred (*Matheson*, 1631, 1 Sup. 186; *Tailors of Leith, supra*; Ersk. i. 7. 36); and bills and bonds granted in fulfilment of an express undertaking to pay ancestor's debts had to be met, unless the original obligation to pay debts was reduced (*Henderson*, 1684, Mor. 8992). A minor may still become liable as *vitious intromitter* for all his ancestor's debts, unless he obtains relief within the *anni utiles* (*Kerr, supra*). Since the Conveyancing Act, 1874, a minor heir is only liable to the extent of the heritable estate or his intromissions (s. 12). See SUCCESSION.

A minor may retract his acceptance of a legacy imposing heavy liabilities or attended with a disadvantageous condition, and may also retract his renunciation of a lucrative inheritance or legacy (Fraser, 400).

Where the minor is lesed by something happening subsequent to his taking up the succession, such as fire, or by loss of the succession after payment of creditors, he cannot be restored (Bankt. i. 7. 77; Ersk. i. 7. 36; *Edgar*, 1614, Mor. 8986).

4. *WHERE RESTITUTION IS BARRED.*—(1) Much that was stated in treating of deeds which a minor could validly grant without consent of his creditors applies here. For example, all deeds such as bills and bonds granted by a minor who is *engaged in trade*, profession, or business, within the line of that business (see *Wall*, 1724, Mor. 9035; *Crawford*, 1827, 3 W. & S. 608; *Rogers*, 1681, Mor. 9029; *M'Michael*, 1840, 3 D. 279, where the deeds were held not binding, as outwith the line of business), are unchallengeable on the ground of lesion (Stair, i. 6. 44; Ersk. i. 7. 38; *Blythman*, 1649, 1 Bro. Supp. 405; *Wilson*, 1816, 6 Pat. App. 222); and the presumption is that the deed was granted for business purposes (*Craig*, 1732, Mor. 9035; *Campbell*, 1822, 1 S. 266). Even where the minor borrows money, the presumption of lesion is reversed (*Macdonald*, 1789, Mor. 9038). The leading rule has been applied to the acts of a minor engaged as factor or agent (*Grieve*, 1732, Mor. 9036), writer (*Galbraith*, 1676, Mor. 9027), sheriff-clerk substitute (*Heddell*, 5 June 1810, F. C.).

(2) A minor, however, who speculated to his loss in railway shares with other parties who were aware of his position, was held not barred by his contract; and it was stated that the defence of *de in rem verso*, or that he was engaged in trade, was not maintainable (*Denniston*, 1850, 12 D. 613 (see Ld. Ivory)).

(3) The minor will not be restored where the contract has been beneficial to him, or the money which he has paid away applied *de in rem verso* of himself (*Thomson*, 1666, Mor. 8982; *Ruthven*, 1672, Mor. 31; *Dempster*, 1837, 15 S. 364; *Johnstone*, 1782, Mor. 9036; Hailes, 911). Where the father is not primarily liable under his obligation to aliment, the rule seems to be to uphold the contract for so much of the goods supplied as are suitable, or necessary, to the minor's condition, or really applied to his use (see *Gray*, 1816, Hume, 411; Stair. i. 6. 44; *Harpers*, 1687, Mor. 8927 (boots); *Fontaine*, 1808, Hume, 409 (tailor's bill); *Scoffier*, 1783, Mor. 8936 (haberdashery)). For *alimentary debts* a father is the proper

debtor where the minor is without funds (Ersk. i. 6. 57; *Wallace*, 1672, Mor. 13425; *Telfer*, 1758, Mor. 9625; *Anderson*, Mor. 13424; *Gray, supra*; *Hamilton*, 1825, 3 S. 572).

The defence of *in rem versum* is good even where money is borrowed by the minor or his curators, if it be applied in payment of debts, purchase of property, or improvement of the estate (*Morton*, 1749, Mor. 8931; see *Dempster*, 1837, 15 S. 364; *Stark*, 1843, 5 D. 542).

Where it is doubtful, however, if the transaction is for the benefit of the minor, it will be reduced, the creditor's right to sue "as accords" being reserved (*Rose*, 1821, 1 S. 154; *Inglis*, 1631, Mor. 8941; Stair, i. 6. 33 *ad fin.*).

The defence also applies to transactions even between the minor and his guardian, though of such the law is jealous (see Stair, *supra*; *Corsar*, 1672, Mor. 8944; see also *Anderson*, 1832, 11 S. 10).

(4) Fraud, or fault, on the part of the minor, either leading to the contract, or after it has been entered into, is usually a good answer to the action for restitution (Stair, i. 6. 44; Ersk. i. 7. 36; see *Harvey*, 1829, 7 S. 561); for example, where he pretends that he is of age (*Cranstoune*, 1649, 1 Sup. 422; *Borthwick*, 1681, Mor. 12433); or fraudulently fails to state that he is minor when he appears to have attained majority (*Wilkie*, 1834, 12 S. 506; *M'Dougall*, 1705, Mor. 8995 and 421; *M'Michael*, 1840, 3 D. 282 (Ld. Moncreiff)). If, however, the minor states, and believes, that he is major without intent to deceive, he is entitled to be restored on the ground of lesion (*Sutherland*, 1825, 3 S. 449, where an affidavit of majority in order to obtain the degree of M.D. was held not to bar the plea of minority and lesion in defence to an action for implement of a cautionary obligation: *Bell*, 1639, Mor. 8943). If, again, his appearance indicates minority, his affirmation of majority is said not to bar restitution (Stair, Ersk., *supra*), as the other party ought to use due diligence, and it is *a fortiori* of this rule where the contracting party was aware of the disability (*Kennedy*, 1665, Mor. 11658; *Wemyss* 1637, Mor. 9025). It has been laid down that minority may be proved by *exception* in an action on a bond (*Bell, supra*), and that the proof of the minor's fraudulently inducing the other party to contract must be by writ or oath (*Wemyss, supra*), Fraser, 420; cf. Bankt. i. 7. 81).

(5) Unless there is fraud on the part of the debtor, (*a*) the payment to the minor, or the minor and his curators, of ordinary personal debts, rents, interests, dividends, and (*b*) deeds which the party is compelled to grant, are usually safe from after challenge (Ersk. i. 7. 36; *Tailors of Leith*, 1687, Mor. 9001). But lesion will be presumed in all cases where, there being curators, payment is made without their knowledge and concurrence (Ersk. i. 7. 36; *Hume*, 1636, 1 Sup. 94). Where, again, a minor, to his lesion, agrees to a discharge by novation or delegation, or accepts a personal obligation in room of a heritable security (*Moncrieff*, 1729, Mor. 8996), he will be restored.

While a debtor may safely pay a heritable debt called up and discharged by a minor and his curators (Fraser, 229), it is, as we have seen (p. 357), doubtful whether a discharge by a minor who has no curators is safe from challenge.

(6) There is no restitution where the injury is the result of some transaction between third parties to which the minor is not a party (*Anderson*, 1732, Mor. 9020; *Carnegie*, 1663, Mor. 8991 and 7732), or is a *damnum fatale* (*Edgar*, 1614, Mor. 8986; Stair, i. 6. 44; Ersk. i. 7. 36; More's *Notes*, xlvi; Bell, *Com.*, 5th ed., i. 136).

For the rules as to marriage, see Fraser, *P. & C.* 410.

(7) *Ratification and Homologation of Minor's Deeds.*—Formerly a minor was barred from claiming restitution if he had given his oath not to challenge, but by 1681, c. 19, it was declared unlawful to exact such oaths during minority. After majority, however, the party may ratify so as to bar challenge, even against his tutors and curators (Stair, i. 6. 44; *Southesk*, 1670, 1 Sup. 603; *Robertson*, 1831, 9 S. 865; Bell, *Com.*, 5th ed., i. 135).

The ratification may be by express deed, or the homologation may be implied from facts and circumstances (see *Wemyss*, 1896, 24 R. 216). In the latter case the homologation must be deliberate (see *Henry*, 1892, 19 R. 545), and in full knowledge of the whole circumstances and of the party's legal rights (*Dempster*, 1837, 15 S. 364; *Wemyss, supra*; see HOMOLOGATION). In each case the question depends on the special facts. Payment of interest (*Johnston*, 1630, Mor. 9041; Ersk. i. 7. 39), receipt of rent (*Gordon*, 1757, Mor. 15178), assignation of a subject purchased (*Montrose*, 1697, Mor. 9046), payment of the whole or part of a bond, receipt of part of the price, or completion of an inchoate transaction, will bar the right to be restored; but ratification obtained by unfair means or influence will not be effectual (*Leiper*, 1822, 1 S. 552; *Melvil*, 1782, Mor. 8998). It was held not to bar challenge that the minor had recognised a deed in his marriage contract (*Rose*, 1821, 1 S. 154); and there can be no ratification after challenge by the minor's creditors (*Harkness*, 1833, 11 S. 760).

5. *PARTIES AGAINST WHOM MINOR HAS REDRESS.*—(1) *Majors.*—Recourse may always be had against the party transacting with the minor and his guardians. Where, however, the former has assigned to *third parties*, the case may depend on circumstances.

(i.) Where the right has been assigned *gratuitously* to third parties, the minor's rights against them are said to be the same as against the original creditor (Ersk. i. 7. 40).

(ii.) *Onerous Transactions.*—(*a*) *Real rights.*—Here the singular successor is safe in trusting to the records, unless the matter was litigious before he acquired his right, or unless he knew that the original transaction had been with a minor, or saw the fact stated in the titles (Ersk. *supra*; Bankt. i. 7. 95; *Campbell*, 1752, Mor. 9021; *Gourlie*, 1728, Mor. 10288). (*b*) *Personal rights.*—While restitution will be granted against the general creditors of one contracting with a minor (*Moncrieff*, 1729, Mor. 8996), Erskine's doctrine that the minor may be restored against all such transactions (i. 7. 40) has been doubted (Fraser, 428; see *Anderson*, 1683, Mor. 10286; *Craick*, 1682, Mor. 9029).

(2) *Minors.*—Where a minor contracts with a minor, the party lesed is entitled to redress if the other cheated him, or is a gainer by the transaction (Bankt. i. 7. 92; Ersk. i. 7. 40). Where, again, there is no fraud, and both minors are lesed, the *status quo* is maintained, and the minor who is under obligation to perform or give anything, in return for some consideration already received, is relieved (Ersk. *supra*).

6. *EFFECT OF RESTITUTION.*—(1) The decree of reduction sets aside the objectionable deed *ab initio*, and not only from the date of litiscontestation (*Houston*, 1631, Mor. 8986); and in real rights there is no need that the minor be again infeft (Dirl. & Stew. 330). (2) The restitution is, as far as possible, to be mutual (Ersk. i. 7. 41; Bell, *Com.*, 5th ed., i. 136). (*a*) In the case of a sale of land the price and interest, or so much as has been applied *in rem versum*, must be restored, and any real improvement on the property paid for,—while the property itself must be returned as it came

from the minor (Ersk., Bell, *supra*; *M'William*, 1576, Mor. 9022). As before stated, the minor, although bound in any case to pay for real improvements, is not bound to restore the price, or any part of it, which has been unprofitably squandered (*Thomson*, 1666, Mor. 8983; Dirl. *supra*). (*b*) In regard to borrowed money also, as we have seen, the minor is only liable for what has been applied *in rem versum* (Ersk. i. 7. 37, i. 7. 41; *Blantyre*, 1667, Mor. 8991, 2215; *Harkness*, 1833, 11 S. 760). (3) Where, however, the contract is not voluntary on the part of the other, restitution must be in all respects equal, and the defence that money has been recklessly squandered is not effectual (Ersk. i. 7. 41; *Farquhar*, 1628 and 1630, Mor. 9022; *Aberdeen*, 1708, Mor. 9031; *Erskine*, 1739, Mor. 9002); but deductions for payment of just debts due by an ancestor whose successor the minor had taken up (*Ruthven*, 1682, Mor. 9030), and, perhaps, for fruits *bonâ fide* consumed, will be sustained (*Winton*, 1666, Mor. 9047).

II. MINOR'S PRIVILEGE IN REGARD TO PRESCRIPTION.

Certain of the prescriptions and limitations do not run against minors, but are suspended during minority. The years that have run before the suspension will be added to those after majority is attained, in order to make up the full period (Ersk. iii. 7. 45; *Marchmont*, 1714, Mor. 11154). To enable the minor to claim the privilege, he must have been entitled to make the demand, and accordingly the years of minority of substitute heirs of entail are not deducted (*Auchindachy*, 1792, Mor. 10971); and the minority of one of the nearest of kin only affects that part of a debt which would have come to him in the distribution of the estate (*Cumming*, 1790, Mor. 11170; see also *Allan*, 1839, 1 D. 678). The privilege may be pleaded even by a minor engaged in trade (*M'Donald*, 1789, Mor. 9038).

The following prescriptions do not strike against minors: (1) The vicennial prescription of retours (1617, c. 13, and 1494, c. 57; *Edinglassie*, 1701, Mor. 11149); it is not clear whether the same privilege is allowed in regard to the right of succession as heir, which is only challengeable within twenty years of infeftment and entering into possession, by anyone entitled to challenge a service (Conveyancing Act, 1874, s. 13); (2) the prescriptions under the Act 1669, c. 9, namely, the vicennial limitation of holograph obligations; the triennial prescription of arrestments on ordinary decrees (1 & 2 Vict. c. 114, s. 22; see *Jameson*, 1887, 14 R. 643), registered bonds, dispositions, or contracts, or the dependence of actions; the quinquennial prescription of ministers' stipends and multures; the quinquennial prescription of arrears of agricultural rents, and of bargains anent moveables; the quinquennial prescription of actions which have been raised on warnings, spuilzies, ejections, arrestments, or for stipend (1669, c. 9, read along with 1685, c. 14; Fraser, 434); (3) the septennial prescription of interruptions of prescription (1669, c. 10; 6 Geo. IV. c. 120; the register is now the Register of Sasines, 31 & 32 Vict. c. 64, s. 15); (4) the decennial prescription of tutorial and curatorial accounts (1696, c. 9); (5) the sexennial limitation of bills (12 Geo. III. c. 72, ss. 37–40; 23 Geo. III. c. 18, s. 55); (6) the biennial limitation of the right of appeal from Court of Session to House of Lords (6 Geo. IV. c. 120, s. 25, two years after majority being allowed); (7) the positive long prescription,—in regard to minors, extended to thirty years (1874 Act, s. 34; Stair, ii. 12. 18; Ersk. iii. 7. 35; Bell, *Prin.* s. 2022); and apparently the negative prescription, though it has been doubted (*Sinclair*, 1835, 13 S. 594; 1837, 15 S. 770; 1841, 13 D. 871; Bell, *Prin.* s. 2022). (8) In adjudications the legal is extended in favour of minors, who are allowed the ordinary legal,—ten years,—or the whole period

of minority, and the four *anni utiles* in addition (Stair, i. 6. 44, and iii. 2. 14; Ersk. ii. 12. 10, and 41; 1621, c. 6, read along with 1672, c. 19; see *Aitken*, Jan. 1809, Bell, *Com.*, 5th ed., i. 706, note (3)). A minor singular successor of an adjudger is entitled to the same privilege (*Oliphant*, 1677, 3 Sup. 202). For the rules where a minor succeeds a minor, or a major succeeds a minor, see Fraser, *P. & C.* 435. (9) The minority is deducted in counting the possession, on a charter and sasine, of an adjudger who has not declared the expiry of the legal (*Ged*, 1740, Mor. 10789; Elchies, *voce* "Prescription," 22, and "Adjudication," 28; see *Grieve*, 1871, 9 M. 582 (decree in absence, pupil).

The other prescriptions take no account of minority, since it is not saved in the Statutes creating them, *e.g.* the triennial prescriptions of merchants' accounts, etc. (1579, c. 83; *Brown*, 1709, Mor. 11150), the septennial limitation of cautionary obligations (1695, c. 5; *Stewart*, 1712, Mor. 11151; 4 Sup. 913). See TRIENNIAL PRESCRIPTION; CAUTIONARY OBLIGATIONS (SEPTENNIAL PRESCRIPTION OF); etc.

III. PRIVILEGE OF *MINOR NON TENETUR PLACITARE SUPER HEREDITATE PATERNA.*

The rule that a minor need not defend any action questioning the validity of his paternal ancestor's rights to his lands, when vested in the ancestor by sasine, brought by one claiming on a right preferable to the ancestor's (Stair, i. 6. 45; Ersk. i. 7. 43), is one of the most ancient in the common law of Scotland, and is now practically in desuetude (*Macfarlane*, 1797, Mor. 9086). This privilege did not extend, *inter alia*, to leases, or possessory actions, or actions of division, or for feu-duties or casualties, or to actions brought in the ancestor's lifetime. Nor can it be pleaded to support the fraud of the ancestor, or to oppose his obligation (see Bell, *Dict. h. t.*). As most of the cases belong to the early part of the 17th century, it may be enough here to refer to the detailed account of the privilege and authorities given by Ld. Fraser (*P. & C.* pp. 439–449). See PUPIL; CURATOR; TUTOR; SUCCESSION; ALIMENT.

[Ersk. i. 7; Stair, i. 6; Bell, *Prin.* s. 2088; Bell, *Com.* bk. ii. pt. ii. chap. 8; Fraser, *Parent & Child.*]

Minute (in Process).—When it is necessary to preserve evidence of any incidental judicial act or statement (as, *e.g.*, an admission of fact, a restriction of claim, an amendment of pleadings, a settlement of the case by the parties, etc.), this is done, both in the Court of Session and in the inferior Courts, by minute. As a general rule, minutes in the Supreme Court must be signed by counsel (Mackay, *Manual*, 23); but a minute of admissions (*ib.*), or of restriction in an undefended summons (*ib.* 193), may be signed by an agent. A minute of reference to oath must also be signed by the party referring, or he must give a written mandate authorising it (A. S., 12 Nov. 1825). See MANDATARY (JUDICIAL); TRANSFERENCE; WAKENING; ABANDONMENT OF ACTION; AMENDMENT OF RECORD; etc. As to minutes of debate, see RECLAIMING.

Minute-Book.—*Court of Session.*—The heads of decrees and interlocutors pronounced by the Court are noted in a Minute-Book by the several Clerks of Court. These are entered of the date on which the judgment is signed. The Keeper of the Minute-Book prints and issues a sheet

of the General Minute-Book (prepared from the separate books kept by the Clerks) twice a week during session (A. S., 9 July 1872). No decree can be extracted until twenty-four hours after it has been read in the Minute-Book. Protestations also are entered in the Minute-Book, as are also such intimations as are ordered to be inserted in the General Minute-Book. The offices of Keeper of the Minute-Book and Keeper of the Record of Edictal Citations are now conjoined (1 & 2 Vict. c. 118, s. 21).

[Mackay, *Manual*, 49; *Practice*, i. 156.]

Sheriff Court.—The Minute-Book, called also the Diet-Book, is one of the two books (the other being the Motion Roll) generally kept in the Sheriff Courts. In it are entered memoranda of all important proceedings not appearing in the "Motion Roll." "In some Courts the commendable practice is followed of having a separate book for minuting all decrees" (Dove Wilson, *Sheriff Court Practice*, 4th ed., 92).

Minutes of Meetings.—A minute of a meeting, "at common law, is nothing more than a note of what takes place at the meeting, more or less regular and complete, but it does not prove itself. It requires to be set up by evidence—to be established as a correct record of what passed at the meeting—before it can become evidence, or be received as such by any Court" (*City of Glasgow Bank Liquidators*, 1880, 7 R. 1196, Ld. Pres. Inglis, at p. 1199). The minutes of certain bodies, at common law, have, however, been admitted as evidence (*Hamilton*, 1827, 4 Mur. at p. 239 (*Senatus Academicus*); *M'Ghie*, 1850, 12 D. 442 (road trustees); *Wilson*, 1827, 4 Mur. 366; *Oswald*, 1828, 5 Mur. 8 (hospital)),—apparently on the ground that the bodies in question have a recognised legal *status*, and that the records of their proceedings are usually intrusted to qualified officials, under some supervision (Dickson, *Evidence*, s. 1216; cf. Bell, *Prin.* s. 2222); but Dickson (*ib.* s. 1215) considers that the above cases go too far. By Statute, however, the minutes of meetings of certain bodies are conclusive evidence of the proceedings thereat, and cannot be contradicted by parole (*e.g.* 25 & 26 Vict. c. 89, s. 67 (joint stock company); *City of Glasgow Bank Liquidators, ut supra*; 19 & 20 Vict. c. 79, s. 84; Goudy, *Bankruptcy*, 2nd ed., 352).

[Dickson, *Evidence*, ss. 1213 *et seq.*, 1205; Kirkpatrick, *Evidence*, ss. 73, 121.]

See also Books; Evidence.

Misrepresentation.—The term Misrepresentation is wider in meaning than the term Fraud. Misrepresentation may be either innocent or fraudulent. Persons are frequently deceived by statements and led to contract to their prejudice, when those making the statements themselves believe in their truth, and have no intention to deceive. For the legal effect of fraudulent misrepresentation, see Fraud (and see case of *Thin and Sinclair*, 1896, 24 R. 198); and for the legal effects of innocent misrepresentation, see Error. See also Circumvention; Directors' Liability Act, 1890; Fraud (Criminal Law); Falsehood, etc.; Fire Insurance; Life Insurance.

Missives.—Heritage (Proof of Obligations regarding); Holograph Writings; Lease; Sale; Rei interventus; Stamps.

Mobbing.—In the law of Scotland, mobbing, or "The Tumultuous Convocation of the Lieges," includes the several degrees and stages of disorder which are known in the law of England under the names of Riot, Rout, and Unlawful Assembly (Hume, i. 416). (An *Unlawful Assembly* is an assembly of three or more persons from which a breach of the peace may be reasonably apprehended; a *Rout* differs from an unlawful assembly only in the fact that the persons have already made a motion towards the execution of their purpose; while a *Riot* is where they are executing their purpose—a riot in England being a tumultuous assembling of three or more persons to the disturbance of the peace and the terror of at least one of Her Majesty's subjects.) In Scotland these distinctive terms are not in use, and these varying degrees affect only the measure of punishment, and not the denomination of the crime. Mobbing consists in the assembling of a number of people, combining against peace and order, to the alarm of the lieges. (As to what constitutes the crime, see Ld. Mure in *Martin*, 1886, 1 White, 297; Ld. Young in *Nicolson*, 1887, 1 White, 307; Ld. J.-C. Moncreiff in *Macrae*, 1888, 1 White, 543, 15 R. (J. C.) 33; *Gollan*, 1883, 5 Coup. 317). Thus, in the case of *Gollan* (*ut supra*), certain persons who assembled with a crowd at a pier for the purpose of preventing what they considered to be Sabbath desecration, by overpowering the police, and riotously and tumultuously preventing the unloading at the pier on a Sunday of fish from steamboats for transmission by rail, were convicted of mobbing and rioting, and sentenced to imprisonment for four calendar months. In *Macrae* (*ut supra*) the Crown evidence was to the effect that accused were part of a crowd exceeding a hundred persons who in the daytime entered upon a deer forest and openly marched across it, shooting the deer as they went; that they were seen by the gamekeepers, who were unable to interfere with them on account of their numbers; and that they continued to do this for two days. Ld. J.-C. Moncreiff directed the jury that such conduct, if proved, amounted to the crime of mobbing and rioting.

(1) There must be assembly of *a number*. No number has been fixed as a minimum to constitute a mob (Hume, i. 416; Alison, i. 510; Macdonald, 181; *Blair*, 1868, 1 Coup. 168). Whether the assemblage amounts to a mob or not is to be decided on the whole circumstances of each case, according to the temper and purpose of the meeting, and the nature and degree of the excesses to which they proceed (Hume, *ib.*). Under the Riot Act (1 Geo. I. c. 5) twelve persons are sufficient.

(2) The assembly must be to the *alarm* of the lieges and the *disturbance* of the public peace (Hume, *ib.*; Alison, *ib.*), being accompanied by such circumstances of actual violence, or a plain tendency thereto, as to beget a reasonable apprehension of what may ensue. On the one hand, a meeting is not necessarily a mob although the persons have gathered together for an unlawful and forbidden purpose, provided that the business may be, and actually is, transacted in a quiet manner, without disorder or commotion. On the other hand, the offence of mobbing may be committed in the execution of even a perfectly lawful and legitimate purpose, if that be done in a violent and outrageous manner (Hume, Alison, Macdonald, *ib.*; *Robertson*, 1842, 1 Br. 152, at pp. 192, 193). A casual affray or sudden quarrel breaking out among people, no matter how numerous, who have no hostile purpose against the peace of the neighbourhood, does not constitute mobbing. But a previous compact or understanding, when the persons first assemble, is not essential. "There may be and often is a substantial and sufficient, though a sudden and tumultuary, consent on

such occasions, and amongst persons who at a meeting had no settled purpose of mischief" (Hume, i. 418). Actual violence is not necessary (*Robertson, ut supra*), if the concourse unmistakably indicate purposes of violence.

All *disorderly acts* of a mob are chargeable against every individual who is present in the concourse; it is not necessary to prove the acts against the persons separately (Hume, i. 423, and cases there; *Cairns and Others*, 1837, 1 Swin. 597). But the whole mob are not guilty of a *serious crime* perpetrated by one individual, provided this was not done in pursuance of the common purpose of the assemblage (*Marshall and Others*, 1824, Alison, i. 524, and Ld. J.-C. Boyle in *Cairns and Others, ut supra*; see also *Robertson, ut supra*). What constitutes presence in a mob is, of course, a question depending on the circumstances of the particular case. Remaining with the crowd, especially after an order to disperse, raises a strong presumption of guilt. An instigator is guilty though not actually present (Hume, i. 421; Alison, i. 518; Macdonald, 185).

The punishment is either penal servitude or imprisonment.

The Riot Act provides that if twelve or more persons, "being unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace," and being required or commanded by one or more Justices of the Peace, or the Sheriff of the county, or other qualified magistrate, to disperse themselves, shall, to the number of twelve or more, "unlawfully, riotously, and tumultuously" continue together for an hour after the command, they shall be liable to penal servitude for life or not less than fifteen years, or to imprisonment not exceeding three years (1 Geo. I. c. 5; amended as to punishment by 7 Will. IV. and 1 Vict. c. 91, 20 & 21 Vict. c. 3). The order and form of proclamation is as follows:— The magistrate "shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be while proclamation is making, and after that shall openly and with loud voice make or cause to be made proclamation in these words or like in effect:—

"Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George (the First) for preventing tumults and riotous assemblies.

"God save the Queen."

(Sec. 2.) [See Barclay's *Digest* (Chisholm), *voce* "Mobbing."]

See also Breach of the Peace.

Modification.—See Augmentation.

Molestation, Action of.—The old action of molestation (concluding for damages against a defender who has troubled one in the possession of his lands) is still competent, though obsolete in practice, having been superseded by the remedy of suspension and interdict (Stair, i. 9. 28; iv. 27; Ersk. iv. 1. 47; Bankt. iv. 24, 53; Rankine, *Landownership*, 3rd ed., 19). It differed from the similar action on a brieve of perambulation in pleading possession as well as a title; and was chiefly used in questions of commonty and controverted marches. The action may be

brought before the Judge Ordinary or the Bailies of Regality (A. S., 1580, Act 1587, c. 42).

See FINIUM REGUNDORUM ACTIO; EJECTION AND INTRUSION.

Money.—Money is the circulating medium of the country. It consists of coin and BANK NOTES (*q.v.*). Unlike other corporeal moveables, it cannot be identified in the possession of another than the owner, unless separated and marked for that purpose (Bell, *Prin.* s. 1333). The coins are of gold, silver, or bronze. A tender of payment is legal if made in coins issued by the Mint in accordance with the Coinage Acts, 1870, 1891, and not called in by proclamation, nor become diminished in weight by wear or otherwise, so as to be of less than the minimum statutory weight (33 Vict. c. 10, s. 4). Gold coins are legal tender for a payment of any amount; silver coins are legal tender for only forty shillings (*ib.* s. 18); and bronze coins for only one shilling (*ib.* s. 4). Tokens to workmen are no longer legal (*ib.* s. 5). All contracts and dealings relating to money, or involving payment of or liability to pay money, must be made according to the coins which are current and legal tender under the Act, and not otherwise, unless made according to the currency of some British possession (*ib.* s. 6).

In construing certain testamentary writings which were expressed in popular language, the Court held that the word "money" and "moneys" included the testator's whole moveable estate which had not otherwise been specifically disposed of (*Easson*, 1879, 7 R. 251, and *Dunsmore*, 1879, 7 R. 261).

By sec. 14 of the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), the word "money" when used in an indictment includes all current coin of the realm, post-office orders and postal orders, and bank and bankers' notes; and it is no longer necessary to specify whether the money consisted of gold, etc., it being sufficient to state the sum as consisting of money.

As to interest of money, see INTEREST (OF MONEY). As to crimes relating to Her Majesty's coinage, see COINING.

See also TRUCK ACTS.

Month.—See TIME.

Mora, lit. delay, is used, though not a good *nomen juris* (*Mackenzie*, 1877, 5 R. 313, per Ld. Deas, p. 317), to signify excessive or unreasonable delay in performing an obligation or asserting a right. The consequence of such delay in the acceptance of an offer is that the offer itself, in the option of the offerer, becomes void (Bell, *Com.* i. 343; Bell, *Prin.* s. 79; *Allan*, Mor. 9428). But the delay must be the fault of the acceptor; and so where an acceptance was posted at once, but not delivered in due course, through the fault of the Post Office, the contract was held completed (*Higgins*, 1847, 9 D. 1407; affd. 6 Bell's App. 195). Failure to pay a debt at the time stipulated will render the debtor liable in damages, the measure of damages, in all but very exceptional cases, being the interest applicable to the period of non-payment (Bankt. i. 472; *Peters*, 1894, 21 R. 886; *Roissard*, 1897, 24 R. 861). Where special damages have been awarded, this has been done on the express ground of breach of contract; and it seems, therefore, incorrect to cite such cases under the head of *mora* (see *Mansfield*, 1836, 14 S. 585, and *Little*, 1830, 8 S. 418). Delay in giving

back a subject deposited will render the depositary liable for the price if the subject accidentally perish during the period of the delay (Stair, i. 13. 2; Bank. i. 472). A preference gained by arresting on the dependence of an action will be cut down by sequestration if there has been undue delay in following up the diligence (*Mitchell*, 1872, 8 R. 875; Bankruptcy (Scotland) Act, 1856, s. 12). On the question of reductions under the Act of 1621, see Bell, *Com.*, M'Laren's ed., ii. 188; *Drummond*, Mor. 1079; *Young*, Mor. 1078. "In obligations for rent or stipend payable in meal or corn, the debtor by incurring delay is liable to the highest prices that year, whereas otherwise the fiars or rates settled yearly by authority is the rule" (Bankt. i. 472).

Where goods are not conform to contract, the buyer has a right of rejection, but this right will be lost by unreasonable delay in intimating the rejection. What is timeous rejection is a question of circumstances (*Pini & Co.*, 1895, 22 R. 699; *M'Cormick & Co.*, 1869, 7 M. 854; Bell, *Com.*, M'Laren's ed., i. 463 *et seq.*).

By delay in giving entry a superior will lose his right to exact from the vassal dues of non-entry (Ersk. *Inst.* ii. 5. 45; *Fullerton*, Mor. 9293; *Kelhead*, Mor. 9292; *Chalmer*, Mor. 9330).

Mora is perhaps most frequently used in reference to delay in the assertion of a right or claim. It was at one time frequently urged that by lapse of time alone, without any other circumstance, a pursuer might be barred from insisting in an otherwise unimpeachable claim. It is now conclusively settled that, apart from prescription, delay alone is insufficient to bar a right of action (*C. B.*, 1885, 12 R. (H. L.) 36, per Ld. Selborne, p. 40; *Mackenzie*, 1877, 5 R. 313; *Cook*, 1872, 10 M. 513; *Cook*, 1850, 13 D. 157; *Brisbane's Trs.*, 1828, 7 S. 69). It is therefore incorrect to put into the defender's pleas in law the word "mora" as a separate plea, as is still sometimes done. The correct expression of the plea is "the action is barred by *mora, taciturnity*, and *acquiescence*"; and the plea should be supported by the averment on record of facts and circumstances from which the pursuer's acquiescence in defender's operations, or abandonment of his own claim, can reasonably be inferred (*Cowan*, 1865, 4 M. 236, per Ld. J.-C. Inglis, p. 241). From this it follows that the question whether acquiescence has been made out is a question of fact to be determined by the jury (or by the judge sitting as a jury) (*Colvin*, 1890, 18 R. 115, per Ld. Pres. Inglis, Lds. Adam and Kinnear; *Bicket*, 1866, 4 M. (H. L.) 44, per Ld. Cranworth, p. 51). The majority of the cases to be found in the Digests under the heads of *Acquiescence* and *Mora* are therefore little more than examples of varying circumstances in which the judge or jury have held acquiescence proved or not, and consequently are of no more value as precedents than other findings in fact. Each case must be tried on its own merits, as brought out in the proof, but certain general principles which have been held applicable to this doctrine require notice.

First, then, since "acquiescence is nothing but implied consent," the facts on which the plea is rested must be sufficient to establish consent, and must admit of no other reasonable explanation (*Cowan*, 1865, 4 M. 236, per Ld. J.-C. Inglis, p. 241; *Moir*, 1849, 12 D. 77; *Hill*, 1850, 12 D. 808; *Brisbane's Trs.*, 1828, 7 S. 69). Such facts may be definite actings of the pursuer, inconsistent with the claim he now makes (*Steel Co. of Scotland*, 1892, 19 R. 1062; *Ure*, 1857, 19 D. 758; *Macintosh*, 1849, 12 D. 85); or silence in the circumstances to be afterwards noticed where consent is presumed from silence. The second rule is a necessary consequence of the first, namely, that there must be full knowledge, on the part

of him whose claim is sought to be barred, both of his own rights and of the acts said to infringe these (*Bicket, ut supra,* per Ld. Chan. Chelmsford, p. 49; *Hill,* 1862, 1 M. 360, per Ld. J.-C. Inglis, p. 377). Knowledge by a representative or agent is the same as knowledge by the principal, and the bar so established transmits against singular successors (*Viscount Melville,* 8 S. 841; *Colville,* 27 May 1817, F. C.). The case of *M. of Abercorn* (20 May 1820, F. C.) at first sight seems to conflict with one or both of these rules. The pursuer there was proprietor of a barony mill, and was held barred by acquiescence from insisting on the removal of another mill which infringed on his exclusive privileges, although it was proved that he had originally intended to prevent the erection of the second mill until advised by counsel that he was powerless to do so. The explanation appears to be that the law presumes on the part of everyone knowledge of his rights, provided he is aware of the facts out of which they arise (Rankine on *Landownership,* 3rd ed., p. 347).

As here there is a presumption of knowledge which cannot be redargued by any proof to the contrary, so in certain circumstances there will be a similar presumption of consent. Thus where one, in full knowledge of his own rights and of the alleged infringement, stands by and permits another, without remonstrance, to incur great expense for an object necessarily in contravention of such rights, he will be presumed to have consented to the operations, and will be barred from insisting on their removal (Bell, *Prin.* 946; *Bicket, ut supra,* per Ld. Chan. Chelmsford, p. 49; *Muirhead,* 1863, 2 M. 420; *Earl of Kinnoul,* 18 January 1814, F. C.; *Aytoun,* 19 May 1801, F. C.; Mor. App. "Property," No. 6). "Whatever may be said of acquiescence as applicable to a right of property . . . I do not doubt that a right of servitude . . . . may be extended as well as restricted or abandoned by acquiescence, on the faith of which large expenditure has been made in the knowledge of the party who inexcusably stands by at the time, and afterwards objects when it is too late to undo what has been done, without unreasonable loss or hardship to the party whose operations are then objected to. The law has been so settled and acted on from, at all events, the beginning of this century downwards, and is not now to be gone back upon" (per Ld. Deas in *M'Intyre,* 41 Sc. Jur. 112, at p. 117).

Consent will also be presumed from the creditor's silence amid material changes of circumstances. Thus where shareholders in a railway company asked the Court to interdict certain persons from acting as directors, on the ground that their election was invalid, the Court held that the pursuers were barred from going into this by having delayed raising the question for a month, during which the respondents had entered on the duties of their office (*Blackburn,* 1848, 10 D. 590). In another case the liquidators of a bank which had stopped payment were held barred by delay and acquiescence from suing a former director, who had retired from the Board and the company some years before the stoppage, for alleged irregularities of management by the Board during his term of office (*Liquidators of the City of Glasgow Bank,* 1882, 9 R. 535). "There is authority and also reason for holding that claims for profits in joint adventures, particularly of a speculative character, must not be allowed to slumber; and this has a special application to a claim for profits made by some use of the property of the joint adventure which was not in contemplation of the contract. The principle of the law of partnership gives to the absent joint adventurer a right to claim an account of the profits so made in the extraneous enterprise, if he chooses to do so; but it is necessary that he should assert his right in

reasonable time, and should not lie by" (*Stewart*, 20 R. 260, per Lord President, 268; *Clegg*, 8 De G. M. & G. 787). It is only in circumstances of this kind, if at all, that Ld. Benholme's dictum in *Cook* (10 M. 513) can be supported, viz. "when the claim is one which requires constitution . . . . the plea of *mora* will be justified by delay for a certain length of time in constituting the claim. In such a case presumption of acquiescence or abandonment is not required." It is thought that it would be more correct to say that *mora*, in certain circumstances, gives rise to an absolute presumption of abandonment.

The question whether acquiescence is a competent mode of acquiring or fortifying rights of property (as distinguished from minor rights, such as servitudes) has never been settled by authoritative decision. But the view that it is not a competent mode has been expressed very strongly by Lds. Balgray and Gillies in *Viscount Melville* (1830, 8 S. 841), and more guardedly by Ld. Pres. Inglis in *M'Intyre*, 41 Sc. Jur. at p. 115. There is also an opinion to the same effect by Ld. Cringletie, Ordinary, in *Sim* (1827, 5 S. 841) (N. E. 780). As there is only one case in which the contrary view was applied (*Aytoun*, 19 May 1801, F. C.; Mor. App. "Property," No. 6), and that case was special, and the judges wavered in their views considerably, it may safely be assumed that it is not competent to acquire rights of property by acquiescence (Rankine on *Landownership*, p. 349).

For *mora* and acquiescence as defences to actions for separation or divorce, see *supra*, CONDONATION.

The effect of *mora* as a defence to an action for declarator of nullity of marriage was finally settled by the case of *C. B.* (1885, 12 R. (H. L.) 36), in which it was laid down that while lapse of time undoubtedly increases the burden of proof laid on the pursuer, it constitutes no absolute bar. This is in conformity with a prior judgment of the House of Lords in an English case (*Castleden*, 4 Macq. 159), which was referred to in the case.

In questions between landlord and tenant, delay in claiming damages may prejudice the defender by loss of evidence necessary for his defence, and will in such cases effectually bar the claim (*Eliott's Trs.*, 1894, 21 R. 858; *Johnstone*, 1894, 21 R. 777; *Elmslie*, 1894, 21 R. 710; *Stewart*, 1888, 16 R. 346; *Broadwood*, 1854, 17 D. 340).

In addition to increasing the *onus probandi*, *mora* may subject a pursuer to special restrictions. Thus an undischarged bankrupt, who raised an action for defamation two years after the publication of the libel complained of, was held bound to find caution for expenses, as a condition of proceeding with the action (*Collier*, 1884, 12 R. 47).

See also *supra*, under HOMOLOGATION.

For the effect of delay in presenting bills of exchange, or giving notice of dishonour, commonly called "laches," see *supra*, BILLS OF EXCHANGE.

For delay in presenting cheques, see *supra*, CHEQUES.

For delay in calling a summons or petition, see PROTESTATION.

Motion Roll; Motions.—See ROLLS OF COURT.

Motions.—A motion is a proposal submitted for adoption or approval at a meeting. It requires to be moved and seconded. It is finally put to the meeting by the chairman, with or without amendments (see AMENDMENT; PREVIOUS QUESTION), and the meeting either adopts it

unanimously, or votes regarding it in accordance with custom or the practice of the particular body.

[Palgrave, *Chairman's Handbook*; Blackwell, *Law of Meetings*; Chambers, *Public Meetings*; Erskine May, *Parliamentary Practice.*]

Motor Carriages.—See Locomotive.

Mournings.—See Privileged Debts.

Moveable.—See Heritable and Moveable.

Muirburn.—*History.*—As early as the reign of Robert III. an Act of Parliament was passed (in 1400) forbidding the burning of any muir or heath except in the month of March, and specially during summer and autumn. The penalty was forty shillings, to be recovered by the lord of the soil, and in the event of his negligence, to be recovered for the Crown before the Justiciar. The immediately preceding Act prohibits the shooting of hares in time of snow. Plainly the Act against muirburn was meant for the preservation of game. The Statute was re-enacted in nearly every subsequent reign. By 1424, c. 21, the time during which muirburn was prohibited was after March, "till all the corn be shorn," and failing payment of the penalty, forty days' imprisonment followed. 1478, c. 8, increased the penalty to £5, and fixed the period from the last day of March until Michaelmas. 1493, c. 18, was directed against landlords who ordered poor tenants to burn muir in the forbidden time, and declared both parties liable in penalties. 1685, c. 24, "an Act for preserving game," revived 1493, c. 18. The Act 6 Geo. III. c. 32, on the narrative of the injury caused to game, and also to woods and plantations, forbade muirburn in Scotland from the last day of March to the first of November, under penalties of forty shillings for the first offence, £5 for the second, and £10 for the third and every subsequent offence. The onus was placed on the occupier of showing that he was not responsible for muirburn during the forbidden time.

Existing Law.—The Statute now in force is the Game (Scotland) Act, 1772 (13 Geo. III. c. 54), ss. 4–7. Every person who makes muirburn, or sets fire to any heath or muir in Scotland, from 11th April to 1st November, is liable to a fine of forty shillings for the first offence, £5 for the second, and £10 for the third or any subsequent offence, and failing payment within ten days after conviction, to imprisonment for six weeks, two months, and three months respectively (s. 4). The onus of proving innocence is laid on the occupier of the ground (s. 5). A proprietor of high and wet muirlands may, if he occupies them himself, burn heath thereon between 11th and 25th April, and, if they are let, may by writing authorise his tenant to do so, provided that such writing is recorded in the Sheriff Court Books previous to the burning (ss. 6, 7). Offences must be prosecuted before the Sheriff (40 & 41 Vict. c. 28, s. 10). In *Rodger* v. *Gibson* (1842,1 Broun, 78) it was held that it was not essential to the statutory offence that heath or heather should be burned, as the offence could be committed by the burning of the vegetable substances growing on high uncultivated land adapted to the breeding of black game, and perhaps red grouse, where bent grass prevailed, but destitute of heather. On the same

principle, the Statute being one for the preservation of game, it might be successfully pleaded that the offence could not be committed in a district unfit for game. The case of *Mackintosh* (1864, 2 M. 1357), sometimes referred to under this heading, deals with a question of negligence in exercising the right of muirburn.

Multiplepoinding.—*Nature of the Action.*—An action of multiplepoinding is a form of process the object of which is to have it decided which of two or more parties is entitled to a fund, or in what proportions a fund is to be divided among several claimants. The process of double or multiplepoinding is mentioned in an Act of Sederunt of 1 Feb. 1677 as being the proper process for settling the preferences of various arresters. The action was known at a much earlier date, and is dealt with in Act of James VI. 1584, c. 3. The original idea of the action was to benefit the holder of the fund by suspending multiple, or double, poinding. He held a fund which belonged to a third party, called the common debtor, and arrestments had been used in his hands by creditors of the common debtor. The holder of the fund was willing to pay to the person entitled to get payment, and the object of the action was to relieve him of the responsibility of deciding to whom he should pay, and to prevent his being troubled by demands for payment by the various claimants.

The scope of the action has gradually become wider. It may be raised not only by the holder of the fund, but by a claimant. In both cases the holder of the fund is the pursuer. Where he raises the action he is called the real raiser, where it is raised in his name he is called the nominal raiser, and the claimant raising the action is called the real raiser. It must always be stated in the summons who is the real raiser. If a claimant raises the action, the condescendence to the summons should not contain any statements which the pursuer might deny (*Carmichael*, 1853, 15 D. 473). The action may now be resorted to not only in cases where double diligence has actually been done, but also where double diligence is threatened, or wherever there are double claims on one fund, founded on separate and hostile grounds. The action is also much used by trustees for the purpose of obtaining exoneration, or of getting a judicial decision as to the meaning or effect of the deeds under which they act. The ordinary subject, the right to which is disputed in a multiplepoinding, is a sum of money, but the right to any moveable or heritable property may be decided by this form of action (Bankt. b. iv. t. 42, s. 6). It has been said that heritable property is not properly the subject of a multiplepoinding (Mackay, vol. i. p. 113), but Ld. Kincairney decided otherwise in *Byers' Trs.* (1895, reported on other points 23 R. 332). The right to title deeds and to corporeal moveables may be the subject of the action (*Baillie*, 1830, 8 S. 318). In an old case it was decided in a multiplepoinding which of two persons had been duly elected to a professorship of law (*Cattenach*, 1744, Mor. 12253). All questions may be discussed and decided in a multiplepoinding which are necessary for the decision of the question to whom the fund *in medio* belongs. Thus the meaning of deeds founded on by claimants is decided, their validity is sustained (*Ogilvie's Trs.*, 1874, 1 R. 693), or they are reduced in a multiplepoinding. A separate action of reduction was at one time thought not to be necessary (Stair, More's *Notes*, ccclxxix), and the rule there stated was followed in *Byers' Trs.*, *ut supra*. The more common modern practice is to raise a separate action of reduction, except in cases

where deeds are to be reduced under the Bankruptcy Statutes, which is often done incidentally in a multiplepoinding. Questions whether a deed has been delivered, whether a subject is heritable or moveable, questions as to legitimacy, and questions as to presumption of life have all been discussed and decided incidentally in a multiplepoinding (*Tait's Factor*, 1890, 17 R. 1182; *Tulloch's Trs.*, 1895, 3 S. L. T. 20; *Logan*, 1823, 2 S. 253; *Ramsey*, 1828, 6 S. 343). A multiplepoinding cannot be raised where there is not a debt which the holder of the fund is bound to pay. The fund must be in the hands of the raiser (but see *Lang*, 1872, 9 S. L. R. 308). The right to future rents cannot be decided (*Pentland*, 1830, 9 S. 164), nor questions as to a fund which has not been received (*Cameron's Trs.*, 1844, 17 Sc. Jur. 42), or which is only *in spe* (*Provan*, 1840, 2 D. 298; see also *Allardice*, 1845, 7 D. 362; *Nimmo*, 1863, 1 M. 791).

The Summons.—A form of a summons of multiplepoinding is given in Sched. A of the Court of Session Act, 1850 (13 & 14 Vict. c. 36). The first conclusion of the summons is declaratory, that it should be found and declared that the pursuer is only liable in once and single payment of the fund *in medio*, and that to the person or persons who may have just right thereto. The second conclusion is that for determining who are entitled to the fund; all the claimants or pretended claimants, whether called as defenders or not, ought to produce their grounds of debt and diligences thereon, or other interest in the said fund, and dispute their preferences thereto. The third conclusion is that the pursuer should be found entitled to retain the expenses of the process, and be decerned and ordained to make payment of what sum remains in his hands after such retention to such of the defenders or other claimants as may be found to have the best right thereto. The last conclusion is that the defenders found to have no rights to the fund *in medio*, and all other persons, should be decerned and ordained to desist and cease from further troubling the pursuer with respect to the premises in time coming. There may also be conclusions for exoneration. Annexed to the summons is a condescendence, in which the circumstances making the action necessary are set forth. Pleas in law follow the condescendence.

Jurisdiction.—Jurisdiction in a multiplepoinding is created by the existence of the fund *in medio* in Scotland, and any person claiming, or who might lay claim to, the fund may be called as a defender, even though he is not otherwise subject to the jurisdiction of the Scotch Courts. Arrestment to found jurisdiction is not necessary in a multiplepoinding (*Miller*, 1838, 16 S. 1204).

Bringing the Action into Court.—A summons in multiplepoinding is served in the ordinary way with an *inducice* of six days, unless there are conclusions for exoneration or other extra conclusions, in which case the ordinary *inducice* must be given. If the action is raised by a claimant, the summons must be served on the pursuer and nominal raiser in the same manner as if he were a defender (Act of Sederunt, 11 July 1828, s. 23). It is not sufficient to intimate the summons to the nominal raiser after the action is brought into Court (*Paterson*, 1826, 4 S. 822). It must be stated in the summons who is the real raiser (13 & 14 Vict. c. 36, s. 9).

Defences.—If defences are lodged, the record is made up in the ordinary way. The ordinary defences to the action are: (1) that it is incompetent; (2) that all parties are not called. The latter defence is not of much importance, for any person may claim in the multiplepoinding, whether he be called or not, and intimation may be ordered either generally

by advertisement or on any particular person having interest. The defence to the competency of the multiplepoinding raises the question as to whether there is double distress, without which the action is incompetent (see article DOUBLE DISTRESS, where the principal cases are cited; see also *Milne*, 1898, 5 S. L. T. 366). If a multiplepoinding is raised by trustees for their exoneration, or to settle questions as to the meaning of trust deeds, double distress is not necessary to its competency. Defences may be stated either by the nominal raiser or by any of the claimants. It is not a good objection to the competency of the action that the nominal raiser has no funds belonging to the common debtor (*Crombie*, 1830, 8 S. 745). All objections to the competency must be disposed of before any order is pronounced (*Connell*, 1861, 23 D. 683). A claimant will not be ordained to sist a mandatory till a question as to the competency of the action has been decided (*Clark*, 1873, 1 R. 281).

PROCEDURE WHERE NO DEFENCES ARE LODGED—ORDER FOR CLAIMS.—In the event of no defences being put in, the case may be enrolled after ten days from calling. The enrolment may be made either by the pursuer or the real raiser. If, as frequently happens, some of the parties who may be interested in the fund *in medio* are unknown to the pursuer, or their addresses are unknown, an order is made for advertisement of the dependence of the action so many times in certain newspapers. This is done by interlocutor at the first calling of the case. If no advertisement is necessary, the usual first interlocutor finds the pursuer liable only in once and single payment, and appoints all parties claiming an interest in the fund *in medio* to lodge their condescendences and claims within so many days. The time allowed will vary according to circumstances. No claim can be lodged till an order for claims has been made (*Connell, ut supra*). After the time for lodging claims under the first interlocutor has expired, a second order for claims is usually pronounced.

FUND IN MEDIO.—By Act of Sederunt, 11 July 1828, s. 47, if the pursuer is the real raiser he should give a condescendence of the fund *in medio* along with the summons, and where he is nominal raiser he should at the first calling of the case give in a condescendence of the funds in his hands, stating any claim or lien which he has on the funds. If the pursuer fails to put in a condescendence, a claimant may be allowed to do so. If the fund *in medio* is set forth in the condescendence annexed to the summons, it is usual to insert in the first interlocutor a clause holding that condescendence as a condescendence of the fund *in medio*. If not, an order appointing the pursuer or other party to lodge a condescendence within a certain time is pronounced; the order also allows parties to lodge objections to the fund *in medio* within a certain time after it is put in. An amended condescendence of the fund *in medio* may be put in if necessary. Any claimant may object to the condescendence of the fund (*Lang*, 1826, 5 S. 21). A record is made up on the condescendence of the fund and the objections, if any, and the case is sent to the procedure roll to have the objections discussed, or a proof or remit is allowed if necessary. In practice, questions as to the fund *in medio* are often delayed till after the competition has been decided (*Strathallan*, 1847, 19 Sc. Jur. 690). If the condescendence of the fund has been approved and objections to it repelled, questions as to the fund cannot be raised in a subsequent reclaiming note from an interlocutor in the competition (*North British Rwy. Co.*, 1872, 10 M. 870). An interlocutor approving of the condescendence of the fund *in medio* may be reclaimed against within

twenty-one days (*School Board of Harris*, 1881, 9 R. 371). Leave to reclaim is not required (*Walker's Trs.*, 1876, 5 R. 678).

Consignation and Exoneration.—In many cases where the pursuer is the real raiser, he desires to get out of the process as soon as possible. This he can do whenever the condescendence of the fund *in medio* has been approved of, either by there being no objections or by a final decision as to the amount of the fund, and by consigning the fund in bank, in name of the Clerk of Court, to abide the orders of the Court. The pursuer is found entitled to the expenses of raising and bringing the action into Court. He gets decree entitling him to retain the amount of these expenses as taxed, and ordering him to consign the balance of the fund. When consignation has been made, an interlocutor is granted exonering and discharging the pursuer of the fund *in medio*, and of his whole actings and intromissions therewith. The effect of a decree of exoneration is to relieve the holder of the fund of all responsibility, even though the fund is paid to the wrong creditor in the absence of one who has a better claim (Stair, iv. 16. 3). It has been stated that a creditor not cited in a multiplepoinding might have a claim against the holder for his neglect to cite him if the claim were known to the holder (Shand, *Practice*, 600). In one case, after decree of exoneration had been granted in favour of the trustees of a deceased person, a creditor put in a claim founded on a debt due by the deceased, but which had prescribed under the triennial prescription. The creditor, having been allowed to prove his debt by reference to the oath of party, proposed to make a reference to the oath of the trustees, but it was held that the reference must be to the oath of the other claimant, as the trustees had been discharged (*Farquhar*, 1886, 13 R. 596).

Consignation is often ordered on the motion of a claimant, and may be ordered on the motion of a riding claimant (*British Linen Co.*, 1836, 15 S. 356). In one case the nominal raiser was ordered to consign the alleged fund *in medio*, although he denied that he held any such fund (*Clow*, 1850, 13 D. 132; *Mackenzie*, 1828, 6 S. 1057). The raiser cannot be ordered to consign if he have any good claim to the fund (Shand, *Practice*, 593). If the holder fails to obey an order to consign decree of consignation may be obtained against him. Diligence can be used on the decree. If decree of consignation has been granted in the absence of the nominal raiser, diligence may be suspended (*Macleman*, 1827, 5 S. 370).

Claims.—A condescendence and claim is a paper signed by counsel. The condescendence usually adopts part of the condescendence annexed to the summons, and sets forth any additional facts bearing on the claimant's right to the fund. At the end of the condescendence is a claim which states what portion of the fund the claimant asserts a right to. The claim is essential, as where a condescendence does not contain a claim the claimant cannot be preferred (*Connell*, 1861, 23 D. 683). Pleas in law are added after the claim.

Procedure where there is no Competition.—After the expiry of the time allowed by the second order for lodging claims, if there is only one claim lodged, or if the various claimants are agreed as to the proportion in which the fund should be divided, an interlocutor is pronounced for aught yet seen ranking, and preferring the claimant or claimants in terms of his or their claims. The interlocutor usually contains also an order for payment, but this does not always follow, as there are cases where it is obvious that the only claims put in could be defeated by claims which might be made by an absent person (*Kerr's Tr.*, 1894, 2 S. L. T. 3). As to the effect of an interlocutor *for aught yet seen*, it is conclusive against a person

called as defender in the action, but a person not called may be reponed against it in certain cases, without payment of expenses (*Johnston*, 1832, 10 S. 195; *Morgan*, 1856, 18 D. 797). An interlocutor for aught yet seen is not now in frequent use (Mackay, *Manual*, 384). As to reduction of a decree of preference, see below.

In some cases an interlocutor is pronounced ordering payment on caution being found for repetition and payment, with interest, of the sum decerned for if any person should appear and make good a preferable claim. In a case where a person, who if alive had a good title to a fund *in medio*, had disappeared and not been heard of for many years, Ld. Lee ordered payment to other claimants on caution, and limited the time to thirteen years. Extract was superseded till caution had been found. Caution was not found, and after thirteen years had elapsed Ld. Pearson ordered payment to the claimants (*Pullar's Trs.*, 1884 and 1897, not reported).

Procedure in Competition.—Where several competing claims are lodged, there is usually an order on the pursuer to print the condescendences and claims. The case thereafter appears in the adjustment roll, the record is closed, and ordinary procedure follows. It is not the practice for the different claimants to specifically answer the statements in the condescendences of other claimants, but this may still be done under an order for revisal (31 & 32 Vict. c. 100, s. 30). Claims may be lodged by any persons, whether called in the action or not. A process of multiplepoinding implies all the powers necessary for determining the rights of the parties, and no process of reduction or other action is necessary for setting aside any deed which may be founded on by one of the parties, nor is any process of constitution necessary for establishing any of the claims, the effect of the process of multiplepoinding being such as to authorise the Court to discuss incidentally all such points arising in the course of it as are necessary for extracting the rights of the parties (Stair, *Notes*, ccclxxviii). After the case has been heard in procedure roll, or proof taken, an interlocutor is issued repelling the claims of the unsuccessful, and sustaining the claims of the successful, claimant. Sometimes there is an order for payment in the same interlocutor, but it is frequently delayed. An interlocutor preferring one creditor has the effect of an interlocutor repelling the claims of all the rest (Shand, *Pract.* 598) It is usual, in interlocutors ranking and preferring claimants, to grant leave to reclaim (see *Lamond's Trs.*, 1872, 10 M. 690; *Kennedy*, 1873, 11 M. 603).

Procedure in reclaiming note in multiplepoindings is the same as in ordinary actions. If one claimant reclaims, other claimants may take advantage of his reclaiming note (31 & 32 Vict. c. 100. s. 52).

Appointment of Factor.—Formerly it used to be the practice to appoint a common agent or factor. He was appointed by the claimants, who were ordained to meet for that purpose by the Lord Ordinary. The duties of the common agent were similar to those of a common agent in a process of ranking and sale. A common agent is rarely now appointed.

Payment of Government Duties.—As the fund *in medio* in a multiplepoinding is *in manibus curiæ*, no order for payment can be made till all Government duties have been satisfied and paid, or provision made for this being done (Act of Sederunt, 1 March 1878; 36 Geo. III. c. 52, s. 25; 16 & 17 Vict. c. 51, s. 53). The Act of Sederunt provides that the duties are to be paid before decree is granted. The Court must be satisfied that this has been done, and may, if necessary, appoint the agent for the party, or, failing him, another agent, to settle the duties with the Inland Revenue.

When the duties have been settled, an order is made for payment to the Inland Revenue. In some interlocutors ordering payment, extract is superseded till the Government duties have been paid. The Clerks of Court may not present any interlocutor ordering payment for the signature of the Lord Ordinary or Court till the provisions of the Act of Sederunt and Acts of Parliament have been complied with.

Amendment of Claims and New Claims.—Claims in a multiplepoinding may be, and often are, amended in view of the judgment of the Court or Lord Ordinary (*Ferguson's Trs.*, 1862, 24 D. H. L. 8; 1 Macq. 397). It is in the discretion of the Court to allow such amendment, or to allow new claims to be received, and to settle on what terms such claims are to be received, if allowed. A person who has not been cited as a defender is generally allowed to put in a late claim on easier terms than one who has been called, but a person waiting to see the result of the competition before putting in his claim, will in general have to pay a share of the expense incurred by other claimants in vindicating his right. Sometimes new claims are allowed to be received on condition of payment of expenses hitherto incurred which would not be available at the future stages of the cause (see *Jaffe*, 1860, 22 D. 936; *Sawer's Judicial Factor*, 1889, 17 R. 1; *Morgan*, 1856, 18 D. 797; *Binnie's Trs.*, 1883, 10 R. 1075; *Cowan's Trs.*, 1888, 16 R. 7; *Dymond*, 1877, 5 R. 196; *Cameron*, 1873, 45 Sc. Jur. 272). In one case, where the Court had decided that one of the claimants was not entitled to participate in the fund, another party, who had claimed upon the footing that the unsuccessful competitor was entitled to a share, was refused leave to amend his claim (*Graham*, 1868, 6 M. 820). Where parties who had lodged a claim in a multiplepoinding, and subsequently withdrawn it by minute, moved the Lord Ordinary for leave to withdraw their minute, and prove their averments after decree of preference pronounced in the competition had become final, the motion was refused, and on a reclaiming note presented against the interlocutor refusing the minute, it was held that the decree of preference was a decree *in foro quoad* the minuter, and that the reclaiming note did not bring the decree of preference under review (*Duncan's Factor*, 1874, 1 R. 964).

Reduction of Decrees of Preference.—Though a decree ordering payment to a particular claimant is an absolute discharge to the holder of the fund who has paid in terms of the interlocutor, it is not an absolute decree to the claimant obtaining payment, but may, under certain circumstances, be reduced. If a person was not called in the original action, he may reduce the decree if he can produce a preferable claim. By Act 1584, c. 3, a person, even though expressly called in the multiplepoinding, may bring a reduction of the decree if he can show a reasonable cause of absence from the original competition; or a person may reduce the decree if at its date he was a minor without tutors or curators (see *Stodart*, 1860, 22 D. 1092).

Riding Claims.—The creditors of a claimant may claim to be ranked on the fund, or portion of the fund, to which their debtor may be found entitled. The creditor's claims are called riding claims. Where there are several riding claims on one original claim, and the amount found due to the original claimant is not sufficient to pay the riding claimants in full, the competition among the riding claimants is conducted as an ordinary multiplepoinding. The riding claim is not admitted unless the debt is liquid and constituted (*Home's Trs.*, 1834, 12 S. 727; *Stevenson*, 1849, 12 D. 251; *Wilson*, 1851, 13 D. 1366). A riding claim should be lodged before the original claimant has obtained decree for payment (*Anglo-Foreign Bank*,

1879, 16 S. L. R. 731). A creditor has no title to claim, in a multiplepoinding, funds to which his debtor has rights, except by way of a riding claim upon a claim lodged by his debtor (*Gill's Trs.*, 1889, 16 R. 403). The interlocutor on a riding claim finds the original claimant entitled to be ranked *primo loco* on the fund *in medio* in terms of his claim; but in respect of the claim for the riding claimant as a rider on the claim of the original claimant, ranks and prefers the riding claimant upon the fund *in medio* in room and place of primary claimant, and as a rider upon his claim.

Multiplepoinding for Exoneration of Trustees.—The process of multiplepoinding is the common mode by which trustees seek to obtain judicial exoneration. They do not require to allege actual double distress to entitle them to bring the action (*Taylor*, 1836, 14 S. 817). Wherever there are difficult questions as to the disposal of the trust estate, or reasonable doubt as to the true construction of the trust deed, or where its validity is called in question, the trustees are entitled to raise a multiplepoinding. If extrajudicial exoneration is refused to the trustees by the beneficiaries, or if the trustees, or any of them, had a claim on the estate which the beneficiaries disputed, the trustees would be entitled to raise a multiplepoinding (*Blair's Trs.*, 1863, 2 M. 284). Trustees may also raise the action where they are bound to distribute the estate within a fixed period and are uncertain to whom payment should be made (*Macdougall's Trs.*, 1830, 8 S. 1036); or where the trust has lasted for a very long time (*Dunbar*, 1850, 13 D. 54).

A narrower view of the right of trustees to raise a multiplepoinding was taken by the Court in a recent case. Where trustees apprehend trouble in administering the estate in future, they are not entitled on that account alone to end their administration by raising a multiplepoinding, more especially where they do not allege that the beneficiaries refuse to grant them an extrajudicial discharge. A multiplepoinding was brought by trustees who were in course of distributing the estate, in which they called the beneficiaries and a creditor whose claim against the estate was objected to by certain of the beneficiaries — the action was held incompetent, and expenses were awarded against the trustees as individuals (*Mackenzie's Trs.*, 1895, 22 R. 233; see also *Connel's Trs.*, 1878, 5 R. 735). When trustees under a testamentary deed bring an action of multiplepoinding to have a question which has been raised as to its validity determined, it is their duty to lodge a claim, as trustees, for the whole fund for the purpose of administration (*Hall's Trs.*, 1892, 19 R. 567).

It is competent for a creditor to raise an action of multiplepoinding and exoneration in name of the trustees on whose estate he is a creditor, provided the trustees in whose name it is raised adopt it as their own (M'Laren on *Wills*, 1164; *Jameson*, 1888, 16 R. 15).

A judicial factor cannot obtain exoneration by a multiplepoinding (*Campbell*, 1870, 8 M. 988).

Effect of Multiplepoinding on Diligence by Claimants and Others.—When an action of multiplepoinding has been raised, no person who has claimed, or even appeared in the action, is entitled to use personal diligence against the holder of the fund, the object of the action being to suspend diligence (*White*, 1772, Mor. 9133). If a party has not appeared, but has been cited, the holder of the fund can obtain a suspension of diligence by him. Whenever a multiplepoinding is raised, the fund becomes litigious, and the holder is barred from granting any voluntary conveyance of it. On the other hand, the claimants or creditors must use all proper diligence to attach or acquire preference over the fund *in medio*. A claim

in a multiplepoinding has in itself no effect. The multiplepoinding does not supersede the necessity for diligence (*Smith's Trs.*, 1862, 24 D. 1142, at 1163). If a creditor is not a party to the multiplepoinding he may, if the subject be poindable, proceed to carry off the fund *in medio* by poinding (Bell, *Com.* ii. 279), and also even if he is a party to the multiplepoinding (*Ferguson*, 1882, 9 R. 687). Where a process of multiplepoinding has been raised in consequence of an arrestment, it will save the arrestment from prescription, though no claim be lodged within the prescriptive period (*Thomson*, 1774, Mor. 11049). If no procedure takes place in a multiplepoinding for the prescriptive period, claims founded on arrestments will fall by prescription (*Graham*, 30 May 1811, F. C.).

Expenses in Multiplepoinding.—Where the competency of the multiplepoinding has been sustained, the expenses of the real raiser are always given out of the fund *in medio* (*Hepburn's Trs.*, 1894, 21 R. 1024). This rule was applied on the principle that the holder of the fund on which double arrestments had been used was entitled for his safety to raise the action, and to be relieved of expense connected with it. It has been extended to multiplepoindings raised by a claimant. In one case where a multiplepoinding was found competent, but where one of the claims appeared to be obviously ill-founded, it was observed that a party should not be allowed to reduce the fund *in medio* by making a claim which was totally unsound, but which justified the raising of a multiplepoinding. "There have been cases in the past, and may be again in the future, where the expenses of a multiplepoinding, rendered necessary by an unreasonable claim, are imposed on the persons lodging such a claim, and in which no part of the expenses of the cause, even those for bringing it into Court, are put on the party so bringing it" (*Pollard*, 1881, 9 R. 21, per Ld. Young). The nominal raiser is also entitled, out of the fund *in medio*, to his expenses. Where it is held that a multiplepoinding is incompetent, expenses are given against the raisers (*Mackenzie's Trs.*, 1895, 22 R. 233). The ordinary rule that expenses follow the result is applied to claimants in multiplepoinding. As to expenses of claims received at a late stage in the case, see under heading *Late Claims*.

Where questions of difficulty as to the meaning of ambiguously worded deeds have been tried in a multiplepoinding, the expenses of all parties have been frequently given out of the fund *in medio*. But there is no general rule to this effect (*Moram*, 1867, 5 M. 353, per Ld. Justice Clerk).

[See Mackay, *Manual*, 383; Shand, *Practice*, 579; Bell, *Com.* ii. 276.]

Multures—Multurer.—Multures (*molituræ*) were the payments in kind for grinding grain exigible under the prædial obligation of thirlage. The *multurer* was the tacksman of the mill, who, as tenant, derived right from the heritor of the mill to exact the multures due (Ersk. II. ix. 19).

Multures were of two degrees: outsucken (or out-town) and insucken (or intown). The sucken was the name given to the area astricted to the mill. The occupants of lands in that area (suckeners) were prohibited from having their grain ground elsewhere, under the penalty of being sued for Abstracted Multures (*q.v.*); and thus in their case the multurer was able to charge something more than the services rendered, just because he had a monopoly. These were the Insucken Multures (*q.v.*). But the multurer could not exact such high payments from those who came of their own free will to grind at his mill, without risking the loss of their custom, and so he charged them Outsucken Multures (*q.v.*), which represented the fair

market value of the services rendered. Thus insucken multures represented the monopoly price of the services (Bell, *Prin.* s. 1018); outsucken multures represented their competition value.

The rate of multure was fixed either by the document constituting the thirlage or by usage. The rate of insucken multures was frequently a peck in the boll (one-sixteenth), and that of outsucken multures a peck in six firlots (one twenty-fourth). But the former might be any amount, as fixed by the obligation, while the latter was subject to adjustment between the parties. Thus in the same thirle different lands might pay multures at different rates; some might be astricted at the ordinary insucken rate, while others might be astricted to pay even at the outsucken rate (*Halkerston*, 1708, Mor. 15997; *Anderson*, 1788, Hume, 730). In fixing the rate of multures they were not calculated so as to include SEQUELS (*q.v.*), these being exigible in addition (*Campbell*, 1672, Mor. 15978).

In some cases the thirled lands paid a fixed amount annually, to be free of the obligation to resort to the mill. This was known as *dry multure*, and the amount should have corresponded with the difference between the insucken and the outsucken rates.

Prescription of Multures.—The Act 1696, c. 14, provides that multures "not pursued within five years after the same are due, shall prescryve in all time coming, except the saids shall be offered to be proven to be due and resting-owing by the defenders their oaths or by a special writ under their hands acknowledging what is resting-owing." See THIRLAGE.

Municipal Elections. — Municipal elections are conducted in the same way as parliamentary elections, so far as regards the ordinary machinery of the Ballot Act. The sections, provisions, rules, and schedules of the Act which relate to the poll and the taking of the poll in parliamentary elections apply to municipal elections, subject to the necessary modifications to be noticed hereunder (s. 20, Ballot Act; *Hamilton*, 1875, 2 R. 299). In all other matters concerning the election not provided for by sec. 20, municipal elections are conducted in the manner prescribed by the Acts in force at the passing of the B. A. relating to the election of councillors in certain royal burghs specified in Sched. C of 3 & 4 Will. IV. c. 76 (s. 22 (2)). These Acts are: 3 & 4 Will. IV. c. 76; 15 & 16 Vict. c. 32; 16 Vict. c. 26; 31 & 32 Vict. c. 108; 33 & 34 Vict. c. 92).

A *municipal election* is defined to mean an election of any person to serve the office of councillor or commissioner of any municipal burgh, or of a ward or district of any municipal burgh; and a *municipal burgh* is defined to mean any place for the time being subject to the Municipal Corporation Acts, or any of them (s. 29, B. A.). These Acts, as regards Scotland, are: 3 & 4 Will. IV. cc. 76 and 77, and 55 & 56 Vict. c. 55 (Burgh Police Act, 1892), which repeals the Police Acts of 1850 and 1862, and amending Acts, except to such extent as they are incorporated by reference in portions of local police Acts not repealed by the Act of 1892 (s. 6, Act 1892).

The Ballot Act consequently affects royal burghs, parliamentary burghs, and places which have adopted the Police Acts of 1850, 1862, and the Burgh Police Act, 1892.

Electorate.—The right of electing the town council is conferred (1) on all such as are qualified to vote for the appointment of councillors and magistrates under the terms of sec. 1, 3 & 4 Will. IV. c. 76; secs. 3–5, Municipal Elections Amendment Act, 1868; and Municipal Elections Act,

1881; and (2) on those qualified for the parliamentary franchise as inhabitant occupiers under sec. 3 of the Representation of the People Act, 1884 (Burgh Police Act, 1892, s. 31). Shortly, those qualified are: (1) *owners* of £10 yearly value (Reform Act, 1832, s. 11); (2) *tenant and occupier* of £10 yearly value (Representation of People Act, 1884, s. 5); (3) *householders* (s. 3, Act 1868); (4) *lodger* of £10 yearly value, unfurnished (Representation of People Act, 1884, s. 2; (5) *service franchise* (s. 3, *ib.*); (6) *women* may vote if unmarried or living apart from their husbands (44 & 45 Vict. c. 13), provided, of course, they have any of the qualifications mentioned above. Police constables may vote, the disqualification which previously existed having now been removed by the provisions of the Police Disabilities Removal Acts, 1887 and 1893. Persons in arrears with burgh assessments are not placed on register and cannot vote (s. 31, B. P. A., 1892). No one may vote whose name is not on the register (s. 8, 3 & 4 Will. IV. c. 76; s. 2, 3 & 4 Will. IV. c. 77). A mere misnomer in the register, however, does not prevent a person from voting (s. 35, 3 & 4 Will. IV. c. 76; s. 8, Municipal Amendment Act, 1868). See FRANCHISE. A roll must be made up in all burghs under sec. 30 of the Burgh Police Act, 1892.

Time of Election.—The election takes place on the first Tuesday of November in each year (ss. 8, 15, 3 & 4 Will. IV. c. 76; s. 32, Burgh Police Act, 1892). For electoral purposes, any burgh may be divided into wards under the Burgh Police Act, 1892, ss. 7, 8, 9, 10, 12, 13, 14, 16.

A third part of the council retires annually (3 & 4 Will. IV. c. 76, s. 16; Municipal Election Act, 1870, s. 5; Burgh Police Act, 1892, s. 37). A councillor once elected, remains in office three years. Under the Burgh Police Act, 1892, the number of councillors may have been altered in some towns, so that the system of rotation in retiring may require to be rearranged. In these cases the first retiring third are these canditates who stood lowest at the poll; the next third, the next lowest; and so on (*Thomson*, 1876, 3 R. 451). In the event of equality, the majority of the council decides who is to retire (s. 15, 3 & 4 Will. IV. c. 76).

Who may be elected.—Any male householder in the burgh who is not in arrears with any burgh assessment is eligible (s. 28, Burgh Police Act, 1892). The definition of "householder" in the Act excludes lodgers, who are therefore ineligible (s. 4 (14) (21)). Women are ineligible (44 & 45 Vict. c. 13, s. 2). A trust deed for behoof of creditors creates no disqualification (*Cooban*, 1886, 18 Q. B. D. 269); but bankruptcy, or being a bankrupt undischarged, does (*Thom*, 1885, 12 R. 701); so also acceptance of any place of profit under the Police Act, 1892, disqualifies (s. 71). As to the town clerk, see sec. 62. The returning officer is not the proper party to decide questions of disqualification (*Corporation of Bangor*, 1886, 18 Q. B. D. 349). As to the number of commissioners and magistrates in all burghs, see secs. 29, 36, Burgh Police Act, 1892.

Returning Officer, Who is.—The provost, or chief magistrate, or other officer who, under the law relative to municipal elections, presides at such elections, is the returning officer (ss. 20, 22, Ballot Act). He acts in co-operation with the town clerk, who in municipal elections takes the place of the sheriff clerk in parliamentary. If the provost's term of office expires at the period of election, the senior bailie presides (*Dunlop*, 1837, 16 S. 254; *Whyte*, 14 D. 105; 15 & 16 Vict. c. 32, s. 6; Burgh Police Act, 1894, s. 4 (7)). If all magistrates retire, including the provost, the retiring provost who does not seek re-election acts as returning officer (15 & 16 Vict. c. 32, s. 5; *Ogilvie*, 1865, 3 M. 589). The question has not been raised in Scotland whether a provost or senior magistrate, who is himself a candidate

for re-election as a councillor, is entitled to act as returning officer under the provisions of ss. 5 and 6, 15 & 16 Vict. c. 32. It has, however, been settled in England, by a long series of decisions, that he is not (*Owens*, 1859, 28 L. J. Q. B. 316; *White*, 1867, L. R. 2 Q. B. 557; *Blizard*, 1867, L. R. 2 Q. B. 55; *Morton*, [1892] 1 Q. B. 39). In Scotland the expediency of this practice is recognised by appointing some other party (see *Kirriemuir*, 1884, 12 R. 103; *Hillhead*, 1886, 14 R. 18). If none of the magistrates can act, or if the person who should act declines to do so, the council may appoint a returning officer; and, failing their doing so, the town clerk, or a person appointed by him, may act (s. 33, Burgh Police Act, 1892).

The returning officer at municipal elections may vote (s. 20 (7), Ballot Act), but may not give a casting vote. In the event of equality, he orders a new election (3 & 4 Will. IV. c. 76, s. 10; *Hamilton*, 1875, 2 R. 299). The returning officer is required, as in parliamentary elections, to provide everything necessary for the poll (s. 20 (3), Ballot Act); and he is entitled to the use of ballot-boxes, fittings, etc., provided for parliamentary elections, free of charge (s. 14, B. A.).

The provisions in the Ballot Act as to the taking of school and public rooms for parliamentary elections do not apply to municipal (s. 20 (7), B. A.).

The real duties of the returning officer do not begin till the time arrives for making preparation for the poll. On the expiry of the time appointed to receive nominations, the returning officer will be in a position to know definitely if a poll is necessary, and in which wards. He must then begin to make his arrangements, as the Ballot Act, s. 20 (3), imposes the same duties on provosts in this respect as require to be carried out by the returning officer in parliamentary elections.

Duties of Town Clerk at an approaching election.—"Town clerk" includes the clerk appointed by the commissioners of police under the Police Acts, 1850 and 1862 (r. 65, B. A.). He cannot be a councillor, nor may he be the partner of a councillor, nor can he interfere in elections, except as regards his statutory duties, and he cannot vote (3 & 4 Will. IV. c. 76, s. 28). The notices necessary for an election are given by him (s. 29, *ib.*; s. 27, 3 & 4 Will. IV. c. 77). If there is no town clerk in parliamentary burghs, the duties fall on the sheriff clerk of the county (s. 27, *ib.*).

Nominations.—Notice of annual election must be given at least ten days before the first Tuesday in November (s. 8, 3 & 4 Will. IV. c. 76); and this is followed by a notice as to how, where, and when nominations are to be made. His duties concerning nominations are regulated by sec. 9, Municipal Elections Amendment Act, 1868; s. 3, Municipal Elections Amendment Act, 1870; s. 39 and Sched. IX, Burgh Police Act, 1892. There must be a proposer and seconder and five assenters, having the necessary ward qualification, and the paper must be signed by the candidate himself (Sched. IX, Act 1892). It must be intimated to the town clerk before 4 p.m. of the Tuesday immediately preceding the election day (s. 39, *ib.*). Where a notice directed nomination papers to be sent in before 5 p.m. on a day that was too late, and one paper was lodged in proper time, but the other not lodged till the time mentioned in the notice, the election was held to be void (*Howes*, 1876, 1 C. P. D. 670). As to delivery of a nomination paper on Sunday, see *in re Westbury*, 1854, 4 El. & Bl. 314; *Rawlins*, 1846, 2 C. B. 72. Only the name and abode of candidate need be stated. The full name should be given. "Robert V. Mather" is not the proper way to describe "Robert Vicars Mather" (*Mather*, 1876, 1 C. P. D. 596). "William" may be contracted into "Wm." (*Henry*, 12 Q. B. D. 257); and "W. Penford," for "William

Penford," was held a misnomer, and curable by sec. 142, 5 & 6 Will. IV. c. 76).

Nominators may sign initials thus: "W. E. Waller" (*Bowden*, 1888, 21 Q. B. D. 309; see also *Gledhill*, 1889, 23 Q. B. D. 136; *R.* v. *Hartlepool*, 21 L. J. Q. B. 71; *R.* v. *Avery*, 18 Q. B. D. 576).

Notice of the names of the candidates nominated must given by the town clerk, either on the Thursday or the Friday succeeding the last day for nomination, in the usual way—on the doors of the council chambers, parish churches, and, if necessary, in newspapers (s. 9 and Sched. C, Municipal Amendment Act, 1868). Where there is no opposition, persons nominated are declared elected (s. 3, Municipal Amendment Act, 1870).

Validity or Invalidity of Nomination Paper.—None of the Statutes have any special provisions dealing with the validity or invalidity of a nomination paper in the hands of the town clerk, if, as seems to be clear, the provisions of the Ballot Act in regard to nominations do not apply to municipal elections. The provisions concerning nominations under the Municipal Elections Amendment Acts, 1868 and 1870, and the Burgh Police Act, 1892, imply certain discretionary powers in the town clerk, and the right to decide the validity or invalidity is presumed by the best authorities to be one of them (Marwick, p. 46). His decision would of course be subject to review by petition in the Sheriff Court under the Corrupt Practices Act, 1890, if the ground of the petition fell under sec. 30. It has recently been decided by Ld. Kincairney in the Outer House, and acquiesced in (*Hodge*, 1897, 35 S. L. R.), that challenge of an election on the ground that returning officer accepted and afterwards rejected a nomination may be brought by action of reduction in the Court of Session, notwithstanding sec. 30 of the Elections (Corrupt Practices) Act, 1890.

Withdrawal of Candidate after Nomination.—Notice of withdrawal may be given to the town clerk not later than 4 p.m. of the Thursday preceding the first Tuesday of November. It must be in the form of Sched. X of the Act 1892, and signed either by (1) the person nominated and his proposer or seconder, or (2) his proposer and seconder and one of the five assenters (s. 40, *ib.*). Withdrawal is not competent if its effect is to reduce the number of nominations in a burgh or ward below the number necessary to supply the vacancies (s. 40, *ib.*).

Presiding Officers.—The qualifications necessary under 3 & 4 Will. IV. c. 77, s. 4, remain unaltered by the Ballot Act. Persons qualified are: (1) Advocates, (2) Writers to the Signet, (3) Solicitors before the Supreme Courts, (4) Procurators of inferior Courts, of not less than three years' standing. Their fees are the same as in parliamentary elections; but the town clerk, if he acts as presiding officer, is not entitled to a fee (3 & 4 Will. IV. c. 76, s. 30). Clerks require no special qualification, and, as in the case of presiding officers, are appointed by the returning officer. Although not expressly enjoined by the Act, declarations of secrecy are as necessary for officials in municipal as in parliamentary elections, otherwise secrecy, which is the essence of voting by ballot, might be entirely disregarded.

Agents.—The appointment of agents is not expressly authorised by the Ballot Act; but if an agent is appointed, and a notice in writing of such appointment is given to the returning officer, the provisions of the Act with respect to agents of candidates apply (s. 20 (6), B. A.).

Counting the Votes is conducted in the same way as in parliamentary elections. The returning officer, however, reports to the town clerk (1) the number of ballot papers rejected, under their several heads, (2) with regard to the verification of the ballot paper accounts (r. 36, B. A.). He should

proceed with the counting as quickly as possible, as the result requires to be declared the day after the election.

Declaration of the Poll.—The result must be declared within the Town Hall or other public building in the burgh between 12 and 2 p.m. on the next day after the election (3 & 4 Will. IV. c. 76, s. 10). Intimation of the result is given by him to the successful candidates, and they are required to attend at the Town Hall on the second lawful day after the election to declare whether they accept or decline office (33 & 34 Vict. c. 92, s. 3). Failure to attend, unless a sufficient explanation is given in writing, is held to imply a declinature (3 & 4 Will. IV. c. 76, s. 13).

Custody and Inspection of Election Papers.—The election papers are sealed up by the returning officer and handed to the town clerk, and kept by him (r. 64, B. A.). He retains the ballot papers for a year, and then, unless directed by an order of the Sheriff Court or other tribunal in which a municipal election is questioned, causes them to be destroyed (r. 39, 64 (*a*), B. A.).

Inspection of (1) rejected ballot papers, and (2) ballot papers and counterfoils, is allowed only on the order of the Sheriff or any competent tribunal, upon such conditions as the Court may impose (r. 40, 41, 64 (*b*) (*a*), 65 B. A.); (3) of all other documents may be made at any time and by any person, subject to such regulations as may be prescribed by the council of the burgh and approved by the Secretary of State (r. 42, 64 (*a*), B. A.).

Casual Vacancies.—Vacancies in municipal elections caused by (1) an equality of votes, *i.e.* double returns, (2) a candidate being elected for more than one ward, (3) a candidate declining or failing to accept office, (4) fewer candidates being elected for a ward than there are vacancies—are filled up by the procedure of the Ballot Act, and a new election by the electors is necessary (s. 22, B. A.; s. 10, 3 & 4 Will. IV. c. 76; 31 & 32 Vict. c. 108, s. 9). An exception is introduced by sec. 32, Burgh Police Act, 1892, in the case of a double return or failure to nominate candidates in a burgh situated in any island of Scotland. The council fill up the vacancy themselves. So also in casual vacancies under sec. 72 of the Burgh Police Act, when a councillor vacates his seat voluntarily, or under any statutory provision, the council elect a successor.

Ad interim Vacancies, i.e. caused by death, disqualification, or resignation, are filled up by the remaining members of council at a meeting to be called on five days' notice. The appointment does not extend beyond the first Tuesday of November thereafter, the date of the next ensuing general election (3 & 4 Will. IV. c. 76, s. 25; c. 77, s. 23). It is not necessary to fill up all the vacancies, but enough to constitute a quorum (*Sime*, 1877, 5 R. 132). When the seat has been declared vacant on petition, and no one else has been declared elected, the Town Council of Edinburgh, acting on the opinion of counsel, themselves appointed a representative (*Marshall* v. *Dryborough*, 6 Jan. 1891). This course seems at least doubtful (see sec. 45, Elections (Scotland) (Corrupt, etc.) Act, 1890; and cf. secs. 33, 36, Local Government Act, 1889).

Challenge of Elections, if involving questions of bribery, disqualification of candidate, or his undue election, must be in terms of Elections (Scotland) (Corrupt, etc.) Act, 1890. (See ELECTION PETITION.) Challenge on any other ground is made by an action of reduction or declarator, or other competent legal process. (See, as to nominations, *Hodge*, 1897, 35 S. L. R. .) The action must be brought within one month from the date of election (16 Vict. c. 26, s. 5; *Drew*, 1854, 17 D. 51; *Thom*, 1885, 12 R. 701).

[Marwick on *Municipal Elections*; Muirhead, *Police Government in*

Burghs (*Burgh Police Act*, 1892); Irons, *Police Law*; Rogers on *Elections*; Crichton on the *Ballot Act*; Blair, *Election Manual*.]

See CORRUPT PRACTICES; ELECTION PETITION (MUNICIPAL); BURGH PARLIAMENTARY ELECTION.

Munus publicum.—The nearest approach to a definition of the expression *munus publicum* in Roman law is in *Dig.* 50. 4. 14: *Publicum munus dicitur, quod in administrandâ republicâ cum sumptu sine titulo dignitatis subimus.* The distinction between *honores* and *munera* was one of considerable importance, and a whole title of the *Digest* (50. 4) is occupied with the statement of examples illustrating the distinction. A duty which was in its nature a *munus publicum* could be imposed on a person against his will, and the person on whom it devolved was not entitled either to decline it or to retire from it. Thus, since the office of *tutor* was a *munus publicum*, it was only on the ground of certain *excusationes*, specified by Statute, that a person on whom the office devolved could obtain exemption, and, further, such an exemption could be obtained only if the recognised ground of exemption were stated to the magistrate within a prescribed time. Similarly, in the region of private law, the office of trustee (*fideicommissarius*) was recognised as compulsorily imposed. So, in public law, the duty of sitting on the local senate or serving the *municipium* as a *decurio*, or taking other public office in the community, constituted a *munus publicum*.

In modern law the term is sometimes used to denote an office, the duties of which are performed to the public, or some particular community, so that any member of the public, or of the community, may compel their performance. Thus the offices of judge, parish clergyman, parochial teacher, and other public administrative officials are *munera publica*. It has been laid down as a general principle in English law that "if a man takes upon him a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies" (per Ld. Holt in *Lane*, 1696, 12 Mod. Rep. 484). So in the leading case (*Ashby*, 1698, Ld. Raymond, ii. 938: iii. 320; Smith, *Leading Cases*, 10th ed., vol. i. p. 230) it was held that a man who had the right to vote at an election for members of Parliament might maintain an action against the returning officer for refusing to admit his vote, though his right was never determined in Parliament, and though the persons for whom he offered to vote were elected. Somewhat similar are the English cases in which it has been held that an action lies against a Sheriff for delaying to execute a writ, whereby the plaintiff incurred unnecessary costs (*Mason*, 1841, 1 Q. B. 974); and against an officer of customs, for refusing to sign a bill of entry, without payment of excessive duty (*Barry*, 1839, 10 A. & E. 646; as to an action against a clergyman for refusing to solemnise a marriage, see *Davis*, 1841, 1 Q. B. 900). Again, the duties of a common carrier are, in certain aspects, of the nature of *munera publica*, inasmuch as he holds himself out in a public character and undertakes the carriage of goods for any of the public indiscriminately, from and to a certain place (Bell, *Prin.* s. 160).

The idea of a public office—a *munus publicum* under the State or otherwise—is also important in determining the duration of the appointment. Where the office is one of the recognised *munera publica*, as that of a parish minister, or parochial schoolmaster appointed previous to the Education Act of 1870, the law imputes perpetuity to the appointment, though it be not expressed in the contract (*Duff*, 1799, Mor. 9576; *Mitchell*, 1883, 10 R. 982). The law applicable to appointments *ad vitam aut culpam* may be summarised thus:

either the appointment must expressly bear that the appointee is to hold office for life, or the office must be of such a nature that a life-appointment is necessarily implied. In this last class are embraced only offices of the nature of *munera publica*. Public officers are irremoveable except for fault. Holders of benefices in the Church are public officers, and these offices are *munera publica* (per Ld. Pres. Inglis in *Hastie*, 1889, 16 R. 715, at p. 371).

Murder.—Murder is a branch of criminal homicide, the other branch being culpable homicide. The dividing line between murder and culpable homicide is frequently very fine. The distinction between these crimes is that in the case of murder there must be wilful and malicious intent to kill, or wicked recklessness as to consequences, while in the case of culpable homicide the malicious purpose and abandoned depravity as to results are absent. In many cases there can be no dubiety that the crime which has been committed is murder. Thus, if no exonerating circumstances are present, it is murder to kill with intent to cause the death of any person. It is murder if a person intends to cause grievous bodily injury to another, and death results. It is murder if A. is killed, although the intention was to kill or dangerously injure B. If anything be done with an unlawful object, death being a likely result, there is murder if death ensue, although, it may be, there was no intent to injure anyone. It is murder, if death results, where the intention was to do grievous bodily injury to facilitate the commission of a serious crime, or aid the escape of the offender.

The degree of recklessness which may bring a crime up to murder is always a question of circumstances. If the victim be a child, or an aged person, or a weakling, the same conduct may be held to amount to murderous recklessness which would not be so held where the murdered person is strong and fully grown. The mental condition of the accused is always an element to be considered in determining whether homicide of the first or second degree has been committed. Thus where there is mental weakness or disease, not inferring complete irresponsibility, there is culpable homicide, where the same crime, in a person of sound mind, would be murder (*Ferguson*, 1881, 4 Coup. 552; *Thomson* or *Brown*, 1882, 4 Coup. 596; *Gove*, 1882, 4 Coup. 598; *Smith*, 1893, 1 Adam, 34; *Abercrombie*, 1896, 2 Adam, 163). Although intoxication is no defence to a crime, the jury may nevertheless take such a condition into account in considering whether a crime is murder or culpable homicide (*Kane*, 1892, 3 White, 386).

The mode in which murder is committed is immaterial. Thus death may be caused by—

1. *Personal Violence.*—There is no distinction between a lethal and a non-lethal weapon. Murder may be accomplished without the use of any weapon, as by lying on a person's chest and smothering him (*Burke* and *M'Dougal*, 1828, Syme, 345), or by throwing sulphuric acid in a person's face, and thus causing death. There may be murder where death results from blows with the fist. Murder may be accomplished even without a show of violence. Thus a person may be starved to death, or pushed over a precipice, or he may be killed by the cutting of a rope (*M'Callum* and *Corner*, 1853, 1 Irv. 259), or by the tilting up of a board, so that he falls (*Campbell*, 1836, 1 Swin. 309), or by the setting of a spring-gun (*Crave*, 1826, Syme, 188 and 210, and Shaw, 194). Where grievous bodily injury is evidently designed, and death results, the crime is murder. But if death was not a probable consequence of the violence used, the homicide will only be of the

second degree. In this respect it is in favour of the less serious crime that the accused discarded a deadly weapon and used his fists. It is no defence, however, that the deceased in a manner brought his fate upon him, as by challenging his antagonist to a duel. The crime in such a case is murder.

2. *By Poisoning.*—It is not essential that the fatal dose be administered by the mouth; it may be introduced into the body at other localities. The drug, moreover, need not be noxious in general; it is sufficient that the victim's particular condition makes it hurtful, and that this is known to the accused.

3. *By Death resulting from the Commission of a Serious Crime.*—If death results in the course of the commission of a serious crime, it is murder, though there was no intention of killing, or even of seriously injuring, the deceased. Thus it is murder if a pregnant woman die owing to the means employed to cause her to abort (*Reid*, 1858, 3 Irv. 235; *Rae*, 1888, 2 White, 62). It is murder if a child die through being recklessly exposed to the weather (*Kerr*, 1860, 3 Irv. 645). If death result from an act of fire-raising, or as the consequence of a struggle with a robber, the crime is murder.

Defence of Provocation.—Verbal abuse, jostling, or throwing filth, do not justify retaliation by assault. The crime may amount to murder even where death was caused by a blow from the fist (*Wright*, 1835, 1 Swin. 6). The violence offered must cause reasonable alarm of serious injury to justify the extreme retaliation of homicide. If the retaliation is not reckless and grossly vindictive, it will be difficult to reach the conclusion that murder was intended. Thus if a man is provoked by a blow, and retaliates with a blow, or even with several blows, the crime, if death results, is, at the most, culpable homicide. Provocation is no defence if an interval of time has elapsed between the provocation and the retaliation (*Alison*, 1838, 2 Swin. 167). Again, if the retaliation is made with deliberation and vindictiveness, so as to indicate a spirit of revenge rather than loss of presence of mind, the plea of provocation loses its efficacy. Thus if, in retaliation for a blow, a man were to place poison in the food of him who has given the provocation, he would be guilty of murder if the poisoned food were taken, and death resulted. It is not a good defence to a charge of murder that the person killed was in the act of stealing the assailant's property. Thus it is murder to shoot a poacher or a thief by means of a spring-gun (*Craw*, 1827, Syme, 188). An officer of the law who is charged with the duty of executing a warrant is bound to use force if he is resisted. It is therefore no defence to a person who has in these circumstances killed the officer, to urge that the officer was using violence. If, however, the officer meet his death while executing a defective warrant, or while acting outwith the jurisdiction of the magistrate who issued the warrant, or in arresting the wrong person, it is always a question of circumstances whether the crime is or is not murder. The ordinary rule applies to such cases, namely, that the person attacked will be excused in putting the officer to death only if the conduct of the officer has been such as to excite reasonable apprehension of serious injury. On the same grounds an officer who is in course of executing a warrant is only justified in putting to death the person against whom the warrant is issued if the latter has threatened the officer with serious injury, or subjected him to actual violence of a dangerous character. It is not enough that the officer was merely afraid of being struck. An officer is guilty of murder if he kills a person against whom he holds a warrant who was endeavouring to avoid execution by flight.

If an officer in executing an illegal warrant, or in executing a legal

warrant illegally or on the wrong person, kills the person he was endeavouring to capture, the crime may amount to murder, unless the officer could not reasonably be expected to know of the irregularity or illegality.

Soldiers and sailors are justified in killing when this is in the line of their duty. When they are not on duty they are in the position of any other citizens. Even when they are on duty they are only justified in putting civilians to death, on the occasion of a riot, if they have been seriously attacked or threatened, not if they have merely been insulted verbally, or even if they have been pelted with missiles of a non-dangerous character.

The prosecutor, in a charge of murder, must always prove that the injurious act libelled caused the death of the person alleged to have been murdered. The defence of *malum regimen* falls to be considered in this connection. This defence is proponed where the accused maintains that the deceased perished not directly from the injury inflicted by the accused, but owing to the bad treatment accorded to the injury either by the deceased himself or by his medical attendants. This defence will, of course, be more readily upheld where the original injury was slight and not of itself likely to cause death. It is no defence to a charge of murder that death was due to a disease following upon the injury inflicted, when such supervening disease was the natural result of the injury. And in such a case the prosecutor is not bound to set forth the disease in the charge (*Stewart*, 1858, 3 Irv. 206).

There must be no dubiety as to the cause of death. If the injury inflicted is only one of several circumstances, to any one of which death may be attributed, there can be no conviction of murder. Thus if robbers, by the noise they make in breaking into a house, so terrify a woman on child-bed that she dies, they cannot be charged with her murder (*Duff and Others*, 1707, Hume, i. 182; *Kinninmonth*, *ib.* 183). It is, however, no defence to a charge of murder that the person fatally attacked was on deathbed. Nor is it a defence that the injury inflicted was not necessarily fatal, but would, in more favourable circumstances, have been cured. Thus if a man bleed to death owing to there being no surgeon near at hand, his assailant is guilty of murder, although death would have been easily prevented, could a surgeon have been procured.

There is no defence in the law of Scotland based on lapse of time between the infliction of the injury and the death of the victim. So long as the death can be indubitably traced to the injury, it is of no moment that a long period of time has elapsed between the one event and the other.

To give ground for a charge of murder the person killed must have been an existing human creature. The destruction of a child *in utero* is not murder.

Indictment.—The Act of 1887 (50 & 51 Vict. c. 35, Sched. A) gives the following forms of indictment in cases of murder:—

. . . You did assault Theresa Unwin, your wife, and did beat her, and did murder her . . . .

. . . You did stab Thomas Underwood, baker, of Shiels Place, Oban, and did murder him . . .

. . . You did administer poison to Vincent Wontner, your son, and did murder him . . .

. . . You did strangle Mary Shaw, millworker, daughter of John Shaw, residing at Juniper Green, in the County of Midlothian, and did murder her . . .

Punishment.—The punishment of murder is death, and confiscation of moveables.

[Hume, i. 254; Alison, i. 2; Burnett, 46; Macdonald, 120; Anderson, *Crim. Law*, 70.]

See Homicide; Casual Homicide; Justifiable Homicide; Culpable Homicide; Attempt to Murder.

Mussels.—See Fishings.

Mutiny—"Implies collective insubordination, or a combination of two or more persons to resist, or to induce others to resist, lawful military authority" (*Manual of Military Law*, War Office, 1894, p. 20). Sec. 7 of the Army Act, 1881 (44 & 45 Vict. c. 58), provides as follows: "Every person subject to military law who commits any of the following offences; that is to say, (1) causes, or conspires with any other persons to cause, any mutiny or sedition in any forces belonging to Her Majesty's regular, reserve, or auxiliary forces, or navy; or (2) endeavours to seduce any person in Her Majesty's regular, reserve, or auxiliary forces, or navy, from allegiance to Her Majesty, or to persuade any person in Her Majesty's regular, reserve, or auxiliary forces, or navy, to join in any mutiny or sedition; or (3) joins in, or being present does not use his utmost endeavours to suppress, any mutiny or sedition in any forces belonging to Her Majesty's regular, reserve, or auxiliary forces, or navy; or (4) coming to the knowledge of any actual or intended mutiny or sedition in any forces belonging to Her Majesty's regular, reserve, or auxiliary forces, or navy, does not without delay inform his commanding officer of the same, shall on conviction by court-martial be liable to suffer death, or such less punishment as in this Act mentioned." Civilians who endeavour to seduce persons serving in Her Majesty's sea or land forces from allegiance to Her Majesty, or to incite such persons to commit any traitorous act, can be sentenced by a Criminal Court to penal servitude for life (37 Geo. III. c. 70; 7 Will. IV. and 1 Vict. c. 91). Mutiny in the navy is dealt with in secs. 10 to 16 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109).—[See *Manual of Military Law* (War Office, 1894); Thring, *Criminal Law of the Navy*.]

See Army.

Mutual Gable.—See Common Gable.

Mutual Settlement.—See Revocability; Settlement; Will.

Mutuum is the gratuitous loan of things which are usually estimated by number, weight, or measure, on condition that an equal quantity of things of the same kind shall be returned. *Mutuum*, a loan for consumption, is contrasted with *commodatum*, a loan for use. It was one of the contracts *re*, since delivery of the *res mutua* was required to constitute the obligation. In *mutuum* the property in what is lent passes to the borrower (*Dig.* 12. 1. 2. 2). Accordingly, as a general rule, no one can lend in this form unless he is owner and has the capacity of alienation (*Dig.* 12. 1. 2. 4; 26. 8. 9. pr.).

The duty of the borrower is to restore, not the identical things, but as much of the same kind and quality, or, as it is otherwise expressed, the things have to be returned not *in specie*, but *in genere*. As the property in the

things lent passes to the borrower, the loss of them by inevitable accident does not excuse him from restoring an equivalent. Unless a date for repayment is agreed upon, expressly or by implication, repayment can be demanded at any time. The borrower cannot be compelled to pay interest on the loan, unless he has undertaken to do so in an independent *stipulatio*. The action under which the lender establishes his claim against the borrower is the *condictio certi*.

By the SC. Macedonianum it was enacted that no action should lie for the recovery of money lent to a son under the power of his father. The enactment applied only to loans of money, but to these it applied even though veiled under the loan of some other commodity immediately convertible into money (*Dig.* 14. 6. 7. 3). The operation of the enactment was excluded, if the son, on becoming *sui juris*, ratified the contract (*Cod.* 4. 28. 2); if, and so far as, the loan was *in rem versum* of the father (*Dig.* 14. 6. 7. 12–14); if the lender had good ground for believing that the son was *sui juris* (*Dig.* 14. 6. 3 pr.); or if the father had consented to the transaction (*Cod.* 4. 28. 2; *Dig.* 12. 1; *Cod.* iv. 1; *Inst.* iii. 14 pr.) As to the SC. Macedonianum, see *Dig.* 14. 6; *Cod.* 4. 28; *Inst.* iv. 7. 7. The distinctive features of *mutuum*, and the main differences between *mutuum* and *commodatum*, are dealt with in the following Scots authorities:—Stair i. 11; More, *Notes on Stair*, lxxi; Ersk. *Inst.* iii. 1. 18; Bankt. i. 354; Bell, *Prin.* s. 200; Bell, *Com.* i. 275.

Name, Change of.—In Scotland, unless in the case of an officer under the Crown or the holder of a public office, it is not necessary for a person desiring to change his name to obtain the authority of the Court to do so; and a petition for such authority will be refused (*Furlong*, 1880, 7 R. 910, per Ld. Pres. Inglis). A Writer to the Signet having obtained the royal licence to assume an additional surname, presented a petition to the Court to sanction his using it in all legal acts and deeds and judicial proceedings. Ld. Pres. Hope said: "This petition should be withdrawn as unnecessary. I do not remember to have ever seen an application of this nature. In the case of a Notary Public I have seen such an application, but not in any other. There is no need of the authority of the Court to enable a man in Scotland to change his name" (*Young*, 1835, 13 S. 262).

Nationality.—British nationality is the status of a British subject, a person who owes allegiance to the Crown and is entitled to its protection. All who do not possess it are aliens (see ALIEN). At common law it was determined by the feudal principle of allegiance depending on birth under the control and protection of the sovereign, that is, in practice (though not in strict theory), on birth within the British dominions. *Protectio trahit subjectionem et subjectio protectionem* (1 Blackstone, 366). It was "imposed, and not merely offered for acceptance" (*Æneas Macdonald's case*, 1747, 18 St. Tri. 857; Westlake, *Priv. Int. Law*, p. 323), and it was inalienable, according to the rule, rigidly enforced by the English Courts, *nemo potest exuere patriam*. It was not dependent on descent.

These rules of the common law have been materially modified by

statute, and now British nationality may be acquired in the following ways:—

(1) By birth, under the common law rule above stated, with certain exceptions, every person born within the British dominions, and no one born beyond them, is a "natural-born British subject," without reference to the nationality of his parents. The exceptions are, children born in a place within the British dominions which, at the time of birth, is in hostile occupation, their father being an alien enemy (*Calvin's case*, 1608, 7 Coke, 18 *a*), and children born within the British dominions to an alien father who is an ambassador or other diplomatic agent accredited to the Crown by a foreign sovereign. These are aliens. On the other hand, the children of a British ambassador, born abroad, are natural-born British subjects (*Calvin's case*, *supra*), a rule which does not extend to the children of officers in the military service of the Crown abroad (*De Geer*, 1882, 22 Ch. D. 243). These exceptions are explained by reference to the theoretical, as distinguished from the practical, rule determining nationality at common law.

(2) By statute, British nationality in certain cases depends on descent. The term "natural-born British subject" was gradually extended, so that by the combined effect of a series of statutes it now includes any person whose father or paternal grandfather was born within the British dominions, and is at the time of such person's birth a "natural-born British subject." To produce this result, "the two characters of subject and subject by birth must unite in the father" (*Doe d. Thomas*, 1824, 2 St. Tri. N. S. 105, at 120, 2 B. & C. 779; *Dundas*, 1839, 2 D. 31; 7 Anne, c. 5, s. 3; 4 Geo. II. c. 21, s. 1; 13 Geo. III. c. 21, s. 1). This statutory extension of the term does not apply where the father or grandfather through whom the status is claimed, though a "natural-born British subject," is at the time of the child's birth in the service of a foreign State at war with Great Britain (4 Geo. II. c. 21, s. 2). The Acts have been so construed that the status thus given is strictly personal, in the sense that it is not transmitted to descendants (*De Geer*, 1882, 22 Ch. D. 243; *in re Willoughby*, 1885, 30 Ch. D. 324; Westlake, p. 326).

Nationality acquired by descent under these statutes is never inherited through a woman. The children of a British mother and an alien father, born abroad, are aliens (*Doe d. Duroure*, 1791, 4 T. R. 300). An illegitimate child, by the law of England, unlike that of other countries, does not belong to the State of which the *mother* is a subject. The statutes do not apply to bastards, and the rule is that illegitimate children born abroad of English women take the nationality of the place of their birth. If born in the British dominions, such a child is a British subject by virtue of the original common law principle. Further, to take advantage of these statutory modifications, it is not sufficient that the child, born a bastard, should be legitimated by the subsequent marriage of the parents (*Sheddon*, 1854, 1 Macq. 535, at p. 612).

(3) By NATURALISATION (*q.v.*).

Loss of British Nationality.—At common law, as has been said, the character of a British subject was indelible. A person might become the subject of another State, but the British Courts refused to recognise the change as freeing him from his duty of allegiance to the Crown. Apart from statute, no voluntary expatriation was possible. The rigorous application of this principle was one of the causes which mainly led to the war between Great Britain and the United States in 1812, but the rule was gradually relaxed in practice, and legislation has now provided means for the renunciation, as well as for the resumption, of the character of a British subject.

Under the Naturalisation Act, 1870 (33 & 34 Vict. c. 14), any British subject who is "not under any disability," and is in a foreign State, may now, since the date of the Act (12 May 1870), by voluntarily becoming naturalised in that State, cease to be a British subject. From the date of such naturalisation he is an alien. The provision was made retrospective, so as to apply to those who had, before the date of the Act, been voluntarily naturalised in a foreign State (s. 6). By what is known as a "declaration of alienage," in the manner and form prescribed by the Act (ss. 3, 11), a person who is a natural-born British subject by virtue of his birth within the British dominions, but who was also at birth the subject of another State by the law of the latter, and is still a subject of it, may, if of full age and under no disability, become an alien. The same means may be taken and under like conditions, by the child of a natural-born British subject born abroad (s. 4). By a similar declaration, a naturalised subject of Great Britain may divest himself of his British nationality and revert to that of his original State, where a convention has been entered into for that purpose between Great Britain and the other State (s. 3). As yet, however, only two such conventions have been made, viz. with the United States, dated 13 May 1870, and 23 Feb. 1871 (see Naturalisation Act, 1872, 35 & 36 Vict. c. 39, Sched.). The provision is not of great practical consequence.

Loss of British nationality does not exempt the person from liability in respect of any act done before the date of such loss (33 & 34 Vict. c. 14, s. 15).

British nationality, having been thus renounced, may be afterwards resumed. A "statutory alien" (see ALIEN) may, under the same conditions as are required for a certificate of Naturalisation (*q.v.*), obtain from a Secretary of State a "certificate of readmission to British nationality." This, on his taking an oath of allegiance, readmits him to the status of a British subject, but only from the date of the certificate. And the readmission is subject to the same qualification as in the case of naturalisation, that within the foreign State of which he became a member, the person readmitted is not to be deemed a British subject unless he has ceased to be a subject of that State by its laws or in pursuance of a treaty (33 & 34 Vict. c. 14, s. 8).

Certain special rules regarding the acquisition, loss, and resumption of British nationality apply in the case of women and children.

It may be acquired, in the case of women only, by marriage. The rule in Great Britain was, until 1870,—as it still is in the United States,—that a woman's marriage did not affect her nationality. But now, by statute, "a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject" (33 & 34 Vict. c. 14, s. 10 (1), replacing 7 & 8 Vict. c. 66, s. 16). A British woman, therefore, loses her nationality by marriage with an alien, and, conversely, an alien woman acquires British nationality by marriage with a British subject. Whether British nationality thus acquired is retained after the dissolution of the marriage by the death of the husband or by divorce, has not yet been decided. It is probable that it is so, at least in the case of the husband's death (see ALIEN; Dicey, *Conflict of Laws*, pp. 189 and 742). A woman who has become a "statutory alien" by marriage may, after her husband's death, obtain a certificate of readmission to British nationality at any time during widowhood (33 & 34 Vict. c. 14, s. 10 (2)). Change of nationality by marriage does not deprive the woman of any estate or interest in any property to which she was previously entitled, or affect such estate or interest to her prejudice (35 & 36 Vict. c. 39, s. 3).

As regards children, British nationality is made by statute in certain cases dependent on the combined effect of descent and place of residence. Thus where a father or a mother (if a widow) becomes naturalised in the United Kingdom, the child of such parent, who has during infancy become resident with the parent in the United Kingdom, is to be deemed a naturalised British subject (33 & 34 Vict. c. 14, s. 10 (5)). By the latest Naturalisation Act (1895, 58 & 59 Vict. c. 43, s. 1) this is extended so as to apply to children residing with a naturalised father in the service of the Crown beyond the United Kingdom. Apparently, this provision applies whether the child in question was born before or after the naturalisation of the parent.

Under similar conditions a child may lose its British character. Where the father or the mother (being a widow) becomes an alien, children becoming resident during infancy in the country where the parent is naturalised, and being by the law of that country naturalised in it, are to be deemed subjects of the latter and not of Great Britain (s. 10 (3)). And the child of a father or a widow mother who has been readmitted to British nationality, becoming resident during infancy with the parent within the British dominions, is "deemed to have resumed" the position of a British subject to all intents (s. 10 (4)). It will be observed that in the latter case the residence required is residence within the British dominions, and not, as in the case of naturalisation of a parent, residence within the United Kingdom.

These provisions regarding residence are extremely vague, and they have not yet been judicially construed. The uncertainty is increased by the fact that "infancy," in the sense of English law, in which it is here used, is a term unknown to the law of Scotland (Dicey, p. 191).

Where it is necessary to determine whether any given person is or is not a British subject, *e.g.* for the purpose of extradition, the question is decided—at least in England—by a jury, on the facts, in accordance with the law determining the possession of British nationality (*Querin*, 1889, 5 T. L. R. 160).

For nationality of ships, see SHIP.

[See Dicey, *Conflict of Laws*, pp. 173. *sqq*, 740 *sqq.*; Westlake, *Priv. Int. Law*, 3rd ed., pp. 323 *sqq.*; Cockburn, *Nationality.*]

Nations, Law of.—See INTERNATIONAL LAW.

Natural Children.—See BASTARD; AFFILIATION; LEGITIMATION; CUSTODY OF CHILDREN.

Natural Obligations.—See OBLIGATIONS.

Naturalisation—The adoption of an alien into a State community—the process by which an alien is invested with the rights and obligations of a subject.

The term is sometimes applied so as to include the informal methods of admitting an alien to the position of a subject, as, *e.g.*, by marriage, by the law of Great Britain, in the case of a woman. More usually it is restricted

to those cases where nationality is conferred by some express act or solemnity.

As has been stated in the article on NATIONALITY (*q.v.*), the doctrine of the English common law was that nationality was indelible and inalienable. A special Act of Parliament was required to confer on an alien the status of a British subject. In a restricted sense, however, it might be conferred by letters of denisation, granted by the sovereign under 12 & 13 Will. III. c. 2; and this method of partial naturalisation may still be adopted (see DENIZEN). Where an Act of Parliament is employed, the exact extent of the rights conferred depends on the provisions of the particular Act.

A much more usual method of naturalisation now is that provided by the general Naturalisation Act, 1870, which replaces several earlier enactments (33 & 34 Vict. c. 14). Under this statute an alien may apply to one of the principal Secretaries of State for a certificate of naturalisation on certain conditions. He must produce evidence to the satisfaction of the Secretary that he has resided for five years in the United Kingdom, or has been for that period in the service of the Crown, and that he intends, on being naturalised, either to reside in the United Kingdom or to serve under the Crown. The previous residence or service must have been within a limited time before the application (usually eight years), as the Secretary may determine. The Secretary has an absolute discretion to give or refuse the certificate, as he thinks best for the public good. He need state no reasons for refusal, and, while the Act does not prevent repeated applications, there is no appeal from his decision (s. 7). On receiving the certificate, the applicant is required to take an oath of allegiance in the terms provided by the Act (s. 9; and see 33 & 34 Vict. c. 102, s. 2). Until he has done so, the certificate is ineffectual. Provision is also made for the granting of a similar certificate to persons whose British nationality is doubtful, and to those who had become naturalised before the Act, as, *e.g.*, under 7 & 8 Vict. c. 66 (33 & 34 Vict. c. 14, s. 7).

The effect of this naturalisation is that *within the United Kingdom* the recipient is "entitled to all political and other rights, powers, and privileges, and subject to all obligations to which a natural-born British subject is entitled or subject, in the United Kingdom." The only qualification is that the alien thus naturalised is not, when within the State to which he formerly belonged, to be deemed a British subject, unless he has by the laws of that State or by treaty ceased to be one of its subjects (*in re Bourgoise*, 1889, 41 Ch. D. 310).

It is to be observed that this provision does not expressly put the naturalised alien in the position of a "natural-born" British subject, and it is very doubtful whether his children born abroad after naturalisation possess the status of natural-born British subjects (*in re Bourgoise, cit. supra*).

Naturalisation in the United Kingdom does not extend to the British colonies or India. Naturalisation in these possessions is regulated by local laws, and does not extend to the United Kingdom (33 & 34 Vict. c. 14, ss. 8, 11, 16, 17).

The resumption of British nationality, by a person who has lost or renounced it, is closely analogous to naturalisation. This subject has been dealt with in the article on NATIONALITY.

For collective naturalisation, or a general change of the nationality of the inhabitants of a territory, by cession, conquest, etc., see ALIEN.

[See Dicey, *Conflict of Laws*, pp. 181 *sqq.*]

Nature, Law of.—The law of nature is "that which God, the Sovereign of the Universe, has prescribed to all men, not by any formal promulgation, but by the internal dictate of reason alone. It is discovered by a just consideration of the agreeableness or disagreeableness of human actions to the nature of man; and it comprehends all the duties we owe either to the Supreme Being, to ourselves, or to our neighbours — as reverence to God, self-defence, temperance, honour to our parents, benevolence to all, a strict adherence to our engagements, gratitude, etc." (Ersk. *Prin.* i. 1. 2; *Inst.* i. 1. 7; Stair, i. 1. 3).

Nautæ, caupones, stabularii. — The chapter of the Prætorian edict which fixed the responsibilities of shipmasters, innkeepers, and stablers, in respect of the property of travellers, was in these terms: *Ait Prætor: Nautæ, caupones, stabularii, quod cujusque salvum fore receperint nisi restituent, in eos judicium dabo* (*Dig.* 4. 9. 1 pr.). The term *nautæ* here means anyone who carries on the transport of goods or passengers with a ship, whether his own or chartered, and whether commanded by himself or by a captain. The proper name for the person liable by the edict under the class *nautæ* is *exercitor*—a term defined in *Dig.* 14. 1. 1. 15. *Caupones* were the keepers of inns, where travellers are accommodated with food and lodging. The nature of the business of a *caupo* is explained by Gaius (*Dig.* 4. 9. 5). *Stabularii* were livery-stable keepers. The term is often used of one who kept an inn and stabling in connection with it, for "innkeeper and postmaster" seems to have been a combination as common in Rome as with us. "The edict," observes Ulpian in commenting on it, "is of the greatest advantage to the public, who must very often rely on the honesty of these persons, and intrust articles to their custody."

The result of the edict was to introduce an action, technically known as the *actio in factum de recepto*, available against persons exercising the trades therein specified. The action concluded for the restoration of the property intrusted to them or, in default, for full compensation for the loss actually sustained. The bare admission of travellers and their effects implied an obligation to answer, not for negligence merely, but for every loss and damage that might have been avoided by a specially watchful care. Thus in the texts it is said that the recipient of the goods has the risk (*Dig.* 4. 9. 4 pr.) and is responsible for *custodia*, and not merely for *culpa* (*Dig.* 4. 9. 3. 1). This means that he is absolutely responsible for theft and for every injury to the thing held by him, whether the wrong-doer be a servant, a fellow-passenger, or any other person, known or unknown, provided the loss was not the result either of *damnum fatale* or *vis major*. These expressions contain the only limitations on the unqualified responsibility of the persons within the edict, and they cover only losses arising from pure accident, or brought about by such a degree of violence as no ordinary care or courage could avert. (*Vis major* is defined as "the act of God," *Dig.* 19. 2. 25. 6, and it includes both inevitable accidents, *Dig.* 13. 6. 18, and physical compulsion by a third party. The texts of the *Corpus Juris* as to what constitutes *vis major* are collected by Voigt, *Die xii. Tafeln*, i. 431, n. 8; see DAMNUM FATALE.) The civil actions on hire (*locati conducti*) or deposit were available against *nautæ, caupones*, and *stabularii* only when there was *culpa*; so that the effect of the edict was greatly to increase the civil responsibility of the trades in question. At the same time, the obligations of *custodia* could be excluded by express agreement between the parties. Further, the recipient of the goods could contract himself out of responsibility

under the edict by giving public notice beforehand of the limits of responsibility he was prepared to incur, provided that the traveller was either made aware of this notice on entering the premises, or assented to it when brought to his notice by allowing his effects to remain.

Besides the action under the edict, the Roman law allowed a penal action to be brought against the traders for damage occurring on their premises through fraud or theft on the part of their employees. The ground of this *actio quasi ex delicto* was the fault committed by the master in employing dishonest servants. The action aimed at the recovery of double the value of the property stolen, or double the loss occasioned by the damage (*Dig.* 47. 5. 1. 6); but, being penal, it did not pass against heirs (*Inst.* iv. 5. 3; *Dig.* 47. 5). The main advantages of the action under the edict over this penal action were that (1) it transmitted against heirs; (2) it could be brought for damage done, not merely by servants, but by other travellers; and (3), unlike the quasi-delictual action, it covered damage done on shore as well as on board, provided the goods had been handed over.

Finally, as against the actual wrong-doer, the traveller had the ordinary remedies on the theft, or under the *lex Aquilia*, according to circumstances. If he availed himself of any of these remedies, he could take no further proceedings against the master of the ship or inn (*Dig.* iv. 9. 6. 4; 47. 5. 1. 3).

Few portions of Roman law have been more generally and closely copied in the common law of modern States than the chapter of the edict on this subject. It is fundamental in the English law of bailments, the liability of the carrier or innkeeper being regarded as identical with that of an insurer (*Calye*, 26 Eliz.; Smith, *L. C.*, 10th ed., i. 115). The recognition in English law of the liabilities attaching to these classes of bailees, though it is usual to refer it to the custom of the realm, seems to have come from the Roman law through Bracton (see per Brett, J., in *Nugent*, 1875, 1 C. P. D. 19). The edict has also been incorporated into the French Code (Art. 1784), and forms part of the existing law of Germany, Italy, Spain, and Holland (per Cockburn, C. J., in *Nugent*, 1876, 1 C. P. D. 423, at p. 429).

In Scotland the edict has been adopted with some variations (Ersk. iii. 1. 28). The bare act of receiving the goods lays upon persons, who hold themselves out to the public as engaged in one or other of the employments covered by the edict, the responsibility for the goods committed to their charge, although no neglect is proved, provided that the damage to, or loss of, the goods has not arisen from inevitable accident, the act of God, or of the king's enemies (Ersk. iii. 1. 28; Bell, *Prin.* s. 235).

Under the head of *Nautæ*, the principle of the edict has been extended, not only to carriers by water, but also to carriers by land if they are common carriers. It includes, accordingly, railway companies; canal and navigation companies; owners and masters of sailing and steam vessels, employed as general ships, trading regularly from port to port; proprietors of mail and stage coaches, barges or lighters; waggoners, carters, and porters, who carry for hire. In general, carriers of passengers, *e.g.* railway companies or hackney coachmen, are liable as common carriers for their luggage. (As regards the persons coming under the designation of common carrier, see Bell, *Prin.* s. 236; Notes in Ersk. *Inst.* (Nicholson's ed.), pp. 674 *et seq.*; Macnamara, *The Law of Carriers*, ch. iii.; Angell on *Common Carriers*, 5th ed., pp. 67–123.) After the actual carriage has been accomplished, the liability of the carrier continues for such time as is reasonable and usual for allowing the consignee to take possession of the goods; but,

after the lapse of that time, his responsibility is only that of a warehouseman.

Under the heads *Caupones* and *Stabularii* are included innkeepers, vintners, and stablers, who are liable for property placed under their charge or that of their servants, or brought by guests or employers within their premises (Ersk. iii. 1. 29; Bell, *Prin.* s. 236; *Laing*, 1850, 12 D. 1279). Negligence of a guest may relieve the innkeeper (*M'Pherson*, 1841, 3 D. 930); and he is also free if the guest specifically undertakes the care of his own effects, though the mere fact that the guest has locked up certain articles for greater security does not imply that he undertakes the responsibility of their safe-keeping (Stair, i. 13. 3). (As to what constitutes the placing of property in charge of an innkeeper so as to infer liability under the edict, see *Meikle*, 16 Feb. 1813, F. C.: *Williamson*, 21 June 1810, F. C.)

It is no answer that the loss was due to theft or robbery, for these are the very dangers against which the rule is designed to guard (*Forbes*, 1687, Mor. 9233; *Chisholm*, 1714, Mor. 9241; but see *Watling*, 1825, 4 S. 83). Nor is it an answer that the loss was caused, or the damage done, by the fraud or negligence of servants of the carrier or innkeeper, for the servants are identified with their master, and the policy of the law is to protect the public against the servants, as well as the risk of collusion between master and servant (Stair, i. 13. 3; *Garnett*, 1821, 5 Barn. & Ald. 53). On the other hand, fire, being regarded as a *damnum fatale*, affords a good defence at common law, unless where fraud or collusion is proved (*M'Donnel*, 15 Dec. 1809, F. C.). This, however, was altered as regards carriers—the Act does not apply to innkeepers or stablers—by the Mercantile Law Amendment Act (19 & 20 Vict. c. 60), which provides (s. 17) that "all carriers for hire of goods within Scotland shall be liable to make good to the owner of such goods all losses arising from accidental fire while such goods were in the custody or possession of such carriers." Perils of the sea are not a ground on which carriers can escape responsibility, unless they can be shown as a matter of fact to have been inevitable. (As to this, see Scrutton on *Charter Parties*, 3rd ed., pp. 176–180.)

The value of the goods lost, or the extent of the damage done, may now be proved *prout de jure* (*Campbell*, 1852, 24 Jur. 455; *Crawcour*, 1842, 5 D. 10; *Gowans*, 1844, 6 D. 606; *Ciceri & Co.*, 1889, 16 R. 814). The general rule as to the measure of damages is the market price of the goods, in their undamaged state, at the place of delivery (*G. W. Rwy. Co.*, 1866, L. R. 1 C. P. 329); but sometimes the Court allow only the cost price of the goods, the carriers getting the goods in their damaged state for what they are worth (*Ciceri & Co.*, 1889, 16 R. 814). The carrier may also be liable for damages for loss of market, if the loss of market is the direct result of the damage done to the goods (*Keddie, Gordon, & Co.*, 1886, 14 R. 233).

The responsibility under the edict has been limited by statute in several directions, both as regards innkeepers and carriers. The liability of innkeepers at common law was limited, by 26 & 27 Vict. c. 41, s. 1, to £30 for any kind of traveller's property, not being a horse or other live animal, or its gear or any carriage, except where the loss has been brought about by the wilful act, default, or neglect of the innkeeper or any servant in his employ, or where the property has been deposited expressly for safe custody with the innkeeper. To secure the benefit of the Act, the innkeeper must place a copy of the first section in a conspicuous part of the hall or entrance to his inn. Similarly, the liability of carriers has been limited by the

Carriers Act, 1830 (11 Geo. IV. and 1 Will. IV. c. 68), and certain other Statutes, *e.g.* the Railway and Canal Traffic Act (17 & 18 Vict. c. 31).

As regards these statutory limitations, see article CARRIER.

Navy.—The principal Act dealing with the discipline of the navy is 29 & 30 Vict. c. 109, as amended by 47 & 48 Vict. c. 39. Enlistment in the navy is regulated by the Naval Enlistment Acts of 1835 (5 & 6 Will IV. c. 24), 1853 (16 & 17 Vict. c. 69), and 1884 (47 & 48 Vict. c. 46): and a seaman in the merchant service may leave his ship for the purpose of forthwith entering the naval service of her Majesty, and in that case shall not, by reason of so leaving his ship, be deemed to have deserted therefrom, or otherwise be liable to any punishment or forfeiture whatever (57 & 58 Vict. c. 60, ss. 195–197).

[Stephen, *Com.* ii. 589; Thring, *Criminal Law of the Navy.*]

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