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VOLUME IX



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WILLIAM GREEN & SONS,

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EDITED BY

JOHN CHISHOLM, M.A., LL.B.

ADVOCATE, AND OF THE MIDDLE TEMPLE BARRISTER-AT-LAW

NEGLIGENCE TO *PRESCRIPTION*

VOLUME IX

EDINBURGH

WILLIAM GREEN & SONS

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1898

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OF

THE LAW OF SCOTLAND

Negligence.—Negligence is the failure to observe that care and circumspection which is due from one man to another (Pollock on *Torts*, p. 17, 5th ed.). In this view negligence is the breach by omission of a positive duty, as opposed to the breach by commission of a negative duty (Austin, *Jurisprudence*, Lect. 20). Though for practical purposes a person may be spoken of as having negligently done something or having negligently omitted to do something, theoretically negligence must be regarded as a failure or omission, and the test of liability in an action founded on negligence always is whether the pursuer has shown that the defender has omitted to do something which he ought to have done. Negligence, therefore, as a branch of the law of wrongs, has been understood to stand opposed to malice, or that branch in which intention is an element (although it may be that the recent decision of the House of Lords in *Flood* v. *Allen*, 1897, A. C. 1, will necessitate a reconsideration of this division of wrongs). Consequently a pursuer seeking to recover damages on account of loss alleged to have been caused by the negligence of the defender, does not require to show that the defender was actuated by the intention of causing him hurt, but merely that the defender did not take due care to avoid hurting him. A pursuer seeking to recover for a loss maliciously caused, must, in order to get damages at all, or to get aggravated damages, as the case may be, show an intention on the part of the defender, which in law amounts to malice. (See MALICE.)

Without negligence there is no liability, that is to say, the mere fact of damage being caused does not render the individual causing it liable (*Chalmers*, 1876, 3 R. 464). There is no liability *ex dominio*. A person may be under a very strict obligation with regard to property which he possesses, but nothing short of a breach of that obligation will subject him to payment of damages (*Moffat*, 1877, 5 R. 17; *Cormack*, 1889, 16 R. 812; *Campbell*, 1864, 3 M. 121). It follows that there is no liability for accident caused by a latent defect, that is, a defect which careful inspection would not reveal (*Sneddon*, 1859, 11 D. 1159; *Ovington*, 1864, 2 M. 1066; *Weems*, 1861, 4 Macq. 221; and see DAMNUM FATALE).

Negligence at one time was regarded as being of different degrees; but as the duty to exercise care is estimated with reference to the particular circumstances of each case, it seems more correct to say that the degree of care required varies with different circumstances, and that negligence is the failure to use the degree of care which the circumstances demand. If the

necessary care has been used, there is no negligence and no liability, although loss may have been suffered; if less than the necessary care has been used, there is negligence and liability.

The fact that the duty of which negligence is the breach varies both in kind and degree with different circumstances, suggests a division of the subject according to the different classes of circumstances which create the duty. For what instructs negligence in one class of cases may have no apparent resemblance to what instructs it in another set. And only in this way can evidence of negligence, the practical side of the subject, be usefully treated. The diversity in the application of the general principle may be illustrated by the dissimilar cases of loss of trust funds and personal injury from the bite of a dog. A trustee has to investigate as to the sufficiency of security according to recognised methods, and if he fails to employ these is said to be negligent. In the case of ownership of animals, on the other hand, the owner does not require to make investigation, but knowledge that an animal is of a ferocious disposition must be brought home to him. He is said to be negligent, not in failing to discover the animal's propensities, but in failing to keep it absolutely secure after its propensities are known.

The general standard of care which the law demands of an individual, as has been indicated, is that which a prudent and conscientious man would exercise in his own affairs, and would observe in the interest of his neighbours, having in view the magnitude of the risk run (*Mackintosh*, 1864, 2 M. 1362); or, in other words, negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate conduct, would do (per Alderson, B., in *Blyth*, 1856, 11 Ex. 784). This rule assumes knowledge of a risk; so that where this knowledge is excusably wanting, the obligation to take care does not arise (*Galloway*, 1872, 10 M. 795). Further, the duty to take care presupposes some person to whom the duty is owing. It is not a duty in the air, but a duty towards particular people. In the case, for instance, of premises which contain an element of danger, a duty arises as soon as there is a probability that people will go upon them. It varies in the case of those invited to the premises and to mere licensees; towards trespassers it does not exist (*Thomas*, 1887, L. R. 18 Q. B. D. 694). When the conditions are present which create the duty of taking precautions, the obligation is to take those which ordinarily would be taken in the circumstances (*Murdoch*, 1885, 12 R. 817). A person having machinery or appliances of the kind ordinarily in use, does not require to discard these because a better kind is procurable (*Welsh*, 1885, 12 R. 590; *Forbes*, 1888, 15 R. 323; *M'Gill*, 1890, 18 R. 206); though if a slight alteration will make a dangerous thing safe, that is a precaution which ought to be taken (*Johnson*, 1885, 22 S. L. R. 698). But, on the other hand, if the danger is great, an expensive precaution will have to be taken if that is the only way of avoiding it (*Henderson*, 1889, 16 R. 633).

The duty to take care, a duty imposed by law, may exist along with, or independently of contractual relation. The existence of a contract between parties does not, unless it necessarily implies that, alter the duties imposed by law. For instance, the duty which a master owes to his servant to see that the premises on which he works are safe does not depend on contract (*Riley*, 1861, 6 H. & N. 445; *Membery*, 1889, L. R. 14 A. C. 184). A servant driving his master's carriage, and injured by a breakdown in it, has no greater or less right to damages than the man on the street injured by the same occurrence. As has been observed, the existence of a contract between two persons does not prevent the existence of the suggested duty between them being also raised by law, independently of the contract, by the facts with regard to which the contract is made (*Heaven*, 1883, L. R. 11 Q. B. D. 507, 509). Con-

sequently the absence of a contract between pursuer and defender, or the fact that the pursuer has a contract of service with someone else, does not negative the existence of a duty on the part of the defender. "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (*Heaven, supra*). Dockowners, for instance, who supply staging, cranes, and the like for the use of vessels coming to the dock owe this duty to all those employed at them, though not in their service. But the duty does not exist towards those who are not invited to use the defective thing, unless it is one noxious or dangerous in itself (*Caledonian Ry.*, 1898, A. C. 216).

But although the existence of a contract between the parties does not extinguish the common-law duty to take reasonable care, a contract may impose a higher duty. Breach of that duty has been called negligence or fault, but it would save confusion of ideas if it were always called breach of contract. The previous illustration of a driver and a defective vehicle makes the distinction clear. For suppose that the vehicle contained a passenger who was being driven for hire, and that he was injured by a breakdown: while the injured driver would require to show that the owner had failed to use reasonable care to discover the defect, the passenger having contracted for safe carriage would require only to show that the vehicle broke down, and the owner in a question with him would escape liability only by showing that he had used, not merely ordinary, but every care to ensure safety, and that the breakdown was due to latent defect, or other unpreventible cause (*Lyon*, 1838, 16 S. 1188; *Hyman*, 1881, L. R. 6 Q. B. D. 685; *Smith*, 1895, 2 S. L. T. 536; *Francis*, 1870, 5 Q. B. 184, 501; *Redhead*, 1869, L. R. 4 Q. B. 379).

The liability of skilled men, such as doctors and lawyers, is also spoken of as depending on negligence, but it is probably more correct to refer it to contract. The maxim which is held to fix the ratio of their liability, *spondet peritiam artis*, supports the view that liability arises from contract. The obligation, however, is not absolute: a lawyer does not guarantee victory nor a surgeon a cure, but only undertakes to employ the usual care and skill.

The question of negligence is a jury one, and the Court is slow to interfere with their finding. But the matter is subject to certain rules of law. The onus of proof, in cases where the duty does not depend on contract, is on the pursuer. "Where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury" (*Hammack*, 1862, 11 C. B. N. S. 588; *Manzoni*, 1880, L. R. 6 Q. B. D. 153). A defect *per se* is not evidence of negligence: it must also be proved that reasonable care would have discovered it (*Gavin*, 1889, 17 R. 210). Remoteness of damages (see DAMAGES, MEASURE OF) is also a ground on which the Court will interfere to direct the jury, or afterwards overturn their finding.

On the other hand, there may be a legal presumption of negligence in certain circumstances. "Where a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care" (*Scott*, 1865, 3 H. & C. 596; *Byrne*, 1863, 2 H. & C. 722).

[Pollock on *Torts*; Wharton on *Negligence*; Glegg on *Reparation*.]

See CONTRIBUTORY NEGLIGENCE; REPARATION.

Negotiable Instruments.—*Distinctive Characteristics.*—The distinguishing privileges of negotiable instruments are two in number.

(1) The legal title to the property represented by the instrument is effectually transferred by the delivery of the instrument. In the ordinary case of a non-negotiable document of debt, the instrument is merely evidence of the debt, and the legal title to the debt is transferable only by assignation, completed by intimation. The debt, in short, is quite independent of the instrument vouching it, and may be effectually assigned without any change in the possession of the instrument. In the case of a negotiable instrument, on the other hand, the obligation is incorporated in, and is transferred with, the document by which it is evidenced. In the case of certain documents, indorsement by the holder is required, as well as delivery of the instrument, in order to transfer the property. Documents transferable by the indorsement of the holder followed by delivery, *e.g.* bills payable to order, are correctly termed negotiable; but documents negotiable by simple delivery of the instrument, *e.g.* bills or notes payable to bearer, or indorsed in blank, are negotiable in a fuller sense of the word.

(2) The holder of a negotiable instrument, if he has taken it in good faith, has a title independent of his predecessor's title, and free from defences available against the transferor. In the case of a non-negotiable document, a holder, who has received it from one who neither is owner of it nor has the owner's authority to deal with it, acquires no title in it against the true owner, though he took it honestly and gave full value for it. In the case of a negotiable instrument, on the other hand, any person in possession of it may convey a good title in it, even when he himself has no title and is acting in fraud of the true owner, by passing it over for value to one who takes it without knowledge of the want of title in the transferor (see per Ld. Herschell in *London Joint Stock Bank*, [1892] App. Ca. 201, at 217). The *bonâ fide* holder of a negotiable instrument has no concern with the original contract out of which the instrument arose, and has a right to exact payment from the party liable on the instrument, according to its precise tenor, free from any counter-claim or exception pleadable against any of his predecessors in title.

In England it is, further, a distinguishing characteristic of a negotiable instrument that the holder of it may sue on it in his own name, whereas the general rule, when a chose in action is assigned, is that the assignee must sue, not in his own name, but in the name of the person to whom the obligation was originally undertaken. In Scotland, however, the assignee of any debt may have a right to sue in his own name; and, accordingly, the fact that the transferee of a document of debt can sue in his own name affords, in Scots law, no criterion for determining whether the document is negotiable or merely assignable.

Both the above-named characteristics must concur in order to full negotiability. If either of them is wanting, the document is not, properly speaking, a negotiable instrument. Thus while a bill of lading, indorsed to a holder for value, carries with it to the transferee not only the property in the goods, but all rights of action in respect of the goods, as if the contract contained in the bill of lading had been made with himself (18 & 19 Vict. c. 111, ss. 1 and 2; *Lickborrow*, 1787, 2 T. R. 63), nevertheless it is not, strictly speaking, a negotiable instrument, since the transferee, *e.g.* in the case of a stolen bill, does not, though he take in good faith, become owner of it independently of the transferor's title (*Gurney*, 1854, 3 El. & Bl. 622). Similarly, though, by the Factors Acts (52 & 53 Vict. c. 45; 53 & 54 Vict. c. 40; cf. Sale of Goods Act, 1893, s. 25), many documents of title,

such as dock warrants, warehouse-keepers' certificates, and warrants or orders for the delivery of goods, are given some of the incidents of negotiability, they are not fully negotiable, since their transfer gives no better title to the transferee than was possessed by the transferor.

There are various other minor characteristics common to all instruments which have been recognised as negotiable. Thus they embody rights *in personam*, *i.e.* obligations prestable against particular persons, never rights *in re*, *i.e.* titles to specific things (Anson on *Contracts*, 7th ed., p. 240). At the same time the right conferred by a negotiable instrument is not necessarily a right to receive money; it may be a right to receive other negotiable securities representing money (*Goodwin*, 1876, 1 App. Ca. 476). But a document which contains an obligation to pay money merely as part of a larger contract containing other stipulations, is not properly negotiable (*Mortgage Insurance Corpor.*, 1888, 21 Q. B. D. 352). Again, in a negotiable instrument the obligation to pay must be absolute, *i.e.* it must not be dependent on a condition or contingency (*Crouch*, 1873, L. R. 8 Q. B. 374). "It would perplex commercial transactions if paper securities were issued into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably be reduced to a certainty" (per Kenyon, C. J., in *Carlos*, 1794, 5 T. R. 482). The mere fact, however, that an instrument has annexed to it certain limitations, which modify the nature of the obligation undertaken, does not necessarily deprive it of the character of a negotiable instrument (*Venables*, [1892] 3 Ch. 527).

Negotiability by Statute or by Custom.—The privilege of negotiability may be conferred on an instrument either (1) by express statutory provision, or (2) by the custom of merchants, recognised by the Courts.

(1) The negotiability of bills of exchange, long recognised by the law merchant, is now regulated by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). The negotiability of promissory notes was recognised by Statute 12 Geo. III. c. 72, and is now regulated by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). The same statute also recognised the negotiability of cheques and dividend warrants. East India bonds are made negotiable by 51 Geo. III. c. 4.

(2) Certain instruments of contract have the quality of negotiability attached to them by the custom of merchants, recognised by the Courts. The elements to be regarded in determining whether an instrument is negotiable under this head, are: (*A*) the tenor of the document, and (*B*) the usage of merchants in this country in dealing with it.

(*A*) The instrument must be of such a nature, and in such a state, as to represent that the property in it, and all rights under it, pass by delivery of the instrument. No special form of words is necessary to negotiability: all that is necessary is that the instrument should in some form or other, *e.g.* by being payable to bearer, or executed in blank, distinctly oblige the issuer to pay to anyone who presents it. Thus postal orders are not negotiable in form, being payable to the signed receipt of a named payee; and a regulation that they may be paid through bankers though the instrument is not signed, does not make them of the nature of documents payable to bearer, so as to admit them within the category of negotiable instruments (*Fine Art Society*, 1886, 17 Q. B. D. 705). Again, the tenor of the document must be such that the mere delivery of the instrument, without any further act, passes a complete title to the property. If the terms of the document show that some further act, such as registration, is required, in addition to the delivery of the instrument, in order to perfect the

transferee's right, the document, though merchants are accustomed to regard its delivery as giving a title to the property, will not be a negotiable instrument in the contemplation of law (*London and County Banking Co. Ltd.*, 1887, 20 Q. B. D. 232: *France*, 1881, 26 Ch. D. 257; *Colonial Bank*, [1890] 15 App. Ca. 267). Thus share certificates with blank transfers are not negotiable, though bankers and dealers in public securities frequently treat them as negotiable, since the terms of these documents make it clear that mere delivery of the documents does not invest the transferee with the full legal title to the shares, until he is registered in the books of the company (*Colonial Bank*, 1887, 36 Ch. D. 36; *Williams*, 1888, 38 Ch. D. 388; 1890, 15 App. Ca. 267).

(*B*) The property in the instrument must, in the custom of merchants, pass by delivery. The usage of trade regarding the instrument is a question of fact (*Lang*, 1831, 7 Bing. 284). The question whether a foreign document is negotiable depends, not on the usage with regard to it abroad, but on the usage with regard to it of merchants in this country (*Gorgier*, 1824, 3 B. & C. 45; *Picker*, 1887, 18 Q. B. D. 515; cf. per Romer, J., in *Alcock* v. *Smith*, [1892] 1 Ch. 238, at 255). The usage, in order to be established, must be general and not local or prevalent only in a particular market or particular section of the commercial world (see per Bowen, L. J., in *Easten*, 1886, 34 Ch. D. 95, at p. 113: cf. *Partridge*, 1846, 9 Q. B. 396).

When these two elements concur—that is, when the document itself bears to be transferable by delivery, and when there is proof that, by the general usage of merchants in this country, it is transferred by delivery—the negotiability of the document is established, if it is a document of foreign origin (*Goodwin*, 1875, L. R. 10 Ex. 337; 1876, 1 A. C. 476; *Simmons*, [1892] A. C. 201; *Bentinck*, [1893] 2 Ch. 120). If the document has been issued in the United Kingdom, there is some doubt whether the mere concurrence of these two elements suffices to render it negotiable. It has been laid down by eminent judges (see per Blackburn, J., in *Crouch*, 1873, L. R. 8 Q. B. 374, and per Cranworth, L. C., in *Borill*, 1856, 3 Macq. 1, at p. 13) that an instrument issued in this country, and having its nature, incidents, and effects regulated by the law of this country, cannot be relied on as negotiable, unless its negotiability has either been expressly sanctioned by statute or has been recognised by a decision of the Courts. The authority of this doctrine has, however, been doubted in more recent cases, and all the later decisions show a tendency on the part of the Courts of this country to follow and give effect to general mercantile usage, and to accept instruments as negotiable, though issued in this country, provided that their tenor is consistent with a complete title to them passing by delivery, and that the general usage of merchants is to transfer them by delivery (*Goodwin*, 1875, L. R. 10 Ex. 337: affd. 1876, L. R. 1 A. C. 476; *Rumball*, 1877, 2 Q. B. D. 194; *Picker*, 1887, 18 Q. B. D. 515; *Simmons*, [1892] A. C. 201).

Issue of Negotiable Instruments by Corporations and Companies.—The issue of negotiable instruments by corporations and companies is subject to certain restrictions. In England the general rule is that the contracts of corporations must be made under the seal of the corporation, and, that being so, it is doubtful whether at common law corporations can validly issue negotiable instruments (*Crouch*, 1873, L. R. 8 Q. B. 374, at p. 382; *in re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758; see Pollock on *Contract*, 6th ed., p. 124). A power to borrow and to grant securities of a negotiable character may, however, be conferred on corporations by statute; and, in the case of instruments within the Bills of

Exchange Act, 1882, a corporation may now, both in England and Scotland, seal with the corporate seal any instrument which, under the Act, requires to be signed (45 & 46 Vict. c. 61, s. 91 (2)). In Scotland, since corporations may contract by the signatures of their office-bearers or agents, duly appointed for that purpose, and signing *per procurationem*, the technical difficulty in corporations being bound by negotiable instruments does not arise. As regards companies, it is settled that a power to accept bills of exchange or issue negotiable instruments is not given to a company by the Companies Act, 1862, as an incident of its incorporation (*in re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758; *Peruvian Rwy. Co.*, 1867, L. R. 2 Ch. App. 617). Accordingly, the rule is that a joint stock company or corporation cannot bind itself by issuing negotiable instruments unless the terms of the Act, charter, articles of association, or other instrument, under which the company or corporation is constituted, authorise, upon a fair construction, the issue of such instruments, or unless the issue of such instruments is directly within the scope of its business, and necessary to the carrying on of the trade in which it is engaged. Even in the case of companies which are in some degree of the nature of trading concerns, such as mining, gas, waterworks, and railway companies, it has been held that there is *primâ facie* no power to issue negotiable instruments (*Bateman* v. *Mid-Wales Rwy. Co.*, 1866, L. R. 1 C. P. 499; cf., as regards railway companies, the statutory provision in 7 & 8 Vict. c. 85, s. 19). In construing provisions conferring special powers on a corporation or company, the general rule is that acts which are not authorised, or which cannot reasonably be inferred from the special powers granted, are prohibited (*Wenlock*, 1885, 10 A. C. 354, and other cases there cited; *Mann*, 1891, 18 R. 1140; affd. 1892, 20 R. H. L. 7; but see opinion of Ld. Wensleydale in *Scottish North-Eastern Rwy. Co.*, 1859, 3 Macq. 382). Directors signing and issuing negotiable instruments on behalf of a company, in excess of the powers intrusted to them, may incur personal liability to persons who, having no notice that the issue of the instruments was *ultra vires*, take the instruments in good faith and for value (*West London Commercial Bank*, 1884, 13 Q. B. D. 360). This is on the principle that the issue of such instruments is a representation on the part of the directors that they have authority to issue them (*Firbank's Exrs.*, 1886, 18 Q. B. D. 54). The directors in such a case are not liable as guarantors of the contract of the company; they are liable merely in damages to the person whom they have induced to act on the faith of the false representation, and, consequently, the measure of their liability is the loss sustained by the person taking the instruments through the fact that the company is not liable on the contract (*in re National Coffee Palace Co.*, 1883, 24 Ch. D. 367; as to the distinction between liability under a guarantee and liability under a representation, see Gloag and Irvine, *Rights in Security*, at pp. 663 *et seq.*). The statutory provisions as to the issue of negotiable instruments by local authorities in Scotland are contained in the Local Government (Scotland) Act, 1894, 57 & 58 Vict. c. 58, s. 44 (6), and in the Local Authorities Loans (Scotland) Acts, 1891, 54 & 55 Vict. c. 34, and 1893, 56 & 57 Vict. c. 8.

Quasi-Negotiability by the Operation of Personal Bar.—The privileges of negotiability are practically much extended through the operation of personal bar. The principle of personal bar in Scots law corresponds to the principle of estoppel in English law, and two things are necessary in order to ground the plea: (1) the party against whom it is taken must have made representations by words or conduct concerning existing facts with the intention of inducing another to act in the belief that these representations

were true; and (2) the party raising the plea must, in fact, have contracted or altered his position in reliance on the truth of the representations (per Ld. Kinnear in *Mitchell* v. *Heys & Sons*, 1894, 21 R. 600, at p. 610; cf. per Ld. Kyllachy in *Clavering, Son, & Co.*, 1891, 18 R. 652, at 657). A party, in virtue of this principle, may by his acts or representations bar himself from setting up a defence which would otherwise be available; and, in this way, if an instrument, though not properly speaking negotiable, professes on the face of it to confer a good title on the transferee by delivery, and is, in fact, passed from hand to hand by the usage of merchants, both the issuer of the instrument and each holder of it may be barred, by the representation on the face of it, from disputing the title of, or setting up a claim as against, a person who has taken the instrument in good faith and for value. The effect of this principle in conferring the incidents of negotiability is clearly stated by Ld. Chan. Cairns in *Goodwin* v. *Robarts*, 1876, L. R. 1 App. Ca. 476, as follows: "The plaintiff bought in the market scrip which, from the form in which it was prepared, virtually represented that the paper would pass from hand to hand by delivery only, and that anyone who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign Government. . . . The scrip itself would be a representation to anyone taking it—a representation which the appellant must be taken to have made, or to have been a party to—that, if this scrip itself were taken in good faith and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed for the moment that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign Government; still the appellant is in the position of a person who had made a representation on the face of his scrip that it would pass with a good title to anyone taking it in good faith and for value, and who had put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representations so made" (per Ld. Chan. Cairns in *Goodwin* v. *Robarts*, 1876, L. R. 1 App. Ca. 476). It is not only the issuers of instruments purporting to be negotiable who may be barred by the representation on the instruments from impeaching the title of a person who has acted thereon (*in re Imperial Land Co., ex parte Colborne*, 1871, L. R. 11 Eq. 478; *in re Agra & Masterman's Bank*, 1867, L. R. 2 Ch. App. 391), but holders for the time being of such instrumnents may also be treated as adopting the representation, and so be barred from denying the negotiable quality of the instruments (*Easten*, 1886, 34 Ch. D. 95, at p. 113, *vide* per Bowen, L. J. The decision of the Court of Appeal in this case was reversed in the House of Lords *sub nom. Earl of Sheffield*, 1888, 13 App. Ca. 333. This reversal, however, as explained in *London Joint Stock Bank*, [1892] App. Ca. 201, turned wholly on questions of fact). In this way certain incidents of negotiability may be effectually annexed to documents by the insertion of special stipulations. Thus where it was shown that iron trade warrants for goods "deliverable (*f. o. b.*) to A. B. or their assigns by indorsement hereon," were treated as passing free from vendor's lien, it was held in a question with the company which issued the warrants, and a party to whom they had been pledged and indorsed, that, though the warrants were not negotiable, the pledgees were entitled to the goods free of vendor's lien (*Merchant Banking Co. of London*, 1877, 5 Ch. D. 205). Again, if an instrument, *e.g.* a debenture, issued by a company, is issued bearing to be payable to bearer, a transferee by delivery of the instrument for value, *e.g.* a person

who advances money on it, is entitled in England to petition in his own name for the winding up of the company (*re Olathe Silver Mining Co.*, 1884, 27 Ch. D. 278), and can rank in the winding up of the company, for the full amount due on the instrument, without reference to any equities between the company and the party to whom the instrument was originally issued (*re Blakely Ordnance Co.*, 1867, L. R. 3 Ch. App. 154). In short, where a person issues debentures, or instruments of that nature, in such a form as to hold out a distinct promise that he will pay to the order of the person or persons named "or bearer," the issuer is barred, in a question with a *bonâ fide* holder who has been induced to take the instrument by the form in which it was issued, from subsequently setting up any claims on which he, the issuer, might have insisted against the person or persons with whom he originally contracted. (Examples of forms of instruments which have been held thus to bar the issuers from insisting on equities and counter-claims will be found in *in re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758; *Higgs*, 1869, L. R. 4 Ex. 389; *in re Imperial Land Co., ex parte Colborne*, 1871, L. R. 11 Eq. 478.) Similarly, in *Agra and Masterman's Bank* (1867, L. R. 2 Ch. App. 391, at 397) it was held that the granter of a letter of credit was bound by the representation on the face of it to perform his obligation, without regard to equities existing between himself and the payee, to all persons who advanced money or discounted bills on the face of it. The principle of personal bar also operates to render valid debentures, issued informally or invalidly by a corporation or company, in the hands of *bonâ fide* transferees for value without notice. Thus where certain commissioners, incorporated by statute, who were empowered to borrow money and issue assignable debentures, issued debentures purporting to have been executed pursuant to the powers contained in the statute, they were held to be barred from alleging, against an innocent assignee for value, that the debentures had been issued illegally in contravention of the statutory powers (*Webb*, 1870, L. R. 5 Q. B. 642; *Romford Canal Co.*, 1883, L. R. 24 Ch. D. 85). In such cases the directors or managing board may be personally liable to make good the loss sustained by the corporation or company through the improper issue of the debentures (*London Trust Co.*, 1893, 62 L. J. Ch. 870).

Acquisition of Title in Negotiable Instruments.—All that is necessary to constitute a good title in a negotiable instrument is that it be handed over to the transferee, and that he take it in good faith. In every case where a contest arises as to the title of the holder of a negotiable instrument, the single question at issue is whether the circumstances under which the document passed to him afford evidence of *mala fides* on his part, or show that he had notice of a defect of title in the person from whom he took it. Even if the negotiable instrument has been stolen, no *vitium reale* attaches to it, and anyone who takes it for value, and in good faith, acquires a good title (*Crawford*, 1749, Mor. 875; *Scott*, 27 February 1812, F. C.; *London Joint Stock Bank*, [1892] App. Ca. 201). In a recent Scotch case (*Walker & Watson*, 1897, 35 S. L. R. 26) it was further held that the mere fact that the person from whom the bond was stolen accidentally re-obtains possession of it, does not entitle him to keep it in a question with a person who had taken it in good faith and for value from the thief. The question of good or bad faith is a question of fact to be determined in each case by a consideration of the circumstances. A negotiable instrument is taken in good faith where it is in fact taken honestly, whether it has been done negligently or not. "Honest acquisition confers

title. . . . However gross the holder's negligence, if it stops short of fraud, he has a title" (per Byles, J., in *Swan*, 1863, 2 H. & N. 175, at 184). In order to deprive the transferee of a negotiable instrument of his title, it is not sufficient to show that, when he took it, he had means at his disposal which would have enabled him to detect the bad title of his transferor; it must be shown that he was actually affected with notice that there was something wrong at the time the instrument came into his possession (*Venables*, [1892] 3 Ch. D. 527). At the same time, negligence or failure on the part of a transferee to avail himself of the means of knowledge at his disposal, when taken in connection with surrounding circumstances, may be evidence of bad faith; or, in other words, may be an important element in proving that he had actual notice of the fraud or defective title of the person from whom he took the instrument. Similarly, it is important to inquire into the value of the consideration given by the person who claims to hold in good faith; for an obvious disproportion between the value of the instrument and the amount given for it may supply cogent evidence of dishonesty on the part of the person taking the instrument (see opinions in *Jones*, 1877, 2 App. Ca. 616).

The condition of the document itself may be such as to excite suspicion and convey a warning, so that the transferee can acquire no better title than the person from whom he took it had. Thus the transferee of a bill of exchange, which is not complete and regular on the face of it, or which is overdue at the time of the transfer, or which is wanting in any material particular, takes it at his peril (Bills of Exchange Act, 1882, s. 29; *Awde*, 1851, 6 Ex. 869). Again, if there are marks of cancellation, or alteration, or erasure on the instrument, they convey a warning which ought to lead any reasonably careful person, before taking the instrument, to inquire carefully into the circumstances in which the cancellation, alteration, or erasure was made (*Young*, 1827, 12 Moore, 484, 4 Bing. 253; *Orr & Barber*, 1852, 14 D. 395; rev. 1 Macq. 513; *Caledonian Insur. Co.*, 1859, 21 D. 1197; 1861, 4 Macq. 107; *Scholfield*, [1895] 1 Q. B. 536; [1896] A. C. 514).

Pledge of Negotiable Instruments by an Agent in Fraud of the True Owner. —Inasmuch as any holder of a negotiable instrument has power to give a title to anyone who takes the instrument honestly, the fact that an agent has pledged such an instrument in fraud of the true owner has no relevancy in impeaching the title of the pledgee, unless it is coupled with bad faith on the part of the latter. In other words, the principal cannot recover negotiable instruments fraudulently pledged by his agent, unless he pay the debt for which they were pledged, or show, directly or by inference from the facts proved, that the pledgee knew that the pledge was made in violation of the agent's duty. The mere fact that the pledgee was aware that the person from whom he received the securities was an agent, and did not inquire whether the agent had the authority of his principal, does not prevent him from getting a good title, although it subsequently turn out that the agent was acting in fraud of the true owners of the securities. These principles are fully recognised both in Scots and English law (*National Bank of Scotland*, 1895, 22 R. 740; *London Joint Stock Bank*, [1892] App. Ca. 201, at 217; *Bentinck*, [1893] 2 Ch. 120). On the other hand, if there is anything in the nature of the agent's business, or in the circumstances surrounding the transaction, or in the course of previous dealings between the pledgee and the agent, calculated to arouse the pledgee's suspicion that there is something wrong with the transaction, or if he is cognisant of facts which might reasonably lead to a doubt whether the person proposing to hand over the instruments has authority to do so,

the pledgee will not be acting in good faith if he take the instruments, shutting his eyes to the facts and putting his suspicions aside without inquiry (*Earl of Sheffield*, 1888, 13 App. Ca. 333; reported *sub nom. Easten* in L. R. 34 Ch. D. 95; cf. *Cooke*, 1887, 12 App. Ca. 271; *Walker & Watson*, 1897, 35 S. L. R. 26).

Right of Retention of Negotiable Instruments.—A creditor, who is lawfully in possession of negotiable instruments belonging to a debtor, has a right to retain the instruments for debts due by the debtor, unless the right is excluded by agreement, express or implied. A special agreement between the parties, or proof that the instruments were lodged with the creditor for a specific purpose, excludes the creditor's right of retention (*Farrar & Booth*, 1850, 12 D. 1190; *Allan*, 1831, 9 S. 519); but the special agreement, or the specific purpose, must be clearly ascertained, otherwise the general rule will apply (*Robertson's Tr.*, 1890, 18 R. 12). Thus where certain negotiable bonds were deposited from time to time by a customer with a bank, receipts being granted by the bank bearing that the bonds were held "for safe-keeping on your account and subject to your order," it was held, in an action for the delivery of the bonds by the trustee on the customer's sequestrated estate, that the terms of the receipts were not conclusive in instructing a special agreement which would exclude the bank's right of retaining the bonds (*Robertson's Tr.*, 1890, 18 R. 12; cf. *Alston's Tr.*, 1893, 20 R. 887). A creditor's right to retain unappropriated negotiable instruments in security of debts due is also impliedly excluded, if it is shown that the creditor knew that the instruments were the property of a third party other than the debtor, or was aware that the debtor had possession of them merely as a trustee (*ex parte Kingston*, 1871, L. R. 6 Ch. App. 632). Where negotiable instruments are pledged with a creditor by a person who is known by the creditor to be an agent, this knowledge on the part of the creditor, while t does not prevent him from getting a good title to the instruments in security of the particular debt for which they were pledged, nevertheless prevents him from having the right to retain the instruments against the agent's principal for a general balance which may be due to the creditor by the agent. Thus where a stockbroker who had in his possession negotiable instruments belonging to a client, pledged them in security for an advance which he had obtained from a bank on a loan account in his own name,—the bank being well aware that the broker was merely an agent, and not the principal in the transaction,—it was held, upon the broker's bankruptcy, that the bank was not entitled to retain the instruments for a general balance due on the broker's current account (*National Bank of Scotland*, 1895, 22 R. 740).

The question not infrequently arises whether a creditor, with whom negotiable instruments have been lodged by their owner with a view to securing a particular debt, is entitled to retain them against any general balance due to him by the owner. In *Alston's Trs.* (1893, 20 R. 887), Ld. Low (Ordinary) held, on the analogy of *Stewart* (1770, Mor. App. "Compensation," No. 2), *Harper* (Bell, *Octavo Cases*, 440), and *Lawrie* (1853, 15 D. 404), that where a claim of retention for a general balance is founded upon possession of a subject, the property in which is capable of being transferred by delivery, it is necessary to consider the circumstances in which, and the purpose for which, possession was given; and that where negotiable instruments are lodged with a creditor for the purpose of securing a particular debt, this constitutes a special appropriation, and has the effect of excluding the creditor's right of retaining them for a general balance due by his debtor. Both in England and Scotland the *onus* appears

always to lie on the debtor to show that negotiable instruments, lodged with a creditor, were specifically appropriated to secure a particular debt; and if the debtor fail to establish this, the creditor may retain the instruments for all debts due to him by their owner (*Robertson's Tr.*, 1890, 18 R. 12; *re European Bank*, 1872, 8 Ch. App. 41; *London Chartered Bank of Australia*, 1879, 4 App. Ca. 413).

Bills of Exchange and Promissory Notes.—Bills of exchange and promissory notes are, as a rule, fully negotiable. A negotiable bill may be payable either to order or to bearer. A bill is payable to bearer which is expressed to be so payable, or on which the only, or last, indorsement is an indorsement in blank. Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer. A bill payable to bearer is negotiated by delivery. The negotiation of bills and notes is now regulated by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). In certain circumstances bills and notes are non-negotiable. Thus when a bill contains words prohibiting transfer, or indicating an intention that it shall not be transferable, it is valid as between the parties thereto, but is not negotiable (45 & 46 Vict. c. 61, s. 8 (1)). Again, a bill ceases to be negotiable when it is restrictively indorsed (45 & 46 Vict. c. 61, s. 35 (1) (2) (3)). A bill or note also ceases to be negotiable when it is discharged by payment or otherwise (45 & 46 Vict. c. 61, s. 36 (1)). Finally, when a bill becomes overdue, it loses its full negotiability. "Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had" (45 & 46 Vict. c. 61, s. 36 (2)). See BILLS OF EXCHANGE.

Cheques are negotiated by delivery, or by indorsement and delivery, in the same manner as bills, and with similar liabilities. The legal effects of crossing cheques are now regulated by 45 & 46 Vict. c. 61, ss. 78–80. The crossing of a cheque does not interfere with its negotiability, unless the crossing includes the words "not negotiable." A cheque crossed "not negotiable" is still transferable, but transferees are deprived of the protection which is afforded to the holders of negotiable paper (*National Bank*, [1891] 1 Q. B. 435; *Fisher*, 1890, T. L. R. p. 354, C. A.). See CHEQUES.

Bank Notes.—It has been settled law in Scotland since 1749 (*Crawfurd*, 1749, Mor. 875), and in England since 1758 (*Miller*, 1758, 1 Burr. 452), that bank notes are fully negotiable, so that, even if they are stolen, no *vitium reale* attaches to them, and the *bonâ fide* possessor has a good title to them. See BANK NOTES.

I. O. U.'s and similar memoranda of debt are not in any sense negotiable. The holder of such a document sues on the debt, using the document merely as evidence. So the delivery of the document does not transfer the title to the debt. The debt can only be transferred by intimated assignation, the assignee taking subject to all defects in the transferor's title. See I. O. U.

Deposit Receipts.—The acknowledgments granted by bankers for sums of money received by them on deposit are not, in their ordinary form, negotiable, and the property in the money deposited is not transferred by merely passing the document from hand to hand (*MacNicol*, 1889, 17 R. 25). Even where the delivery of the document is accompanied by indorsation, the property represented by it does not pass to the indorsee, unless it is shown that such was the intention of the parties (*Barstow*, 1857, 20 D. 230; *Sharp*, 1883, 10 R. 1000). See DEPOSIT RECEIPTS.

Debentures.—The term "debenture" is employed to denote many different

forms of obligation. "You may," observed, Lindley, L. J., in *British India Steam Navigation Co.* (1881, 7 Q. B. D., 165), "have mortgage debentures; you may have debentures which are bonds; you may have a debenture which is nothing more than an acknowledgment of indebtedness." The question of the negotiability of a debenture depends largely on the form of the instrument. It is now the general custom among London bankers to treat debentures and debenture stock certificates which are in terms payable to bearer as negotiable (see Palmer, *Company Precedents*, 6th ed., 620), and though they have not been definitely recognised by the Courts as fully negotiable, yet, as has been pointed out (*supra*), they are practically endowed with the most valuable privileges of negotiable instruments by the operation of the principle of personal bar (*re Blakely Ordnance Co.*, 1867, L. R. 3 Ch. App. 154; *re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758, at 762). In the case of debenture stock certificates payable to bearer, stipulations designed to ensure the negotiability, as far as possible, of these certificates are embodied in the deed constituting the stock, and the certificates themselves contain merely a reference to the principal deed. The holders of the certificates are, of course, bound by the provisions of the deed constituting the stock. Where debentures are issued payable to bearer, but capable of being registered at any time, they are transferable by delivery so long as they are unregistered, but a holder can at any time put a stop to their negotiability by registering them. See DEBENTURES.

Coupons.—The interest on debentures and other securities is frequently made payable on the presentation of annexed coupons. Before the interest is paid, coupons are evidence of title to demand the interest; and after the interest is paid, they serve the purpose of vouchers or receipts. Coupons to bearer are negotiable and may be negotiated before their maturity, or discounted, or pledged in security of advances (Stamp Act, 1870, s. 48; *Australian Mortgage Co.*, 1888, 16 R. 64). By the Finance Act, 1894, 57 & 58 Vict. c. 30, s. 40, it is provided that a coupon for interest on a marketable security, as defined by the Stamp Act, 1891, being one of a set of coupons, whether issued with the security or subsequently issued in a sheet, shall not be chargeable with any stamp duty.

Stock Certificates to Bearer, with Coupons, may be issued by local authorities, under the Local Authorities Loans (Scotland) Acts, 54 & 55 Vict. c. 34, and 56 & 57 Vict. c. 8. Further, many local Acts, in authorising the creation of debenture stock, county stock, corporation stock, municipal stock, and so on, provide for the issue in connection therewith of stock certificates to bearer. Again, in the National Debt Act, 1870 (33 & 34 Vict. c. 71), provision is made (s. 26) for the issue of stock certificates with coupons to bearer. By sec. 32 of the Statute it is enacted that a stock certificate, unless a name is inscribed therein, shall entitle the bearer to the stock therein described, and shall be transferable by delivery.

Exchequer Bills, which are now regulated by 29 & 30 Vict. c. 25, are negotiable instruments. Their negotiability was recognised in *Wookey* (1820, 4 Barn. & Ald. 1) and in *Brandao* (1846, 12 Cl. & Fin. 787).

Dividend Warrants.—In *Partridge* (1846, 9 Q. B. 396) it was held that a dividend warrant payable to A., without the addition of the words "order" or "bearer," was not negotiable. This case, however, was doubted in *Goodwin* (1875, L. R. 10 Ex. 337, at 354), and it is provided by the Bills of Exchange Act, 1882, that instruments within the Act are negotiable unless they contain words prohibiting transfer, and there appears to be no doubt that dividend warrants are within the Act (Bills of Exchange Act, 1882,

ss. 8, 95, and 97 (3)). Dividend warrants indeed, in their usual form, are simply cheques, and the statutory provisions as to crossed cheques apply to such warrants (45 & 46 Vict. c. 61, ss. 76–82).

Post Office Orders are not negotiable instruments, and the effect of the regulation by the Post Office that these instruments, when presented for payment by a banker, shall be payable without the signature of the payee, provided they bear the stamp of the banker, is not to render these instruments transferable by delivery among all persons having a banking account, but merely to make the stamp of the bank a substitute for the signature of the original payee to the receipt (*Fine Art Society*, 1886, 17 Q. B. D. 705).

Letters of Credit are either *special*, *i.e.* addressed to particular persons by name, or to a particular class of persons, or *general*, *i.e.* addressed to all persons in general, or, in other words, to anyone to whom they may be shown. A special letter of credit is available only to the person in whose favour it is drawn, and is not negotiable (*Struthers*, 1842, 4 D. 460; *Orr & Barber*, 1854, 1 Macq. 513). On the other hand, as soon as the offer in a general letter of credit is acted on by anyone, a contract is completed between this person and the granter of the letter, so that the effect is the same as if the letter had been specially addressed to him. Further, any person cashing a draft in pursuance of such a general letter of credit, or taking and paying for bills upon the faith of it, in conformity with its terms and requirements, is not affected by equities which might be pleaded by the granter of the letter against the person in whose favour it was granted (*in re Agra & Masterman's Bank*, 1867, L. R. 2 Ch. App. 391). To this extent a general letter of credit is of the nature of a negotiable instrument.

Circular Notes, a particular form of letters of credit issued for the use of travellers, are negotiable to certain effects. Thus in *Conflans Quarry Co.* (1867, L. R. 3 C. P. 1) certain circular notes which had been remitted by post to the plaintiff by his agent were lost in transmission. The plaintiff claimed repayment from the issuing bank of the sum paid by him for the notes, but the Court held that there was no obligation on the bank to refund *simpliciter*, unless they were offered proper indemnity, because there was a possibility that the bank might be called upon to pay the notes; for if a dishonest person got them cashed by some of the correspondents of the bank mentioned in the letter of indication, these correspondents would have recourse against the bank.

Bonds of Foreign and Colonial Governments.—The negotiability of an instrument of foreign origin is recognised by the Courts of this country, provided (1) that the nature and terms of the instrument indicate an intention that the property in it shall pass to a transferee by delivery, without further act; and (2) that, by the general usage of bankers and other dealers in securities in this country, the instrument is transferable in this country by delivery, without further act. If these two elements concur, the negotiability of a foreign instrument is recognised by British Courts, even though the instrument is not negotiable in the country in which it is issued (*vide supra*, p. 5). On the other hand, an instrument, though it is fully negotiable in the country in which it is issued, will not be negotiable in this country unless both the above-mentioned elements concur (*Picker*, 1887, 18 Q. B. D. 515). The doctrine of the negotiability of foreign instruments by the usage of merchants in this country has been applied to very various classes of documents, *e.g.* the bonds of foreign and colonial Governments, the scrip for the bonds of foreign Governments, and instruments issued by foreign companies.

Scrip issued in this country by the agent of a foreign Government was

recognised as negotiable in *Goodwin* (1875, L. R. 10 Ex. 337; 1876, 1 A. C. 476). Following this decision, scrip certificates in an English company, certifying that the bearer would be entitled to be registered as the holder of shares, were, on proof that such scrip certificates were in use to be transferred by mere delivery, held to be negotiable (*Rumball*, 1877, 2 Q. B. D. 194). See SCRIP.

Share Warrants.—The statutory provisions relating to the creation of share warrants are contained in the Companies Act, 1867 (30 & 31 Vict. c. 131, ss. 27–36). By sec. 28 of the Statute it is provided that a share warrant shall entitle the bearer of such warrant to the shares or stock specified in it, and such shares or stock may be transferred by the delivery of the share warrant. The question as to the negotiability of share warrants came before the English Courts in *Little* (reported along with *Simmons*, [1891] 1 Ch. 270). It was admitted in this case that share warrants were transferable by delivery and passed from hand to hand on the London Stock Exchange, and the decision of the Court of Appeal certainly proceeded on the assumption that the share warrants were negotiable. Bowen, L. J., however, in his judgment expressed doubts whether such warrants were "entitled to the description of completely negotiable instruments, within the known commercial and legal definition of that term." See JOINT STOCK COMPANY.

Share Certificates with Blank Transfers are not negotiable instruments. The property represented by the share certificate can be completely transferred only by the registration of the transferee in the books of the company, and, consequently, neither evidence of usage among merchants to treat certificates with blank transfers as negotiable (*Colonial Bank*, 1887, L. R. 36 Ch. D. 36), nor an admission that they are negotiable abroad (*Williams*, 1888, 38 Ch. D. 388; 1890, 15 A. C. 267), will avail to render them negotiable in this country.

[On the whole subject, see Gloag and Irvine, *Rights in Security*, pp. 544 *et seq.*]

Negotiorum gestio, in Roman law, occurs where one person, without previous mandate or authority, manages the affairs of another in his absence. The reciprocal obligations of the parties are similar to those which arise under the contract of mandate. *Negotiorum gestio*, as a quasi-contractual relation, was first recognised by the prætors under their edict *causa utilitatis* (*Dig.* 3. 5. 1. 3).

The duties of the *negotiorum gestor* are practically identical with those of a duly commissioned agent. In the first instance, and in all cases, he is bound to carry out the business he has undertaken with *omnis diligentia* (*Dig.* 3. 5. 3. 9); and he must hand over to his principal all profit which resulted from the transaction (*Dig.* 3. 5. 3. 2). These duties were enforced by the *actio negotiorum gestorum directa.*

The principal (*dominus negotii*), whose affairs are being managed, incurs liability only in certain circumstances, *e.g.* to indemnify the *gestor* for reasonable expenses, and to relieve him from the engagements he has entered into in the course of his administration. The *gestor* could claim such relief, even though the anticipated benefit to the estate of the principal was not, as a matter of fact, realised, *e.g.* if the *gestor* had provided medical attendance for a sick slave, who died notwithstanding all care. Where the interference was not warranted by genuine necessity, the *gestor* could recover only so far as the advantage actually went (*Dig.* 15. 3. 11).

[For the Roman law on this subject generally, see *Inst.* 3. 27. 1; *Dig.* 3. 5; *Cod.* 2. 19.]

In Scotland the principles of the Roman law of *negotiorum gestio* have been adopted practically without change. If one person spontaneously undertakes the management of the affairs of another person, who is absent or incapacitated from attending to his affairs, without the latter's knowledge and on the presumption that he would, if aware of the facts, have given a mandate for such interference, the law recognises that the *negotiorum gestor* can claim full indemnification from the person for whom he has intervened (Stair, i. 8. 3; Ersk. iii. 3, ss. 52, 53). The *negotiorum gestor* is bound to carry out what he has begun, and to account for all sums of money which come into his hands in the course of his actings. On the other hand, he is entitled to recover all expenses reasonably and in good faith incurred or laid out by him in the course of his actings, and to interest on all money he has paid out; but he can claim nothing as recompense for the trouble or labour he may have been put to (*Smith's Heirs*, 1714, Mor. 9275; *Campbell*, 1725, Mor. 9276; *Fernie*, 1871, 9 M. 437). The degree of care required from a *negotiorum gestor* depends on the circumstances in which he intervened. If he interfered officiously and without good reason, he is liable for the slightest fault. On the other hand, if he interfered under the pressure of urgent necessity or sudden emergency, where immediate attention was required, he is liable only for gross negligence (Ersk. iii. 3. 5. 3; *Maule* or *Ker*, 1757, Mor. 3529; affd. 2 Pat. 13; *Fulton*, 1864, 2 M. 893; *Bannatine's Trs.*, 1872, 10 M. 319).

[See, in addition to the above-mentioned authorities, More, *Notes*, liv, cclxiii; Bell, *Prin.* ss. 540, 541; Bell, *Com.* i. 287.]

Neutrals.—See Blockade; Prize Law; Reprisals; Flag, Law of.

Newspapers.—See Defamation; Contempt of Court.

New Trial.—The only means by which the verdict of a jury may be brought under review is by motion for a new trial, with or without a bill of exceptions (55 Geo. III. c. 42, ss. 6, 7). By sec. 6 it is competent for a party, who is dissatisfied with a verdict, to apply to the Division to which the cause belongs for a new trial, upon the ground of the verdict being contrary to the evidence, on the ground of misdirection of the judge, or of undue admission or rejection of evidence, on the ground of excess of damages or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case. There is no limit to the number of new trials which may be granted in this way, but there is no reported case in which more than three have been allowed (*Railton*, 1846, 8 D. 747; *Flood*, 1889, 27 S. L. R. 127). Where the application for review is made upon the ground of misdirection by the judge, or undue admission or rejection of evidence, exception must have been taken during the trial, and the case comes before the Court upon a Bill of Exceptions (*q.v.*). But a notice of motion for a new trial is also a competent method of bringing an exception under review of the Division (Court of Session Act, 1868, s. 34; *Bicket*, 1893, 20 R. 874).

Where a party against whom a verdict has been given intends to apply

for a new trial by notice of motion, he must, in a case which has been tried at the sittings after the end of the session or during the Christmas recess, or on Circuit, give notice of motion for a rule to show cause why the verdict should not be set aside, and a new trial granted within six days after the commencement of the next session, or of the meeting of the Court after the Christmas recess, or ten days after the trial of the cause if it has been tried during session or immediately before the beginning of session (A. S., 16 Feb. 1841, s. 36). The February week is in the same position in regard to this matter as the Christmas recess (*Cockburn*, 1897, 24 R. 529). The motion for a new trial is always made to the Division to which the cause belongs, even although an Outer House judge has presided at the trial, and the Division is the Court of review. The case, however, is not removed from the Lord Ordinary in other respects. Intimation of the motion is made to the opposite agent, and the notice, which does not require to be printed, is lodged with the clerk of process. The case is sent to the summar roll, and when it appears there one counsel for the party moving is heard. A rule is granted if a *primâ facie* case is shown, counsel for the other side not being heard then. If the rule is granted, the case is again put out for hearing in the summar roll, the Division having been furnished in the meantime with a report in writing of what passed at the trial, including the judge's notes of the evidence. To obtain this, application must be made to the judge who tried the case if he was an Outer House judge, or to the Division to which the presiding judge belonged if he was a judge of Division (A. S., 29 Nov. 1825, s. 55, 16 Feb. 1841, s. 36). At the hearing, on the rule, counsel for the party holding the verdict is first heard, and must show cause why the verdict should not be set aside and a new trial granted. Counsel for the party who has obtained the rule is then heard, and a new trial is granted or refused, as the case may be. If the judge who tried the case is not one of the judges of the Division, he is called in to hear the motion (Court of Session Act, 1868, s. 58). As to his right to vote, see *Bicket, supra*. An interlocutor granting or refusing a new trial upon notice of motion is not subject to appeal to the House of Lords (55 Geo. III. c. 42, s. 6).

The grounds upon which a new trial may be obtained in manner above described, and without a bill of exceptions, are—

1. *That the Verdict is contrary to the Evidence.*—The jury, and not the Court, is the judge of the evidence, and the verdict will not be set aside because the judges of review think that if they had been the judges of the evidence a different result would have been reached. Especially is this the case where the verdict depends upon the credibility of witnesses. "The jury are the sole judges of credibility, and the discernment of true from false testimony is a function which the law gives them, and which they are well fitted to discharge" (Ld. Neaves in *Byres*, 1866, 4 M. 388). To justify the motion for a new trial upon the ground that the verdict is contrary to the evidence, the jury must have gone flagrantly wrong (*Ross*, 1886, 14 R. 255). If there is some evidence to go to the jury, the verdict will stand; if, upon the other hand, it is a verdict which cannot, from any point of view, be reconciled with the weight of the evidence, it will be set aside (*Kinnell*, 1890, 17 R. 424). The Court will give great weight to the opinion of the judge who tried the case, but his view is not conclusive.

2. *Excess of Damages.*—Here, too, the jury must have gone flagrantly wrong, and the damages awarded must have been altogether exorbitant. The case must be such as to satisfy the Court that the jury, whether from wrong intention, incapacity, or mistake, here committed gross injustice (*Landell*,

1841, 3 D. 825; *Johnston*, 1875, 2 R. 836). Where excessive damages have been awarded, the pursuer may avoid a new trial by agreeing to accept a modified sum of damages, the amount being usually suggested by the Court (*Johnston, supra; Wallace*, 1888, 15 R. 307).

3. *Res noviter veniens ad notitiam.*—See RES NOVITER. It may be stated, however, that a new trial will not be granted upon this ground merely because the evidence was not known to the party at the time of the trial. It must be of such a character that he could not, by the exercise of reasonable diligence, have recovered it prior to the trial. Very weighty reasons are required to justify an allowance of additional evidence after a proof has closed (*Allan*, 1893, 20 R. 804; *Glengarnock Iron & Steel Co. Ltd.*, 1895, 22 R. 672).

4. *Such other Cause as is Essential to the Justice of the Case.*—Under this general clause a new trial has been allowed upon the ground of surprise, inadequacy of damages, fabrication of evidence or fraud in the proceedings, illegality in the composition of the jury or irregularity in their proceedings, *e.g.* where one of them visited the *locus* while the trial was proceeding (*Sutherland*, 1888, 15 R. 494). The cases cannot well be classified, but a new trial will always be granted on this ground when the Court is satisfied that there has been a miscarriage of justice arising out of the proceedings at the trial, or the conduct of the parties. The cases are fully discussed in Mackay's *Manual*, 360.

[See Mackay, *Manual*, 356 *et seq.*, *Practice*, ii. 63; Macfarlane, *Jury Practice*, 253, 260; Adam, *Trial by Jury*, 185; Coldstream, *Procedure*, 60.]

Next-of-Kin.—See DEGREES OF KINSHIP; "EXECUTORS"; HEIR.

Nexum was the most important contract in early Roman law. The exact nature of the transaction is somewhat obscure, but it seems to have been, in its essence, a solemn loan effected in formal terms *per æs et libram*. The ceremony was the same in substance as that in every *mancipatio* (*q.v.*), and required the presence, besides the parties themselves, of five citizen witnesses and a *libripens*. The debtor was termed *nexus*; the debt, *nexum æs*; and the transaction itself, *nexum*.

The characteristic of this form of obligation, to which it mainly owed its popularity among the lending class, was that the creditor, on the debtor's default, was not under the necessity of bringing an action at law, but might at once proceed to execution by *manus injectio*. This was a consequence of the self-pledge of the debtor involved in *nexum*. The *nexus*, in short, stood on the same footing with a defender against whom decree has been given (*judicatus*), or who has admitted his liability in Court (*in jure confessus*). The effect of *manus injectio*, if no *vindex* appeared to raise a *vindicatio in libertatem* on the debtor's behalf, was to transform the debtor into the bondsman of the creditor. For sixty days the debtor lay in chains in the creditor's private prison. During the first thirty days he could still procure his release by payment or compromise; and, during the remaining thirty days, the creditor must take him before the prætor on three successive market-days, and publicly proclaim the amount of his debt, in order to give anyone an opportunity of saving him from the final severities prescribed by the Twelve Tables. When subsequently a *Lex Vallia* did away with *manus injectio* as an incident of *nexum*, the contract gradually fell into disuse, and not long afterwards a *Lex Poetilia* seems practically to have

put an end to *nexum* as a form of contract altogether. In its place came *mutuum*, the contract of loan in the later law.

Corresponding to the obligations created by *nexum* was the method of discharge called *nexi liberatio*.

In Scots law, arrestment, inhibition, and other kinds of diligence are sometimes spoken of as imposing a *nexus* upon the property of the debtor. The term here means simply the legal restriction thereby imposed on future dealings with the property in question, *e.g.* an arrestment imposes a legal restraint on the arrestee from parting with the custody of the property arrested, and an inhibition restricts the owner's power of dealing with his property. In the same way a servitude is sometimes spoken of as a *nexus realis* by the institutional writers (*e.g.* Stair, iv. 45. 17), inasmuch as it restricts the exercise by the owner of the absolute rights of property.

Night Poaching.—See Poaching; Game Laws.

Nobile Officium.

Extent of its Present Exercise.

The origin and history of the *Nobile Officium* as a branch of the equity jurisdiction of the Court of Session has been treated under Equity. This article is confined to the extent of its exercise in recent times and according to present practice. No claim is now made by the Court of Session to the jurisdiction of the Privy Council, as was at least once made (*Hamilton*, 1741, Mor. 7335; see Ersk. i. 3. 23); or to have power to make Acts of Sederunt of an administrative character, as it at one time did (Acts of Sederunt 1553–1790,—*e.g.* A. S., 29 Jan. 1687, 31 July 1691, 4 Aug. 1692 (stents), 8 July 1725, 26 July 1748 (price of ale), 2 Nov. 1725 (brewers of Edinburgh), 6 July 1692 (beggars), 23 Feb. 1740 (poorhouses)); or to impose penalties for contravention of Statutes when the Statute is silent, as in *Gordon*, 1765, Mor. 7357.

The *Nobile Officium* is now deemed an extraordinary equitable jurisdiction of the Court of Session inherent in it as a Supreme Court (Ersk. i. 3. 22). Ordinary equity every judge in the Court of Session, and now it may be said of the Sheriff Court also, with few exceptions, is entitled and bound to administer.

Much also that was formerly considered the exercise of the *Nobile Officium* as an extraordinary branch of equity competent only to the Court of Session, and in the Court of Session competent only to the Inner House, is now deemed ordinary equity common to all Courts, or regulated by Statute giving the jurisdiction in the first instance to one of the judges of the Court of Session, or to the Sheriff, or to either.

Although anomalous or exceptional cases occur, the chief categories of the *Nobile Officium*, considered as extraordinary equity, now are—

1. To supply omissions or defects in Statutes or statutory procedure, of which the chief head is in bankruptcy.

2. To supply omissions or defects in Deeds or writings in order to carry out their true purpose, of which the chief head is in the law of trusts.

3. To afford remedies by petition to the Inner House of the Court of Session in cases competent neither to the Outer House of that Court nor to the Sheriff.

With regard to the first two categories, it is not of course in every case

that the Court will supply omissions in Statutes or in Deeds. The rule is the other way. The Court will now seldom do so unless there is a precedent or analogous case, and the omissions so supplied are only, speaking generally, those in administrative or executive details. But if we regard Courts as business bodies, and judges as men of business, it is convenient that such powers should be sometimes exercised, provided there is no risk of injustice to unrepresented interests. Perhaps the *Nobile Officium* might be exercised to a greater extent than is now common. The safe course, however, for the practitioner, in advising, is to assume that it is doubtful whether it will be exercised unless it has been exercised before. The Court, in modern practice, leans on statutes and decisions more than upon its inherent equitable power to deal with circumstances which the Legislature or the parties have not provided for. The *Nobile Officium* in the civil law, in finding remedies, might formerly have been, but can scarcely now be, compared to what has been called the native vigour of the criminal law with regard to punishing new offences, with this difference, that remedies are more favourably considered than punishment or penalties. It deserves to be kept in view that the English Supreme Courts of Equity have often exercised a beneficial jurisdiction without waiting for a legislative solution. Of this the *Equity to a settlement* of a married woman, and the doctrine of *Cy-près* in charitable trusts, are examples. The latter has been applied to some extent in Scotland, but the former required a Statute. This is one of the points which show there may be advantage in separating Equity from Common Law Courts, although it does not outweigh the graver disadvantages of a conflict of jurisdiction in the same country.

The principal recent decisions or points of practice under the above three categories are here collected, but the list is of course not exhaustive as to the past, and may be added to in future.

I. Nobile Officium as to Statutes, specially in Bankruptcy.

The *Nobile Officium* has been applied in bankruptcy in the following cases where there has been an omission in following out the statutory provisions: Authority has been granted to record the abbreviate when omitted to be done in proper time (*Allan*, 1861, 23 D. 972; *Stark*, 1886, 23 S. L. R. 507), and to insert *Gazette* notices where so omitted (*Garden*, 1848, 10 D. 1509; *Ross*, 1852, 14 D. 546; *Fonbister*, 1869, 8 M. 31), but not at the instance of the bankrupt alone, in order to supersede subsequent proceedings (*Ross-Robertson*, 1885, 12 R. 1361); or to correct an error in the form of notice (*Von Rotbery*, 1876, 4 R. 263: *Myles*, 1893, 20 R. 818). The Court has also authorised the necessary steps for the appointment of a new trustee when property falling under the bankruptcy was discovered after discharge of the original trustee (*Young*, 1888, 16 R. 92; *Dryborough*, 1893, 20 R. 396; *Macduff*, 1892, 20 R. 101), for the continuance of a sequestration although the Sederunt Book had been lost (*Skirving's Tr.*, 1883, 11 R. 17); but this was refused in a case where the original petition and warrants had been lost (*Anderson*, 1884, 11 R. 805; Goudy, p. 447). It has also accepted the report of the Accountant of Court as to a bankrupt's right to discharge where the trustee who ought to have reported had disappeared (*White*, 1893, 20 R. 600; *Mackay*, 1896, 24 R. 210); declared a bankruptcy at an end on petition by bankrupt's testamentary trustees and the representative of the only creditor (*Macleish's Trs.*, 1896, 24 R. 251). In such cases the procedure is by petition to the Inner House, though it may remit to the

Lord Ordinary or Sheriff, with powers. In one case where the election of a trustee was set aside, the Sheriff of his own authority ordered a meeting for a new election (*Mann*, 1857, 19 D. 942). But even where the sequestration is in the Sheriff Court a petition to the Inner House is the only safe course (see Goudy, *Bankruptcy*, 2nd ed., p. 158, note *k*; *Hutton*, 1872, 10 M. 620).

The following are rarer examples of the exercise of a similar jurisdiction in cases other than bankruptcy: Where the heritors declined to execute the Act 1696 and settle a school, the Court did so (*Caithness Presbytery*, 1773, Mor. 7449): but it may be doubted whether this course would now be taken. When road trustees had by inadvertence failed to make up a statutory list of bridges, the Court authorised it, after the lapse of the statutory time (*Banff County Road Trs.*, 1881, 9 R. 20). A remit was made to the Sheriff to take the necessary steps to reconstitute a Salmon Fishery Board which had lapsed (*Campbell*, 1883, 10 R. 819; see *Duke of Argyle*, 1896, 23 R. 991). The Court, however, refused to appoint a meeting for electing Police Commissioners when the prior proceedings were set aside as irregular (*Tod*, 1869, 7 M. 412); and a statutory remedy had to be found—40 & 41 Vict. c. 21, s. 14.

II. Nobile Officium with regard to Trusts.

The *Nobile Officium* has been exercised with reference to trusts: (1) with regard to construction of deeds, and (2) with regard to the grant or withdrawal of powers; for though the two may run into each other, it is well to distinguish them.

1. Questions of construction are as a rule competent to all Courts, and every judge must construe any writing which comes before him fairly and according to its true meaning. Construction cannot in general be deemed a branch of equity or limited to the Supreme Court (Ld. Moncreiff in *Synod of Aberdeen*, 1847, 9 D. 745). But there is a class of cases, chiefly in charitable trusts, in which what may be called an extensive construction has been applied, and this can only be done by the Court of Session, though in that Court it is not limited to the Inner House. The leading case on this subject is *Magistrates of Dundee*, 1857, 9 D. 918; 1858, 3 Macq. 134, where the House of Lords reversed the decision of the Court of Session, and held that the construction of charitable bequests should be benignant, and that where the charitable fund, objects, place, and general mode of application were stated by the truster, the Court would supply the necessary details of administration, and sustain the trust although the trust deed was in other respects vague and in part erased. This case, says Ld. M'Laren, who apparently thinks it went too far, would be followed as a precedent, and it has been (*Royal Infirmary*, 1861, 23 D. 1213; M'Laren on *Wills*, ii. p. 921).

But while the Court has interposed to supply omissions in the provisions for the creation of trusts, there are other cases in which it will not interfere, holding such interference to be beyond the power even of a Supreme Court of Equity. Thus where the objects of a trust have failed which is not purely charitable, the Court will not distribute the funds or make a new scheme for their application (*Mitchell* (*Seamen's Society of Montrose*), 1878, 5 R. 954; and Ld. Cottenham in *Bain*, 1849, 6 Bell's App. 329). Nor will it sanction payment to English parents of infant beneficiaries who are not entitled by the law of England to grant a discharge (*Atherstone's Trs.*, 1896, 24 R. 39). The Court has a special power, derived from its *Nobile Officium* and now recognised by Statute, to settle

schemes for charitable trusts (*Presbytery of Drem*, 1868, 6 M. 940; *University of Aberdeen* v. *Irvine*, 1869, 7 M. 1087). It also has jurisdiction to correct abuses, to declare the right of election or set aside improper admissions (*Ross* v. *Governors of Heriot's Hospital*, 1843, 5 D. 609; Mackay, *Manual*, p. 85): but the latter cases are now treated as a branch of ordinary jurisdiction, and most frequently dealt with in an ordinary action.

2. With regard to the powers of trustees, the Trusts Acts, 1861, 1863, 1867, 1884, and 1891, which are read together, are now generally resorted to, and have given the jurisdiction, in the first instance, to one of the Lords Ordinary, but the equitable jurisdiction of the Inner House has not been taken away, and may occasionally require to be appealed to. Power of sale of heritage (including feuing and excambing) is not granted except in cases of absolute necessity (*Hay's Trs.*, 1873, 11 M. 694), but under the Statute may be granted when expedient and not contrary to the purpose of the trust (*Whyte's Factor*, 18 R. 276). Power to borrow on security of the trust estate may be deduced by necessary implication from the trust deed, but will not be conferred by the Court under the *Nobile Officium* (*Kinloch*, 1859, 22 D. 174). It now can be got under the Act of 1867.

Power to make advances to beneficiaries with vested interests have often been granted by the Court (see *Baird's Trs.*, 1872, 10 M. 482), and under the Statute of 1867, s. 3, may now be granted in favour of minor descendants of the truster though the interest is only contingent (*Pattison*, 1870, 8 M. 575; *Thomson*, 1883, 11 R. 461).

The power of removing trustees is still treated as very exceptional, and only exercised by the Court in cases of grave misconduct (*Gilchrist's Trs.*, 1883, 11 R. 22; *Harris*, 1893, 21 R. 16; *Bowman*, 1891, 19 R. 205; *White*, 1896, 23 R. 775). No provision has been made for it under the Trusts Acts; but the necessity for it may be frequently obviated by resignation, which has been facilitated by these provisions, or by the concurrence of all parties in the appointment of a factor (M'Laren on *Wills*, ii. p. 1278). In the case of disability of the truster the Court held its *Nobile Officium* as to removal was taken away by the terms of the Trust Act of 1891, ss. 2 and 3 (*Tod*, 1895, 23 R. 36).

III. Nobile Officium in Procedure by Petitions to Inner House.

The petitions which may be held to belong to the *Nobile Officium* are those which are not statutory, and must still be presented to the Inner House. Some classes of such petitions have become so much matter of course that, in a Court combining equity with common-law jurisdiction, it is not surprising they should be considered rather a branch of the *praxis curiæ* than an exercise of extraordinary equitable jurisdiction, which is their real character. Before the Inner House was divided they would have gone before the whole Court, and they were originally granted in exercise of the supereminent power of the Court as a whole, and now of its Divisions. Such are, to name a few examples of each—

1. Petitions for the custody of children (*Nicolson*, 1869, 7 M. 1118: *M'Callum*, 1893, 20 R. 293); but many cases in which this was formerly necessary are now superseded by the statutory remedies provided by the Conjugal Rights Act, 1861, s. 9, and the Guardianship of Infants Act, 1888.

2. Petitions for the appointment of factors, curators, and trustees in cases not provided for by the Distribution of Business Act, 1857. An example of this will be found in *Campbell* v. *Campbell*, 1863, 1 M. 991 (sequestration of an estate pending litigation); but the Lord Ordinary may appoint a factor to an executry estate (*Rhind*, 1875, 2 R. 1002). On petitions

as to trusts which do not come under the Trusts Acts, see *Webster*, 1887, 14 R. 501. A singular case of a petition to change *ex officio* trustees may be noted—*Harrison*, 1893, 20 R. 57.

3. Petitions for the recall of appointment of officers where appointed by the Inner House, but not where appointed by the Lord Ordinary (*Lyle*, 10 June 1862, 24 D. 1083).

4. Petitions to authorise a change of name (*Dunlop*, 20 May 1879, Mackay, *Manual*, p. 82); but the Court refused to entertain this petition where the petitioner did not hold a public office, such as notary (*Forlong*, 1880, 7 R. 910).

5. Petitions to dispense with citation of next of kin (*Kyle*, 1861, 23 D. 1104); or to modify the mode of citation, or service, or execution of diligence (*N. of Scotland Bank*, 1891, 18 R. 460; *Robertson*, 1893, 20 R. 712); or *inducicæ* (*M'Kidd*, 1890, 17 R. 547). In older cases the Court has suspended diligence on the ground of necessity, but it is doubtful whether it would now do so (*Hope-Brown*, 11 Dec. 1816, F. C.; *Moodie*, 18 May 1819, F. C.).

6. Petitions to appoint public officers *ad interim* in case of the death or incapacity of the holder of the office. A list of the officers in whose cases this has been done is given in Mackay's *Manual*, p. 83 (see also *Logan*, 1890, 17 R. 757). It was doubted, in the case of *Glasford Bell*, Sheriff of Lanarkshire, whether this could be done in the case of a Sheriff without leave of the Crown, although it was in earlier practice by A. S. (*E. of Dumfries*, A. S., 23 Jan. 1745, Mor. 7434), and various A. S. between 23 Jan. 1745 and 28 May 1790; and now that matter has been regulated by the Statute 39 & 40 Vict. c. 70, s. 51, in case of the principal Sheriff. The case of a Sheriff-Substitute is regulated by arrangement between him, the Sheriff Principal, and the Crown. Petitions to appoint notaries are also presented to the Inner House.

7. Petitions to sequestrate estate and appoint a factor pending litigation (*Campbell*, 1883, 1 M. 991; *Spence*, 1877, 5 R. 75; *Orr-Ewing*, 1884, 11 R. 600 and 682, 13 R. H. L. 1); or to appoint a factor to wind up a partnership (*Dickie*, 1874, 1 R. 2030).

8. Petitions for admission to the Poor's Roll, A. S., 21 Dec. 1842.

9. Various applications have been granted with reference to the public records, which are in a special manner under the protection of the Court, of which the following are instances: To collate and sign a burgh register, which the predecessor of the town clerk had omitted (*Mags. of Elgin*, 1885, 12 R. 1030); to produce a recorded deed in an English Court upon caution (*Macdonald*, 1877, 5 R. 44; *Inglis*, 1882, 9 R. 761). In the case of parochial registers authority was refused; and the Lord President said nothing would induce the Court to order a public register to be sent out of the country. Extracts or excerpts from such registers, properly authenticated, can always be got (*Kennedy*, 1880, 7 R. 1127). A later case, in which a volume of marriage certificates in the custody of the Registrar-General was sent to London, is doubtful (*Earl of Morton*, 1883, 11 R. 235, see note by Rettie, p. 235). An application to send a deed, recorded in the Sheriff Court Books, for exhibition in the Court of New York was refused (*Western Bank Liquidators*, 1868, 6 M. 654); but authority was granted to send such a deed to the Clerk of the Court of Session for stamping (*Gordon*, 1871, 2 S. L. R. 445).

10. Petitions and complaints which conclude for punishment and penalties (see A. S., 11 July 1828, ss. 83 to 90; *M'Pherson*, 1844, 6 D. 422). In a recent case the Inner House deprived a notary public (*Incorporated Society of Law Agents*, 1893, 21 R. 267).

With regard to the interim appointment of factors and other officers, the urgency of the case in vacation may sometimes authorise the Lord Ordinary sitting in vacation to make such appointments (see Beveridge's *Forms*, i. p. 228; *Stewart*, 1864, 2 M. 1216; *Mitchell*, 1865, 2 M. 1378; and cases of appointment of interim officers by Lord Ordinary on Bills (*Sheriff*, 25 Aug. 1810, Beveridge, p. 230; *Commissary Clerk*, 9 Aug. 1815, *ib.* p. 23)). A definition and some enlargement of the powers of the single judge in vacation is much required.

[Stair, iv. 3. 1; More, *Note*, cccIxxiv; Ersk. i. 3. 22; Thoms and Fraser, *Judicial Factors*, pp. 246, 439, 515; Mackay, *Practice*, 1209, *Manual on Practice*, pp. 82 and 530.]

Nobility.—See PEERAGE; PRECEDENCE; DIGNITIES.

Noise.—See NUISANCE.

Nominate and Innominate Rights.—See INNOMINATE RIGHTS.

Nominate Tutor.—See TUTOR.

Nomination.—See PARLIAMENTARY ELECTION; MUNICIPAL ELECTION; COUNTY COUNCIL ELECTION; PARISH COUNCIL ELECTION; SCHOOL BOARD ELECTION; UNIVERSITIES ELECTION.

Non-Entry.—See ENTRY WITH SUPERIORS; SUPERIORITY.

Non memini.—See OATH ON REFERENCE (10 (*a*)).

Non numeratæ pecuniæ. — See EXCEPTIO NON NUMERATÆ PECUNIÆ.

Non valens agere.—See PRESCRIPTION.

Notarial Execution.—See DEEDS (EXECUTION OF).

Notarial Instrument.—A notarial instrument has been defined as "the narrative under the hand of a notary detailing procedure which has been transacted by or before him in his official capacity" (Dickson, *Evidence*, s. 1233). But this is scarcely correct, inasmuch as all notarial instruments are not merely narratives, *e.g.* an instrument of sasine under the Infeftment Act, 1845, which was really an operative deed in respect of the clause "I hereby give sasine." On an analysis it will be

found difficult to distinguish between what might be called proper notarial instruments and other notarial acts. Using the term in a somewhat restricted sense, the class of notarial instruments includes instruments for completion of title under the Conveyancing Statutes, instruments of disentail, instruments of kenning to terce, protests of bills and notes, and maritime protests. This article is limited to the first of these—notarial instruments for completion of title to heritable property under the Conveyancing Statutes. The others will be found dealt with under their more appropriate heads. And even as regards the former, general reference is made to the articles on DISPOSITION; FEU-CHARTER; and INFEFTMENT.

NOTARIAL INSTRUMENTS UNDER THE CONVEYANCING STATUTES.

NATURE AND FUNCTION.—A notarial instrument of this class is in effect simply a recorded inventory or abstract of the titles under which the person expeding it claims or alleges that he is entitled to a certain estate in or connected with lands or other heritages. In *Kerr's Tr.* (1888, 15 R. 520) Ld. Rutherfurd Clark said—

> A notarial instrument does not in any sense operate as a conveyance, or service, or other legal method of transmitting lands. The Act assumes that the right is in the person who expedes the instrument. The instrument in itself is no more than a statement of the titles which confer the right, and on being recorded it will operate as an infeftment. If the right does not otherwise exist, it will do nothing.

The instrument has no legal existence until it is recorded. The date of registration is its only date. If not recorded in the lifetime of the person on whose behalf it is expede, it can never be recorded or used to any effect in the progress of titles; it thereby becomes as if it had never been. It shares this peculiarity with writs of *clare constat*.

The person claiming the title is entitled to have a notarial instrument expede on production of what he considers to be his warrants. He proceeds *suo periculo*. Take the case of a person founding on a will which he maintains is holograph. He is not to be prevented having his title or alleged title put upon record by a notarial instrument until he produces evidence to the notary that the will is really holograph. If that were so, it would be necessary to go further, and prove also that the will fell to be judged of under the law of Scotland, or at least not under the law of England, by which holograph wills are ineffectual. Any number of cases similar in principle may be imagined, *e.g.* questions as to the identity of the testator with the person named in what is represented to be the testator's infeftment, the testamentary capacity of the testator, the identity of the person desiring to expede the instrument with the legatee named in the will, the identity of the property, the fulfilment of conditions affecting the right, as, for instance, the death of the testator without heirs of his body, or, in case of destinations, the fact that the claimant has become a conditional institute by reason of the death of the institute and prior substitute or substitutes, if any. It is obvious that all these matters must be ultimately established, if challenged, in order to vindicate the right. But to do so before the notary is out of place: it is unnecessary as regards the *title*, and insufficient as regards the *right*. See Mowbray's *Styles*, 155.

IS A NOTARIAL INSTRUMENT A BASIS FOR PRESCRIPTION?

The question arises whether a recorded notarial instrument, by itself alone and without its warrant, is an "*ex facie* valid irredeemable title" in the sense of sec. 34 of the 1874 Act, so as to be a sufficient foundation for

prescription. In considering this question it is important to note the terms of the section. It refers to "any *ex facie* valid irredeemable title," and provides that twenty years' possession,

> following on such recorded title shall for all the purposes of the Act of the Parliament of Scotland, 1617, c. 12, "anent prescription of heritable rights," be equivalent to possession for forty years by virtue of heritable infeftments for which charters and instruments of sasine or other sufficient titles are shown and produced according to the provisions of the said Act.

It is necessary to distinguish three cases, according as the prescriptive progress commences with an infeftment in favour of an heir, an adjudger, or a disponee.

1. *Heir.*—It is clear that as an instrument of sasine was always a sufficient foundation for prescription in favour of an heir without producing his precept or service, so a notarial instrument would in this case be a sufficient foundation without its warrant. That would be reached even without sec. 34 of the 1874 Act, for the instrument is equivalent to an instrument of sasine.

2. *Adjudger.*—On the other hand, it appears equally clear that a notarial instrument would not in this case found prescription without production of the decree of adjudication. For if it did, it could only be in virtue of sec. 34 of the 1874 Act, and that section has no application, for an adjudication, whether "*ex facie* valid" or not, does not fulfil the other requirement of the section, inasmuch as it is not "irredeemable." For the same reason the prescriptive period is still forty years (*Hinton*, 1883, 10 R. 1110).

3. *Disponee.*—Here there is more room for doubt. The case of *Glen* (1881, 9 R. 317) may be quoted as supporting the view that the production of the warrant is necessary. The contrary opinion is stated in Begg's *Conveyancing Code* (p. 374), and the same view seems to be supported in Rankine's *Landownership* (p. 33). It is submitted that this is the correct view, namely, that the notarial instrument is sufficient without its warrant. To establish the contrary, it must be made out that a notarial instrument is not a "title" at all. But by the combined effect of secs. 15 and 17 of the 1868 Act, it is equivalent to a sasine, and under the Act of 1617 a sasine was always a good enough title on which prescription might run in favour of an heir. That seems to establish that a sasine, and therefore a notarial instrument, is a title, for it is elementary that, whether in favour of an heir or anyone else, there can be no prescription without a title. Then sec. 34 of the 1874 Act clearly draws a distinction between the requirements of the old law and the new, for as regards the former it is recognised that there were required "*charters and* instruments of sasine," and it is difficult to suppose that, if the same requirement of production of the warrant had been intended to be perpetuated, that would have been left to implication. Then the section speaks of "an *ex facie* valid irredeemable title *recorded*," which manifestly the warrants would not be. And further, the same Act (s. 46) refers to the completion of "a title . . . and that by notarial instrument." Nor can any reason be suggested for holding that it is improbable that this change was intended. The law was being simplified, and why should not that be sufficient in the case of disponees which had for centuries been sufficient in the case of heirs? There are still the two essentials, namely, (1) possession, and (2) a clear and express claim published to the world by the possessor that he holds on a basis of legal right. At the same time, while this opinion is submitted as the sounder construction of the Statute, it is stated with deference in view of the case of *Glen*, which, however, can hardly be regarded as a judgment on the point.

When Notarial Instruments are necessary.

One must keep clearly in view to what effects it is, and to what effects it is not, necessary to complete title. These questions arise most frequently with reference to heritable securities; but as to both redeemable and irredeemable rights, it is to be observed that in the case of trustees, assuming the title has been once made up in their favour, there is no necessity to renew the infeftment, no matter how many assumptions of new trustees may have taken place, so long as one of the trustees whose title was completed survives and acts; but in such cases care must be taken, in regard to any deed dealing with the property, to see (1) that it is signed by a quorum at least of the whole acting trustees at the time; and (2) that such signatures include the trustee or trustees who hold the feudal title (see Discharge, vol. iv. p. 238). In form such deeds may bear to be granted by these latter with concurrence of the other acting trustees, or simply by all the trustees without any such distinction. In this connection it is to be noticed that it is unnecessary to trouble about any defects, or supposed defects, in the deeds of assumption, for either they are good or they are not; if they are, you have the signatures of a sufficient number of the assumed trustees; if they are not, the only effect is that the original trustees have the only title; you have their signatures, and the others can do no harm. This, however, does not apply to defects in stamp duty, for there the deed is good enough, but a fiscal requirement has yet to be complied with.

On the general question of testamentary trustees completing titles to the heritable properties and securities which belonged to the testator, there is one sense in which it may be said that it is necessary that they should do so without delay—necessary, that is to say, if they are to protect the estate and the beneficiaries against a risk of loss, and themselves against a risk of personal liability. The risk is the possibility of the heir or next of kin, as the case may be, making up a title in his own person, and granting rights to *bonâ fide* third parties relying upon the faith of the records.

As regards the necessity of completing titles to heritable securities, there is room for a distinction, founded upon the dual nature of these rights, viz.: (1) personal obligation, and (2) real security. For instance, it appears clear enough that executors, duly confirmed, could obtain and execute a warrant for personal diligence without completing title by notarial instrument; but, as a condition of actually receiving payment, they would require to make up title and formally disburden the lands, on the footing that the security is a pledge returnable on repayment of the debt (*North Albion Property Investment Co.*, 1893, 21 R. 90).

It has been suggested that in the case of general disponees the completion of title by notarial instrument is necessary to give them any transmissible right at all. This was the supposed ground of decision in *Kerr's Trs.* (1888, 15 R. 520). That was the case of a general trust disposition *inter vivos* by A. to B., whom failing to any person to be appointed by A. B. accepted and acted, but made up no title, and thereafter resigned, whereupon A. appointed C. as trustee. C. then recorded a notarial instrument on (1) A.'s infeftment, (2) the general disposition, and (3) his own appointment; he did not trouble even to set out B.'s resignation. The title was challenged, but the Second Division of the Court, Ld. Rutherfurd Clark dissenting, held that it was validly completed. The only importance of the case lies in the views expressed by the Lord Justice-Clerk (Moncreiff) as to the result on a title of a general disponee omitting to expede a notarial instrument, as B. did in that case. His Lordship said: "I do not think that B. had a personal right.

. . . He had a right to obtain a title, and if he had chosen . . . to proceed under the Titles to Land Act, he might have made his right available. But he had no personal title to the property, because the right that is given to him is indefinite to all and sundry the lands and heritages of A. . . . the truster. . . . Under the Titles to Land Act he did obtain a power to make that a real right, but he never used it. . . . If a grantee has only an indefinite right, and takes no step at all to put himself in the position of a special disponee, he acquires no right whatever." Ld. Rutherfurd Clark strongly dissented, holding that "the title is utterly bad, and I do not think the agent has a right to be paid for it." With deference, it is submitted that the judgment is bad, and that the *dicta* of the Lord Justice-Clerk are not well founded.

Real Burdens in General Dispositions.

Another matter turning upon the relation between, and the combined effect of, a general conveyance and a notarial instrument is the constitution of real burdens by qualifications of general conveyances followed by notarial instruments. Take the case of a general testamentary conveyance to A. without the intervention of a trust, burdened with an annuity to B., declared a real burden by the use of proper words introduced at the proper place in the conveyance, which is followed by a notarial instrument in favour of A. in the special heritage, in which instrument the annuity and real burden are duly set forth. Is this an effectual constitution of a real burden? In *Williamson* (1887, 14 R. 720) the point did not properly arise, but certainly Ld. Pres. Inglis indicated the view that a real burden could not be so constituted, his point being that a real burden can be constituted only in a special disposition of particular heritable property. In *Cowie* (1891, 18 R. 709) the Second Division, Ld. Rutherfurd Clark dissenting, formally gave a decision to that effect, mainly on the supposed authority of *Williamson's* case. But the judgment was reversed in the House of Lords (20 R. H. L. 81), and it was declared that by the method referred to—general conveyance and notarial instrument—a real burden may be effectually constituted.

Descriptions in Notarial Instruments.

Passing now to the form of the instrument, it is to be kept in view that titles are made up by notarial instrument in two entirely different cases. The one is where the new proprietor does, and the other is where he does not, hold a deed granted by the proprietor last infeft, and specially conveying the particular property. In the former case there is the alternative of direct registration of the deed itself, but there may be special circumstances leading to the adoption of the procedure by notarial instrument. In the other case, on the other hand, that procedure is compulsory, for it is necessary to set out the last infeftment in order to connect the new owner with the particular property, *e.g.* the ordinary case of a general testamentary conveyance to trustees. In the one case, that is, where the warrant is not recorded, and the instrument is to come in place of it on the record, it is evident that the property ought to be described in the instrument exactly as in the warrant; but in the other case it might be supposed that a very general reference to the description in the prior recorded deed would be sufficient in the instrument, and certainly the case appears to be covered by sec. 61 of the 1874 Act. But, on the other hand, the conveyancer is expressly directed, in the leading form of instrument for such cases, "to describe the lands . . . as the same are described in the said disposition"

(1868 Act, Sched. L). In the case of heritable securities it is made even plainer that the intention is that the instrument shall, in this particular, repeat the bond *verbatim*, for the direction is to insert "the disposition of the lands in security, with the description of them, all as set forth at full length or by reference in the bond and disposition in security" (1868 Act, Sched. HH ; 1874 Act, Sched. N). It seems impossible to give any reason why this should be so; indeed, these seem pre-eminently cases for a mere reference in any event, and there certainly appears to be a collision between the directions quoted and sec. 61 of the 1874 Act. Still, the only practical advice is to follow the specific directions in the schedules, which in the case of the 1874 Act have expressly (s. 66) the same effect as if they were contained in the body of the Act. The result is that in all cases the property will be described as in the warrant. To this there is an exception in the case of notarial instruments on behalf of assignees of unrecorded conveyances where such conveyances are themselves to be recorded along with the instruments; in that case there is merely a reference to "the lands of X. as therein described," *i.e.* in the conveyances (1868 Act, Sched. N).

Superiorities.—Assuming that the right to which a title is being made up is an estate of superiority, and *ex facie* embraces the lands, it is proper, but not essential, to set out in the notarial instrument the warrandice clause in the infeftment, assuming that that clause contains an exception of feu-rights, that being the only indication of the true nature of the estate.

Consolidated Estates.—Take the case of completion of title by notarial instrument in the persons of testamentary trustees, say the testator having had separate estates of superiority and property which he consolidated in his lifetime by minute of consolidation duly recorded. On the theory that after consolidation the sole title is what was formerly the superiority title, it would seem that it should be sufficient to produce it alone to the notary. And if the consolidation had been by prescription, it is clear that that is so. But in the case supposed, viz. consolidation by feudal method, it seems equally clear, on the contrary, that if the superiority title was a title to "the superiority" only, it cannot be sufficient to produce it alone. To do so would stamp the trustees' title on the face of it as a title to a bare superiority and nothing more. In that case there must be produced and set forth (1) the superiority infeftment, (2) the property infeftment, and (3) the minute of consolidation. If, again, the testator's superiority infeftment *ex facie* embraced the lands, it may be that the case is different, and that it is sufficient to produce it only; but that is not clear; and it will meet all views, and can certainly do no harm, to produce and set forth all three writs, as in the other case. See Consolidation, vol. iii. p. 226.

Specification of Burdens, etc.

As with the description of the property, so with the specification of burdens it is evident that the words of the warrant must be strictly followed in those cases where a special disponee elects to complete his title by notarial instrument instead of by direct registration, and Sched. J of the 1868 Act is express to that effect. But there is no such direction in Sched. L applicable to instruments in favour of general disponees, and accordingly it is clear, in virtue of sec. 32 of the 1874 Act, that even though the infeftment of the granter of the general disposition contains a full description of existing burdens, or a new constitution of burdens, or both, it will be sufficient to insert in the instrument a reference to such burdens as contained in the warrant in the form of Sched. H to the 1874 Act.

Specification of Personal Obligations.

This has reference to notarial instruments on heritable securities; and the following cases may be distinguished:—

1. *Notarial Instruments on unrecorded bond and general disposition.*—In this case the personal obligations will be set forth at full length in the notarial instrument (1868 Act, Sched. MM).

2. *Notarial Instruments on recorded security and general disposition.*—The direction is, to "insert the personal obligations so far as necessary" (1874 Act, Sched. N). It is not necessary to set forth the full obligation *verbatim*; it is enough to say—

> by which bond and disposition in security the said *C. D.* bound himself to repay the sum of £1000 to the said *E. F.* at the term of , with a fifth part more of liquidate penalty in case of failure, and with interest on the said principal sum at the rate of *per cent. per annum*, payable half-yearly at Whitsunday and Martinmas with termly failures.

3. *Notarial Instruments on unrecorded assignation and general disposition.*—Here it appears unnecessary to set out the obligations, except so far as that may be considered to be done by the presence of the words "for the sum of £ " in the description of the bond (1868 Act, Sched. MM).

Where Part of the Property has been sold.

If part of the property has been alienated after the date of the infeftment or deed which is produced as the warrant, or one of the warrants, of the notarial instrument, this ought to be made to appear on the face of the instrument. It is not, however, necessary, and obviously it will often be impossible, to produce to the notary the deed of alienation of such part. It is sufficient to say after the full recital of the prior infeftment or deed containing the whole undivided subjects—

> As also it was represented to me that by disposition dated and recorded in the said division of the General Register of Sasines on , the said *C. D.* disponed to *X. Y.* the following part of the said subjects, namely [*here insert the description of the part so disponed*].

Securities partly assigned or discharged.

Here, again, the notarial instrument ought to make it clear what the facts actually are. The clause, however, may be better inserted at a different point in the instrument. Thus the forms of the 1868 Act (Scheds. JJ and KK) contain, after the specification of the mid-couple, these words: "whereby the said A. B. acquired right to (*or* is now in right of) the said bond and disposition in security"; and the form of the 1874 Act (Sched. N) in the same place contains these words: "in which general conveyance was included the said bond and disposition in security, the said E. F. being then vest therein as aforesaid." At these points respectively there will, in the case now being dealt with, be inserted a clause such as the following:—

> But that only to the extent of the principal sum of £ , with the interest thereof and penalties corresponding thereto, the said *E. F.* having, as was represented to me, assigned (*or discharged*) the said bond and disposition in security to the extent of the remaining principal sum of £ , with relative interest and penalties, conform to assignation (*or discharge*) granted by him in favour of , dated , and recorded in the said division of the General Register of Sasines on .

The case is different where, though sums have been paid to account of the debt, no formal discharge of the bond to that extent has

been granted. In that case the notarial instrument ought to take up the bond to the full extent, without any reference to the payment to account. The reason is that the debtor will desire to have a formal discharge of the whole bond when the balance is paid up, but the new creditor will not be *in titulo* to clear the record unless his title is made up to the whole. It may be objected that, so far as regards the part referred to, there is nothing to which to make up a title. This is on the ground that the security is the creature of the debt, and that, once any part of the debt is repaid, the security is *eo ipso* and necessarily extinguished to the same extent, for the reason that there is to that extent nothing to be secured. If that view be sound, then the debtor's title is clear as regards that part of the debt, for not only is a notarial instrument incompetent as regards it, but, further, a discharge is unnecessary. But the notarial instrument ought to be made up to include the whole, and on full payment the whole ought to be formally discharged by the new creditor; and in this way both views will be satisfied.

Where Discharge granted, but not recorded in Debtor's Lifetime.—This is a case which sometimes happens, that is to say, the proprietor pays off the loan and obtains a formal discharge, but does not record it. He dies, and the question may be raised: How is the record to be cleared? The 1868 Act (s. 17, and Sched. J) is available, and there appears no reason to doubt that it is competent for the successor to make up title to the discharge by notarial instrument. The procedure does, however, seem incongruous, and it certainly is not specially contemplated by the section in question. But the question occurs, whether it is necessary, or whether it is not competent simply to record the discharge with a warrant of registration on behalf of the new proprietor. It is submitted that the latter course is sufficient.

Specification of General Dispositions.

In practice this is often much fuller than need be. It will be noted that in Sched. L of the 1868 Act the words are simply "the whole heritable estate of which he might die possessed," and in Sched. N of the 1874 Act (securities) "his whole heritable and moveable estate." If there are half a dozen words of conveyance in the general disposition, it is quite enough to repeat the one word "disponed," or "assigned," as the case may be. If there is a destination to survivors and survivor, it ought to be repeated (see further, p. 32). But if all those who are appointed as trustees accept office, there is no need to set out a destination to acceptors or acceptor. If, on the other hand, any have declined office, that ought to be mentioned, and it is proper that the evidence be produced and specified. In the same way, if any have died, that will require to be mentioned, but it is quite unusual to produce any evidence. In no case is it necessary to set out a destination to the heir of the last survivor, for to do so can have no effect in the way of completing the title of such heir. It may be thought desirable to repeat any provisions as to quorum and power of sale.

Deduction of Title.

The forms of notarial instruments given in the 1868 and 1874 Acts are available not only to disponees, special or general, but also to their assignees. This applies to irredeemable as well as to redeemable rights. When the instrument is expede in favour of such an assignee it is necessary, as regards the connecting links of title, (1) that they be specified, and (2) that they be produced to the notary. This refers to the

deeds connecting the person expeding the instrument with the original *grantee* of, say, the general disposition. As regards irredeemable rights, that is the only deduction of title for which there is room. But in the case of securities it is obvious that there may be, in addition, a prior deduction of title, *i.e.* if the *granter* of the general disposition was not the original creditor under the bond. Take the case of a bond granted by A. to B., who (infeft) assigns to C., who (infeft) grants a general disposition to D., who (uninfeft) assigns to E. Proceeding under Sched. N of the 1874 Act, E. will expede a notarial instrument, which will first set forth the production and contents of (1) the bond, and then, immediately thereafter, (2) the general disposition, which will be stated to have included the bond, in respect that C. was infeft therein in virtue of (3) the assignation by B. to C., and the instrument will finally narrate the production of "the following writ, whereby the said E. acquired the said D.'s right to the said bond and disposition in security," viz. (4) the assignation by D. to E. The peculiarity is that there is no direction to the effect that the assignation by B. to C. shall be *produced* to the notary, so that it would appear that, in such cases and for the purposes of the instrument, the fact that the granter of the general disposition ever had any right at all is left to rest upon the mere representation of the person in whose favour the instrument is expede. These are cases in which the writs in question are specified, but not produced. But under Sched. MM of the 1868 Act, when say, the executor of an uninfeft special assignee is making up title, it does not appear to be necessary even to specify, much less to produce, the writs by which the granter of the assignation came to have right to the bond. It is recommended, however, that in all such cases the whole writs connecting the person expeding the instrument with the original creditor should be both specified and produced. But as regards the form of such specification it is quite unnecessary to do more than to describe the deeds briefly by the names of the deeds, the names and designations of the parties, the dates of the deeds, and, if they are recorded, the date of registration, without any paraphrase of the contents of the deeds.

Survivorship.

Secs. 123–7 of the 1868 Act provide that where executors and others are making up titles to heritable securities by notarial instrument, if they hold "not wholly for their own use and benefit," they may take the instrument in favour of themselves "and the survivors and survivor of them," if not expressly excluded by the terms of their appointment. It is recommended that this rule should be followed in all ordinary cases where trustees or executors are completing titles, whether to redeemable or irredeemable rights. In such cases the instrument will commence by setting out that the writs were presented on behalf of "A. B. and C., and the survivors and survivor of them, as trustees and trustee under" certain specified deeds, or as the case may be, and the warrant of registration will also set out the survivorship.

[See Infeftment.]

Notary Public.—A notary public is an officer of the law, whose chief function is to act as a witness of any solemn or formal act, his certificate being accepted as sufficient evidence of acts done in his presence and attested by him. At the Reformation, the appointment of notaries was vested in the Sovereign by several Scotch Statutes, and the royal

authority is still interposed in the form of a presentation, addressed to the Lord President and remanent Lords of Council and Session, signed by the Clerk to the Admission of Notaries, written to the Signet and cacheted. Under the Law Agents Act of 1873, s. 18, an enrolled law agent is entitled to be admitted a notary public as a matter of right, and under the Law Agents Amendment Act of 1896, s. 2, no person can now be admitted as a notary public in Scotland until he shall have been admitted and enrolled as a law agent. The proceedings for the admission of candidates are conducted by the Clerk and Agent to the Admission of Notaries (whose office is in Edinburgh), who holds his commission from the Crown. A petition for admission is presented to the First Division of the Court of Session, and the prayer thereof is granted *de plano*. The Clerk to the Admission of Notaries then inserts in the register kept by him the entrant's name, designation, and place of business, together with the date of his admission, and the entrant exhibits his subscription, and the motto which he is thereafter to use. No notary can alter his subscription and motto without judicial authority. The Clerk also administers the declaration *de fideli administratione officii*, and gives the entrant a protocol-book containing ninety-one leaves, along with his commission. The whole charges of admission, including the stamp duty of £20, amount at present to £26, 4s. 6d. (*M'Culloch*, 1874, 1 R. 521). The Court of Session has power to deprive a delinquent notary of his office (*Incorporated Society of Law Agents*, 1893, 21 R. 267).

The Law Agents Amendment Act of 1896 (59 & 60 Vict. c. 50), s. 3, provides that any notary public may at any time present a petition to the Court of Session praying to be admitted as a law agent, and that he shall be admitted as such on passing the examination in forms of process merely, and that even this examination may be dispensed with in the case of a notary who has regularly taken out his licence and been in practice as a notary for not less than seven years preceding 14 August 1896. Before admitting notaries under this provision, the Court order intimation of the petition to be made to the societies of Writers to the Signet and Solicitors in the Supreme Courts, if the petitioner be resident in Edinburgh, or to the Incorporated Society of Law Agents, if he be resident out of Edinburgh. A large number of notaries have been thus admitted as law agents, so that there are now comparatively few notaries who are not also law agents, and in the course of time there will be none, in consequence of the provisions already mentioned of section 2 of the Statute. As to the previous position of notaries, see LAW AGENTS, Part I.

A notary public requires to take out the same annual certificate or licence to practice as a law agent requires. See LAW AGENT, Part III. But only one such certificate is required although he be practising both as a notary and as a law agent.

Without being admitted as a law agent, a notary public is entitled not merely to exercise his properly notarial duties, but also to act as a conveyancer and to conduct all other legal business, except practising in any Court. See LAW AGENT, Parts IV. and V.

The protocol-books above mentioned, though not kept by all notaries, are very regularly kept by most notaries in maritime towns, such as Greenock, Glasgow, Leith, and Aberdeen, for recording protests against wind and weather, as well as other protests, contracts, wills of foreign sailors, etc. When the first protocol-book is full, the owner sends it to the Clerk to the Admission of Notaries to be certified as having been produced to him, and the Clerk issues a second protocol-book, certified by him as such, of even date, and returns the old one to the notary therewith

so that a regular record may be kept by the notary of all his acts. These books would always be valuable evidence in any foreign Court as containing the acts of a notary, his office being always recognised by foreign tribunals.

One important part of a notary's duty is the notarial execution of deeds by parties who are from any cause unable to write. This has been simplified by sec. 41 of the Conveyancing (Scotland) Act, 1874. See the cases of *Aitchison's Trs.*, 1876, 3 R. 388; *Watson*, 1883, 11 R. 40; and *Campbell*, 1895, 22 R. 443. If there are two or more granters of the deed who cannot write, and if they have antagonistic interests, the same notary should not act for more than one (*Graeme*, 1868, 7 M. 14). Neither should the law agent of one party act as notary for the other (*Lang*, 1889, 16 R. 591). In no case may a deed be notarially executed by a notary who takes any benefit under it, or is named trustee or executor; the execution in such a case is absolutely invalid (*Ferrie*, 1863, 1 M. 291).

Notaries used to have a good deal of work in preparing instruments of sasine. These are now obsolete; but in modern conveyancing notarial instruments, introduced by various Statutes, are largely used. Since 1868 notaries have been authorised to take evidence in petitions of service of heirs (31 & 32 Vict. c. 101, s. 33). Affidavits in the High Court in England may now be sworn before a notary.

[The *Office of a Notary* (6th ed., 1821), though now quite out of date, may be referred to for the history of Notaries Public in Scotland.]

Note.—In the Court of Session, a Note is an application to the Court usually for an order incident to a depending cause, *e.g.* to have a case put out for early hearing, to have a party sisted, or the like. Notes must be intimated to the opposite party (A. S., 9 July 1806), and lodged with the Clerk of Process. Notes presented to the President of one of the Divisions may be in writing. They begin with an address to the President of the Division ("My Lord President," or "My Lord Justice-Clerk"); state shortly the facts which have led to the application; and conclude, "Your Lordship is therefore craved to move the Court," stating the order asked for. When a Note is presented in a case in which there have been prior petitions or Notes, reference ought to be made to these by date on the head of the new Note (*Scott*, 1856, 18 D. 323—case of a petition). See Petition.

[Mackay, *Practice*, ii. 353, *Manual*, 526.]

Notes, Judge's.—See Judge's Notes.

Notour Bankruptcy.—See Bankruptcy.

Novation is the extinction of one obligation by the substitution for it of another.

In Roman law the substituted obligation might be between the same parties, the purpose and effect of the novation being to change the nature of the subsisting obligation, *e.g.* to convert a consensual into a verbal obligation; or it might be between different parties, the purpose and effect of the novation being to change one of the parties to the subsisting obligation. The change in parties may consist in the substitution of a new debt, which is *expromissio*, or in the substitution of a new debtor, which

is *delegatio* in the narrower sense of the term. Every obligation, civil or natural, can be novated; and the new *obligatio*, though itself only *naturalis*, provided it is valid, will extinguish the old one (Gaius, iii. 176).

In order to extinguish the subsisting obligation, the *animus novandi* was required, and, in the latest era of the law, it was enacted that in order to effect a novation the parties to the contract must expressly state that such was their intention (*Dig.* 46. 2. 1; *Inst.* iii. 29. 3). The substituted obligation must relate to the same subject-matter as the earlier obligation, but the terms of performance as regards time, place, manner, conditions, conventional penalties, payment of interest, and the like, might be different in the case of the two obligations (Gaius, iii. 177; *D.* 46. 2. 8. 1). A kind of quasi-novation (*novatio necessaria*) is involved in LITIS-CONTESTATION (*q.v.*). Cf. Pollock on *Contract* (6th ed., p. 191).

In Scots law novation is the extinction of a debt by the substitution of a new obligation in place of the old one, the debtor and creditor being unchanged.

It is thus distinguished from delegation, which is the substitution not of a new debt but of a new debtor. But in commercial law novation is often used as a generic term to include both novation proper and delegation (Pollock on *Contract*, 6th ed., p. 191). The consent of the creditor is always necessary.

Novation is not to be presumed. Indeed, the presumption of law is against it unless it be clearly established (*Buchanan*, 1833, 11 S. 762; *Skinner*, 1823, 2 S. 354; *King*, 1626, Mor. 11518; *Mackintosh*, 1872, 10 M. 304). The last-named case raised a question of delegation, where it was held that the mere taking a bill from a new debtor was only to be construed as taking an additional security, and did not free the old debtor. So a new obligation is understood to be simply in corroboration of the old one, unless it be clearly expressed that there is to be novation (Ersk. iii. 4. 22; *Oswald*, 1711, Mor. 11521; *Binny*, 1675, Mor. 7057).

The acceptance of a new security without the former one being discharged, does not operate as novation (*Rutherford*, 1785, Mor. 7069). In the case of *Pattie* (1843, 6 D. 350), it was held that where a party had a claim on a trust estate, the fact that payment was taken by a bill drawn by one of the trustees upon and accepted by a co-trustee, but who was not designed as such in the bill, did not free the estate from the said claim upon it. There can be no novation as long as the original obligation can be sued on, for, in order to novation, the original debt must be extinguished. Thus where the holder of bills took renewal bills for part of the original bills, but retained the latter as good obligation, it was held that there was no novation (*Hay & Kyd*, 1886, 13 R. 777, *vide* per Ld. Rutherfurd Clark).

Questions of novation, or, more accurately, of delegation, arise in the law of partnership, as, for instance, where a new firm takes over the debts and liabilities of an old firm. In such a case the old debtor will not be freed and novation established unless there be such conduct on the part of the creditor as reasonably amounts to a "holding out," or representation to the debtor that he was discharged, or, in other words, unless there be circumstances sufficient to bar the creditor from having recourse to the original debtor (see Campbell, *Mercantile Law*, pp. 204–211; *Buchanan*, 1779, Mor. 3402; *Pearston*, 1856, 19 D. 197; *Rolfe*, 1866, L. R. 1 P. C. App. 27; and Partnership Act, 1890 (53 & 54 Vict. c. 39, s. 14)). In all cases it is a question of fact whether there has been an agreement to innovate. In the case of a new firm being established, and where a former creditor continues

his dealings, the fact that he looked to the new firm as his debtor will not be difficult to prove. In many other cases, however, the presumption in favour of the creditor being entitled to have recourse against his original debtor will not be easily overcome, and a difficult question of fact arises. If it were shown that the old debtor knew, while the creditor was ignorant, that the substituted debtor was insolvent, then the original debtor would not be discharged.

With regard to the obligations incurred to its policy-holders by an insurance company, there is a statutory provision which prevents extinction by novation in the transfer of the business and liabilities to another insurance office, unless the abandonment of the policy-holder's claim on the old company, and his acceptance of the liability of the new company in lieu thereof, shall be signified in writing signed by the policy-holder or his agent (35 & 36 Vict. c. 41, s. 7).

[See also Stair, i. 18. 8; Bell, *Prin.* s. 576; Gloag and Irvine on *Rights in Security*, p. 653; Addison on *Contracts*, 1226.] See Delegation.

Novels.—See Corpus juris; Roman Law (*Texts*).

Novodamus, Charter of.—This is a deed by which a superior, whether the Crown or a subject-superior, renews a grant previously made to his vassal. It may be granted to replace titles which have been lost, to cure a defective title, or to effect alterations agreed upon by the parties in the conditions of the original grant. Commutation of casualties may be effected by a charter of novodamus in which the superior of new dispones the lands together with the casualties to his vassal, or by a discharge in the form of Sched. F of the Conveyancing Act, 1874. It can be used alternatively with a memorandum in the form of Sched. D of the Act of 1874 for the allocation of feu-duties, and it is the proper deed to employ if it is desired to reduce a feu-duty, or to make it elusory. In short, "it is the appropriate medium by which to express and complete a change in the prior contract between the superior and vassal in any respect" (Bell, *Convey.* 739; *Magistrates of Inverkeithing*, 1874, 2 R. 48).

Prior to 1874 a simple charter of novodamus was seldom required, the more usual form being a clause of novodamus inserted in a charter of resignation or confirmation. Charters of novodamus were excepted from the provision of the Act of that year making it incompetent for superiors to grant any charter or other writ by progress (37 & 38 Vict. c. 94, s. 4), but since that date they have necessarily been pure charters. In form the charter is similar to an ordinary feu-charter (*Jurid. Styles*, i. 384). The narrative clause fully sets forth the cause of granting, and the dispositive "of new gives, dispones, and for ever confirms" to the vassal the subjects therein contained. The only other difference between it and an ordinary feu-charter is in the warrandice clause. Since the superior only interferes in the interest of the vassal, the warrandice given ought not to be absolute. The Juridical Styles say it should be from "fact and deed"; but in the interest of the superior it is better to grant only simple warrandice, and this is the practice of some conveyancers.

It was essential to the valid granting of a charter or clause of novodamus that the subjects thereby conveyed should be in the hands of the superior at the time of granting. Thus if applicable to lands which had already been given out by the superior in a valid title, it was, unless resignation

had previously been made in the hands of the superior, invalid as regards third parties until fortified by prescription (*Grieve*, 1760, Mor. 3022; 2 Ross, *L. C.* L. R. 152). It was, however, effectual against the superior. The Act of 1887 (50 & 51 Vict. c. 69, s. 3) provides: "It shall not be competent to object to the validity of any charter of novodamus, whether granted prior to or after the passing of this Act, on account of the lands therein contained not having previously, and in order to the granting thereof, been resigned into the hands of the superior."

Though *ex facie* merely the renewal of a former grant, a charter of novodamus operates as an original charter, and all subjects mentioned in the deed are effectually conveyed to the grantee although he has no antecedent title to them in his person (*Scot*, 1680, Mor. 9339; *Heritors of Spey*, 1737, Mor. 9342 and 1775, 5 Bro. Supp. 527; *Riddel*, 1758, Mor. 9346).

Where the words "used and wont" were added to a clause of novodamus, the extent of the grant was held to be measured by the previous possession (*Bruce*, 1714, Mor. 9342). A charter of novodamus implies a discharge of all bygone casualties and feu-duties (Ersk. ii. 5. 46).

The person in whose favour a charter of novodamus has been granted may complete his title either by recording the charter, with a warrant of registration thereon in the form of Sched. H, No. 1, of 30 & 31 Vict. c. 101, or by expeding a notarial instrument in the form of Sched. J of that Act, and recording it, with a like warrant of registration, in the appropriate Register of Sasines.

For Crown charters of novodamus, see the article on CROWN CHARTERS.

[Stair, ii. 3. 15: Ersk. ii. 3. 23; Bankt. ii. 3. 35; Menzies, 817; Bell, *Convey.* 738, 759, 1150; *Jurid. Styles*, i. 361, 384.]

Nudum pactum.—See PACTUM.

Nuisance —The subject of nuisance is treated in this article under the following heads:—

I. Nuisance at Common Law.
  1. Scope and General Characteristics.
  2. Special Nuisances—
    (1) Water Pollution.
    (2) Air Pollution.
    (3) Unusual Noise or Vibration.
    (4) Unnatural Heat.
    (5) Nuisances caused by Dangerous Proceedings.
    (6) Nuisances caused by Offensive Proceedings.
    (7) Nuisances caused by Unusual Proceedings.
  3. Pursuers and Defenders—
  4. Legal Procedure.
  5. Defences—
    (1) Valid.
    (2) Invalid.
  6. Restrictions in Property Titles bearing on Subject of Nuisance.

II. Nuisance under Public Health Acts.
  1. Definition of Nuisances under Public Health (Scotland) Act, 1897.
  2. Pursuers and Defenders under Public Health (Scotland) Act, 1897.

3. Legal Procedure for Discovery and Removal of Nuisances under Public Health (Scotland) Act, 1897.
4. County Council Bye-laws for Prevention and Suppression of Nuisances.

I. Nuisance at Common Law.

1. Scope and General Characteristics.

Scope.—Nuisance at common law deals with the following subjects: Pollution of water and air; unusual noise or vibration: unnatural heat and nuisances caused by dangerous, offensive, or unusual proceedings.

Scots and English Laws compared.—In regard to questions of nuisance, the law of Scotland and the law of England rest on the same principle (per Ld. Fitzgerald in *Fleming*, 1886, 13 R. H. L. 48). The following distinctions in scope and treatment exist, however: (1) The English branch of the law has a wider scope, including subjects such as closing up ancient lights; (2) the law of England provides different modes of suing for the removal of public and private nuisances. No such distinction exists in Scotland: a private person is entitled to sue for the removal of any nuisance affecting him.

Definition.—The essentials of a nuisance are: (1) A proceeding on the part of one person which, when the natural rights of his fellows are taken into consideration, is unnatural, dangerous, offensive, or unusual. (2) Material injury occasioned to another by reason of such proceeding. The injury must be material, not sentimental or speculative (*Fleming*, 1886, 13 R. H. L. per Ld. Selborne, 45, and Ld. Bramwell, 47). Material injury will be caused if (1) life is endangered or health affected by the proceeding; (2) if the proceeding occasions sensible personal discomfort according to a simple mode of living (*Hunt*, 1827, 4 Mur. per Ld. Ch. Com. Adam, 313: *Fraser's Trs.*, 1877, 4 R., per Ld. Shand, 795, and Ld. Ormidale, 798; *Fleming*, 1882, 10 R. 426, and 1886, 13 R. H. L. 43; *Walter*, 1851, 4 De G. & Sm., per Knight Bruce, V. C., 322; *Crump*, 1867, L. R. 3 Eq., per Ld. Romilly, M. R., 413): or (3) if the proceeding results in real substantial damage to property (*Inglis*, 1881, 8 R. 1006; 1882, 9 R. H. L. 78; *Salvin*, 1874, L. R. 9 Ch. App. 705).

Damage.—The person injured by a nuisance is not only entitled to get the nuisance put a stop to, but is also entitled to compensation for the damage caused to him thereby. Where cessation of the nuisance is an impossibility, as in the case of noxious vapours from a burning bing of refuse, the fire from which cannot be extinguished, but must go on burning till it has spent itself (*Chalmers*, 1876, 3 R. 461), or where the nuisance has been brought to a close simultaneously with the occurrence of the damage, as in the case of the fall of a ruinous house causing injury (*Cleghorn*, 1856, 18 D. 664), the action should be one for damages alone.

Material Contribution.—It is not necessary for a pursuer to prove that the nuisance is caused wholly by the act of the defender: all he requires to prove is that the nuisance exists and that the defender materially contributes to it (*Buccleuch*, 1866, 5 M. 214; *Blair*, 1887, 57 L. T. (N. S.) 522: *Lambton* [1894], 3 Ch. 163).

Prospective Nuisance.—Where a person is able to prove that the operations of another will necessarily occasion a nuisance to him, or that it is at least extremely probable that they will do so, he is entitled to prevent the other from commencing or going on with such operations (*Trotter*, 1831, 5 W. & S., per Ld. Chan. St. Leonards, 655; *Arnot*, 1852, 1 Macq. 229; *Haines*, 1847, 10 Beav. 75; *Attorney-General* v. *Mayor of Kingston*, 1865,

34 L. J. Ch. 481; *Attorney-General* v. *Corpor. of Manchester*, [1893] 2 Ch. 87).

2. SPECIAL NUISANCES.

(1) *WATER POLLUTION.—Essentials.*—A nuisance is caused where one person discharges into the stream or other water noxious, offensive, and artificial refuse, and material injury is caused thereby to another person having an interest in the water.

Public Rivers, etc.—The Crown, being the proprietor of the channels of public or navigable rivers, the solum of bays or estuaries within the *fauces terræ*, and the bed of the sea within the three-mile limit, is entitled to prevent a nuisance caused to members of the public by their pollution (*Lord Advocate* v. *Clyde Navigation Trs.*, 1891, 19 R. 174).

Private Rivers.—As regards private or non-navigable rivers, the owners of the banks and alveus have a common interest in the water, and right to the exclusive use of it as it flows over their land, and are entitled to object to pollution of the water to their injury (*Blantyre*, 1848, 10 D., per Ld. J.-C. Hope, 529, and Ld. Medwyn, 536; *Buccleuch*, 1864, 2 M., per Ld. Benholme, 658).

Primary Purposes.—Every proprietor is entitled to use the water as it flows past his land for primary purposes, which include drinking, cooking, washing, and bleaching for the family, and watering cattle (*Russell*, 1791, Bell's *Oct. Cas.*, per Ld. Monboddo, 345, and Ld. J.-C. Macqueen, 346; *Dunn*, 1837, 15 S., per Ld. Gillies, 859; *Buccleuch*, 1866, 5 M., per Ld. J.-C. Inglis, 217, and Ld. Benholme, 232).

Causes of Water Pollution.—These are: (1) discharge of refuse and impurities from manufactories and *opera manufacta*; and (2) discharge of sewage from dwelling-houses.

Material Injury.—In determining whether the pollution causes material injury, the following points have to be taken into consideration: the size of the stream, for a large stream will receive without detriment more pollution than a small one; whether the pollution is fluctuating or constant; and especially the quality of the water.

If a river devoted to primary purposes, viz. fit for the ordinary domestic uses above set forth, or for some of these uses, is prevented by reason of the discharge into it of manufactory refuse or sewage from reaching the property of a lower proprietor in a condition fitted for primary purposes, material injury is caused to the latter, and he is entitled to a legal remedy.

Examples of destruction of primary purposes by discharge from opera manufacta—Distillery: Miller, 1791, Mor. 12823, Bell's *Oct. Cas.* 334. *Printing calico manufactory: Miller*, 1828, 5 Mur. 28. *Turkey-red dye-work: Dunn*, 1837, 15 S. 853; 1839, MacFarlane, 241. *Paper mill: Buccleuch*, 1866, 5 M. 214. *Chemical work: Rigby*, 1872, 10 M. 568. *Farina manufactory: Robertson*, 1872, 11 M. 189. *Muddy water from buddles: Hodgkinson*, 1863, 4 B. & S. 229. *Discharge from reservoir: Clowes*, 1872, L. R. 8 Ch. App. 125.

Examples of destruction of primary purposes by sewage pollution: Montgomerie, 1853, 15 D. 853; *Caledonian Rwy. Co.*, 1876, 3 R. 839.

A river is devoted to secondary purposes where from time immemorial the primary purposes have been superseded, or where the river has been rendered unfit for domestic use on account of pollution cast into it by persons who have acquired a right to do so by grant, or prescription, or acquiescence. In such case no person is entitled to increase the pollution or introduce a new pollution into the stream if his doing so materially

injures a lower proprietor by destroying his use of the water for the purposes of his manufactory, or any other use to which it was applied before the commencement of the new, or the increase of the former, pollution.

Examples—Discharge from dyework hurting tannery: Ewen, 1857, 19 D. 513, per Ld. J.-C. Hope, 516. *Discharge from dyework hurting carpet manufactory: Crossley*, 1866, L. R. 3 Eq. 279; 1867, L. R. 2 Ch. App. 478. The same river may, in one part of its course, be fit for primary purposes, and in another unfit for such purposes (*Local Authority of Portobello*, 1882, 10 R. 130).

Material Contribution.—Where nuisance by discharge of pollution into a stream is proved, although it cannot be traced to the actings of one person, anyone materially contributing to its pollution can be forced to discontinue his share of the pollution (*Buccleuch*, 1866, 5 M. 214, per Ld. J.-C. Inglis, 216, and Ld. Cowan, 228; *Blair*, 1887, 57 L. T. (N. S.) 522).

Similar rules apply to *mill lades* (*Eyre*, 1827, 5 S. 912), *canals* (*Caledonian Ruy. Co.*, 1876, 3 R. 839), *dry ditches* (*Scott*, 1881, 8 R. 851, per Ld. Craighill, 854), *inland lochs* (*Goldsmid*, 1865, L. R. 1 Eq. 161; 1866, 1 Ch. App. 349), *water percolating through soil and wells* (*Ballard*, 1885, L. R. 29, Ch. Div. 115, 54 L. J. Ch. 454; *Womersley*, 1867, 17 L. T. (N. S.) 190), and *reservoirs* (*Stockport Waterworks Co.*, 1861, 7 H. & N. 160).

(2) *Air Pollution.—Analogous Rules apply to Cases of Air and Water Pollution.*—No man has any more right to pollute the air passing over his neighbour's land than he has to pollute the potable stream flowing through his neighbour's property (per Ld. J.-C. Monereiff in *Inglis*, 1881, 8 R. 1021; per Lindley, L. J., in *Ballard*, 1885, L. R. 29 Ch. Div. 126). Every man has a right to use the air for primary purposes; that is, such uses as are connected with the ordinary domestic occupation of dwelling-houses and the cultivation of land.

Essentials.—Nuisance, therefore, arises when (1) one person pollutes the air by injecting into it smoke, noxious vapours, or nauseous gases, either hurtful in themselves or which give rise to disagreeable smells; and (2) another person is materially injured thereby (per Ld. Shand in *Fraser's Trs.*, 1877, 4 R. 795; per Ld. Blackburn in *Inglis*, 1882, 9 R. H. L. 88; per Ld. Selborne and Ld. Fitzgerald in *Fleming*, 1886, 13 R. H. L. 45 and 48; per Lindley, L. J., in *Rapier*, [1893] 2 Ch. 600).

Material Injury.—The injury suffered will be material if the noxious vapours or offensive gases are such as occasion injury to the health of an ordinarily constituted being, or sensibly diminish his comfort and enjoyment of life, or cause substantial damage to his property. The question of nuisance is one of degree, and depends on the circumstances of the case. In deciding the question of material injury the following points may have to be considered, viz.: The distance of the person or property injured from the pollution; the contour and position of the ground; the height at which the pollution is discharged into the air; the usual direction of the wind; and the *locality* in which the work is situated (per Ld. Shand in *Fraser's Trs.*, 1877, 4 R. 795). A locality "dedicated to nuisances" may be defined as a locality within the area of which certain *opera manufacta* which pollute the air have gained a legal footing by grant, prescription, or acquiescence. In such a case, as in the case of a river devoted to manufacturing purposes, no one is entitled to materially increase the nuisance to the injury of another (*Stewart*, 15 Dec. 1807, F. C., Mor. App. "Public Police," No. 5; *Charity*, 5 July 1808, F. C., Mor. App. "Public Police," No. 6; *Dowie*, 11 Dec. 1813, F. C.; *Sarile*, 1872, 26 L. T. (N. S.) 277).

Examples of Nuisance caused by Air Pollution.—Burning bricks: Ralston,

29 July 1768, F. C., Mor. 12808; *Walter*, 1851, 4 De G. & Sm. 315, 20 L. J. Ch. 433; *Beardmore*, 1862, 3 Giff. 683, 31 L. J. Ch. 892; *Barcham*, 1870, 22 L. T. (N. S.) 116. *Smoke from furnaces and steam engines: Stewart, supra*; *Cooper & Wood*, 1863, 1 M. 499; 1863, 2 M. 116; *Smith*, 1877, 37 L. T. (N. S.) 224. *Glassworks: Savile, supra. Glueworks: Charity, supra. Soda manufactory: Arrott*, 1826, 4 Mur. 149; *Hamilton*, 1827, 5 S. 517. *Candle manufactory: Bliss*, 1838, 4 Bing. N. C. 183. *Gas manufactory: Broadbent*, 1856, 7 De G. M. & G. 436, 26 L. J. Ch. 276; 1859, 7 H. L. C. 600. *Farina manufactory: Robertson*, 1872, 11 M. 189. *Establishment for preparing tripe: Farquhar*, 19 Jan. 1813, F. C. *Whale blubber-boiling: Dowie, supra*; *Trotter*, 1830, 9 S. 144; affd. 1831, 5 W. & S. 649. *Prussian blue manufactory: Jameson*, 24 June 1800, F. C., Mor. App. "Property," No. 4. *Charring coal: Heriot*, 31 Jan. 1804, F. C., Mor. 15255. *Calcining iron in bings: Inglis*, 1881, 8 R. 1006; 1882, 9 R. H. L. 78. *Calcining mineral refuse: Fleming*, 1882, 10 R. 426; 1886, 13 R. H. L. 43. *Copper-smelting: St. Helens Smelting Co.*, 1865, 11 H. L. C. 642, 35 L. J. Q. B. 66, 1 L. R. Ch. App. 66. *Fellmonger's business: Pinckney*, 1861, 4 L. T. (N. S.) 741. *Slaughter-house: Palmer*, 1794, Mor. 13188; *Kelt*, 8 July 1814, F. C.; *Swinton*, 1837, 15 S. 775; 1839, Mael. & R. 1018; *Pentland*, 1855, 17 D. 542. *Smell from stables: Rapier*, [1893] 2 Ch. 588. *Artificial manure manufactory: Fraser's Trs.*, 1877, 4 R. 794, 5 R. 290; 1879, 6 R. 451. *Deodorising sewage: Knight*, 1869, 19 L. T. (N. S.) 673. *Dung depot: Scott*, 1830, 8 S. 845; 1835, 13 S. 646. *Uncovered sewer: Mackay*, 1858, 20 D. 1251.

(3) *Unusual Noise or Vibration.*—The same principle that applies in cases of pollution of water or air applies where the air is disturbed by unusual noise (per Ld. Romilly, M. R., in *Crump*, 1867, L. R. 3 Eq. 413). *Essentials.*—A nuisance arises (1) where one person disturbs the air by making unnatural, unusual, or extraordinary noise or vibration; and (2) where material injury is caused to another thereby.

Material Injury.—If the vibration is shown to have weakened, or cracked, or demolished a structure, that visibly demonstrates that substantial and real mischief has been done, and that a nuisance has been caused (per Blackburn, J., in *Smith*, 1865, 4 F. & F. 350). Where the nuisance is alleged to be caused by noise giving rise to annoyance, the annoyance must not be merely sentimental, but must substantially interfere with the reasonable comfort of the person complaining (per Ld. Selborne in *Gaunt*, 1872, L. R. 8 Ch. App. 11). If the noise occasions serious annoyance and disturbance, interfering with ordinary use and enjoyment of property, it amounts to a nuisance (per Jessel, M. R., in *Broder*, 1876, L. R. 2 Ch. Div. 701, per Bacon, V. C., in *Heather*, 1877, 37 L. T. (N. S.) 394). In determining whether material injury is caused, the locality must be taken into consideration, as noises which might cause annoyance in a country district may scarcely be heard amid the continuous hum of life in a crowded city; and the time also is of importance, as noises which are swallowed up in the traffic of the streets during the day may become extraordinary disturbances if prolonged into the quiet of the night.

Material Increase.—The fact that a person has acquired a right to cause a certain amount of noise or vibration gives him no power to increase the noise to the injury of a neighbour (*Heather*, 1877, 37 L. T. (N. S.) 393).

Examples of Nuisance caused by Noise and Vibration.—Printing press in city: Robertson, 2 March 1802, F. C., Mor. App. "Public Police," No. 3; *Johnston*, 1841, 3 D. 1263, 13 Sc. Jur. 565. *Noise from newspaper-forwarding business in city: Bartlett*, 1896, 44 W. R. 251. *Forges and steam hammers:*

Kinloch, 1756, Mor. 13163, Kames's *S. D.* 175; *Roskell*, 1871, 19 W. R. 804; *Goose*, 1873, 21 W. R. 449. *Boiler-making: Baxter*, 1875, 44 L. J. Ch. 625. *Circular saw: Gort*, 1868, 16 W. R. 569. *Noises from dairy business:* held to cause nuisance in *Tinkler*, 1888, 5 T. L. R. 52; held not to cause nuisance in *Fanshawe*, 1888, 4 T. L. R. 694. *Brass band: Walker*, 1867, L. R. 5 Eq. 25, per Wood, V. C., 30. *Circus noises: Inchbald*, 1869, L. R. 4 Ch. App. 388. *Showman's organ: Winter*, 1887, 3 T. L. R. 569. *Organ in refreshment premises: Lambton*, [1894] 3 Ch. 163. *Speaking trumpet: Rex* v. *Smith*, 1726, 2 Stra. 704. *Bell-ringing: Soltau*, 1851, 2 Simons (N. S.) 133, 21 L. Ch. 153. *Vibration from electric-lighting machinery: Shelfer*, [1895] 1 Ch. 287. *Dancing-hall: Jenkins*, 1888, L. R. 40 Ch. Div. 71. *Fencing-school: Fleming*, 1750, Mor. 13159. *Horses and operations in stables: Ball*, 1873, L. R. 8 Ch. App. 467; *Broder*, 1876, L. R. 2 Ch. D. 692; *Rapier*, [1893] 2 Ch., opinion of Kekewich, J., 591. *Hen-run: Ireland*, 1895, 33 S. L. R. 156. *Discharge of gun: Carrington*, 1809, 11 East, 571; *Keeble*, 1809, 11 East, 574. *Rockets and fireworks: Walker, supra; Ibbotson*, 1865, 34 L. J. Ex. 118. *Pigeon-shooting: Rex* v. *Moore*, 1832, 3 B. & Ad. 184.

(4) *Unnatural Heat.—Essentials.*—When is heat unnatural or unusual? The pollution of air by manufactory smoke, etc., is always noxious, and someone has only to be materially injured by the discharge for that act to become a nuisance. But the artificial production of heat is not in itself noxious, and some standard must be fixed by which to judge whether a particular case of causing artificial heat is unusual or not. Heat, even if it injures the sensitive trade of another, is not a nuisance, unless it is so great as to interfere "with the ordinary enjoyment of life or the ordinary use of property for the purposes of residence or business" (*Robinson*, 1889, L. R. 41 Ch. Div. 88, 58 L. J. Ch. 392, opinions of Lindley, L. J., and Cotton, L. J.). But when heat artificially produced is of the above description, and materially injures another in his health, comfort, or prosperity, it becomes an actionable nuisance.

Examples of nuisance caused by heat.—*Heat from boiler flue in printing office causing discomfort: Wilson*, 1877, 14 S. L. R. 667. *Heat from stove interfering with ordinary use of property: Reinhardt*, 1889, L. R. 42 Ch. Div. 685, opinion of Kekewich, J., 687.

Raising the temperature of water to an unnatural height, and thereby causing injury to another, is also a nuisance (*Tipping*, 1855, 2 Kay & J. 254).

(5) *Nuisances caused by Dangerous Proceedings.—Essentials.*—Any operation by one person, or neglect to do something, whether in the course of trade or otherwise, is a nuisance when it creates real danger to life or property, and at the same time injures another person by the apprehension of such danger. The apprehension of danger must be well founded, such as "would alarm men of steady nerves and reasonable courage" (per Ld. Campbell, C. J., in *Reg.* v. *Lister*, 1857, 26 L. J. M. C. 198). A dangerous nuisance is not a prospective nuisance; it is an existing nuisance, the fact of present danger being the gist of the nuisance (per Ld. Halsbury in *Fleming*, 1886, 13 R. H. L. 48).

Examples of Dangerous Nuisances.—Storing inflammable material, such as wood, naphtha, and rectified spirit of wine, or *explosive material*, such as gunpowder, near property of another person, or near public street (*Crowder*, 1816, 19 Ves. 617; *Reg.* v. *Lister*, 1857, 26 L. J. M. C. 196. *Damp jute* spread to dry near property of another: *Hepburn*, 1865, 2 H. & M. 345, 34 L. J. Ch. 293. *Smith's shop in thatched house: Vary*, 2 July 1805, F. C., Mor. App. "Public Police," No. 4. *Blasting rock* near property of another

or highway: *Reg.* v. *Matters*, 1864, 34 L. J. M. C. 22; *Arnold*, 1874, 22 W. R. 613. *Barbed wire* in such a position as to be a source of danger not to trespassers but to persons and animals passing along public road: *Elgin Road Trs.*, 1888, 14 R. 48. *Hospitals for infectious diseases:* held to cause nuisance in *Metropolitan Asylum District*, 1881, L. R. 6 App. Ca. 193, and *Bendelow*, 1887, 57 L. J. Ch. 762; held not to cause nuisance in *Mutter*, 1848, 11 D. 303, and *Fleet*, 1886, 2 T. L. R. 361.

(6) *Nuisances caused by Offensive Proceedings.—Essentials.*—Exhibitions and other proceedings which are calculated to excite disgust or injure the moral susceptibilities of an ordinarily constituted man, are also nuisances capable of being suppressed by an action at common law at the instance of the party injured. The exhibition or proceeding must not be merely such as may jar refined sensibilities by reason of oddity or incongruity, or objectionable on sentimental grounds, such as the erection in a churchyard of a monument "to the martyrs of political reform" (*Paterson*, 1845, 7 D. 561). But to be a nuisance it does not require to be immoral—indeed, its object may be innocent or laudable. It is sufficient if it is of a disgusting nature or liable to excite abhorrence in a reasonable man. Thus dressing or manufacturing large ox and buffalo hides and hanging up the skins to dry within thirty feet of the public road, and in full view of those passing along the road, has been held a nuisance (*Scott*, 5 July 1810, F. C.); also the exhibition in a shop window of an offensive picture, although there was nothing indecent in the picture, and the motive of the exhibition was innocuous (*Regina* v. *Grey*, 1864, 4 F. & F. 73). Any proceeding incompatible with ordinary morality, which, by reason of its being carried on in close proximity, even although not visible to public gaze, injures any person either by offending his own feelings or giving the neighbourhood a bad name, and thus depreciating the value of his property, is also a nuisance at common law. Thus, keeping an improper house is a nuisance, which the occupiers and owners of the neighbouring tenements are entitled to put down (Bell, *Prin.* s. 974).

(7) *Nuisances caused by Unusual Proceedings.*—A nuisance is also occasioned where a person, by using his premises for some unusual or extraordinary purpose, or by doing some unusual or extraordinary act on his own property or in the public thoroughfare, injures another either by seriously annoying him or by damaging his property. Three examples of such nuisance are found in decided cases.

(*a*) *Electrical Current.*—If a current of electricity is produced by one person, and is discharged so that it finds its way on to the property of another and causes damage to apparatus used by the latter, a nuisance is occasioned to him, and he is entitled to demand its cessation (*National Telephone Co.*, [1893] 2 Ch. 186, per Kekewich, J., 201).

(*b*) *Proceeding causing Crowds to collect.*—Entertainments or other proceedings, whether visible from outside or not, on private property, which cause crowds to collect to the injury of the neighbours, are also nuisances. The question is one of degree. A man giving a ball may cause some slight annoyance to his neighbours by the assemblage of coachmen and cabmen, and the noises accompanying such an assemblage, but such a proceeding is exceptional, and, unless repeated night after night, would not be held to give rise to a legal nuisance. But where a performance in a theatre or club nightly or frequently brings together a crowd, which assembles in the thoroughfare and causes annoyance to the neighbours by obstructing the access and egress from their premises, a nuisance is occasioned, which those injured are entitled to stop (*Barber*, [1893] 2 Ch.

447, opinion of North, J., 449 *et seq.*). Such a nuisance becomes more serious where the assembling of the crowd is accompanied by noise (*Bellamy*, 1891, 39 W. R. 158), or by noise and danger and damage to property (*Rex* v. *Moore*, 1832, 3 B. & Ad. 184; *Walker*, 1867, L. R. 5 Eq. 25).

(*c*) *Scattering salt on snow in streets.*—Scattering salt on the snow in the public highway, and piling the snow at the side of the road to the injury of horses and inconvenience of the traffic passing along the highway, has also been held to cause a nuisance, which the person thus injured is entitled to interdict (*Oyston*, 1896, 24 R. H. L. 8).

3. PURSUERS AND DEFENDERS.

Pursuers.—The persons entitled to sue for the removal of a nuisance at common law are—

(1) *The Owner* of the lands or premises affected by the nuisance. Where the nuisance injures the property not directly by destroying it physically, but indirectly by injuring the tenant, and thus deteriorating its value, it has been held in England that an owner not in occupation is unable to sue for the restraint of a nuisance not necessarily permanent in character, but temporary and likely to cease before the tenancy expires (*Mumford*, 1856, 1 H. & N. 34; *Simpson*, 1856, 1 C. B. (N. S.) 347, 26 L. J. C. P. 50; *Jones*, 1875, L. R. 30 Eq. 539). Where actual damage is caused to the property, or where the injury is of such a permanent nature as necessarily affects the property, the owner is entitled to sue (*Shelfer*, [1895] 1 Ch. 287); and owners of sublet houses maintained without objection actions restraining nuisance arising from noise in *Gort*, 1868, 16 W. R. 569, and *Tinkler*, 1888, 5 T. L. R. 52. Any objection on this ground is obviated by the occupier suing, along with the owner, as co-plaintiff (*Broder*, 1876, L. R. 2 Ch. D. 692). In Scotland, however, the right on the owner's part to see that the use of his house is not destroyed by nuisances was early decided in *Fleming*, 1750, Mor. 13159, and no case has occurred where an owner not in occupation has been held to have no title to sue an action to restrain nuisance.

(2) *The Occupier* or tenant of lands or premises who is injured in health, comfort, or property while occupying the subject of his lease (*Hamilton*, 1839, 1 D. 502; *Fraser's Trs.*, 1877, 4 R. 794).

(3) *A Member of the Public* injured by a nuisance while passing along a public street or highway is entitled to sue for its removal. This point was raised but not decided in *Gardner*, 1860, 22 D. 1501, but has been definitely settled by the House of Lords in *Oyston*, 1896, 24 R. H. L. 8.

(4) *Statutory Trustees* have a good title to sue for the removal of nuisances interfering with the subject of their trust (*Elgin Road Trs.*, 1888, 14 R. 48).

Defenders.—The persons liable to be sued for removal of a nuisance at common law are—

(1) *The Person directly causing it.*—An occupier of a house is liable for continuing a nuisance which was there when he came (*Broder*, 1876, L. R. 2 Ch. D. 692). If a public body constituted under Act of Parliament have no statutory authority to commit a nuisance, their position is no better than that of a private individual (per Ld. J.-C. Moncreiff in *Barony Parochial Board*, 1883, 10 R. 523), and they have no right to sanction the commission of a nuisance by another (*Oyston*, 1896, 24 R. H. L. per Ld. Watson, 15, and Ld. Shand, 17).

(2) *Master and Servant.*—Masters are liable for deeds of their servants giving rise to a nuisance if the servants are acting within the ordinary

course of their employment, even though the master may not have specially authorised, or indeed may have prohibited, the act complained of (*Rex* v. *Medley*, 1834, 6 C. & P. 292).

(3) *Landlord and Tenant.*—A landlord is responsible for a nuisance occasioned by his tenant if the lease authorises its committal, or if it is the natural result of, or unavoidable or inseparable from, the operations or occupation authorised by the lease (*Robertson*, 1872, 11 M. 198; *Caledonian Rwy. Co.*, 1876, 3 R. 839, per Ld. Chan. Cottenham in *Dunn*, 1838, 3 S. & M'L. 378; per Ld. J.-C. Inglis in *Buccleuch*, 1866, 5 M. 219). A landlord has been held responsible for nuisance caused by gypsies or migratory persons dwelling in tents on his land with his permission (*Attorney-General* v. *Stone*, 1896, 60 J. P. 168). But if the nuisance is not authorised by the lease, and does not arise from the natural and ordinary use of the subjects let, or might have been avoided if due care had been shown, the tenant alone is answerable for it (*Harris*, 1876, 45 L. J. Q. B. 545).

(4) *Superior and Vassal.*—The superior of ground feued is not responsible for a nuisance created by the feuars, unless the nuisance is authorised in the feu-right either directly or indirectly, or is the necessary result of the feuing operations (*Governors of Heriot's Hospital*, 1826, 5 S. 94; affd. 1830, 4 W. & S. 1; *Scott*, 1881, 8 R. 851; *Mackay*, 1858, 20 D. 1251, per Ld. Murray and Ld. Cowan, 1253).

4. LEGAL PROCEDURE.

Questions of nuisance may be tried (1) in the Court of Session, by note of suspension and interdict, or by summons of declarator and interdict; or (2) in the Sheriff Court, by petition for interdict, or declarator and interdict (Sheriff Court Act, 1838 (1 & 2 Vict. c. 119), s. 15). Declarator and interdict is the proper remedy where the title of the complainer is obscure or disputed, or where the proceedings complained of have gone on for such a considerable period, or under such conditions that allegations of prescription or acquiescence will possibly be made in defence. Where the complainer's title is clear and the proceedings involving nuisance are recent, the question should be tried by interdict alone (Mackay's *Court of Session Practice*, ii. 222 and 223; Dove Wilson's *Sheriff Court Practice*, 4th ed., 438).

Damages.—Where damages for the injury caused by the nuisance are desired, in addition to interdict, a conclusion to that effect should be inserted in the summons. Where compensation for injury is alone desired, the action should be one solely for damages; in such an action the pursuer must of course prove damage (*Collins*, 1837, 15 S. 895).

Several Pursuers and Defenders.—Several pursuers may unite in one action of interdict against the same nuisance (*Buccleuch*, 1864, 2 M. 653; affd. 1876, 4 R. H. L. 14); and where separate actions of interdict have been raised for the purpose of putting a stop to the same nuisance, the actions may be conjoined, unless there are such complications in the actions, and such shades of distinction between the questions they raise, that confusion might be produced by conjoining them (*Buccleuch*, 1866, 4 M. 475). Where several persons contribute to the same nuisance, they may all be made defenders in one action of interdict (*Buccleuch*, 1864, 2 M. 653; affd. 1876, 4 R. H. L. 14). If, however, damages are sought, it is doubtful whether one action can be raised by several pursuers or against several defenders (per Ld. Chan. Cairns in *Buccleuch*, 1876, 4 R. H. L. 16, and Ld. Shand in *Sadler*, [1896] App. Ca. 455).

Proof of Nuisance.—The onus of proof lies on the pursuer or

person complaining of the nuisance (*Oldaker*, 1854, 9 Beav. 485). Where there is a *primâ facie* case of nuisance made out on record, interim interdict will be granted till the trial of the cause. There are three modes of proof: (1) Remit with consent of parties to a man of skill, and judgment in accordance with his report. (2) Proof before the judge trying the case. (3) Jury trial. When the action is raised in the Sheriff Court, it may, on the Sheriff allowing a proof, be appealed to the Court of Session for jury trial, in terms of the Judicature Act, 1825 (6 Geo. IV. c. 120), s. 40. On such an appeal the Court of Session are not bound to send the case to a jury: they may ordain the proof to be taken by one of their own number, or send back the case to the Sheriff to proceed with the proof in ordinary course (*Dennistoun*, 1871, 9 M. 739; *Laidlaw & Sons*, 1874, 2 R. 148). All actions relating to nuisance raised in the Court of Session must go before a jury, unless (1) some other mode of proof is chosen by consent of parties: or (2) special cause is shown to the judge why the proof should proceed before him alone (Judicature Act, 1825 (6 Geo. IV. c. 120), s. 28, as amended by Evidence Act, 1866 (29 & 30 Vict. c. 112), s. 4; *Hume*, 1875, 2 R. 338). "The rule as to the nature of the special cause which requires to be shown is rather flexible," but it may be generally laid down that a proof before a judge is most suitable in cases in which legal questions of novelty or difficulty arise (*White*, 1875, 2 R. 904).

Issues.—Where the case goes to jury trial the issue should raise in a clear manner the question whether the defender's act is to the nuisance of the pursuer. Where the word "nuisance" appears in the issue, it is superfluous to insert "wrongfully," nuisance being a species of legal wrong (*Buccleuch*, 1866, 4 M. 475). The tract of time to be covered by the issue should be long enough to show that the nuisance is continuous, but otherwise as short as possible, so as to limit the scope of the proof and avoid confusion. The terms of the issue are not cumulative (*Gardner*, 1860, 22 D. 1501); and where an issue raised the question whether there was thrown off from the defender's works "smoke, dust, and gaseous discharges," to the nuisance of pursuer, it was held that pursuer was entitled to win if he proved that these three were thrown off from the defender's works, and that a nuisance was caused to the pursuer by one of them (*Cooper*, 1863, 2 M. 116). Where the defender relevantly avers on record the special defence of prescription or acquiescence, no counter issue is necessary, such a defence, so stated, being open in reply to the question raised in the issue of the pursuer (*Ewan*, 1857, 19 D. 513; *Buccleuch*, 1866, 4 M. 475). Where there are separate defenders proceeded against as contributing to the nuisance, there must be a separate issue for each defender (*Buccleuch, supra*).

Terms of Decree.—If a nuisance is made out, and it is clear that the proceedings of the defender can never be anything else, his operations may be interdicted without qualification (Ld. Ardmillan in *Robertson*, 1872, 11 M. 197; *Fraser's Trs.*, 1877, 4 R. 794; 1877, 5 R. 290; 1879, 6 R. 451). But if there is a possibility of his continuing his operations and at the same time extinguishing the nuisance through the resources of science or otherwise, the interdict will forbid his acting in the manner hitherto practised by him, or otherwise, to the nuisance of the pursuer (*Rigby*, 1872, 10 M. 568; *Inglis*, 1881, 8 R. 1006; affd. 1882, 9 R. H. L. 78).

Prospective Nuisance.—Where an action is brought to interdict a nuisance which does not exist, but which the pursuer avers is about to be created, similar rules apply, with the following modifications: (1) Such actions do not fall under the cases enumerated in the Judicature Act for

trial by jury (per Ld. Chan. St. Leonards in *Arnot*, 1852, 15 D. H. L. 11). (2) The pursuer must relevantly state, and must prove, that the operations complained of, if they are allowed to be commenced or gone on with, will necessarily cause a nuisance, or at least that it is extremely probable that they will do so (per Ld. Pres. Inglis in *Steel*, 1872, 10 M. 958; *Haines*, 1847, 10 Beav. 75; *Attorney-General* v. *Mayor of Kingston*, 1865, 34 L. J. Ch. 481; *Attorney-General* v. *Corpor. of Manchester*, [1893] 2 Ch. 87). (3) If the Court are satisfied that a nuisance will necessarily be created if the defender's operations are allowed to be commenced or proceeded with, interdict will be granted, but if it is thought that scientific research in the future may discover a method of conducting the business without creating a nuisance, liberty should be reserved to the defender to apply to the Court for consideration of the method proposed, and, if they should then find that it will prevent the nuisance, for removal of the interdict already granted (*Trotter*, 1830, 9 S. 144: 1831, 5 W. & S. 649; reopened on defender's alleging discovery of method of carrying on business without nuisance, 1832, 10 S. 423: *Swinton*, 1837, 15 S. 775; modified by House of Lords, 1839, Macl. & R. 1018).

5. DEFENCES.

Valid Defences.—Where a nuisance is admitted or proved to exist, there are three special defences which, if established, will bar a decree or verdict in favour of the pursuer of an action to restrain the nuisance. The *onus* of proving these special defences lies on the defender (per Ld. Chan. Chelmsford in *Crossley*, 1867, L. R. 2 Ch. App. 482; per Mellish, L. J., in *Ball*, 1873, L. R. 8 Ch. App. 471).

(1) *Grant.*—This defence is of two kinds: (*a*) Permission granted by the pursuer or his author in an authentic writing to the defender or his author to commit the nuisance. This permission may be inferred as well as expressed; thus if one person let a manufactory on his ground to another, the former could not object to any nuisance which arose from the ordinary use of the building by the latter for the purpose for which it was constructed. (*b*) Statutory authority in Act of Parliament to commit the nuisance. The presumption always is that common-law rights are not interfered with by Statute, therefore the enactment founded on as relieving parties from liability for nuisance must either do so in distinct terms or grant special powers, the use of which necessarily involves the creation of a nuisance. Even where parties are relieved by Statute from liability for nuisance, they must take all reasonable care in their operations to prevent nuisance. (Examples of cases where nuisances were held to be authorised by Statute: *London, Brighton, and South Coast Rwy. Co.*, 1885, L. R. 11 App. Ca. 45; *Rex* v. *Pease*, 1832, 4 B. & Ad. 30; *Hammersmith, etc., Rwy. Co.*, 1869, L. R. 4 H. L. 171; *City of Glasgow Union Rwy. Co.*, 1870, L. R. 2 H. L. (Sc.) 78; *National Telephone Co.*, [1893] 2 Ch. 186. Examples of cases where nuisances were held not to be authorised by Statute: *Pentland*, 1855, 17 D. 542; *Cooper*, 1863, 1 M. 499; *Smith*, 1877, 37 L. T. (N. S.) 224: *Rapier*, [1893] 2 Ch. 588; *Shelfer*, [1895] 1 Ch. 287; *Ogston*, 1896, 24 R. H. L. 8.)

(2) *Prescription* or performance of the nuisance for forty years without any complaint or interruption on the part of the pursuer or his authors (per Ld. Cockburn in *Collins*, 1837, 15 S. 902: per Ld. Ardmillan in *Robertson*, 1872, 11 M. 198; per Ld. Shand in *Fraser's Trs.*, 1877, 4 R. 795; *Duncan*, 9 June 1809, F. C.). The right to commit a nuisance can only be acquired prescriptively by the person exercising it, and his successors: it is not like a right-of-way, which may be acquired by the public generally, a different

person carrying on the use of the road after the one who began it has ceased to use it (per Ld. Pres. Inglis in *Rigby*, 1872, 10 M. 573). In order to make the plea valid, the prescription must run from the date when the operations of the defender became a nuisance to the pursuer by prejudicially affecting him (*Goldsmid*, 1865, L. R. 1 Eq. 161; 1866, 1 Ch. App. 349).

(3) *Acquiescence.*—The facts from which acquiescence is to be inferred must be set forth on record by the defender (*Cowan*, 1865, 4 M. 236; *Buccleuch*, 1866, 4 M. 475). Acquiescence means more than mere silence (*Cowan*, 1865 4 M., per Ld. J.-C. Inglis, 241, and per Ld. Neaves, 244; *Brisbane's Trs.*, 1828, 7 S. 69); it must come up to implied consent (Bell, *Prin.* s. 946, approved by Ld. Chan. Chelmsford in *Bargaddie Coal Co.*, 1859, 3 Macq. 479; and Ld. Cowan in *Cowan*, 1865, 4 M. 243; per Ld. Cranworth in *Bargaddie Coal Co., supra*, 3 Macq. 487; per Ld. J.-C. Hope in *Hill*, 1850, 12 D. 811). Knowledge of encroachment on his rights must be proved as against the pursuer (*City of Edinburgh*, 1858, 20 D. 731; per Ld. Chan. Chelmsford in *Bicket*, 1866, 4 M. H. L. 49), and that knowledge must be explicit (*M'Gibbon*, 1871, 9 M. 423). Where a person, in full knowledge of his rights and of encroachment on them by another, permits to be carried on by the latter operations which either cannot be undone or which incur great expense, he will be held to have acquiesced (per Ld. Chan. Chelmsford in *Bargaddie Coal Co.*, 1859, 3 Macq. 480; and in *Bicket*, 1866, 4 M. H. L. 49; per Ld. Deas in *Muirhead*, 1864, 2 M. 427); but acquiescence will not be inferred where no great expense has been incurred, and where things may be replaced *in statu quo* by some slight operation (*Cowan*, 1865, 4 M. 236), or the expenditure of a few pounds (*Hill*, 1863, 1 M. 360). Acquiescence is assumed where the person whose rights are invaded by the operation has testified his approbation of the operation *rebus factis et ipsis* (*Ayton* v. *Douglas*, 1800, Mor. App. "Property," No. 5; *Ayton* v. *Melville*, 1801, Mor. App. "Property," No. 6; *Hart*, 1827, 4 Mur. 307). In order to make the defence of acquiescence successful, the defender must prove acquiescence after the operations have become a nuisance to the pursuer, or acquiescence in operations which the pursuer was aware must necessarily result in nuisance (Bacon, V. C., in *Sarile*, 1872, 26 L. T. (N. S.) 280; Ld. Pres. Inglis in *Robertson*, 1872, 11 M. 195).

A right to commit a nuisance, acquired by prescription or acquiescence, gives the person who has acquired it no title to materially increase it (*Charity*, 5 July 1808, F. C., Mor. App. "Public Police," No. 6; *Crossley*, 1866, L. R. 3 Eq. 279; 1867, L. R. 2 Ch. App. 478; *Baxendale*, 1867, L. R. 2 Ch. App. 790), or to alter its character (*Clarke*, 1888, 57 L. J. M. C. 96), and such an acquired right may be lost by non-user for the prescriptive period or non-user for a shorter period, accompanied by some evidence of intention to abandon the right, such as lying by and permitting others to incur expense in preparing to do that which, if continued uninterruptedly for the prescriptive period, would destroy the right (*Crossley, supra*).

Invalid Defences.—The following defences are invalid: (1) *That the pursuer came to the nuisance* (*Fleming & Hislop*, 1886, 1 R. H. L. 43, per Ld. Halsbury, 49; per Tindal, C. J., in *Bliss*, 1838, 4 Bing. N. C. 186). (2) *That the manufacture or other operations creating the nuisance are for the public convenience, or for the good of the country or mankind in general* (per Ld. Gillies in *Arrott*, 1826, 4 Mur. 158; per Ld. Cowan in *Buccleuch*, 1866, 5 M. 229; per Ld. J.-C. Moncreiff in *Fraser's Trs.*, 1879, 6 R. 452; per Baron Bramwell in *Bamford*, 1860, 31 L. J. Q. B. 295; *Broadbent*, 1856, 7 De G. M. & G. 436, 26 L. J. Ch. 276; 1859, 7 H. L. C. 600; *Attorney-General* v. *Leeds*

Corporation, 1870, L. R. 5 Ch. App. 583). (3) *That the defender is making a legal or reasonable use of his property* (*Miller*, 1791, Mor. 12823; Bell, *Oct. Cas.* 334; *Montgomerie*, 1853, 15 D. 853; per Ld. Shand in *Caledonian Rwy. Co.*, 1876, 3 R. 842; per Ld. Chan. Selborne in *Inglis*, 1882, 9 R. H. L. 79; *Bamford*, 1860, 31 L. J. Q. B. 286, 3 B. & S. 62; *Reinhardt*, 1889, L. R. 42 Ch. Div. 685). (4) *That the nuisance is in a proper or convenient place* (*Charity*, 5 July 1808, F. C., Mor. App. "Public Police," No. 6; *Dowie*, 11 Dec. 1813, F. C., per Ld. Shand in *Fraser's Trs.*, 1877, 4 R. 795; *Walter*, 1851, 4 De G. & Sm. 315, 20 L. J. Ch. 433; *Stockport Waterworks Co.*, 1861, 7 H. & N. 160; *Carey*, 1863, 13 C. B. (N. S.) 470, 32 L. J. C. P. 104; *St. Helens Smelting Co.* v. *Tipping*, 1865, 11 H. L. C. 642, 35 L. J. Q. B. 66; per Ld. Romilly in *Crump*, 1867, L. R. 3 Eq. 413). A convenient place for a nuisance is a place "so convenient in the use that it should not be a nuisance to anybody" (per Ld. Halsbury in *Fleming*, 1886, 13 R. H. L. 49). (5) *That the defender is not the sole cause of the nuisance, because, although a nuisance exists and the defender contributes to it, the acts of the defender, taken alone, do not amount to nuisance* (*Buccleuch*, 1866, 5 M. 214, per Ld. J.-C. Inglis, 216, and Ld. Cowan, 228; *Blair*, 1887, 57 L. T. (N. S.) 522). (6) *That a nuisance would still exist although the operations of the defender were put a stop to.* This is no defence if the defender's proceedings materially contribute to the nuisance (*Charity, supra*; per Ld. J.-C. Inglis in *Buccleuch*, 1866, 5 M. 218; per Ld. Pres. Inglis in *Rigby*, 1872, 10 M. 573; *Caledonian Rwy. Co.*, 1876, 3 R., per Ld. Shand, 843, Ld. J.-C. Moncreiff, 854, and Ld Ormidale, 846; *Crossley*, 1866, L. R. 3 Eq. 279; 1867, L. R. 2 Ch. App. 478). (7) *That the pursuer is himself causing a nuisance* (*Mackay*, 1858, 20 D. 1251, per Ld. Wood and Ld. Cowan, 1253; *Barony Parochial Board*, 1883, 10 R. 510, per Ld. Adam, 519. (8) *That the defender will suffer great loss if prevented from carrying on the acts which create the nuisance* (per Ld. Pres. M'Neill in *Montgomerie*, 1853, 15 D. 858; per Ld. J.-C. Moncreiff in *Inglis*, 1881, 8 R. 1022; per Ld. Blackburn in *Inglis*, 1882, 9 R. H. L. 88). (9) *That it is impossible for the defender to obey the interdict.* Such a defence, if clearly shown to be true, may prevent the imposition of an interdict (per Ld. J.-C. Moncreiff in *Barony Parochial Board*, 1883, 10 R. 526); but to cause a nuisance which it is impossible to stop will render the defender liable for the full damage caused by the nuisance as long as it continues (*Chalmers*, 1876, 3 R. 461). (10) (*In cases of water pollution*) *that stream is natural channel for draining sewage* (*Montgomerie*, 1853, 15 D. 853; *Caledonian Rwy. Co.*, 1876, 3 R. 839).

6. RESTRICTIONS IN PROPERTY TITLES BEARING ON SUBJECT OF NUISANCE.

Three general rules apply to all such restrictions: (1) The words in the clause of restriction are to be construed according to their "ordinary and popular significance," unless there can be gathered from the deed "a clear intention that some special or limited meaning should be attached to them" (*German*, 1877, L. R. 7 Ch. Div., per James, L. J., 276, 277, and Thesiger, L. J., 282). (2) If the meaning of the restriction is at all doubtful, it is to be construed in the mode which favours the free use of property and not "in an extensive or liberal way" (per Ld. Curriehill in *Frame*, 1864, 3 M. 292, and Ld. Pres. Inglis in *Manson*, 1887, 14 R. 808). (3) On the person averring contravention of the restriction there lies the onus of proving both that the restriction exists in the deed and that it has been contravened (per Ld. Deas in *Frame*, 1864, 3 M. 292, and James, L. J., in *German*, 1877, L. R. 7 Ch. Div. 276; *Anderson*, 1879, 6 R. 901).

Building restrictions bearing on the subject of nuisance which have been brought under the practice of the Court may be classed generally under four heads:—

(1) A stipulation that the house erected or to be erected on the property let or feued shall be used "as a private dwelling-house only." This restriction effectually excludes trades or businesses of any kind, including schools, being conducted on the premises (*Ewing*, 1872, 5 R. 439; *German*, 1877, L. R. 7 Ch. Div. 271).

(2) A stipulation "not to use or exercise on the property feued or let certain specified trades," the clause not being qualified or limited in any way. Such a restriction will effectually prevent the carrying on of any of the trades specified, or any branch of these trades (*Doe* v. *Spry*, 1818, 1 B. & Al. 617).

(3) A stipulation "not to carry on on the property feued or let any trade or business whatsoever." These terms will effectually prevent the exercise of any business, including schools, whether carried on for a profit or not (*Doe* v. *Keeling*, 1813, 1 M. & S. 95; *Kemp*, 1851, 1 Simons (N. S.) 517, 20 L. J. Ch. 602; *Bramwell*, 1879, L. R. 10 Ch. Div. 691).

(4) A stipulation "not to erect or carry on on the property feued or let certain specified trades, or any trade or manufacture which may operate as a nuisance to the neighbouring proprietors or feuars," *or* a stipulation "not to carry on certain specified trades or any other business, though not above enumerated, which may be nauseous or hurtful, or occasion disturbance to the neighbouring proprietors or feuars." In clauses similar to the above the word "which" has been held to apply not only to the words immediately preceding it, but also to the enumerated trades, and the person alleging contravention must prove that the business, whether specified or not, is a nuisance at common law before he is entitled to succeed. A clause in above terms, therefore, leaves parties in the same position as if no clause existed (*Mutter*, 1848, 11 D. 303; *Frame*, 1864, 3 M. 290; *Anderson*, 1879, 6 R. 901; *Manson*, 1887, 14 R. 802; *Harrison*, 1871, L. R. 11 Eq. 338). Of course a stipulation in similar terms will be construed differently if there are other clauses in the deed which necessitate a stricter interpretation (*Porteous*, 1839, 1 D. 561). And where feuars were prohibited from carrying on certain specified works, "or any other works or occupation which shall be considered nauseous or injurious by the said first parties (the superiors) and their foresaids, or the adjoining proprietors, although the same shall not be legally deemed a nuisance," opinions were expressed that this clause prohibited the erection of stables and a public dairy (per Ld. Young and Ld. Rutherfurd Clark in *Sandeman's Trs.*, 1892, 20 R. 215, 216). It follows, therefore, in the case of restriction (4), that if the insertion of the general prohibition is desired, and if at the same time it is wanted to prevent the carrying on of any particular business or manufacture, whether a legal nuisance is thereby created or not, the special prohibition should be inserted *after* the general prohibition, so as effectually to exclude the application of the qualifying words in the latter.

As long as the grantee holds on a personal title, the restrictions therein are effectual against singular successors. But if the grantee's rights are capable of being made real, the stipulation in order to be effectual against a singular successor, must be constituted a real burden on the property.

Those entitled to enforce the Restrictions.—(1) The landlord or superior has a title to enforce a restriction contained in the titles of tenants or vassals as long as he has a legitimate interest to do so. A superior was held to have sufficient patrimonial interest where he (1) owned the superiority

of the feu to which the condition was attached, (2) was landlord of houses and (3) owner of building ground available for feuing near the feu in question, and (4) was owner of a mansion-house and grounds within half a mile of the feu (*Earl of Zetland*, 1881, 8 R. 675; rev. 1882, 9 R. H. L. 40). In Ld. Chan. Selborne's opinion the superior's right of superiority and interest in the contingent reversion in the *dominium utile* is "enough to justify him in seeking to maintain unimpaired the value of the houses erected" on the vassal's propery (*ib.*, 9 R. H. L. 45). If a vassal contravening the restriction pleads want of interest on the part of the superior to enforce the stipulation, the onus lies upon him to prove the truth of his plea (per Ld. Watson in *ib.*, 9 R. H. L. 47).

(2) Where in the grantee's title the restrictions are declared real burdens upon the property leased or feued, not only in favour of the granter but also in favour of the neighbouring tenants or feuars, or even where no such express declaration in their favour is contained in the title, if mutuality and community of rights and obligations is established between several feuars or lessees by reasonable implication from some reference in these deeds to a common plan or scheme of building, any one of them is entitled to enforce the restriction (*Ewing*, 1872, 5 R. 439; *Frame*, 1864, 3 M. 290; *Hislop*, 1881, 8 R. H. L. 95, per Ld. Chan. Selborne, 97, Ld. Blackburn, 97, and Ld. Watson, 102).

Right to enforce such a restriction may be lost by allowing contravention thereof without objection for the prescriptive period, or by acquiescing in the contravention (*Brown*, 1823, 2 S. 298; *Campbell*, 1868, 6 M. 943). But acquiescence in the contravention of a restriction in the feu-rights of one street does not imply acquiescence in the contravention of a similar stipulation in the feu-rights of another quarter of the town (per Ld. Watson in *Zetland*, 1882, 9 R. H. L. 51). And where a particular vassal obtains from the superior relaxation of the restriction, the superior is not barred thereby from enforcing the restriction against his other vassals (*Ewing*, 1877, 5 R. 230).

II. Nuisance under Public Health Acts.

1. *Nuisances under Public Health (Scotland) Act*, 1897, 60 & 61 *Vict. c.* 38.—*Definition.*—This Statute consolidates the law of Scotland relating to public health. The nuisances struck at by it are enumerated in sec. 16, as follows:—

"(1) Any premises, or part thereof, of such a construction or in such a state as to be a nuisance, or injurious or dangerous to health.

"(2) Any street, pool, ditch, gutter, watercourse, sink, cistern, water-closet, earth-closet, privy, urinal, cesspool, drain, dungpit or ashpit, so foul or in such a state or so situated as to be a nuisance, or injurious, or dangerous to health.

"(3) Any well or water supply injurious or dangerous to health.

"(4) Any stable, byre, or other building in which any animal or animals are kept in such a manner or in such numbers as to be a nuisance, or injurious, or dangerous to health.

"(5) Any accumulation or deposit, including any deposit of mineral refuse, which is a nuisance, or injurious, or dangerous to health, or any deposit of offensive matter, refuse, or offal, or manure (other than farmyard manure, or manure from byres or stables, or spent hops from breweries), within fifty yards of any public road wherever situated: or any offensive matter, refuse, or offal, or manure other than aforesaid, contained in mineral trucks or waggons standing or being at any station or siding, or elsewhere

on a railway, or in canal boats, so as to be a nuisance, or injurious, or dangerous to health.

"(6) Any work, manufactory, trade, or business, injurious to the health of the neighbourhood, or so conducted as to be injurious or dangerous to health, or any collection of rags or bones injurious or dangerous to health.

"(7) Any house, or part of a house, so overcrowded as to be injurious or dangerous to the health of the inmates." A building used during the day for religious services and at night as a refuge for the destitute poor, but which contained no sleeping accommodation, has been held to be a house within the meaning of a section in above terms (*Reg.* v. *Mead*, 1895, 64 L. J. M. C. 169), the temporary occupiers being equivalent to inmates (*Reg.* v. *Slade*, 1896, 65 L. J. M. C. 108).

"(8) Any schoolhouse or any factory which is not a factory subject to the provisions of the Factory and Workshop Acts, 1878 to 1895, or any Act amending the same with respect to cleanliness, ventilation, or overcrowding, and

"(i.) is not kept in a cleanly state, and free from effluvia arising from any drain, privy, water-closet, earth-closet, urinal, or other nuisance; or

"(ii.) is not ventilated in such a manner as to render harmless, so far as practicable, any gases, vapours, dust, or other impurities generated in the course of the work carried on therein, that are a nuisance, or injurious, or dangerous to health; or

"(iii.) is so overcrowded while work is carried on as to be injurious or dangerous to the health of those therein employed.

"(9) Any fireplace or furnace situated within the limits of any burgh or special scavenging district which does not, so far as practicable, consume the smoke arising from the combustible matter used therein for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever."

"So far as practicable" means so far as practicable consistently with the carrying on of the manufactory, etc., in an ordinary manner, and with the careful use and management of a properly constructed furnace (*Cooper*, 1867, L. R. 2 Ex. 88).

"(10) Any chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance, or injurious or dangerous to health; and

"(11) Any churchyard, cemetery, or place of sepulture so situated or so crowded, or otherwise so conducted, as to be offensive, or injurious, or dangerous to health.

"Provided that (*a*) a penalty shall not be imposed as hereinafter provided on any person in respect of any accumulation or deposit necessary for the effectual carrying on of any business, trade, or manufacture if it be proved to the satisfaction of the Court that the accumulation or deposit has not been kept longer than is necessary for the purposes of the business, trade, or manufacture, and that the best available means have been taken for preventing injury or danger thereby to the public health; and (*b*) in considering whether any dwelling-house or part thereof which is also used as a factory, or whether any factory used also as a dwelling-house, is a nuisance by reason of overcrowding, the Court shall have regard to the circumstances of such other use."

2. *Pursuers and Defenders under Public Health (Scotland) Act*, 1897.—1. *Pursuers.*—(1) The *local authority* within the district in

which the nuisance exists (s. 12). (2) If the local authority neglect to take proceedings, the *Local Government Board* have the choice of three courses to remedy such neglect: (*a*) They may give written notice to the local authority of the matter in which such neglect exists, and if the local authority do not, within fourteen days, take steps to remove the nuisance, the Board may present a petition to the Sheriff to enforce the removal or remedy of the nuisance, if need be, at the expense of the local authority (s. 146). (*b*) The Board may, with the approval of the Lord Advocate, present a petition to either Division of the Court of Session, or, during vacation, to the Lord Ordinary on the Bills, to compel the local authority to do their duty (s. 147). This is the usual mode of procedure (*Board of Supervision* v. *L. A. of Montrose*, 1872, 11 M. 170: *Board of Supervision* v. *L. A. of Pittenweem*, 1874, 1 R. 1124; *Board of Supervision* v. *L. A. of Galashiels*, 1874, 12 S. L. R. 111). (*c*) The Board may direct the procurator-fiscal of the Sheriff Court, with the approval of the Lord Advocate, to take proceedings to compel the local authority to do their duty, or himself to remove the nuisance at the expense of the local authority (s. 148). If the local authority neglect to take proceedings for the removal of a nuisance, this neglect may be remedied not only by the Local Government Board, but also by any of the following parties: (3) *ten ratepayers residing within the district*, (4) *the parish council*, *and* (5) *the procurator-fiscal of the Sheriff Court of the county*, in the manner first above mentioned as applicable to the Local Government Board (s. 146).

2. *Defender.—The author of the nuisance*, defined as "the person through whose act or default the nuisance is caused, exists, or is continued, whether he be the owner or occupier, or both." "The word 'owner' means the person for the time entitled to receive, or who would, if the same were let, be entitled to receive, the rents of the premises, and includes a trustee, factor, tutor, or curator, and in case of public or municipal property applies to the persons to whom the management thereof is entrusted." "The word 'occupier' means, in the case of a building or part of a building, the person in occupation or having the charge, management, or control thereof, either on his own account or as the agent of another person: and in the case of a ship, means the master or other person in charge thereof" (s. 3). Whether the owner or occupier is liable will depend on the nature of the nuisance. Where it arises from any want or defect of a structural character, or where the premises are unoccupied, the owner is the proper person to be proceeded against (s. 20, subs. 3): but if the nuisance arises solely from the act or default of the occupier, and is outwith the knowledge and beyond the control of the owner, the occupier is responsible (*Binning Home*, 1876, 3 Coup. 239). Where the occupier of the house had received a statutory notice, and proceeded to abate the nuisance, and it turned out, in the course of the work, that the nuisance arose from defect of structure, it was held that the occupier was entitled to recover the amount expended by him in abating the nuisance from the owner (per Charles, J., in *Gebhardt*, [1892] 2 Q. B. 458). But where the occupier of the premises, on receiving a friendly warning, addressed to the owner by the local authority, to abate a nuisance, did not send on the notice to the owner, but proceeded to do the work himself, it was held that he was not entitled to recover the expense from the owner (*Thompson & Norris Manufacturing Co. Ltd.*, 1895, 73 L. T. 369). Where the person causing the nuisance cannot be found, and it is clear that the nuisance is not caused by the act and default or sufferance of

either the occupier or the owner of the premises, the local authority may remove the nuisance, and do what is necessary to prevent the recurrence thereof (s. 20, subs. 3). In regard to a similar provision in the Public Health (London) Act, 1891, it was held by the Queen's Bench Division (*Conservators of River Thames*, [1894] 1 Q. B. 647) that the sanitary authority were in the above circumstances bound to abate the nuisance, but the authority of this decision has been shaken by opinions expressed by the Chancery Appeal Judges in *Attorney-General* v. *Tod Heatley*, [1897] 1 Ch. 560, in which case it was held that the proprietor of a vacant piece of ground was bound to prevent a nuisance caused by members of the public breaking up the hoarding surrounding the ground, and throwing filth and refuse on to it.

3. *Legal Procedure for Discovery and Removal of Nuisance under Public Health (Scotland) Act*, 1897.—*Information of Nuisances.*—Information of any nuisance struck at by the Act may be given by any person to the local authority of the district in which the nuisance exists, and it is the duty of the local authority officers and of constables and officers of police of county or burgh to give such information (s. 19).

Duty of Local Authority to Inspect.—With a view to ascertain whether any nuisance exists within their district, the local authority are bound to inspect their district periodically (s. 17).

Power of Entry.—If the local authority or medical officer or sanitary inspector have reasonable grounds for believing that a nuisance exists in any premises, they may, in order to inspect the same, demand admission for themselves, the chief constable or superintendent of police, or any other person, at any hour between 9 a.m. and 6 p.m., or at any hour when the operations which are suspected to cause the nuisance are believed to be in progress or are usually carried on, and may cause such work to be done as may be necessary for the effectual examination of the premises, provided that if no nuisance is found to exist, the local authority must restore the premises at their own expense. If admission to the premises is refused, the local authority, medical officer, or sanitary inspector may apply to the sheriff or any magistrate or justice of the peace having jurisdiction, stating on oath such belief. The sheriff, magistrate, or justice may thereupon, after intimation to the owner, occupier, or person in charge of the premises, require, by order in writing, the occupier or person having custody of the premises to admit the local authority and others aforesaid. If the occupier or person in charge does not obey this order, he is liable to a penalty of £5, and the sheriff, magistrate, or justice may grant warrant to the local authority or others aforesaid to enter the premises by force. If no occupier or person in charge can be discovered, or if no person is found on the premises to give or refuse admission, the local authority may enter without order or warrant, and forcibly if need be. If no nuisance is found to exist, the local authority must restore the premises at their own expense. The order of the judge for the admission of the local authority and others aforesaid continues in force till the nuisance has been removed, or the work for which the entry was necessary has been done (s. 18). When the fact that a nuisance exists can only be ascertained by inspection, the local authority are not entitled to prosecute for the removal until they have made themselves fully acquainted by such inspection with the cause of the nuisance (*L. A. of Dumfries* v. *Murphy*, 1884, 11 R., per Ld. Pres. Inglis, 700).

Notice to remove Nuisance.—If the local authority are satisfied of the existence of a nuisance, they must immediately bring it to the knowledge of the person liable to remove it, by serving a notice on the author of the

nuisance, or, if such author cannot be found, on the owner or occupier of the premises in which the nuisance exists, requiring him to remove it within a specified time, and to execute such works and do such things as are necessary for its removal (s. 20, subs. 1). Where the nuisance arises from any want or defect, of a structural character, or where the premises are unoccupied, the notice should be served on the owner (s. 20, subs. 3). If the local authority think it desirable, they may specify the works to be executed (s. 20, subs. 1). They may also in the notice require such person to do what is necessary to prevent the recurrence of the nuisance, and, if they think fit, may specify the works to be executed for that purpose. They may also serve the notice even although the nuisance is for the time stopped if they think it is likely to recur (s. 20, subs. 2).

Application for Removal.—If the nuisance is not removed within the time specified in the notice, or if it is removed, but the local authority are of opinion that it is likely to recur or be repeated, they may apply for its removal by summary petition, referring to the clauses of the Act on which it is founded (ss. 21, 22, and 154). The application, in the case of nuisances under subsecs. (6) and (8), can only be made on a medical certificate, or on a representation by a parish council, or on a written requisition by ten ratepayers of the district (s. 22). Such petition may be presented to the Sheriff or to any magistrate or justice, except in the case of nuisance under subsecs. (6), (8), (9), (10), and (11), for the removal of which application must be made to the Sheriff only (s. 22).

Service and Answers.—On the petition being presented, the judge orders it to be served on the author of nuisance, and appoints written answers to be lodged within three days, or orders parties to attend in person (s. 154). If a churchyard is the nuisance in question, intimation is made to the collector of churchyard or other dues, or to such other person as the Sheriff thinks proper, who is allowed to appear and answer, if the Sheriff sees fit, as if he were the author of the nuisance (s. 22). Petitions and orders are served by (1) delivering them to or at the residence of the author of the nuisance, or if there is no person on the premises, by affixing them to some conspicuous part, or (2) putting them in the post office, duly addressed to the author of the nuisance, the date of the posting being the date of service (s. 159) (*M'Dougall*, 1864, 3 M. 248). The petition and answers, if such are ordered, are the only written pleadings in the cause (s. 155).

Mode of Proof.—On advising the written answers, if such are ordered, or on hearing parties, or in the event of the author of the nuisance failing to appear, the Sheriff (1) may at once give judgment, or (2) may remit the matter to a competent person to report upon, and decern in terms of the report, or (3) may at the request of either party appoint a proof to be taken before himself on specified points within five days thereafter (s. 154). Where a proof is allowed, the judge has power to cite witnesses in common form. In cases dealing with nuisances under subsecs. (9), (10), and (11), the Sheriff must keep notes of the evidence, as in the civil proofs (s. 155). Within three days after the close of the proof, judgment must be pronounced.

Form of Decree.—If the Sheriff is of opinion that a nuisance is made out, he does not require to restrict his decree to the remedy asked for in the prayer of the petition; he may ordain the author of the nuisance to do whatever is necessary to remove the nuisance, specifying in what manner and within what time such removal is to be performed. If the judge is of opinion that the nuisance is likely to recur, he may grant interdict against the recurrence (s. 23). If it appears to him that the nuisance arose from

the wilful fault or culpable negligence either of the owner or the occupier of the premises, and that a notice in respect thereof had previously been served on such author, he may, in addition to making decree as aforesaid, impose a fine not exceeding £5 on such owner or occupier (s. 22). If the nuisance be such as to render a building unfit for human habitation or use, he may prohibit such habitation or use until he has pronounced a judgment declaring the building habitable, from which date the building may be let or occupied (s. 23). If it appears to the judge that structural works require to be executed in order to remove or remedy the nuisance, he may order these works to be carried out under the direction and approval of some person appointed by him, and, if he thinks fit, he may require the local authority to furnish him with an estimate of the cost (s. 25). He may also find either party liable in expenses, in full or modified (s. 154).

Appeal.—The decree of the judge trying the cause is final, and no appeal is competent therefrom in any application for the removal of a nuisance (s. 157), with the following exception: Where the application is one for removal of a nuisance under subsecs. (9), (10), and (11), and the Sheriff is of opinion that "the true value of the subject complained of as a nuisance, or the cost of the operations necessary to remove or amend it as ordered, or the value of the trade or business interfered with," exceeds £25 or £50 respectively, he certifies his opinion to that effect in his decree. If the value certified is above £25 but below £50, where the decree has been pronounced by the Sheriff-Substitute either party is entitled to appeal to the Sheriff by lodging a note of appeal within three days after the date of the decree, and serving this note on the opposite party or his agent; the note operates as a sist of execution until the appeal is heard and determined by the Sheriff, whose decision is final. If the value certified is above £50, (1) where the decree has been pronounced by the Sheriff-Substitute and has been brought by appeal under review of the Sheriff, the judgment of the latter on such appeal, or, (2) where there has been no such appeal, the original judgment of the Sheriff-Substitute, or (3) where the case has been heard originally by the Sheriff, his judgment may be appealed against to the Lord Ordinary on the Bills. This is done by lodging a note of appeal in the Bill Chamber, and serving a copy on the opposite party, or his agent, within eight days after the decree complained of, and also lodging with the note of appeal "a sufficient bond of caution by one or more obligants to the amount of £50 sterling, for payment or performance of any judgment that may be pronounced under his appeal." The note operates as a sist of execution till judgment is pronounced by the Lord Ordinary. The judgment of the Lord Ordinary is final, unless he allows a reclaiming note to the Inner House; if he does, the judgment of the Inner House is final (s. 156).

Penalties for Contravening Decrees.—In the case of nuisances under subsecs. (1), (2), (3), (4), (5), (7), (10), and (11), if the decree to remove or remedy them is not complied with in good and sufficient manner and within the specified time, the author of the nuisance is liable to a penalty of not more than ten shillings a day during his failure to comply; and if a decree interdicting the recurrence of such nuisances has been pronounced and is knowingly infringed by act or authority of the owner or occupier, such owner or occupier is liable to a penalty not exceeding £1 *per diem* during the infringement of the interdict. In the case of nuisances under subsecs. (6), (8), and (9), if the decree to remove or remedy is not complied with, the author of the nuisance is liable for the first offence to a penalty not exceeding £5; and for the second offence to a penalty not

exceeding £10; for each subsequent offence, to a penalty not exceeding double the amount of the penalty last inflicted; but no penalty is to exceed £200. In the case of a nuisance under subs. (9), where the Sheriff has pronounced decree ordaining measures to be taken to make such a fireplace or furnace consume its own smoke as far as practicable, and where a complaint that this decree has been contravened is presented, if it appears to the Sheriff that the best means available for mitigating the nuisance have not been adopted, he may suspend his final determination on condition that the author of the nuisance undertakes to carry into effect within a reasonable time the means which he judges to be practicable to prevent the nuisance (s. 24).

Recovery of Penalties—Proceedings for the recovery of the above penalties may be by summary petition as above set forth for the removal of nuisances (s. 154), or by summary complaint in terms of the Summary Jurisdiction Acts and the forms of procedure prescribed therein (Summary Procedure Act, 1864 (27 & 28 Vict. c. 53); Summary Jurisdiction Act, 1881 (44 & 45 Vict. c. 33), s. 3). Where the latter course of procedure is followed, appeal against the decision of an inferior judge is competent on points of law to the Court of Justiciary (Summary Prosecutions Appeals Act, 1875 (38 & 39 Vict. c. 62), ss. 3 and 7; *L. A. of Selkirk* v. *Brodie*, 1877, 4 R. J. C. 21). Proceedings for the removal of a nuisance, and proceedings for the recovery of a penalty imposed on a person not obeying the decree of the Sheriff, are quite distinct processes, and should not be united.

Procedure on Non-Compliance, etc.—In case of non-compliance with or infringement of the decree of the judge ordering the removal or remedy of the nuisance or interdicting its recurrence, the judge may, on the application of the local authority, grant warrant to such person or persons as he deems right to do whatever is necessary to execute his decree, and if it appears to his satisfaction that the author of the nuisance is not known or cannot be found, he may ordain the local authority to execute whatever works are necessary to remedy the nuisance at the expense of the author of the nuisance, failing him the owner of the premises (s. 26). In every case an opportunity of executing the decree to abate the nuisance must be afforded to the author of the nuisance or the owner of the premises before warrant is granted to the local authority or others to execute it at his expense, and if no such opportunity is afforded him he is not liable for the cost which the local authority has incurred in obeying the warrant (*United Kingdom Temperance, etc., Institution*, 1877, 4 R. J. C. 39; *L. A. of Cadder* v. *Lang*, 1879, 6 R. 1242). When the author of a nuisance, caused by accumulation of manure, etc., does not comply with a decree ordering its removal, and the Sheriff orders the local authority to remove it, the local authority may sell the manure, etc., by public roup after five days' notice by printed bills posted in the locality. If the manure, etc., is of less value than £2, or if delay would be prejudicial to health, the Sheriff may order in writing its immediate sale or destruction. The proceeds of the sale are applied in payment of the expenses incurred by the local authority; if there is a balance over after such payment, it must be paid on demand to the owner of the article sold, but if there is a deficit, it must be paid by the author of the nuisance or the owner of the premises (s. 27).

Procedure where Nuisance beyond District.—Where a nuisance situated outside the district of a local authority causes offence or injury to people within such district, the local authority may call on the local authority of the district within which the nuisance is situated to take steps for its

removal, and the latter are bound to do so, and to reimburse the former for any expense incurred by them thereby, the amount of such reimbursement, if disputed, being decided by the Local Government Board (s. 149).

4. *County Council Bye-laws for Prevention and Suppression of Nuisances.*—Under sec. 57 of the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), which is, in certain respects, a Public Health Act, the county council, whose district committees are the public health local authorities within the landward portions of the county, may from time to time make such bye-laws as to them seem meet *inter alia* "for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county, and may thereby appoint such penalties, not exceeding in any case £5, as they deem necessary for the punishment of offences against the same." These bye-laws cannot be made unless two-thirds of the council are present, and they must be properly advertised and receive the approval of the Secretary for Scotland as provided by the Act. They have no force or effect in any burgh unless they have been made with the consent of the town council or police commissioners. A bye-law made by a county council under this section, which provided that "every person who writes upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk or paint or in any other way, or who without authority affixes or causes to be affixed to any church, chapel, or schoolhouse, or without the consent of the owner and occupier, to any other building or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice-board lawfully exhibited, any bill or other notice," should be liable in a penalty not exceeding forty shillings, was held to be *ultra vires* of the county council under this section (*Eastburn*, 1892, 3 White, 300).

[Broun on *Law of Nuisance*; Rankine on *Landownership*, 3rd ed., 341 *et seq.*]

See Alkali Works; Burying-Place; Explosive Substances; River Pollution; Smoke.

Nuncupative Legacies; Testament.—See Legacies; Will; Wills in Roman Law.

Oath of Allegiance.—See Oaths, Promissory; and Allegiance.

Oath in Bankruptcy.—A creditor petitioning or concurring in a petition for sequestration, and creditors claiming to rank and vote, are, in general, required to take an oath of verity (19 & 20 Vict. c. 79, ss. 21 and 49). The oath must be actually administered, but an affirmation may take its place (28 Vict. c. 9). In certain cases an oath of credulity is enough (19 & 20 Vict. c. 79, ss. 22, 23, and 25). The only difference between the oath of a petitioner for sequestration and that of a creditor claiming to rank and vote, is that in the former case it is not taken to the value of securities set forth in it, whereas in the latter case it is (*Learmonth*, 1845, 7 D. 1094; *Gordon*, 17 D. 779, per Ld. Mackenzie (Ordinary)). It must

be taken before the proper magistrate (per Ld. Pres Inglis in *Hall*, 1870, 8 M. 891).

Requisites of Oaths in different Cases.

1. *Creditor Resident in United Kingdom.*—To a creditor resident within the United Kingdom a proper magistrate is a Judge Ordinary, magistrate, or justice of the peace (19 & 20 Vict. c. 79, s. 22); a baron bailie has been held sufficient (*Murray*, 1821, 1 S. 84). The oath of a factor of a creditor resident in Great Britain is not enough.

2. *Creditor out of United Kingdom.*—When the creditor is out of Great Britain he may proceed (*a*) by taking the oath himself before a justice of the peace or other properly qualified magistrate, or (*b*) by permitting his qualified mandatary in Great Britain to take an oath of credulity for him (19 & 20 Vict. c. 79, s. 23).

3. *Creditor a Corporation.*—The secretary, manager, cashier, clerk, or other principal officer may take the oath, though he may not be a member of the corporation (*ib.* s. 25).

4. *Partnership.*—A partner may make oath (*ib.* s. 25), and he need not produce his authority.

5. *Creditors under Age or Incapacitated.*—Here an oath of credulity by the authorised agent, factor, guardian, or manager is sufficient (*ib.* s. 25). The rule applies only to pupils (*Miller*, 1840, 2 D. 1112), lunatics, persons interdicted, and probably persons ill of fever (Bell, *Com.*, 5th ed., ii. 342). Married women take the oath (*Paul*, 1834, 7 W. & S. 462). The agent or guardian must produce authority (*Aitken*, 1852, 14 D. 572).

6. *Assignees*, as legally vested in the debt, take the oath (*Glen*, 1849, 11 D. 387). This is unnecessary if the cedent has already sworn (*Walker* 1835, 13 S. 428).

7. *Trustees.*—A trustee on a sequestration takes the oath when his trust is a creditor of another sequestration (*Berry*, 1825, 3 S. 336; affd. 1826, 2 W. & S. 93). In testamentary trusts the practice is for the acting trustees to swear to the debt (Bell, *Com.* ii. 304; *Watson*, 1848, 10 D. 1414).

8. *Executors.*—One may take the oath, as in the case of trustees, and he does not even need to be confirmed (*Ewing*, 1860, 22 D. 1060).

9. *Factors and Agents* can only take an oath for their principals in cases above mentioned (*supra*, 2).

Oath of Calumny.—This oath is required in certain consistorial causes to prevent collusion. It was formerly administered not only in actions of divorce and nullity of marriage (2 Fraser, *H. & W.* 1195; Shand, *Pr.* 421, 439), but also in actions of separation (*ib.*). By 11 Geo. IV. and 1 Will. IV. c. 69, s. 36, it was ordained "that the Lord Ordinary shall, in all actions of divorce, administer the usual oath of calumny to the pursuer." It may be that it is only required in actions of divorce. In practice it has ceased to be administered in actions of separation.

It is usually emitted in Court (2 Mackay, 275), but in special cases, *e.g.* when the pursuer is abroad, or about to leave home, or in ill-health, a commission to take it will be granted (*A. B.*, 1838, 16 S. 1143; *Murray*, 1846, 8 D. 535; *M'Laren*, 1849, 22 Sc. Jur. 46). It may in special circumstances be taken to lie *in retentis* (*Potts*, 1839, 2 D. 248; *Scott*, 1866, 4 M. 1103; cf. *Hook*, 1862, 24 D. 488). An oath of calumny cannot be

challenged by a third party when adultery has been proved (*Greenhill*, 1822, 1 S. 296; affd. 2 Sh. App. Ca. 435).

Oath de fideli administratione is administered to a commissioner's clerk, and should be mentioned in the record. An omission of such mention, however, will not invalidate the commission, on the ground that there is a presumption *omnia rite esse acta* (*Robertson*, 1841, 4 D. 159). When the clerk to a commission taken abroad, who was an official person, was objected to on the ground that he had not taken the oath, it was held that his oath of office was sufficient (*Cumming*, 1707, Mor. 4433). All notaries take this oath on entering on their office, and it cannot be dispensed with (*Marshall*, 1862, 24 D. 376), and shorthand writers taking down proofs before a Lord Ordinary must also take this oath (29 & 30 Vict. c. 112, s. 1).

Oath to Inventory.—Oaths or affirmations to personal estate given up to be recorded in a Sheriff Court may be taken before the Sheriff or his substitute, or the Commissary Clerk or his depute, or, failing those, before the Sheriff Clerk or his depute; or any commissioner appointed by the Sheriff, or any magistrate or justice of the peace within the United Kingdom or the Colonies, or any British Consul (21 & 22 Vict. c. 56, s. 11; 39 & 40 Vict. c. 70, ss. 35, 36). The oath when confirmation is required must be taken by an executor-nominate, or by some person who has either been appointed or has applied to be appointed executor-dative. Where no confirmation is required, and the inventory is merely for the purpose of paying stamp duty, no appointment as executor is necessary. It may be taken by anyone having an interest in the estate.

When the executor or beneficiary resides abroad, the oath may be taken by an attorney, factor, or mandatary duly appointed. The Oaths Act 1888 (51 & 52 Vict. c. 46) extends the privilege of affirmation to the taking of oath to inventory. The oath must set forth the fact of the death of the deceased, its date and place, his domicile where English and Irish estate included, and the deponent's title. All the testamentary writings must be exhibited if in the deponent's "custody or power." The oath must state whether confirmation is required or not; and when asked for and not expede within six months from the date of recording, the craving is held to be abandoned, and a special oath may be required to obtain it. An additional oath is taken where an essential averment has been omitted from the inventory, *e.g.* domicile (*Cook*, 30 April 1888), or where circumstances have changed, *e.g.* an executor died (*Ramsay*, 19 Sept. 1882), or a testamentary writing is discovered (*Collins*, 28 Oct. 1882).

[Currie, *Confirmation of Exrs.*: 162–8.]

See CONFIRMATION OF EXECUTORS.

Oath of Jurors.—(*a*) *In Civil Cases.*—By 55 Geo. III. c. 3, s. 31, it was enacted "that the Clerk of the Jury Court, before proceeding to the said trial, shall administer to the jury the following oath, viz.:—

> You swear by God, and as you shall answer to God at the great day of judgment, that you shall well and truly try (as the case may be) these issues, or this issue, and a true verdict give according to the evidence.

(*b*) *In Criminal Cases.*—The oath administered to a jury in criminal causes is in these terms:—

> Do you fifteen swear by Almighty God, and as you shall answer to God at the great day of judgment, that you will the truth say and no truth conceal so far as you shall pass in this assize.

The form of this oath is of very ancient origin. The requirement that jurors should swear that they will the truth say and no truth conceal is laid down in the *Regiam Majestatem* in the words: *Jurare autem quilibet illorum debet, quod ad hoc, ad quod vocati sunt, scienter veritatem non tacebunt, nec falsum dicent* (*Reg. Maj.* lib. i. c. 12: *Quo tempore procedendum est ad assisam*; and in *Scots Acts* (Thomson), vol. i. p. 140 (red), where the corresponding passage in Glanvil is given).

The oath is given almost in the exact words now used in Hume ii. p. 316.

If the judge is satisfied that a juror has conscientious objections to taking an oath, he may permit him to make a solemn affirmation (31 & 32 Vict. c. 39). The jury do not repeat the words of the oath or affirmation, as in the case of witnesses. The oath is administered to all at once, they standing with right hand upraised while it is read aloud, and signifying their adherence by a bow.

Oaths of Witnesses.—*Nature, Form, and Effect of Oath.*—All witnesses in Courts of justice are required to give their testimony on oath (Stair, iv. 43. 5; 2 Hume, 376; Tait, *Evid.* 422). This applies to small debt and police Courts as well as to higher tribunals (*Home*, 1825, 4 S. 30; *Grant*, 1827, Syme, 144; *Bonnar*, 1836, 1 Swin. 39). The witness, by imprecating the wrath of God if he speak falsely, or by calling attention to the fact that he speaks as in the sight of a Supreme Being, is found by experience to tell the truth more exactly than if he were merely making a statement without such sanction. The usual form of the oath is as follows:—"I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth." It is administered by the presiding judge, the witness, with right hand upraised (in Scotland), repeating it clause by clause after him. If from religious conviction a witness objects to swear in this form, he must declare what form he considers to be binding on his conscience, and be sworn accordingly (1 & 2 Vict. c. 105; *M'Laughlin*, 1863, 4 Irv. 273). Thus a Jew takes the oath with covered head and with the Pentateuch between his hands (2 Al. 431; *Horn*, 1831, Bell, *Notes*, 265), while a Mohammedan swears on the Koran (*R.* v. *Morgan*, 1764, 1 Leach, 54). A Chinese before taking the oath breaks a saucer (*R.* v. *Entrehman*, 1842). A "nominate" religion is not necessary for the taking of an oath; thus a negro who believed in God and a future state was admitted (*Nicolson*, 1770, Mor. 16770; affd. on appeal, *ib.*). In whatever form the oath may be taken, the witness is guilty of perjury if he swears falsely (1 & 2 Vict. c. 105).

Affirmation in Lieu of Oath.—If a witness, from conscientious motives, objects to the taking of an oath, he may make the following affirmation in lieu thereof: "I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of an oath is, according to my religious belief, unlawful; and I do solemnly, sincerely, and truly affirm and declare, etc." Since the Oaths Act, 1888, 51 & 52 Vict. c. 46, the words from "that the taking of

an oath, etc.," may be omitted. Otherwise the exact statutory words must be used. *E.g.*, the omission of the word "truly" made a declaration inept (*M'Cubbin*, 1850, 12 D. 1123). The affirmation has the same force as an oath (28 Vict. c. 9, s. 2, and 51 & 52 Vict. c. 46); and misstatements following upon it are punishable in the same way as perjury (*ib.* s. 3). See AFFIRMATION. Prior to the Oaths Act, 1888 (51 & 52 Vict. c. 46), there was no provision for taking the oath or declaration of an atheist. If a witness declared or confessed himself to be an atheist, he could not be sworn; and the enactment 28 Vict. c. 9, s. 2, which allowed affirmation when an oath was contrary to religious belief, did not apply to those with no religious belief. The 1888 Act, however, provided (s. 1): "Every person upon objecting to be sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force or effect as if he had taken the oath, etc." The Act does not make the evidence of an atheist who does not object to be sworn receivable; but by sec. 3 it provides, that "when an oath has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking such oath no religious belief, shall not for any purpose affect the validity of such oath."

To whom Oath administered.—The oath must be administered to all witnesses, whether in open Court or when examined on commission: to havers (Dickson, 1390); and to the party in an oath on reference (see OATH ON REFERENCE). This general rule is subject to the following modifications:—

(*a*) An oath must not be administered to children under twelve years of age (2 Hume, 341; 2 Alison, 433; Bell, *Notes*, 246). Such witnesses should merely be admonished to tell the truth. Between the ages of twelve and fourteen a child may be sworn if he or she understands the nature of an oath, on which point they should be questioned by the judge. If over fourteen, there is a presumption that they are fit to be sworn, until by special examination, made on request, they are proved not to be so (Dickson, 1549 (*b*), and cases cited *ib.* (*c*)).

(*b*) When he is a party to the cause, a minor *pubes* may take the oath (*Maitland*, 1623, Mor. 8917; *Forbes*, 1628, Mor. 8920, 12479, *s. c.*; *E. Mar*, 1628, Mor. 8918, 1 Bro. Supp. 265, *s. c.*; *Somervell*, 1670, 2 *ib.* 497). His examination must be confined to those facts which have taken place since his pupilarity terminated (*Little*, 1826, 4 S. 424; *Anderson*, 4 Feb. 1826, F. C.; *Somervell, cit.*; *Kinnear's Exr.*, 1623, Mor. 8918; Fraser, *P. & C.* 339); but if it be upon events immediately before puberty and of recent occurrence, this rule would not apply (Dickson, 1407). The oath of a pupil is incompetent (*Gordon's Tutors*, 1707, Mor. 8909).

(*c*) Peers (except in certain consistorial cases) need not take the oath of calumny, but are entitled to give their word of honour instead, but they are not exempted from the ordinary form when they are required to swear in a reference to oath (A. S., 25 Dec. 1708, and 27 July 1711; *Bryson*, 1710, Mor. 10028: *Earl of Winton*, 1711, Mor. 10029: Ersk. iv. 2. 28, note; Tait, *Evid.* 289). They must also swear in diligences against havers (A. S., *supra*; *D. Montrose*, 1714, Mor. 10029; *Young*, 1716, Mor. 10030); and they also take the ordinary oath when giving evidence as witnesses (*Erskine*, 1712, 4 Bro. Supp. 897; Burnett, 451; Tait, *Evid.* 423). This rule is clearly established in spite of the direction given by the presiding

judge in *Ramsay*, 1833, 11 S. 1033. Peers' widows have the same privileges as their husbands (*M'Donald*, 1756, Mor. 10031).

(*d*) Deaf and dumb witnesses may be sworn through the medium of writing or by signs. They must first be examined as to whether they understand the nature of an oath (*Reid*, 1835, Bell, *Notes*, 246; *Carnegie*, 1710, 5 Bro. Supp. 805; *Smith*, 1841, 2 Swin. 547; Bell, *Notes*, 242, *s. c.*).

Special Cases where Oath forbidden or allowed.—(*a*) Prisoners' declarations may not be emitted on oath, for the law regards it as oppressive to put the prisoner in the position of choosing between confession or perjury. This principle is found expressed in the Claim of Right, where it was declared "that the forcing the lieges to depone against themselves in capital crimes, however the punishment be restricted, is contrary to law," and it has been extended to all criminal cases (Burnett, 491; 2 Al. 567).

(*b*) Precognitions may be taken on oath in criminal investigations where the witnesses are not willing to speak out, and are of such a class that their statements made without oath cannot be relied upon (2 Hume, 82; 2 Al. 137, 504. Reserved in 5 & 6 Will. IV. c. 62, s. 13). The presence of a magistrate, however, is essential (5 & 6 Will. IV. c. 62; *Maccaul*, 1714, 2 Hume, 378, 2 Al. 504) A witness thus examined is entitled to have this statement cancelled before giving his evidence at the trial (2 Hume, 381; 2 Al. 504; *Mackay*, 1827, 4 Mur. 279). If a witness precognosced on oath be subsequently accused, his precognition cannot be used against him, nor even can any declaration which he subsequently emits (Burnett, 491; 2 Al. 567).

Prohibition against Administering Oaths.—Owing to the frequent use of affidavits the oath was at one time in danger of losing its value, and accordingly it was enacted by 5 & 6 Will. IV. c. 62, s. 13, that "from and after the commencement of this Act it shall not be lawful for any justice of the peace, or other person, to administer or cause or allow to be administered, or to receive or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognisance by some Statute in force at the time being: Provided always that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof, respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing, designed to be used in such foreign countries respectively." Oaths in Courts of justice were exempted from this prohibition (*ib.* s. 7), and declarations were substituted for oaths in such matters as taking out patents (*ib.* s. 11), pawnbroking (*ib.* s. 12), transfer of stock (*ib.* s. 14), and others where a solemn affidavit had become usual or was enjoined by statute. By a subsequent Statute (6 & 7 Will. IV. c. 43) it was declared that the prohibitory enactment does not apply to judicial ratifications by married women. See AFFIDAVIT.

Oath on Reference.—(1) *Its Nature.*—It is an established rule that either of the parties to a suit may refer the matters of fact which are in dispute between them to the oath of the other party. This rule rests upon the principle that, however strong a case a man may have to all appearance, yet if he cannot swear to his own averments, or deny on oath

those of his opponent, he shall not be permitted to avail himself of the appearance of evidence on the one side, or the absence of it on the other, to the effect of obtaining a judgment contrary to the truth, as known to him (*Pattinson*, 1846, 9 D. 226, per Ld. Moncreiff; *Adam*, 1847, 9 D. 560, *per cund.*). The distinguishing characteristics of the proceeding are that the position of the person referred to is not that of a witness, that such a reference when complied with by the party referred to deponing upon it, forms a judicial contract between the parties, and that the authority of the Court is necessary to render such a reference effectual. He who makes the reference, subjects himself to the conditions of this contract; and of these, one is that the oath, when emitted, shall be conclusive of the matter referred to. It is neither parole nor documentary evidence; it is not to be taken in connection, or computed along, with the evidence which has been led in the cause, nor is it to be combined with statements made on record. It is to be judged of by itself; and the question which the Court has to determine is not what is the truth of the matter, but what has the party sworn (*Longworth*, 1865, 3 M. 645, per Ld. Pres. M'Neill and Ld. Curriehill; *Kennard & Sons*, 1865, 3 M. 946; see also *D., de jure jurando*, 12. 2; Stair, iv. 44. 6; Ersk. iv. 2. 8). See (10) below.

Further, the Court has a discretion to allow or refuse the reference; but its duty is to sustain it, unless it is of opinion that the proceeding would lead to injustice, or to the injury of those whom it is bound to protect (*Macleay*, 1876, 3 R. 999; *Longworth*, *ut supra*; *Adam*, *ut supra*; *Ritchie*, 1829, 3 W. & S. 490; *Pattinson*, *ut supra*; Dickson, ss. 1482–1484; and the cases of *Nairn*, 1725, Mor. 12468, and *Murray*, 1827, 5 S. 515, there cited).

It follows from the nature of the oath that the deposition must be emitted under a judicial reference in the particular case. Accordingly, while the oath on reference in one cause will be received in another cause as an admission of party, it will not be conclusive against him (*Elies*, 1712, Mor. 14041; *Hunter*, 1836, 15 S. 159).

Where it is plain that delay is the object of the person referring, the Court will either refuse the reference, or sustain it subject to the condition of consignation of the amount at stake (*Pattinson*, *ut supra*), or of the expenses already incurred (*Aikman*, 1868, 6 M. 277).

(2) *The Form of the Reference.*—The form of making a reference is to enrol the cause and lodge a minute (see *Thomson*, 1840, 3 D. 150), which should state distinctly the points to be referred (*Finlay*, 1851, 14 D. 53; see *Napier*, 1874, 1 R. 906). A minute has been dispensed with where the circumstances attending the proceedings made it clear that the person said to refer intended to refer and knew of the reference (*Hewitt*, 1821, 1 S. 167, (N. E.) 159; *Hamilton*, 1852, 14 D. 844). The next step is for the Court, if, after hearing parties, it approve of the reference, to interpone authority thereto (*Nicolson*, 23 Nov. 1810, F. C.): and, if any objection is to be taken to the reference, it should be stated when this interlocutor is moved for (see (4) below). Observe that a reference to two or more parties cannot be sustained as a reference to one of them (*Bertram & Co.*, 1874, 2 R. 255). It may be noted that the A. S., 10 July 1839, s. 84, provides, with regard to the Sheriff Court, that "where the oath of party is required, the party by whom the reference or deference is made must either subscribe, along with his procurator, the paper in which the requisition is made, or sign a separate writing to that effect, to be produced along with the paper, or judicially adhere to the reference or deference in presence of the Sheriff or of the commissioner" (see *Hardie*, 1709, Mor. 12248). It is thought that the general mandate to a party's advocate embraces the

power to refer (Shand, *Practice*, i. 154; Dickson, s. 1444; Mackay, *Manual*, 24).

Stair observes that the party referring may be required, before his adversary is called on to depone, to make oath that he has no further probation (iv. 44. 2; Ersk. iv. 2. 8; Bell, *Prin.* s. 2263; *Chalmers*, 18 Feb. 1813, F. C., per Ld. Gillies). The modern practice is, before the reference is sustained, to find that proof by writ has been renounced or has failed.

Where a judgment has been pronounced exhausting the cause, it is incompetent to tender a minute of reference, and to move the Court to sustain it. The proper course is to present a petition or other application, craving the Court to sustain the minute (*Scott & Livingstone*, 1831, 10 S. 174; *Winton & Co.*, 1862, 24 D. 1094).

(3) *When the Reference is Incompetent.*—A reference to the oath of a lunatic or pupil (*Gordon's Tutors*, 1707, Mor. 8909) is incompetent. But it is not a sufficient objection, upon this ground, that the old age of the person referred to has dulled his faculties, if he be *compos mentis* (*Nicolson*, 1829, 7 S. 743; *Kirkpatrick*, 1864, 3 M. 252); or that he is deaf and dumb, if he be sane and able to communicate what he remembers and has observed (*Carnegie*, 1710, 4 Bro. Supp. 805. As to the mode of examination in such a case, see WITNESS); or that he is a *minor pubes* (*Maitland*, 1623, Mor. 8917; *Earl of Mar*, 1628, Mor. 8918; *Somervell*, 1670, 2 Bro. Supp. 497). The reference is to the minor's oath, even where he has curators (*Forbes*, 1628, Mor. 12479).

It is incompetent for a party to a suit to refer it in whole or in part to his opponent's oath, when he has called and examined him as a witness (16 Vict. c. 20, s. 5); and the same principle received effect where the pursuer of an action, who had been adduced as a witness for himself, was cross-examined by the defender (*Macleay*, 1876, 3 R. 999). The Statute does not apply to the case where, the examination of the party as witness having been incompetent, his adversary has not obtained the benefit of his evidence (*Swanson*, 1870, 9 M. 208); or where the matter referred to the party's oath was one with regard to which he was not and could not have been examined as a witness (*Dewar*, 1866, 4 M. 493).

The oath of party can be allowed only in a competent process (*Hamilton*, 1823, 2 S. 356; *Macfarlane*, 1828, 6 S. 1095); the action must be relevant (*Maclaren*, 1829, 7 S. 780); and the facts must be specifically averred (*Phœnix Insurance Co.*, 1834, 12 S. 921; *Napier*, 1874, 1 R. 906). A deponent will not be allowed to contradict on oath what he has averred expressly and unequivocally on record (*Darnley*, 1845, 7 D. 595); nor may a person endeavour to establish by his opponent's oath facts inconsistent with his own record (Dickson, s. 1421). Where A., a bankrupt who had been discharged on paying a composition, of which the amount had been arrived at on the footing that a certain debt was due to B., averred that the debt was not truly due, and offered to refer the matter to B.'s oath, the Court refused to sustain the reference (*Gordon*, 1828, 6 S. 393). A reference to oath is incompetent where writing is indispensable, not merely *in modum probationis*, but as a solemnity (Stair, iv. 44. 5; Ersk. iv. 2. 9; see *Dickson*, 1871, 10 M. 41, where the question was mooted whether it would be competent to prove, by an oath of reference, the verbal consent of a husband to the missives of sale of his wife's heritage).

In the opinion of Ld. Chan. Chelmsford, a reference to oath is rendered incompetent in declarators of marriage by the terms of the Act 11 Geo. IV. and 1 Will. IV. c. 69, ss. 33, 36 (*Longworth*, 1867, 5 M. H. L.

144). In that case the Court of Session had disallowed the reference on the ground that, were it sustained, the interests of third parties might be injuriously affected (*id.*, 1865, 3 M. 644; see *Harvie*, 1732, Mor. 12388; *Gray*, 1801, Hume D. 414; *Monteith*, 1844, 6 D. 934).

Matters of law cannot be referred to oath (*Taylor*, 1829, 7 S. 565; *Conacher*, 1829, 8 S. 141; *Grubb*, 1835, 13 S. 603; *Anstruther*, 1856, 18 D. 405; *Kirkpatrick*, 1864, 2 M. 1396). In cases where it is of difficulty to separate the law from the fact, "the party to whom the reference is made seems entitled to insist that the separation shall be made in so far as it can clearly be done, that he may not be called upon to give an opinion on what he is not supposed to understand" (*Lawson*, 1829, 7 S. 380).

The question whether the averments of a party are relevant is not a proper matter for reference (*Sawers*, 1892, 19 R. 1090).

A reference to oath has been held competent in proving the custom of a barony (*Ld. Rowallan*, 1626, M. 12419), but incompetent in a question as to the custom of a port (*M'Eachern*, 1824, 2 S. 724, 3 S. 9, 410. *Contra*, *Earl of Galloway*, 1627, Mor. 7193, 12421). Dickson is of opinion that where, as in *Rowallan's* case, the practice alleged is a *factum proprium*, it may competently be referred (s. 1426).

A reference of the truth of a criminal charge to the oath of the prosecutor, public or private, seems to be incompetent (2 Hume, 403; 2 Alison, 623; *Cameron*, 1853, 1 Irv. 316). The reference of such matter to the oath of the accused is undoubtedly incompetent in criminal prosecutions where his life, limb, or liberty is at stake, or where infamy follows upon the conviction (Stair, iv. 44. 5; Ersk. iv. 4. 94).

In civil proceedings a reference to oath will not, it is thought, be sustained where the tendency of the reference may be to oblige the party to swear to his own criminal acts (Ersk. iv. 2. 9, Ivory's note; *Thomson*, 1828, 7 S. 32; *Longworth*, 1865, 3 M. 645; 1867, 5 M. H. L. 144; see *Ritchie*, 1810, noted in *Gordon*, 22 Dec. 1809, F. C.; *Roger*, 1823, 2 S. 444; *M'Callum*, 1825, 3 S. 551), save of consent (*Conacher*, 1859, 21 D. 597), or, perhaps, where the person to whom the reference is made is secured against, or has already suffered, punishment for the offence (Dickson, s. 1429). But the fact that an affirmative deposition would instruct the commission by the deponer of an act immoral, but not criminal, does not render a reference to his oath incompetent (*Cameron*, 1851, 13 D. 1256).

At one time the rule *nemo tenetur jurare in suam turpitudinem* was held not to apply in criminal proceedings or in civil actions where the delinquency involved was punishable only by a moderate fine or by a short imprisonment (see Ersk. iv. 4. 94; Tait, *Evidence*, 233; Dickson, ss. 1427, 1428, where the cases, none of which are modern, are cited). It seems very doubtful if effect would now be given to this view.

The competency of referring to a man's oath matters of which he has no personal knowledge has been doubted (*Conacher*, 1859, 21 D. 597, per Ld. J.-C. Inglis).

(4) *At what Stage of the Proceedings the Reference may be made.*—The Court has expressed grave doubt whether a reference could be sustained before the record was closed (*Riley*, 1853, 16 D. 323). It is incompetent while the preliminary pleas stated are undisposed of. Thus a reference has been disallowed when tendered under reservation of objections to the title of the person referred to (*Henderson*, 1852, 14 D. 583). A reference to oath before answer has been sustained (Dickson, ss. 1423, 1424); but it seems to be wholly repugnant to the nature of the proceeding (*Adam*, 1847, 9 D. 566, per Ld. J.-C. Hope). If a case of sufficient urgency be made out,

the oath may be taken to lie *in retentis* (*Bell*, 1829, 7 S. 893; *Riley, ut supra*).

Observe that where a pursuer in an action rested on alternative conclusions, of which the first had been negatived in the Sheriff Court, referred his claim under the second to the defender's oath, it was held that in respect of this reference he must be held to have renounced his claim under the first (*Thomson*, 1867, 5 M. 679; see also *M'Donald*, 1829, 7 S. 306; *Turnbull*, 1830, 8 S. 735). It is too late to object to the terms of a reference after the objection taken has been repelled by an interlocutor of an inferior Court, and that interlocutor has been acquiesced in (*Broom*, 1843, 5 D. 1087).

A reference to oath is competent after parole proof has been taken (see *Longworth*, 1865, 3 M. 645, 673, per Ld. Deas), or after probation has been renounced (*Anstruther*, 1856, 18 D. 405).

Although there has been final judgment, whether the verdict of a jury, or the judgment of a Lord Ordinary, or of the Inner House, or of the House of Lords, reference to oath is competent at any time before extract (*Longworth*, 1865, 3 M. 645; 1867, 5 M. H. L. 144; *Aikman*, 1868, 6 M. 277. The previous cases are discussed and explained by Ld. Deas in the former case. See *Drew*, 1855, 17 D. 784, and (2) above).

After a note of suspension had been refused in the Bill Chamber, a reference to the oath of the charger, made by minute presented to the Lord Ordinary without reclaiming, but within the reclaiming days, and before a certificate of refusal was issued, was held competent (*Macdonald*, 1848, 10 D. 740); and the same view was taken even where the certificate had been issued, the Court having adhered to the Lord Ordinary's interlocutor refusing the note, and having remitted to the Lord Ordinary to dispose of the question of expenses (*Brown*, 1852, 14 D. 841).

Opinions have been expressed that it is incompetent to refer to the oath of party a cause which has been already referred to an arbiter or judicial referee (*M'Larens*, 1833, 10 R. 1067). As to the course to be followed when the cause is at an end, see (2) above.

(5) *When the Cause may be referred in Part only.*—There is a distinction in a reference to oath before and after final judgment. In the former case it is competent to refer particular facts to the oath of party, and to prove other facts *aliunde*; in the latter case it is necessary that the reference should exhaust the whole cause, or at least such parts of it as will be conclusive (*White*, 9 June 1812, F. C.; *Cowan*, 21 Nov. 1811, noted in *White's* case; *Campbell*, 1822, 1 S. 500; *Sinclair*, 1869, 7 M. 934). Where in an action of filiation the defender did not admit that the pursuer had given birth to a child, the Court found that that fact had been established, and as to the remainder of the case, sustained a reference to his oath (*Cameron*, 1851, 13 D. 1256).

It may be observed that it is not necessary for the person referring to establish all that he refers. He need prove only what is sufficient to make out his case (*Heddle*, 1841, 3 D. 376, per Ld. Mackenzie).

(6) *The reference may be retracted* on payment of the expenses incurred by the person referred to (*Chalmers*, 18 Feb. 1813, F. C.; *Bennie*, 1832, 10 S. 255). But the exercise of this right is subject to the discretion of Court, which will refuse leave where the object of the retractation is improper, or where the interests of the opposite party would suffer (*Chalmers, ut supra*; *Galbraith*, 1828, 7 S. 63; *Dick*, 1876, 3 R. 448. See Dickson, s. 1445).

(7) *Deferring the Oath.*—The party to whose oath a point is referred

sometimes defers it back to the oath of his adversary. The proceeding will be permitted only where it appears that the person deferring cannot himself depone in the matter with distinctness. It is thus in the discretion of the judge to ordain that party to depone who has, in his opinion, the best opportunity of knowing the fact (Stair, iv. 44. 13; Ersk. iv. 2. 8; see *Galbraith, ut supra*).

(8) *To whom the Reference is made.*—Where the limitation of proof is purely statutory, the Statute specifying the person to whose oath reference is to be made (see 1579, c. 83; 1669, c. 9; 12 Geo. III. c. 72, s. 39), his oath is alone admissible (*Bertram & Co.*, 1874, 2 R. 255; but see *Duncan*, 1831, 9 S. 540, per Ld. Gillies, and *Mitchell*, 1882, 10 R. 378, per Ld. Young). As to the competency of the oath of the treasurer of a corporation, see *White*, 1869, 7 M. 583. In cases outwith the Statute, the general rule holds that the reference can be only to the oath of the party or parties (see *Nisbet's Trs.*, 1829, 7 S. 307, per Ld. Glenlee; *Easton*, 1831, 9 S. 440; *Broom*, 1843, 5 D. 1094) having the substantial interest (*M'Nab*, 1843, 5 D. 1014; *Farquhar*, 1886, 13 R. 596). If the reference be a joint reference to two or more parties, it cannot be sustained as a reference to one of them (*Bertram & Co., ut supra*); nor will a deposition by one only of the persons referred to exhaust the reference (*Cleland*, 1851, 13 D. 504).

In certain cases, however, it is competent to refer to the oath of one person as representing another. Thus the reference may be confined to the managing partner of a firm (*Gow*, 1827, 5 S. 473; *M'Nab, ut supra*). But where the partners all act in the business of the company, it seems to be incompetent to select one of them as the person to be referred to (*M'Nab, ut supra*; *Broom, ut supra*). Dickson raises the question whether the constitution of a debt alleged to have been incurred in the ordinary business of a firm may not be referred to one of the partners (s. 1450; cf. Kirkpatrick, s. 199). However this may be, it is clear that such a course is not competent after the partnership has been dissolved (*Nisbet's Trs.*, 1829, 7 S. 307; *M'Nab, ut supra*; *Brown, ut supra*; *Neill & Co.*, 1849, 11 D. 979).

The oath of a co-owner is good against himself alone (*Duncan*, 1831, 9 S. 540; cf. *Dickson*, 1871, 10 M. 41).

In the opinion of Stair (iv. 44. 8; doubted by Ersk. iv. 2. 10; see *Mein*, 1829, 7 S. 902, per Ld. Pitmilly) the oath of one of several *correi debendi*, made upon the creditor's reference, extinguishes the latter's claim as to all the *correi*. It will not, however, in any case bind them (Ersk. *ib.*; *Allan*, 1817, Hume D. 477). Difficulties have arisen as to whether, in order to prove that a debt is resting-owing, it is necessary to refer to the oaths of all of several co-obligants (*Christie*, 1833, 11 S. 744; followed in *Black*, 1838, 16 S. 1220; commented upon in *Darnley*, 1845, 7 D. 599; *Drummond*, 1848, 10 D. 340; *Boyd*, 1853, 15 D. 342). It is to be observed, in considering this question, that the Statutes of Limitation do not introduce a presumption, but regulate the mode of proof, and impose the burden thereof upon the creditor (*Darnley, ut supra*, per Ld. Fullerton). Moreover, the subject of interpretation is *quid juratum est*, and nothing else (see (10) below).

The wife's oath acknowledging a debt contracted by her before marriage will operate against herself, or against any subject belonging to her not falling under the *jus mariti*, but cannot hurt her husband (Ersk. iv. 2. 10; *Ker*, 1627, Mor. 12489; *Morrice*, 1829, 8 S. 156; *Gifford*, 1853, 15 D. 451; 1 Fraser, *H. & W.* 600; Dickson, ss. 1456–1458); and, in such a case, the fact that she is held as confessed will not make him liable (*Urquhart*, 1688, Mor. 12494).

But a reference to her oath is competent to establish as against the husband the constitution and subsistence (but see *Paterson*, *n. d.*, 5 Bro. Supp. 474; *Gilmour*, 1797, Mor. 12042; and *Mitchells*, 1882, 10 R. 378, per Ld. Young) of a debt incurred by her either as *præposita negotiis domesticis* (*Young & Co.*, 1802, Mor. 12486; 1 Fraser, *H. & W.* 628; Dickson, s. 1454), or in virtue of any other special *præpositura*, on proof thereof (*Barclay*, 1630, Mor. 12479; 1 Fraser, *H. & W.* 628; Dickson, s. 1455).

It is difficult to see how the doctrine of *præpositura* can apply to the case of furnishings supplied to a child living in family with his father, so as to make the oath of the former effectual against the latter (Dickson, s. 1459; but see *Lauder*, 1685, Mor. 12481; Tait, *Evidence*, 263; and cf. *Hopkirk*, 1698, Mor. 12482).

Reference to the oath of a tutor is competent as to matters which fell within his administration (Stair, i. 6. 20; Ersk. iv. 2. 10; *Hepburn*, 1661, Mor. 8465). In Tait's opinion (*Evidence*, 262) the reference is competent even after the tutor has become *functus officio* (see *Waddel*, 1707, Mor. 12484, where the circumstances were special). It is incompetent to refer to the oath of a judicial factor *loco tutoris*, at all events as to matters which occurred prior to his appointment (*Stewart*, 12 Dec. 1815, F. C.), or to the oath of a *curator* (see (3) above).

Erskine (iv. 2. 10) observes that "no debt can be fixed against a truster by the oath of the trustee." The oath of the trustee of a deceased partner has, however, been regarded as effectual against the trust estate (*Nisbet's Trs.*, 1829, 7 S. 307); and a distinction has been drawn between the case where the radical right and interest remain in the truster, and the case of the trustee of a party deceased vested in the *universum jus* of the truster's property (*Murray*, 1827, 5 S. 515, per Ld. J.-C. Boyle; see also *Bertram & Co.*, 1874, 2 R. 255; *Farquhar*, 1886, 13 R. 596, per Ld. Shand).

The creditors of a person deceased may prove their debts by the oath of the executor only in so far as the latter's proper interest extends (Ersk. iv. 2. 10; *Monteith*, 1624, Mor. 12477; *Scot*, 1627, Mor. 12477; *Ker*, 1627, Mor. 12478).

It appears to be an open question whether, in cases not under the Statutes of Limitation, it is competent to refer to the oath of a general manager, so as to bind him whom he represents (*Bertram & Co.*, 1874, 2 R. 255, and the cases there cited; see also *Mitchells*, 1882, 10 R. 378, per Ld. Young). It is incompetent to refer to the oath of a person's law agent the terms of a settlement which he obtained for his client (*Sawers*, 1892, 19 R. 1090); or to the oath of a son the conditions of a contract which he had made on his father's behalf (*Kirkwood*, 1823, 2 S. 425).

In a case in which the account libelled had fallen under the operation of the triennial prescription, a reference to the oaths of the chairman and directors and the secretaries, solicitors, and treasurers of the defending company was disallowed, Ld. Pres. Inglis observing that in all the cases where such a reference had been sustained the officer of the corporation was the party alleged to have contracted the debt (*White*, 1869, 7 M. 583; see also *Johnston*, 1676, Mor. 12480; *Dykes*, 1828, 6 S. 479).

A debt, though assigned to a third party, may be extinguished by the oath of the cedent before the assignation be intimated, but not thereafter (Stair iii. 1. 18; Ersk. iii. 5. 9, iii. 6. 19; *L. Pitfoddels*, 1662, Mor. 12454; cf. also *Boyd*, 1674, Mor. 12456; *Crawfurd*, 1675, Mor. 12458), unless the subject assigned has been rendered litigious before intimation (Ersk. iii. 5. 10; *L. Pitfoddels, ut supra*; *Sommerville*, 1673, Mor. 8325; *Houston*, 1709, Mor. 8333), or is proved to have been made gratuitously (Stair and Erskine,

ut supra; *Steil*, 1679, Mor. 8467; *Fotheringhame*, 1684, Mor. 12460; *Aitchison's Assignees*, 1737, Elch. "Assignation," No. 3), or in trust for the cedent (Ersk. *ib.*; Dickson, ss. 1473, 1475; *Knox*, 1850, 12 D. 719).

An arrester may refer his debt to the oath of the arrestee; but the oath, although it be negative, cannot hurt the common debtor (Ersk. iii. 6. 16; 2 Bell's *Com.* 67) or his assignee (*Elies*, 1712, Mor. 14041; see *Fergusson*, 1722, Mor. 14042, as commented upon by Erskine, iv. 2. 8). Further, the arrestee is entitled to prove by the common debtor's oath any defence which would be relevant as against the latter (Ersk. iii. 6. 16; Dickson, s. 1477).

Reference to the oath of a sequestrated bankrupt (*Mein*, 1829, 7 S. 902; *Dyce*, 1846, 9 D. 310; *Adam*, 1847, 9 D. 560, per Ld. J.-C. Hope, who comments adversely upon the statement of the law in 2 Bell's *Com.* 329; see also *Thomson*, 1855, 17 D. 1081, and *Campbell*, 1856, 18 D. 843), or of a bankrupt discharged on a composition (*Ferrier*, 1831, 9 S. 419), is, it is thought, incompetent so as to affect his creditors. And it seems that a reference by one of the creditors for whose behoof a trust deed has been granted would not be sustained, unless there were prospect of a surplus after payment of debts (*Robertson*, 1848, 21 Sc. Jur. 96).

(9) *Of Examination and Re-examination.*—Under the provisions of the Evidence (Scotland) Act, 1866 (29 & 30 Vict. c. 112), depositions on a reference to oath are taken by the Lord Ordinary, or by a judge of the Division, if the reference have been sustained by a Division (Mackay, *Manual*, 335), or, in certain cases (*e.g. Forman*, 1864, 2 M. 787; *Cowbrough & Co.*, 1879, 6 R. 1301), by a commissioner. In the Sheriff Court the oath is taken by the Sheriff, or if he cannot attend, or in any case of special emergency, by a commissioner, appointed by him (A. S., 10 July 1839, s. 79).

The oath or affirmation is the same as in the case of a witness (AFFIRMATION; WITNESS). The examination is conducted by the person referring, or his counsel. He is not bound to prove all that he refers. He need prove only what is sufficient for his case (*Heddle*, 1841, 3 D. 370). The deponent is entitled to the assistance of counsel (*Blair*, 1856, 18 D. 1202). The latter is not entitled to cross-examine his client. He may, however, suggest questions to the judge, who will, if he think it right, put them to the deponent for the purpose of clearing up any matter which the deposition has left obscure (*Heslop*, 1894, 22 R. 83). He may also refer his client to documents (*Blair, ut supra*), or object to incompetent questions (Dickson, s. 1486). It is *pars judicis* to ask such questions as appear to him proper for eliciting the whole truth of the case referred, whether these questions may be agreeable to the parties or not (*Soutar*, 1851, 14 D. 140).

The deponent will be held confessed if he refuse to answer competent questions (*Murray*, 1839, 1 D. 484).

It is competent to show the deponent documents for the purpose of assisting his memory, or of giving him an opportunity of explaining discrepancies between them and his deposition; but it is incompetent if the purpose be to contradict the oath (*Boyd*, 1843, 5 D. 1213; *Heddle*, 1847, 9 D. 1254; cf. *Mowat*, 1673, Mor. 9421; and see (10) (*a*) below).

When special interrogatories are to be put, the proper course is to put them before putting the general question. The reason is that the deponent has the right (which he may waive) to be protected from the suspicion of perjury, which he might incur if, by the admission of specific facts, he contradicted his deposition in general terms (Stair, iv. 44. 11; Ersk. *Pr.* iv. 2. 7; *Campbell*, 1677, Mor. 9422; *Husband*, 1678, Mor. 9422; *Aitken*, 1702,

Mor. 9423; *Callander*, 1717, Mor. 9416; *Jameson*, 14 Jan. 1820, F. C.; *Heddle*, 1841, 3 D. 370). If, however, the general deposition be a statement not of facts but of inferences from facts, the danger does not exist, and, accordingly, it is competent to inquire by means of special questions into the grounds of these inferences (*Heddle, ut supra*, per Ld. Ordinary Murray).

The deponent is entitled to the same protection in re-examination. This proceeding has been allowed by the Court in the exercise of its discretion (see *Cooper*, 1877, 5 R. 258), in order to clear up a deposition which is general or doubtful (Ersk. iv. 2. 15; *Fothringhame*, 1679, Mor. 16179; *Fraser*, 27 June 1809, F. C.), or unsatisfactory and unintelligible (*Young*, 1832, 10 S. 570), where the first examination did not exhaust the reference (*Megget*, 1827, 5 S. 343; *Thomson*, 1830, 8 S. 571), where it is desirable that the documents referred to by the deponent should be before the Court (*Young, ut supra*), or that the deponent should have an opportunity of refreshing his memory by consulting his books (*Anstruther*, 1851, 13 D. 841), or other writings (*Mowat*, 1673, Mor. 9421), and where the person referring was, owing to an irregularity in fixing the diet, absent when the deposition was emitted (*Peacock*, 1828, 6 S. 1081; *Hill*, 1835, 13 S. 764; cf. *Ker*, 1833, 12 S. 272). If re-examination has become impossible by the conduct of the person referring, he must bear the burden of his fault, and the deposition must be taken as it stands (*Cooper*, 1877, 5 R. 258). Where the oath is clear and particular a re-examination will not be permitted, "otherwise an oath, in place of being the end, might be more properly called the beginning of strife" (Ersk. iv. 2. 15).

A deposition may be taken down in shorthand in the Court of Session (29 & 30 Vict. c. 112), but not in the Sheriff Court (*Forman*, 1864, 2 M. 787).

(10) *Interpretation and Effect of the Oath on Reference—(a) General Observations—Treatment of Documents—Deposition non memini.*—As has already been observed, a reference to oath is of the nature of a contract, and, accordingly, after it has been taken, the only point to be inquired into is what is its import—not *quid verum est*, but *quid juratum est* (Ersk. iv. 2. 8). After it has been emitted, the oath cannot be controlled by the production of writings, or the testimony of witnesses (Ersk. *ib.*; *Rule*, 1623, Mor. 13231; *Kincaid*, 1673, Mor. 12143; *Young*, 1832, 10 S. 570, per Ld. Craigie; *Hunter*, 1835, 13 S. 369; *Nicol*, 1852, 14 D. 1044; *Broatch*, 1892, 19 R. 855). If it is desired to make writings available, the proper course is to exhibit them to the deponent, and to interrogate him in regard to them, so as to make them and his statements regarding them component parts of the deposition (*Cooper*, 1824, 2 S. 728; 1826, 2 W. & S. 59; *Hunter, ut supra*; *Gordon*, 1860, 22 D. 903; *Broatch, ut supra*). When that is done, it is not necessary to engross the whole documents: a reference to them is sufficient (*Jackson*, 1873, 11 M. 475). If the deponent refers to and produces documents in confirmation of his oath, the Court will overrule his inference from them if it be not supported by them (*Hunter, ut supra*; see also *Blair*, 1748, Mor. 13217; *Brown*, 1828, 6 S. 1022; *Stevenson*, 1838, 16 S. 1088; *Gordon*, 1860, 22 D. 903).

The oath is conclusive in all subsequent proceedings, whatever may be their form, for the same interest, regarding the same matter, and upon the same *media concludendi* (Stair, iv. 44. 8; Tait, *Evidence*, 256). A person wronged by a false oath has, on prosecuting the deponent criminally for perjury to conviction, been found entitled to a fine sufficient to cover his loss (1 Hume, 373).

Erskine (iv. 2. 14; see Tait, *Evidence*, 240; Dickson, s. 1499) observes that "where one who makes oath as to a debt or payment . . . deposes *non memini*, such oath has in the common case the effect of an absolvitory sentence in favour of him who hath sworn, as the oath is no evidence of the point referred; but since, at the same time, it does not impart a denial of it, he who made the reference is allowed to support his plea by other methods of proof" (see *Fisher*, 1672, Mor. 12142; *E. of Melvil*, 1693, 4 Bro. Supp. 171. This proposition is inapplicable to cases where the only competent proof is by way of reference to oath. *Brown*, 1809, Hume D. 469, appears to be irreconcilable with the terms of the Statute enacting the triennial prescription). But such an oath when emitted as to a *factum proprium et recens*, of which the deponent cannot, in the circumstances, be presumed to be ignorant, is regarded as a concealing or dissembling of the truth, and he who makes such an oath will be held *pro confesso* (Ersk. *ut supra*; *Irving*, 1675, Mor. 12031: *Littlegill*, 1682, Mor. 12035; *Murray*, 1839, 1 D. 484). In cases under the Statutes enacting the short prescriptions, the course of decision has not been uniform in dealing with depositions *nihil novi* and *non memini* (see Bills, Sexennial Prescription of; Triennial Prescription; Dickson, ss. 461 *sqq.*; Millar, *Prescription*, 121, 141, 173).

The statement by the deponent, that although he did not himself pay the debt, he gave money to someone to make payment, does not operate a devolution of the reference to that person's oath (*Mackay*, 1849, 11 D. 982). It was observed by Ld. Pres. Boyle (*Fyfe*, 1841, 4 D. 152) that "no oath with respect to which a previous decision has been pronounced can be treated as a precedent to rule a future case, though no doubt if there be any principles deducible from the decision these may be of authority." Accordingly, a distinction may be noted which has been suggested in construing depositions in this class of cases, *i.e.* the distinction between an oath which bears that the deponent gave money to settle the account to someone to whose character it belonged to make the payment in question,—*e.g.* his wife, factor, or servant,—and one which bears that he selected a particular mandatary to pay the debt, although it in no wise belonged to his character to make the payment (*Mette*, 1830, 8 S. 387; cf. *Roy*, 1830, 8 S. 810; *Mackay*, *ut supra*; with *Paul*, 1841, 3 D. 874; *Crichton*, 1857, 19 D. 661).

(*b*) *Qualified Oaths.*—An oath is sometimes qualified by the expression of certain limitations which restrict its import. The qualification is said to be intrinsic when it is inherent to the matter in dispute or to the point referred, extrinsic when it may and ought to be separated from the other parts of the oath (Ersk. iv. 2. 11). In the former case, effect must be given to the qualification as an integral part of the oath; in the latter case, it is to be disregarded unless proved by the deponent *aliunde*. Thus where a deponent, while admitting the debt referred, states that it was compensated by another debt, the proper course is to grant decree for the debt sued for, and allow the deponent to sue for the debt due to him (*Thomson*, 1855, 17 D. 1081; Dove Wilson, *Sheriff Court Practice*, 4th ed., 308). It is to be observed that a qualification may be in part intrinsic and in part extrinsic (*Graham*, 1860, 22 D. 560).

When the constitution of an obligation is the subject of the reference, any qualification incompatible therewith is intrinsic. Thus an oath is intrinsically qualified where, in a question of loan, the deponent states that the money was received in payment of services (*Gow's Exors.*, 1866, 4 M. 578), or of a sum due (*Aitken*, 1702, Mor. 9423, 13205; *Minty*, 1824,

3 S. 394; cf. *Sinclair*, 1703, Mor. 13205), or on the footing that it should be repaid in board and lodging (*Thomson*, *ut supra*), or as an advance to be repaid at the request of the lender, deceased (*Meikle*, 1737, Mor. 13225; *Gaylor*, 1854, 27 Sc. Jur. 35); or where he admits a verbal agreement, to be held binding only when reduced to writing (*Campbell*, 1676, Mor. 8470, 13203); or where he depones as to a prescribed bill that it was signed in mistake for a receipt (*Agnew*, 1782, Mor. 13219), or on the condition that it should not constitute a debt against him (*Baird*, 1827, 5 S. 820), or that it was granted for a special purpose, to which the payee had not applied it (*Drummond*, 1848, 10 D. 340); or where, in a claim for wages, he states that services were rendered under an agreement that board and lodging were to be taken as payment (*Alcock*, 1842, 5 D. 356; *Anderson*, 1847, 9 D. 1222); or where, in a like claim, he admits his promise to employ the pursuer in a certain capacity, but adds that the pursuer declined to act in that capacity (*Paden*, 1751, Mor. 13207); or where, in an action for the price of goods, he depones that they were furnished, but not upon his credit (*Meyer & Mortimer*, 1851, 14 D. 99), or subject to an agreement that payment was to be made not in money but in services, which he was ready to perform (*Lauder*, 1727, Mor. 13206), or that he purchased them in his capacity of factor to a creditor of the seller (*Campbell*, 1848, 10 D. 361), or that they were supplied and rejected as of bad quality (Stair, iv. 44. 14; *Trotter*, 1687, Mor. 13204). The case of *Robertson*, 1784, Mor. 13244, is distinguishable—the defence resolved into a plea of compensation. In claims for restitution of moveables (*Fenton*, 1632, Mor. 13228; cf. *Scot*, 1672, Mor. *ib.*), and in actions laid on wrongful intromission with moveables (*Mortimer*, 1710, Mor. 13230; *Howies*, 1765, Mor. 13208; cf. *Walker*, 1702, Mor. 13230), the deponent's admission that he received them will be intrinsically qualified if he add that he received them as a gift, or if, in the latter class of cases, he state that he intromitted by the Court's authority, or by consent, or with the approbation of the party (Stair, iv. 44. 14). The same principle applies where the deponent admits that he undertook the obligation referred, but adds that it was entered into subject to a condition not yet performed (Ersk. iv. 2. 11; *Meikle*, 1737, Mor. 13225; *Greig*, 1830, 8 S. 382; see Dickson, s. 1510), or speaks to certain limitations or stipulations as *pars negotii* (*Ewing*, 1749, Mor. 13226; *Robertson*, 1824, 3 S. 186). But the qualification will be regarded as extrinsic where it amounts to a plea of compensation (see below), or a ground of reduction (*Carse*, 1714, Mor. 13247), or challenge (with *M'Niell*, 28 Feb. 1805, F. C., cf. *Campbell*, 1778, Mor. 9530; *Clarkson's Trs.*, 8 June 1820, F. C.; Dickson, ss. 453, 1514).

Under the Statutes enacting the Triennial, Quinquennial, and Sexennial Prescriptions (see thereunder. It is otherwise in cases falling under the Vicennial Prescription), the pursuer must prove the subsistence as well as the constitution of the debt; and, accordingly, its discharge is intrinsic to the reference.

In cases which do not fall under these Statutes, "the nature both of the debt sued upon and of the payment made is to be considered" (Ersk. iv. 2. 13). In considering the nature of the debt, the rule *unumquodque eodem modo dissolvitur quo colligatur* is to be kept in view. Accordingly, a disposition admitting that the debt referred was constituted by writing is not intrinsically qualified by the statement that it has been discharged (Ersk. *ib.*; *Newlands*, 1885, 13 R. 353; Dickson, s. 1514), save, apparently, where it is said expressly that the writing was cancelled or returned at the time

of the discharge (*Brown*, 1669, Mor. 13202; *Walker*, 1702, Mor. 13230). This principle applies to the case of debts constituted without writing, the payment of which ought by their nature to be verified by written vouchers (Ersk. *ib.*; *Cant*, 1665, Mor. 13222). Where writing is not required for the discharge of the obligation, the statement that it has been discharged forms an intrinsic qualification (Ersk. *ib.*; *Newlands*, *ut supra*; Dickson, s. 1516). In considering the nature of the payment, it is to be observed that "things that are properly pertinent to the discharge or settlement of a debt in the natural course of proceeding are intrinsic in their quality, while, on the other hand, separate transactions which raise questions of counter claim requiring constitution, if the claim stood alone, are extrinsic" (per Ld. Pres. M'Neill in *Galbraith*, 1866, 4 M. 295). Accordingly, if the creditor qualify his admission that he received a sum from his debtor by adding that the payment was made not in satisfaction of the debt, but in pursuance of a separate bargain, the quality is intrinsic (Ersk. iv. 2. 12; *Forbes*, 1688, Mor. 12732; *M'Lean*, 1700, 4 Bro. Supp. 487; *Sinclair*, 1703, Mor. 13205; *Pringle*, 1708, Mor. 13230). It will be otherwise, however, if the creditor's statement be, not that the money was paid and received in extinction of other debts, but merely that it was received on the footing of an indefinite payment (*Sinclair*, *ut supra*; *Reid*, 1670, Mor. 13202). So, too, a debtor's oath was held to be intrinsically qualified where he stated that his creditor, deceased, from whom he had received a loan and to whom he had granted an I. O. U., had forgiven him the debt and promised to destroy the I. O. U., and the I. O. U. was not found in the deceased's repositories (cf. *Galbraith*, *ut supra*, with *Hamilton's Exors.*, 1858, 21 D. 51, and *Balfour*, 1873, 11 M. 604). In cases in which the debtor depones to extinction of the debt otherwise than by payment, the rule is that if the oath bear that the creditor actually agreed, either at the time of the contraction of the debt or by subsequent express agreement, to hold the debt compensated either by a counter claim, or by acceptance of goods as payment of it, that will be intrinsic; but if the oath merely import that without any such agreement the debtor delivered goods or assigned accounts or made over some asset which he considered to be a set-off against his debt, that will be extrinsic (*Cooper*, 1877, 5 R. 258, per Ld. Deas; *Cowbrough*, 1879, 6 R. 1301, where the authorities are collected and discussed; see also *Stewart*, 1852, 15 D. 12; Dickson, ss. 1522–1528). Further, a statement that by an express subsequent agreement the creditor had forgiven the debt is intrinsic of the reference (*Cowbrough*, *ut supra*).

The mode of proof in the case of an extrinsic qualification has been dealt with above.

(11) *Party held pro confesso.*—If a person cited personally or edictally, as circumstances require (see CITATION), by an interlocutor ordaining him to depone fail to appear, he will be held as confessed (Stair, iv. 44. 21; Ersk. iv. 2. 17). The same result follows if he refuse to answer competent questions (see (9) above); or to sign his deposition, he being able to write (*Carin*, 1672, Mor. 12532); or depones *non memini* to a *factum proprium* (see (10 (*a*)) above). He may, however, be reponed against such a decree upon his showing good cause. If he apply *de recenti*, slighter excuses are admitted; if *ex intervallo*, only the most pregnant grounds will be regarded (Stair, iv. 44. 23; Ersk. iv. 2. 17; *Buchanan*, 1676, Mor. 12034). As to the payment of expenses as a condition of reponing, see *Drummond*, 1832, 10 S. 266; *Miller*, 1835, 13 S. 369; *Mitchells*, 1882, 10 R. 378. Where a person is reponed *ex justitia* because, *e.g.*, the citation given him was null, the effect of his being confessed is quite taken off (Ersk. *ut supra*). But if he

be reponed *ex gratiâ* and die before deponing, the constructive confession holds good against his heir (Ersk. *ut supra*; *Wright*, 1686, Mor. 12036; *Grant*, 1839, 1 D. 1048; see *Gilmour*, 1797, Mor. 12042, where, owing to the special circumstances of the case, the decision was to an opposite effect). It is the party only who can be held *pro confesso* (*Cant*, 1665, Mor. 12029).

(12) *Where the Proof ought to have been limited, but a Proof at Large has been taken.*—Where the proof ought to have been limited when allowed by the Court of first instance, but a proof at large has been taken, it must be considered (*Simpson*, 1875, 2 R. 673; *Kerr's Tr.*, 1883, 11 R. 108; *Wallace*, 1885, 12 R. 687; see also *Barr*, 1896, 23 R. 1090).

(13) *Contradiction or Modification of Writings by Oath of Party.*—See PAROLE.

[Dickson, ss. 1414–1533; Tait, 217–272, 287–289; Kirkpatrick, ss. 197–204.]

Oath, Judicial.—See OATHS, PROMISSORY.

Oath, Official.—See OATHS, PROMISSORY.

Oaths, Promissory.—The forms of promissory oaths have been laid down by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), and these forms, except in special cases hereafter mentioned, are invariably used when the oath is administered. They are as follows:—

(*a*) *Form of Oath of Allegiance.*

I, , do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors according to law. So help me God. (31 & 32 Vict. c. 72, s. 2.)

(*b*) *Form of Official Oath.*

I, , do swear that I will well and truly serve Her Majesty Queen Victoria in her office of . So help me God. (*Ib.* s. 3.)

(*c*) *Form of Judicial Oath.*

I, , do swear that I will well and truly serve our Sovereign Lady Queen Victoria in the office of ; and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will. So help me God. (*Ib.* s. 4.)

The name of the sovereign for the time being shall be substituted where Her Majesty's name at present occurs (*ib.* s. 10).

The Oath of Allegiance and Official Oath.—These shall be tendered to and taken by the following officers as soon as may be after their acceptance of office, viz.:—

The Lord Keeper of the Great Seal.
The Lord Keeper of the Privy Seal.
The Lord Clerk-Register.
The Lord Advocate.
The Lord Justice-Clerk.

The oath is tendered by the Lord President of the Court of Session at a sitting of the Court (*ib.* s. 5 and Schedule).

The Oath of Allegiance and Judicial Oath.—These oaths, tendered in

accordance with the former custom (*ib.* s. 6), are taken by the following, viz.:—

The Lord Justice-General.
The Lord Justice-Clerk.
The Judges of the Court of Session.
Sheriffs of Counties.
Justices of the Peace for Counties and Burghs (*ib.* Sched. 2).

A solemn affirmation may be substituted for any oath required by this Act, the words "solemnly, sincerely, and truly declare and affirm," being substituted for the word "swear," and the clause "So help me God" being omitted (*ib.* s. 11). If any officer above specified declines or neglects to swear or affirm, he shall be disqualified from, or forced to vacate, his office (*ib.* s. 7).

In all cases except where the oath of allegiance is authorised by this Act or the Clerical Subscription Act, 1865, or the Parliamentary Oaths Act, 1866, the oaths of allegiance, supremacy, and abjuration are prohibited, and the oath of assurance in Scotland is abolished (*ib.* s. 9).

In all other cases, with the exceptions to be hereafter mentioned, a declaration is substituted for the oath formerly in use.

The Act does not affect (*ib.* s. 14)—

(1) Oaths taken under the Clerical Subscription Act, 1865, and the Parliamentary Oaths Act, 1866. In these the form of oaths laid down in 31 & 32 Vict. c. 72 is prescribed.

(2) Oaths taken by privy councillors, where the form here prescribed is also enjoined.

(3) Oaths of homage by archbishops and bishops.

(4) Oaths of canonical obedience.

(5) Oaths taken by peers, baronets, or knights on their creation.

(6) Oaths taken in the army, marines, militia, yeomanry, or volunteers.

(7) Oaths taken by aliens on naturalisation, except that the form of 31 & 32 Vict. c. 72 is prescribed.

(8) Oaths taken under the 18th section of the Merchant Shipping Act, 1854, by "owners of British ships," except that the new form is substituted.

(9) The power of substituting a declaration for an oath under 5 & 6 Will. IV. c. 62.

(10) Any oath of attestation authorised by Parliament.

(11) Any oath taken in judicial ratification by married women in Scotland.

(12) Any oath required to be taken by a juror or witness.

The forms and circumstances in which various promissory oaths are administered are to be found in the following statutes:—

Coronation Oath—1 Will. & Mary, c. 6; 1 Will. & Mary, sess. 2, c. 2; 12 & 13 Will. III. c. 2; 6 Anne, cc. 8 and 11.

Members of Parliament—29 Vict. c. 19, and 31 & 32 Vict. c. 72, s. 14 (1).

Privy Councillors—31 & 32 Vict. c. 72, s. 14 (2).

Archbishops and Bishops—28 & 29 Vict. c. 122, ss. 10–12; 31 & 32 Vict. c. 72, s. 14 (3); 37 & 38 Vict. c. 77, s. 12.

Soldiers or Marines on Enlistment—44 & 45 Vict. c. 58, s. 80; and 44 & 45 Vict. c. 58, ss. 80, 179 (7) (12).

Militiamen—44 & 45 Vict. c. 58, s. 181 (1).

Yeomanry—44 Geo. III. c. 54, ss. 20 and 22.

Volunteers—26 & 27 Vict. c. 65, s. 6, Sched. 1.

Owners of British Ship (in certain cases)—57 & 58 Vict. c. 6, s. 1 (ii.); 31 & 32 Vict. c. 72, s. 14.

Aliens—33 & 34 Vict. c. 14, ss. 7, 9; 33 & 34 Vict. c. 102, s. 1.

Expatriated British Subject resuming Nationality—33 & 34 Vict. c. 14, ss. 8, 9; 33 & 34 Vict. c. 102, s. 1.

Justices of the Peace, etc.—

As to estate—18 Geo. II. c. 20.

Oath of allegiance and judicial oath—31 & 32 Vict. c. 72, s. 6; and 34 & 35 Vict. c. 48.

Oath on new creation after demise of Crown—1 Geo. III. c. 13, s. 1.

New commission during same reign—7 Geo. III. c. 9.

Oaths, Unlawful.—By the Act 37 Geo. III. c. 123, any person administering or being a party to the administering or taking of any oath or engagement (*i.e.* any obligation in the nature of an oath, however administered or taken, and whether administered by others or taken without being administered, *ib.* s. 5), purporting to bind the person taking the same "to engage in any mutinous or seditious purpose; or to disturb the public peace; or to be of any association, society, or confederacy formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall . . . be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years." The same punishment was laid down for those taking such oaths (37 Geo. III. c. 123, s. 1). Penal servitude is substituted for transportation by 20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47. Compulsion shall not be a sufficient defence to an indictment on the above offence unless the oath and the circumstances of it are revealed within four days from the cessation of such compulsion, or of any sickness which prevents a disclosure. It must be revealed to a Justice of the Peace, or Secretary of State, or Privy Councillor, or, in case of a soldier or sailor, to his commanding officer (37 Geo. III. c. 123, s. 3). By 52 Geo. III. c. 104 (amended 7 Will. IV. and 1 Vict. c. 91; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47), where the oath is one taken in furtherance of treason, murder, or any capital crime, the punishment is penal servitude for life, or not less than fifteen years, or imprisonment not exceeding three years, with or without hard labour, and solitary confinement, the latter not to exceed one month at a time, or three months in each year.

[Macdonald, 235, 236; Hume, ii. 556, note; 557, note.]

Obiter dictum, an opinion given incidentally by a judge upon a point raised in argument, but which it is not necessary to determine for the decision of the case. Such incidental expressions of opinion are not authoritative, the presumption being that they have not been so carefully weighed as the real grounds of judgment. They are, however, valuable,

and are frequently cited, their value depending upon the eminence of the judge pronouncing them.

Obligation.—An obligation is a legal tie by which one is bound to pay or perform something to another. The debtor in the obligation is called in Scotland the obligant or granter, the creditor the grantee; in England the debtor is the obligor, the creditor the obligee. An obligation is correlative to a personal right: every personal right involves an obligation; what is an obligation in respect to one person is a right in respect to another. The grantee differs from the person who possesses a real right: the latter has a *jus in re*, or an absolute right of property in the subject, the former has only a *jus ad rem*, or a right of action against the granter. Obligations are divided, both by Stair and Erskine, into natural, civil, and mixed. Obligations purely natural are those by which one person is bound to another by the law of nature only: obligations merely civil are those by which men are bound by positive law only, without any foundation in equity: mixed obligations are those which are both grounded in equity and have the support of the civil sanction. Obligations are further divided by the institutional writers into pure, conditional, and *in diem*. A pure obligation has no conditions, and is exigible the moment the grantee pleases. A conditional obligation has no obligatory force until the condition is purified, "for it is in that event only that the party declares his intention to be bound" (Ersk. *Prin.* bk. iii. tit. i. s. 6). Such an obligation involves that the granter will not withdraw or revoke the *spes* which it confers upon the grantee: an obligation *in diem* differs from a conditional obligation, because the day mentioned must arrive; the debt therefore becomes due from the date of the obligation (see CONDITIONAL OBLIGATIONS). Obligations are further divided into obediential, or *ex lege*, and conventional, or *ex contractu*.

I. OBLIGATIONS EX LEGE.

In England this class of obligations has been divided into four by Holland in his work on *Jurisprudence*, chap. xii. *Firstly*, domestic, including obligations between husband and wife (such being rather *ex lege* than *ex contractu*), parent and child, and guardian and ward. *Secondly*, fiduciary or trusts. *Thirdly*, meritorious, in which he includes the acts of all persons acting analogously to the Roman "negotiorum gestor," as, for example, the salvors and recaptors of ships. *Fourthly*, official: "any member of the community who becomes entitled by circumstances to call upon a public official to exercise his functions, acquires thereupon a right *in personam* against such official to that effect. This right, in so far as it is enforceable by action against the official, is a private law right."

In Scotland, on the other hand, Stair subdivides obediential obligations in a somewhat different manner. He regards certain obligations as arising *ex lege* which modern English jurists look upon as contractual in their nature. His division is: (1) domestic obligations, (2) the obligations of restitution, remuneration or recompense, and reparation.

A. *Restitution.*—The obligation of restitution is that by which men are bound to restore to the proper owner all such things as, coming into their power without the desire of the owner and yet without their fault, ought to be restored. This obligation covers things straying, stolen, found, and such like. Even if the possessor has obtained a thing by purchase, the owner in the ordinary case may have it restored to him. So, too, if the

possessor has sold it, and has obtained more than he paid for it, he must hand over the surplus to the owner as indemnification. Further, whatever is given *ob turpem causam* must be restored if the turpitude was in the receiver, not in the giver.

B. *Recompense.*—Recompense is the obligation by which one who is made richer by the act of another, without the purpose of donation, is bound to indemnify him, either in whole or to the extent to which he himself is the gainer.

C. *Reparation.*—This obligation is founded on the precept *alterum non lædere*; it requires that any one who commits a wrong to a neighbour shall make good the damage done.

II. Obligations ex contractu.

1. *Nature of Contract.*—A contract is a voluntary agreement of two or more persons by which something is to be given or performed upon one part for a valuable consideration, either present or future, on the other part (Ersk. iii. 1. 16). It differs from an obediential obligation in that it is mutual, involving the agreement of at least two parties, while an obediential obligation is unilateral. A contract involves two ideas, obligation and agreement. What is meant by obligation has been stated above; agreement is the intention of at least two persons, expressed and communicated, to do something which will affect their legal relations. The combination of these two conceptions constitutes a contract. The essential features of a contract are: (1) offer, (2) acceptance. An offer must be distinguished from a promise: an offer requires acceptance to constitute an obligation, a promise in itself constitutes an obligation; an offer can be withdrawn at any moment prior to acceptance, a promise can only be withdrawn with the consent of the grantee (*Malcolm*, 1891, 19 R. 278; *Griffith*, 1892, 19 R. 550). As to how far the place of making an agreement regulates its construction, see Story, *Conflict of Laws*, s. 280; Wharton, *Conflict of Laws*, 2nd ed., s. 401; Gillespie's Bar, 324. Where a personal contract is entered into between persons residing in different countries where different systems of law prevail, the intentions of the parties as expressed in the contract will determine the law by which the whole contract is to be interpreted (*Hamlyn & Co.*, 1894, 21 R. (H. L.) 21; *Mackintosh*, 1895, 22 R. 345).

2. *Division of Contracts.*—In the law of Scotland contracts are divided into consensual, real, and written. A consensual contract is complete on the binding words being proved, either by writing or by witnesses. Every obligation, however, to which writing is not indispensable, is effectual where consent is proved (Bell, *Prin.* s. 16). Examples of consensual contracts are sale, mandate, and location. To complete a real contract, an act requires to take place, either of delivery or payment or performance. Without some act there can be no real contract, though the evidence to prove it may be parole. Examples of real contracts are loan, commodate, pledge, and deposit (Bell, *Com.*, 7th ed., vol. i. p. 335). Written contracts are those to which authentic written evidence is required not merely in proof, but in solemnity (Bell, *Prin.* s. 18). Such obligations may be constituted in three ways—by attested, holograph, or privileged writings. Attested writings are subscribed by the granter in presence of witnesses, or, if the writer cannot write, by a notary and two witnesses (Conveyancing Act, 1874, 37 & 38 Vict. c. 94). Holograph writings are wholly written by the party. Writings adopted by a holograph writing are considered holograph, even though written in the handwriting of another; "a holograph writing at the end of

a deed not written by the subscriber will impose quite a different obligation from what would have been imposed by the same holograph writing on a different paper. If at the end of a bond for a principal debt a cautioner should add a holograph undertaking to be cautioner for the within debt, that would be a perfectly good obligation; but if it were written on a different piece of paper, that would be good for naught" (*Christie's Trs.*, 1870, 8 M. 461, per Ld. Pres. Inglis). Writings holograph of a partner are holograph of the firm if written in the firm's name (*Nisbet*, 1869, 7 M. 1097). A holograph writing does not prove its own date except against the party issuing it; a third party cannot be prejudiced by the date which the writ bears (*Purvis*, 1869, 7 M. 764). Privileged writings are for one reason or another effectual though neither attested nor holograph. Such are mercantile writings, bills, cheques, letters *in re mercatoria*, and others (Bell, *Prin.* s. 21; see EVIDENCE; ATTESTED WRITINGS; HOLOGRAPH). Speaking generally, written deeds must be delivered to the obligee; exceptions to this are, testaments, mutual contracts (which are complete by the subscription of all the parties), deeds where delivery is dispensed with, or where the granter is the natural custodier.

3. *WHAT IS ESSENTIAL TO CONSTITUTE A CONTRACT—Offer and Acceptance.*—To make a contract, the expression of intention must be arrived at by means of an offer duly accepted by the person to whom it is made. An offer requires acceptance to constitute an obligation, and in this respect differs from a promise, which requires no acceptance. An offer is presumed to be open until it is recalled; all offers may, however, be recalled at any moment prior to acceptance, unless they are open until a specified time, or for a reasonable time; in Scotland this is a question of intention or construction in each case; the time may be either express or implied. If the offer is simple and without any express time-limit, it is a question of circumstances as to what constitutes a reasonable time; in mercantile cases the time-limit will depend on the circumstances of the case (*Watson*, 1873, 1 R. 189). In the ordinary course of buying and selling, the offer ought to be accepted at once, or as soon as possible after it has been made, as any unreasonable delay is inconsistent with the spirit of trade (Bell, *Com.*, 7th ed., vol. i. p. 343). Further, the offer must be accepted before there is any alteration of circumstances detrimental to the offerer, or of such a nature as to render the offer unsuitable and absurd (*Macrae*, 1885, 13 R. 265, per Ld. Pres. Inglis). If, on the other hand, the offer is expressly limited in point of time, it must be correctly observed. If an offer does not amount to a promise binding the offerer until a specified date or for a reasonable time, there is *locus pœnitentiæ*, or a power of resiling; but this plea is excluded if *rei interventus* has taken place, *i.e.* if something has occurred on the faith of the offer whereby matters do not remain entire (*Stuart*, 1885, 13 R. 221; *Lang*, 1889, 16 R. 590). See LOCUS PŒNITENTIÆ; REI INTERVENTUS; HOMOLOGATION. A revocation of an offer is not a valid revocation unless it has been communicated to the other party (*Stevenson*, 1880, 5 Q. B. D. 346; *Byrne*, 1880, 5 C. B. D. 344). The mere posting of a letter of revocation is not sufficient; the notification must be in the hands of the offerer. In the words of Ld. J. Lindley, "both legal principles and practical convenience require that a person who has accepted an offer, not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties" (*Byrne, supra*). An offer falls on the death or bankruptcy of the offerer before acceptance (*Dickenson*, 1876, L. R. 2 Ch. Div. p. 475, per Ld. J. Melish). There is no distinct authority as to whether notice of the death is

necessary to revocate the offer, but, as is observed in Pollock on *Contract* (p. 36) in the analogous case of agency, the death of the principal puts an end *ipso facto* to the agent's authority, without regard to the time when it becomes known to the agent or to third parties, and it is probable that this analogy would be followed. An offer may be made by parole, by letter, tacitly, or by advertisement (*Williams*, 4 B. & Ad. 621; *Bovill*, 1856, 3 Macq. 1; *Harris*, 42 L. J. Q. B. 171; Bell, *Prin.* s. 74). An offer by advertisement requires extreme care in its construction, otherwise difficult questions may arise (*Law*, 1894, 21 R. 1027; *Martins*, 1885, 13 R. 274). If there are conditions, they ought to be carefully noticed by the acceptor; thus where certain notices were posted up in an employer's works, showing certain deductions to be made from wages, the existence of which notices was proved to be known to the workmen, it was found that the workmen must be held to have assented to these notices (*Wright*, 1893, 21 R. 25; see *White & Co. Ltd.*, 1891, 18 R. 972; *Wood & Co.*, 1893, 20 R. 602; *Smith & Son*, 1888, 15 R. 533).

Acceptance of an offer must be in the precise terms of the offer. It must be absolute and unqualified. It must not contain a condition (*Jack*, 1865, 3 M. 554; *Nelson*, 1889, 16 R. 898). If it differs in any way from the offer, it becomes in itself a new offer, which requires in itself acceptance on the part of the original offerer to constitute a contract (*Wylie & Lochhead*, 1873, 1 R. 41; *Dickson*, 1871, 10 M. 41; *Canning*, 1886, 16 Q. B. D. 727). It may be made either expressly or tacitly. If made timeously, *i.e.* within the time specified by the offer, or within a reasonable time where no time is specified, it completes the contract. It has been settled that the despatch of the acceptance by post completes the contract, even if it be not received. This is based on the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notice to himself (Ld. J. Lindley in *Byrne*, 1880, 5 C. P. D. p. 348; *Household Fire Ins. Co.*, 1879, 4 Ex. D. 216, and cases referred to therein). In the latter of these cases, however, it is right to note that Ld. Bramwell differed from the majority of the judges, and at least one Scotch judge has concurred in this dissent (Ld. Shand in *Mason*, 1882, 9 R. 890). Where the offer bore, "This for reply by Monday," a reply posted on the Monday evening was held to be timeous (*Jacobsen Sons & Co.*, 1894, 21 R. 654). In some cases the sufficiency of the notice may be determined by facts and circumstances (*Chapman*, 1892, 19 R. 837). An acceptance can be resiled from by revocation received prior to or along with the acceptance (*Alexander*, 1830, 9 S. 190). As has been stated above, the acceptance must be unqualified and absolute; thus where the acceptor wrote, "I have decided on taking No. 22 Belgrave Road, and have spoken to my agent, Mr. C., who will arrange matters with you," that was held insufficient to make a contract (*Stanley*, L. R. 10 C. P. 102). But the acceptance may be complete even though it expresses dissatisfaction at some of the terms, if the dissatisfaction stops short of dissent (Pollock on *Contract*, p. 39); nor will it be null merely because of an addition which is immaterial; nor will a simple acceptance be deprived of its effect because of misunderstanding in the construction of collateral terms (*Baines*, 28 L. J. C. P. 338). Where A. offered to buy all the shares of his co-owners in a ship, it was held not to be a completed contract when B., one of the co-owners, accepted so far as his share was concerned (*Anderson*, 1894, 22 R. 105).

It is essential to an effectual obligation that the contracting parties shall be agreed on all the essential points of the engagement. There must be no error in the substantial parts of the agreement, destroying consent;

no constraint such as to overmaster a mind of ordinary vigour; no fraud giving birth to the contract, and misleading the other party as to its true nature and substance (Bell, *Com.*, 7th ed., vol. i. p. 313). The consent must be *consensus in idem placitum* (*Buchanan*, 1878, 5 R. (H. L.) 69; see CONSENT; CONTRACT; Bell, *Com.*, 7th ed., vol. i. pp. 313 *et seq.*). Error *in essentialibus* excludes real consent. Such a contract is null and void (Bell, *Prin.* s. 13). The error may relate to the person, to the subject-matter, or to the nature of the contract. The consent may be obtained by force and fear, in which case the contract will be null (Bell, *Prin.* ss. 11, 12; FORCE AND FEAR). A contract induced by fraud is voidable (FRAUD; MISREPRESENTATION). When a contract is executed in a country by a person domiciled there, who by the law of the country had not the capacity to contract, the contract will not be valid in any country (*Cooper*, 1888, 15 R. (H. L.) 21).

In addition, it is essential that the consent of the parties be voluntary. Thus pupils and imbeciles are legally incapable of giving their consent, and therefore of entering into a contract (PUPIL; INSANITY); so, too, persons in a state of absolute drunkenness (*Couston*, 1862, 24 D. 607). Minors are to a greater degree than pupils considered capable of consent (Ersk. *Prin.* i. 7. 34). If a minor has curators, all deeds *inter vivos* affecting his property are (with a few exceptions) null without their consent (MINOR; CONSENT). A wife has a limited capacity to contract (see HUSBAND AND WIFE; MARRIED WOMAN).

4. *CONSTRUCTION OR INTERPRETATION OF CONTRACTS.*—"Every contract should be so construed that no clause, sentence, or word shall be superfluous, void, or insignificant. Every word ought to operate in some shape or other: *nam verba débent intelligi cum effectu ut res magis valeat quam pereat*" (Addison on *Contract*, 9th ed., p. 43). Each part should be so construed that the whole may stand; the words should be construed in their ordinary everyday sense, unless they have acquired a peculiar sense. Technical words should maintain their technical meaning, and evidence may be adduced to show what that meaning is (*Sutton & Co.*, 1890, 17 R. (H. L.) 40; *Dalhousie's Trs.*, 1890, 17 R. 1060). In order to arrive at the real intention of the parties, the surrounding circumstances at the date of its completion may be looked to. If, from the admission of evidence a "latent ambiguity" arises, further evidence is allowed to remove it, if possible; but where the ambiguity is patent, parole evidence is not admissible to remove it. Parties may by their actings show what construction they put upon their contract, or what meaning they mean to give to any special word (*Jopp's Trs.*, 1888, 15 R. 271; *Hunter*, 1886, 13 R. 883).

III. ILLEGAL AND IMMORAL OBLIGATIONS.

No obligation derived from an illegal or immoral contract is recognised by the law as a ground of action; in the words of Ld. Mansfield in *Holman* v. *Johnston*, Cowp. 343, "No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." *Pacta illicita* may be divided into three heads: illegal contracts, immoral contracts, and contracts against public policy.

A. *Illegal Contracts.*—No contract directly in the face of an express prohibition contained in a Statute will sustain an action. There must of course be no doubt as to the construction and effect of the Statute (*Barton*, 1874, 6 L. R. P. C. 134). Where the contract was to deliver 600 stones of hay, each stone to weigh 24 imperial pounds, it was held that the agreement was not void under the provisions of the Weights and Measures Act,

the transaction being a sale by an imperial weight (*Lang*, 1894, 21 R. 337). Again, purchase of heritage while it is the subject of a lawsuit, by a member of the College of Justice or of any inferior Court, is an illegal contract, and subjects the buyer to deprivation. A *pactum de quota litis, i.e.* an agreement by an advocate or law agent to receive a portion of the subject of the suit instead of his fees, is an illegal contract. Though betting in Scotland is not in itself illegal, the Courts will not entertain actions to determine wagers (*Knight & Co.*, 1892, 19 R. 959, per Lord President).

B. *Contracts contra bonos mores.*—All such contracts are ineffectual. Agreements inductive to crime cannot be the foundation of a claim, for the law says, "You shall not stipulate for iniquity" (Bell, *Com.*, 7th ed., vol. i. p. 318). Bonds given as the price of prostitution do not form grounds of action. The results of the older English authorities relating to immoral contracts have been thus summed up by Ld. Selborne in the case of *Ayerst* v. *Jenkins* (1873, 16 Eq. 275):—

1. Bonds or covenants founded on past cohabitation, whether adulterous, incestuous, or simply immoral, are valid in law and not liable (unless there are other elements in the case) to be set aside in equity (*Webster*, 1886, 14 R. 90).

2. Such bonds or covenants, if given in consideration of future cohabitation, are void in law, and therefore, of course, also void in equity.

3. Relief cannot be given against any such bonds or convenants in equity if the illegal consideration appears on the face of the instrument.

4. Under some circumstances, when the consideration is unlawful and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity (Bell, *Prin.* 37).

C. *Contracts inconsistent with Public Policy.*—The law is jealous of all contracts which restrain the freedom or taint the purity of the domestic relations. A bond not to marry is bad, and an agreement to procure a payment to a party on the condition that he shall procure a marriage between two other parties is void (Bell, *Com.*, 7th ed., vol. i. p. 321). Contracts for defeating the revenue laws, and contracts inconsistent with the national law policy, or tending to disturb public arrangements, are bad (Bell, *Prin.* ss. 40–44). See Illegal and Immoral Contracts.

IV. Extinction or Discharge of Obligations.

1. *By Performance.*—An obligation is usually extinguished by performance, *i.e.* the performance of an act or the delivery of the thing on the one side, and the payment of the price on the other. The performance must be substantial and not a mere compliance with the letter of the obligation. If it be a payment of money, it must be an effectual payment to the right party. When no time is fixed, the obligation must be performed within a reasonable time. Whenever time has not been made the essence of the obligation, and either party is guilty of delay, a notice sent to him by the other party to say that the contract must be completed within a specified time will be binding (*Gt. Northern Ruy. Co.*, 22 L. J. C. P. 49). If a penalty is exigible for non-payment after demand, it is necessary to ask for payment before a right of action will be open (*Toms*, 4 B. & S. 442). If the performance depends on the concurrence of the party for whom it is to be done, it is necessary for him to see that, so far as he is concerned, the performance is not delayed; and if he fails to do so, it is an understood principle that he cannot avail himself of the non-performance which he himself has occasioned. In the words of Ld. Mansfield, "The party who is to do the act

must show that he was ready and willing to do it; but if the other stops him, on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act (*Jones*, 2 Doug. 694; *N. B. Rwy. Co.*, 1886, 14 R. 141; *Linton*, 1889, 17 R. 213). The mere impossibility of performance is in general no answer to an action for non-performance, unless both parties were aware of the impossibility at the date of entering into the obligation, or unless something has occurred by the act of God to the subject-matter of a contract which prevents the contract being completed (*Couturier*, 1856, 5 H. L. C. 673), or where the performance is rendered impossible by an act of law (*Smith*, 1886, 14 R. 95; *Newington Local Board*, 1879, 12 Ch. Div. 725). Where the proprietor of a newspaper, during the currency of a contract between him and the manager, sold the newspaper, he was held to have committed a breach of contract, he by so doing having disabled himself from fulfilling his contract (*Ross*, 1894, 21 R. 396). Payment of money, if that be the form of the obligation, constitutes a discharge, if it be made in the manner directed by the creditor. Specific performance of an obligation is a common-law remedy to which a party to a contract is entitled where the other party to it refuses to implement the obligation (*Stewart*, 1890, 17 R. (H. L.) 1, per Ld. Herschell).

[See CONFUSIO; ACCEPTILATIO; COMPENSATION.]

2. *By Consent.*—Parties may agree to waive the performance of an obligation. "As consent constituteth, so contrary consent distributeth or extinguisheth any obligation, whether it be by declaration, renunciation, or discharge, or *per pactum de non petendo*, which may be extended not only to conventional, but to natural obligations, as to any duty omitted or transgressed which is passed, though not to the discharge of any obligation itself as to the future" (Stair, i. 18. 1). Either party to a contract may, with the consent of the other, reserve the power of putting an end to the contract by notice. The extinction of a debt may be arrived at by novation or the substitution of a new one (see Pothier, i. pp. 380 *et seq.*; *Hay & Kyd*, 1886, 13 R. 777), or by delegation, "which may be accounted a species of novation" (Ersk. iii. 4. 22; see DELEGATION).

3. *By Operation of Law.*—All obligations for personal service are discharged by death. The privilege enjoyed by the debtor to an obligation, viz. that of proving the extent of his injury by his own oath *in litem*, is cut off if the action is not brought within the specified limit of time (Millar on *Prescription*).

V. BREACH OF CONTRACT.

If one party fail to fulfil his part of the obligation, the other party has a right to demand specific performance, or, if he chooses, may sue for damages against the party in default (*Allan's Trs.*, 1891, 19 R. 215). Specific performance was not a common-law remedy in England. To obtain it a party was compelled to resort to the separate jurisdiction of the Court of Chancery. In Scotland, on the contrary, specific performance is one of the ordinary remedies to which a party to a contract is entitled, where the other party refuses to implement the obligation he has undertaken (*Stewart*, 1890, 17 R. (H. L.) 1). If the injured party sues for damages, he cannot bring more than one action, so long as the breach of contract arose from one act on the part of the defaulting party (*Stevenson*, 1887, 15 R. 125). Where a landlord accepted a renunciation of a lease on his tenant's bankruptcy, reserving the rights of parties and declaring that the landlord should "in no way be prejudiced by accepting this renunciation in place of terminating the lease as otherwise therein provided for," it was held that the landlord

had no claim for damages (*Walker's Trs.*, 1886, 13 R. 1198). As to the measure of damages for breach, the ordinary rule is that damage is assessed at the difference between the contract price and the market price when the breach of contract is ascertained (*Duff & Co.*, 1891, 19 R. 199); but where the deliveries under a contract were periodical, the market prices at the dates of the several dates of delivery mentioned in the contract were taken (*Ireland & Sons*, 1894, 21 R. 989).

[See DAMAGES; CONSEQUENTIAL DAMAGES.]

Obligation in Roman Law.—The standard definition of *obligatio* is that in *Inst.* iii. 13: *Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendæ rei, secundum nostræ civitatis jura.* In other words, an obligation, as its etymology denotes, is a tie, whereby one person is bound to perform some act for the benefit of another. In every case it is the law which ties the knot, and its untying (*solutio*) must also be done by law. The one party in this legal relation is the *debitor* s. *reus debendi*; the other party is the *creditor* s. *reus credendi*. Several persons, of course, may be co-debtors or co-creditors in respect of the same obligation (*correi debendi* s. *credendi*). The result of the obligation is that the one party is bound *dare*, *facere*, or *præstare* (Gaius, iv. 2); but in each case the act is reducible to a money value. *Ea enim in obligatione consistere, quæ pecunia lui præstarique possunt* (*Dig.* 40. 7. 9. 2). So Modestinus lays it down: *Debitor intelligitur is a quo invito pecunia exigi potest* (*Dig.* 50. 16. 108). The object of the obligation must not be unlawful (*Dig.* 45. 1. 26; 45. 1. 27 pr.), and must be possible of performance (*Inst.* iii. 19. 1), though one may be validly bound to perform an act at present impossible in the event of its becoming possible (*Dig.* 45. 1. 98 pr.). The act or forbearance must also be sufficiently definite, or capable of becoming so (*Dig.* 45. 1. 94, 95; 45. 1. 115 pr.). The term *obligatio* is also used to denote specifically the right of the creditor (*e.g. Inst.* iii. 28; *Dig.* 45. 1. 126. 2), or the duty of the debtor (*e.g. Dig.* 12. 1. 6).

Actionability, while a usual incident of an obligation, was not a necessary one. Hence the distinction between a *natural* and a *civil* obligation. A civil obligation is one enforceable by action; a natural obligation is one which, though not actionable, possesses the other legal properties of obligations in general. Thus though the creditor in a natural obligation cannot be made to pay, yet if he pays voluntarily, even by mistake, he cannot recover the money back on the ground that it is not due (*Dig.* 46. 1. 16. 4). So the debt due in a natural obligation may be a ground of compensation against an actionable debt, and can form a sufficient basis for pledge, novation or a cautionary obligation. An obligation might be natural instead of civil, either because of some defect in the form of the contract or on account of the lack of legal capacity in the parties. Thus a slave could not be a party to a civil obligation, but he might be a party to a natural obligation. So, too, between a *pater-familias* and a *filius-familias* there could be natural obligation only. Again, an *obligatio*, which had its origin in the *jus civile*, was *civilis*, as opposed to an *obligatio honoria* or *prætoria*, which had its origin in the prætor's edict. Obligations are also classified into *bonæ fidei* and *stricti juris*, terms more properly applied to the actions based on the obligations; and into *certæ* and *incertæ*, according as the value and extent of the obligation is accurately ascertained and defined in the obligation itself.

According to their sources, obligations are divided into *obligationes ex*

contractu; obligationes quasi ex contractu; obligationes ex delicto; obligationes quasi ex delicto (*Inst.* iii. 13. 2).

Obligationes ex contractu arise under contracts or actionable pacts. The term *contractus* is used by Justinian to denote only certain agreements which, owing to their form or nature, were actionable at law. The agreements giving rise to obligations were the contracts made *re*, including the so-called innominate contracts, *verbis*, *litteris*, and *consensu*; and certain agreements (*pactu*) made actionable at different times by the prætorian edict or the imperial legislation (*pacta prætoria* and *legitima*). Agreements from which no obligation arose were termed by the Romans *nuda pacta*. *Nuda pactio obligationem non parit, sed parit exceptionem* (*Inst.* ii. 14. 7. 4). See PACTUM.

Obligationes quasi ex contractu arise from facts and circumstances which imply a contract, and they produce the same effect as a contract. Obligations arising *quasi ex contractu* are illustrated by *solutio indebiti*, the payment by mistake of money which is not due; the relation between tutor and pupil, or between the co-owners of property; *negotiorum gestio*, where one man, without previous authority, manages the affairs of another; or the obligation undertaken by *nautæ*, *caupones*, and *stabularii*, who take charge of property belonging to travellers.

Obligationes ex delicto arise from certain wrongs, recognised as delicts. As soon as a delict has been committed, there arises on the part of the wrong-doer an obligation which the injured party may enforce by action. The private delicts recognised by Roman law were *furtum*, *rapina*, *damnum injuria datum*, and *injuria*. The obligation on the delinquent may either be to pay damages, or to pay a penalty, or to pay both damages and a penalty.

Obligationes quasi ex delicto arise from facts which resemble a delict and produce the same effects as a delict Obligations of this kind are illustrated by the liability of a *judex qui litem suam facit*, *i.e.* a judge by whose act or default a party to an action has been injured: the liability, under the prætorian law, of *nautæ*, *caupones*, and *stabularii* for delicts committed by their servants within the scope of their employment; and the liability of the occupier of a house or room from which something has been thrown or poured, to the injury of another.

Obligations may be extinguished in many different ways. Most commonly an obligation is extinguished by performance—*solutio*. It is not necessary that the debtor himself should pay; any third party may, in the ordinary case, pay in lieu of the debtor (Gaius, iii. 168). Certain obligations might be properly discharged by the process, *imaginaria solutio per æs et libram*, described by Gaius (iii. 173–175). A third mode of extinguishing obligations was *acceptilatio*, a formal contract of discharge. *Acceptilatio verbis* is a discharge by stipulation, the debtor asking the creditor whether he has received payment, and the creditor answering in the affirmative. It is strictly only a verbal obligation, *i.e.* an obligation created by stipulation, that can be extinguished in this way: and if it is desired to extinguish any other kind of obligation by this method, it must first be transformed into a verbal obligation by the formula known as the *stipulatio Aquiliana*. See ACCEPTILATIO. Obligations were also extinguished by *compensatio*, the setting-off of one obligation against another (COMPENSATION); by *noratio*, the substitution of one obligation for another (NOVATION); by *confusio*, as when a creditor becomes the debtor's heir or, *vice versâ*: *confusione perinde extinguitur obligatio ac solutione* (*Dig.* 34. 3. 21. 1); by physical impossibility of performance arising *ex post facto* without the debtor's act or default (*Dig.*

46. 3. 95. 2; 45. 1. 33); by *litis-contestatio* (see LITISCONTESTATION); in the prætorian law, by a *pactum de non petendo*, an informal agreement to discharge, which operated to extinguish the obligation *ope exceptionis*; and, in certain cases, by the death of one of the parties to a contract, as in *societas* (*Inst.* iii. 25. 5) and *mandatum* (*Inst.* iii. 26. 10).

The creditor in an obligation cannot, by strict Roman law, assign his right to another. He may indeed constitute another his agent to enforce the obligation, and confer on him the right to the sum recovered (*mandatum in rem suam*). Gradually it was recognised that such a mandate was irrevocable, not merely from the moment of *litis-contestatio*, but from the moment when the mandatary *in rem suam* gave the debtor notice of his position. From the moment that the mandatary *in rem suam* gave such notice, he had a right to claim that the debtor should pay him, and him alone. Hence arose the idea of assignation. Up to the time of Gaius, the assignee could bring his action only as the cedent's agent, and in the cedent's name (Gaius, ii. 39; iv. 86), but subsequently he was enabled to sue in his own name by an *actio utilis* (*Dig.* 3. 3. 55; *Cod.* 6. 37. 18). Notice to the debtor remained as important as ever, as excluding the right of the debtor to pay to the original creditor (*Dig.* 2. 14. 16 pr.).

On the whole subject, see Gaius, iii. 88–225; *Inst.* iii. 13–iv. 5; *Dig.* 2. 14; 44. 7; *Cod.* 4. 10; Savigny, *Obligationenrecht.*

Obscene Works, Pictures, etc. — It is an offence at common law to publish, vend, circulate, or to cause to be published, vended, or circulated, or to expose for sale any lewd, impure, gross, or obscene book, or printed work, or print, engraving, or representation, devised, contrived, and intended to vitiate and corrupt the morals of the lieges, and to raise and create in their minds inordinate and lustful desires (Macdonald, *Crim. Law*, 208; *Robinson*, 1843, 1 Br. 590, 643; Anderson, *Crim. Law*, 94). The punishment is penal servitude or imprisonment. By the Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36, s. 42), amongst the articles prohibited to be imported into the United Kingdom are: Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles. If any such goods are imported, they shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct.

A person who encloses any indecent or obscene print, painting, photograph, lithograph, engraving, book, or card, or any indecent or obscene article, "whether similar to the above or not"; or who has on such packet, or on the cover thereof, any words, marks, or designs of an indecent, obscene, or grossly offensive character, is guilty of a misdemeanour, and is liable, on summary conviction, to a fine not exceeding £10, and on conviction or indictment, to imprisonment for a period not exceeding twelve months, with or without hard labour (47 & 48 Vict. c. 76, s. 4 (*b*) (*c*); see also 33 & 34 Vict. c. 79, s. 20).

By the Burgh Police Act, 1892 (55 & 56 Vict. c. 55, s. 380 (3)), every person who publishes, prints, or offers for sale or distribution, or sells, distributes, or exhibits to view, or causes to be published, printed, exhibited to view, or distributed any indecent or obscene book, paper, print, photograph, drawing, painting, representation, model, or figure, or publicly exhibits any disgusting or indecent object, or writes or draws any indecent or obscene word, figure, or representation in or on any place where it can be seen by the public, or sings or recites in public any obscene song or ballad, is liable to

a penalty of £10, or alternatively without penalty to imprisonment for sixty days.

By the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18), the affixing, etc., of indecent or obscene pictures, etc., is punishable. See ADVERTISEMENTS, INDECENT.

Occupatio: Occupancy: is a mode of acquiring property, and is indeed the primitive mode of acquisition. It consists in taking possession of a thing which belongs to no one (*res nullius*), with the intention of becoming owner of it. *Quod nullius est, id ratione naturali occupanti conceditur* (*Dig.* 41. 1. 3 pr.). Accordingly, in the *Institutes* of Justinian, following Gaius, ii. 66, *occupatio* is enumerated as one of the *adquisitiones naturales* or modes of acquiring property recognised by all nations. The things mentioned in the *Institutes* as instances of this mode of acquisition are: wild animals, whether beasts, birds, or fish (*Inst.* ii. 1. 12–16); the property of enemies on Roman soil (*Inst.* ii. 1. 17); gems or precious stones in the state of nature (*Inst.* ii. 1. 18); islands which rise in the sea (*Inst.* ii. 1. 22); *thesaurus* or treasure-trove (*Inst.* ii. 1. 39); and *res derelictæ*, *i.e.* property abandoned by its former owner (*Inst.* ii. 1. 47).

As regards wild animals, Justinian settled that such an animal does not belong to the person who merely wounds it, and that the property in it cannot be acquired otherwise than by actually taking the animal. If a wild animal, after being in the possession of one man, regain its liberty, it is free to be again acquired by occupancy. On the other hand, property in tame or domesticated animals is not lost by the animals straying. Property in half-tamed animals, such as bees, pigeons, or hawks in pursuit of game, is not lost as long as the owner continues pursuit. A wild animal captured is none the less the property of the capturer, although it is captured on another man's land. An owner of land may prevent other persons from trespassing on his land, but he has no right of property in animals caught by such persons on his land.

In Scots law the principle of acquiring property by occupancy is fully recognised. The main distinction between the Roman law and the Scots law on the subject is that, whereas the Romans applied the rule *res nullius cedit occupanti*, not only to things which had never before been appropriated, but also to things which, though previously acquired, had ceased to belong to anyone, in Scotland the principle of occupancy only applies to things which have never been appropriated previously, and does not extend to things which have at one time been appropriated, but have ceased to belong to anyone. In Scotland things already appropriated, but lost, forgotten, or abandoned, fall under the rule, *Quod nullius est fit domini regis* (see LOST PROPERTY).

The property in a *res nullius* is acquired by occupancy only when the appropriation is complete or fairly proceeding towards completion. If one person mortally wound an animal *feræ naturæ*, or disable it so as to render escape impossible, or have it in pursuit and not beyond reach, he is deemed the lawful occupant, and is not deprived of his right by another man coming in and taking the animal (Stair, ii. 1. 33; Bell, *Prin.* s. 1289; *Sutter*, 1861, 23 D. 465; rev. 1862, 4 Macq. 355. As to the conditions under which an animal *feræ naturæ* may be stolen, see *Wilson*, 1872, 10 M. 414). On the Scots law of occupancy generally, see Stair, ii. 1. 33; Ersk. ii. 1. 10; Bankt. i. 85, 505; Bell, *Prin.* ss. 1287 *et seq.* See WRECK; LOST PROPERTY.

In whale-fishing the ordinary principles of occupancy are modified by the application of particular rules, well established by custom and recognised by law. The most important of these particular rules is that known as the rule of "fast and loose," which prevails in all the Northern seas, and has been recognised by the Courts both of England and Scotland. "The object of the rule," observed Ld. Westbury (*Aberdeen Arctic Co.*, 1862, 4 Macq. 355, at 357), "is to prevent disputes and quarrels among persons engaged in the capture of whales. The rule is that the person who first harpoons a fish and retains his hold of that fish until it is finally captured, is to be regarded as the proprietor of the fish, although the actual capture and killing of the whale may be accomplished by the assistance of other persons. But the rule involves this condition, that if the fish, after it has been harpooned, breaks away from the person who first harpoons it, or if the fish is subsequently abandoned, that fish, though dying in consequence of the wound originally inflicted by the harpoon, is a 'loose' fish, and becomes the property of the person who first finds it and takes possession of it." The House of Lords, reversing the judgment of the Court of Session, decided in this case that the Scots common law of occupancy had no application, inasmuch as it had been completely set aside in the Northern seas by the rule of "fast and loose" (*Aberdeen Arctic Co.*, 1862, 4 Macq. 355; rev. *Sutter*, 1861, 23 D. 465; see also *Hutcheson*, 1830, 5 Mur. 164). As to the question whether the common law of occupany or the rule of "fast and loose" is applicable in the Southern seas, see Bell, *Prin.* s. 1289; Notes to Ersk. *Inst.* ii. 1. 10, Nicolson's edition; *Fennings*, 1808, 1 Taun. 241. See WHALES.

In public international law the principle of *occupatio* holds an important place in regulating the acquisition of territorial property by States. When a State does some act with reference to territory unappropriated by a civilised or semi-civilised State, which amounts to an actual taking of possession, and at the same time indicates an intention to keep the territory seized, it is held that a right of property is acquired which is valid against other States. The title which is thus obtained is called a title by occupation. (As to how far an exclusive right in a territory may be acquired by merely temporary possession, without the continuance of effective control, see Bluntschli, *Le Droit International Codifié*, 2nd ed., ss. 278, 281; Hall, *International Law*, 4th ed., pp. 107 *et seq.*) The occupation must be a State act; but the acts of a mercantile company, like the British African Companies, acting under a charter enabling it to form establishments and exercise jurisdiction in an uncivilised country, are in the same category in point of competence as those of commissioned agents of the State. (On the international law of occupation, see Hall, *International Law*, 4th ed., pp. 106 *et seq.*; Phillimore, *International Law*, 3rd ed., vol. i. pp. 345 *et seq.*; Wheaton, *International Law* (3rd ed., Boyd), pp. 254 *et seq.*)

Offence.—See CRIME.

Offer and Acceptance.—This contract is constituted by a proposal to transact, accepted by the person to whom the proposal is made. The existence of the contract depends upon the conjunction of the two elements, the offer creating no obligation apart from the acceptance. Professor G. J. Bell, in one passage (*Principles*, s. 73), says, "An offer is an obligation provisional on acceptance," and, in another (*Commentaries*, 7th ed., i. p. 343),

"An offer is a resolution or engagement, provisional on acceptance, and as such proposed to the opposite party"; but Ld. Stair (*Inst.* i. 10. 2 and 3), in treating of conventional obligations, distinguishes, generally, between resolution and engagement, and, with regard to this particular contract, postpones obligation till the time of acceptance, writing of it thus: "When an offer or tender is made, there is implied a condition that before it becomes obligatory, the party to whom it is made must accept." All are agreed in distinguishing a promise from an offer, as a unilateral obligation, created at once, and independent of any condition of acceptance (*Malcolm*, 1891, 19 R. 278).

The contract, in both its parts, is generally constituted by writing; but it may be created by words or by acts. The parties may be both individuals, or one may be the general public. An offer is made ineffectual by the death or the bankruptcy of the offerer before acceptance.

To complete the contract, the acceptance must be timeous; and a limit of time is generally stated, or it may be implied by the nature of the proposal. When none is stated, an offer may become inoperative through any important change of circumstances, which would make it unsuitable or absurd (*Macrae*, 1885, 13 R. 265, especially per Ld. Pres. Inglis, p. 269; *Heron*, 1867, 5 M. 935). In mercantile transactions the acceptance must be prompt, or even—where, for instance, the material offered quickly deteriorates, or prices fluctuate rapidly—immediate (see Bell, *Com.* i. pp. 343, 344; *Heron, supra*; *Wylie & Lochhead*, 1873, 1 R. 41; *Glasgow, etc., Steam Shipping Co.*, 1873, 1 R. 189; and *Murray*, 1897, 24 R. 965, with regard to Bell's doctrine that at common law a simple offer may be accepted at any time till withdrawn). The introduction of the postal system has led to a general shortening of the time-limit for acceptance, and to the use of such expressed limitations as "in course of post," "in due course," which become binding conditions (Bell, *Com. l.c.*; see *Farries*, 1799, Mor. 8482, 4 Pat. 131). Further, the question has been anxiously discussed whether the act of posting a letter of acceptance constitutes the acceptance,—and prevents withdrawal,—or only the receipt of the letter, the conclusion being, in agreement with the English rule, that the posting completes the contract (see leading cases, *Higgens*, 1847, 9 D. 1407; affd. 1848, 6 Bell's App. 195, and *Thomson*, 1855, 18 D. 1, and elaborate opinions in these cases; also Pollock, *Principles of Contract*, 6th ed., pp. 32–35). The arguments are that the posting—apart from a stipulation for receipt—is the expected compliance with the offer, and that any other rule would lead to much greater inconvenience than arises from occasional delay or failure in the delivery of a duly posted acceptance. The theory seems to be that an offer by letter is in some sort *ad longam manum*, and that the acceptance, when the offer comes to hand, merges with it into the completed contract (so Ld. Ivory, in *Thomson, supra*). The opposite view is upheld by Ld. Justice Bramwell, dissenting, in *Household Fire, etc., Ins. Co. Ltd.*, 1879, 4 Ex. D. 216, a case where the posted acceptance never reached the offerer; also, *obiter*, by Ld. Shand, in *Mason*, 1882, 9 R. p. 890; and cf. *Dowie & Co.*, 1891, 18 R. 986. The accepted doctrine has recently been approved, and applied to the effect that an offer containing the condition, "This for reply by" a day named, is accepted when the letter of acceptance is posted, though not delivered, on the named day (*Jacobsen Sons & Co.*, 1894, 21 R. 654.) Retractation, by post or otherwise, completed before acceptance, nullifies an offer (see *Chapman*, 1892, 19 R. 837: for effect of retractation on acceptance, see *Countess of Dunmore*, 1830, 9 S. 190, and opinions in *Thomson, supra*).

The offer must be met by the acceptance, else there is no contract,

because no *consensus in idem placitum* (Bell, *Com., l.c.*). In *Duke of Hamilton*, 1877, 4 R. 854; affd. 5 R. H. L. 69, where there were two offers for a lease, and no written acceptance,—but entry and possession,—it was held that, as there was no real agreement between the parties, the ambiguous possession did not complete a contract, and the offerer must remove (so also *Anderson*, 1894, 22 R. 105; *Liquidators of Edinburgh Employers, etc., Co.*, 1892, 19 R. 550; *Nelson*, 1889, 16 R. 898; *Verdin Bros.*, 1871, 10 M. 35—a case of order for goods by telegram; cf. *Erskine*, 1871, 9 M. 656). The offer, further, must be accepted as it stands, unaltered. "In the case of offer and acceptance . . . the acceptance must be absolute, and indeed no position is more settled in law than that it must be so" (per Ld. Ivory in *Johnston*, 1855, 18 D. p. 74). The incompetence of adjecting conditions or understandings to an acceptance is well illustrated by *Johnston, supra*; *Dickson*, 1871, 10 M. 41; and *Wylie & Lochhead, supra*. A modified acceptance may, however, constitute an offer from the other party. A condition, of course, cannot be added after acceptance (*Jack*, 1865, 3 M. 554; see *Patten*, 1889, 17 R. 52—a case of sale by sealed offers).

[Stair, *Inst.* i. 3. 9, i. 10. 2–4; Ersk. *Inst.* iii. 3. 88; Bell, *Com.*, 7th ed., vol. i. pp. 343, 589; Bell, *Prin.* ss. 8, 9, 72–79; Bell, *Law of Sale*, pp. 32–36; Brown on *Sale of Goods Act*, pp. 19, 20; Pollock, *Principles of Contracts*, 6th ed., chap. i., and App., Note B.; Addison on *Contracts*, 9th ed., pp. 14–17; Anson on *Contracts*, pt. ii. chap. i.; Chitty on *Contracts*, 13th ed., pp. 8, 551, 665; Benjamin on *Sale*, pt. i. bk. i. s. 1.]

See ADVERTISEMENT; AUCTION; CONTRACT; LOCUS PŒNITENTIÆ; OBLIGATION.

Offer.—See AUCTION.

Office.—An office is a position or situation to which certain duties are attached. The person occupying an office is bound to perform the duties attached thereto, and he is entitled to the privileges and emoluments thereof.

Offices are of different kinds, and may be divided in various ways, *e.g.* Public and Private, Civil and Military, Ministerial and Judicial, Heritable and Personal. The last division used to be of great importance when there were many heritable offices in Scotland. All heritable offices and all patrimonial offices, such as are descendible to heirs and assignees, may be sold or otherwise conveyed by the holder, and may be adjudged by his creditors (Ersk. *Inst.* ii. 12. 7; Bell, *Com.* i. 125; Brown on *Sale*, 126; *Blair*, 1737, Mor. 148; *Cockburn*, 1747, Mor. 150, aff. 1755, 1 Pat. App. 603; *Earl of Caithness*, 1749, Mor. 163; *Moncreiff of Reidy*, 1693, Fount. i. 543, 553; *Gardner*, 1835, 13 S. 664; *Bruce*, 1839, 1 D. 583). Offices which are personal and not given to the grantee's heirs and assignees cannot be conveyed or adjudged (*Wilson*, 1759, Mor. 165). In former times the practice upon this point was not uniform, and there were several instances of the sale of offices of trust connected even with the administration of justice, and which implied a *delectus personæ* (Brown on *Sale, ut supra*; Bell, *Com.* i. 125). One of these cases came under the notice of the House of Lords in 1802. There had been a sale of the office of Depute Clerk of the Bills, and a dispute arose between the Principal Clerk, by whom it had been sold, and the Depute Clerk, as to the import of the bargain. The question of the legality of the sale was not directly before the House of

Lords, but the Lord Chancellor (Ld. Eldon), in moving a judgment affirming the decision of the Court of Session, took especial care to prevent its being supposed that there was any intention to decide the question of the legality of the sale of the office (*Stewart*, 1802, 4 Pat. App. 286). The sale of offices of public trust is prohibited under penalties by 49 Geo. III. c. 126. But that Act does not apply to offices which were legally saleable before the date of its passing (s. 9). Neither does it apply to agreements as to salaries and allowances between principals and deputies in the case of offices in which it is lawful to appoint deputies (s. 10), nor to agreements as to reservations of payments out of the fees or profits of any office to a former holder (s. 11).

It is illegal for two public officers to agree that, for a consideration, one shall do the work of both (*Mason*, 1844, 7 D. 160). The question was raised but not decided whether, in the case of a vacancy, when one officer does the work of another officer, he is entitled to draw the emoluments attached to that office (*Murray*, 1837, 15 S. 1184). An agreement by an officer in bad health to share the emoluments of his office with an assistant was sustained (*Haldane*, 6 March 1812, F. C.). It is illegal for persons procuring an office for another to stipulate, in return, for a sum of money either for themselves or for third parties (*Dalrymple*, 1786, Mor. 9531). Patrons of an office are not entitled to make an agreement with one of two candidates, that he will pay an annuity to the other candidate if that other retires from the canvass. Such a bargain is *pactum illicitum* (*Thomson*, 16 Feb. 1811, F. C.).

The tenure of public offices varies. They may be held (*a*) during pleasure, (*b*) for a definite term, (*c*) *ad vitam aut culpam*. The tenure must be expressed in the commission or appointment, or is to be implied from the nature of the office. All civil and military servants of the Crown, excepting persons holding judicial offices, and except in certain special cases where it is otherwise provided, hold office during the pleasure of the Crown and may be dismissed at any time (*in re Tufnell*, 1876, 3 Ch. D. 164; *Dunn*, 1895, W. N. 160; *Shenton*, [1895] App. Ca. 229). But it would appear that such an officer has not the correlative right of resignation at any time and in any circumstances he pleases (*ex parte Hall*, 1887, 19 Q. B. D. 13). For the tenure of an office to be *ad vitam aut culpam* "either the appointment must expressly bear that the appointee is to hold his 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*" (per Ld. Pres. Inglis in *Hastie*, 1889, 16 R. 715, at p. 731).

Although offices of trust cannot be adjudged for debt, the salaries and emoluments attached to them may be arrested for the benefit of the creditors of the holder of the office, at anyrate *quoad excessum* (Bell, *Com.* i. 126; *Laidlaw*, 1801, Mor. "Arrestment," App. No. 4). This does not apply to salaries and pensions paid by the Crown. These, apart from statutory prohibition, are held at common law not to be arrestable (Stair, ii. 5. 18; iii. 1. 37; Ersk. iii. 6. 7; Bell, *Com.* i. 128; A. S., 11 June 1613; Hay Campbell's *Coll.* p. 71; Spotiswoode's *Practicks*, 228; *Dick*, 1676, Mor. 10387), including half pay (*Smith*, 13 Dec. 1815, F. C.). Arrears of pay or salary are arrestable (Bell, *Com.* i. 128; Bankt. i. 6. 14; *Brodie*, 1715, Mor. 709). The Bankruptcy Act makes provision for disposal of the salary of certain Crown officers in the event of their bankruptcy (19 & 20 Vict. c. 79, s. 149). As to the legality of an assignation of the fees of an office in trust for creditors, see *Hill*, 1841, 2 Rob. App. 524.

Against officials guilty of malversation or misconduct in office a party aggrieved has in some cases a remedy in a petition and complaint to the Court of Session (Mackay, *Practice*, i. 438). To what classes of officials this process does or does not apply is not quite clear, but it would seem as if in principle it might extend to all public officers who are not removable at the pleasure of the Crown. It requires the concurrence of the Lord Advocate.

When a person exercises the powers of an office, to which it turns out afterwards that he had no title, questions may arise as to the validity of his official acts. Provided he be *holden and reputed* the holder of the office at the time, the acts which he does within the power and jurisdiction of his office are to be held good (Stair, iv. 42. 12; Ersk. *Inst.* iv. 2. 6; *Douglas*, 1615, Mor. 3092; *Livingstone*, 1849, 6 Bell's App. 469; *M'Gregor*, 8 Dec. 1897, 35 S. L. R. 273).

A holder of an office obstructed in the exercise of his duties is entitled to an interdict against persons so obstructing him (*Drysdale*, 1825, 4 S. 126, N. E. 128; *Lawson*, 22 Jan. 1898, 5 S. L. T. No. 269). But where there are two claimants to an office, the question of title cannot be settled in a process of interdict at the instance of one of them (*Fleming*, 1839, Macl. & R. 547). In one case the right to an office was tried in a multiplepoinding (*Cattanach*, 1744, Mor. 12253).

By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), certain limitations are placed upon the right of action against public officials for acts done in the execution of their duty.

Officers of State.—Sir George Mackenzie points out (*Observations on Precedency*, chap. viii.) that in Scotland there were previously both Officers of the Crown and Officers of State. The Officers of the Crown were all designed "of Scotland," as *Constabularius Scotiæ*, etc. By the Act 31 Parl. 11 James VI., the Officers of the Crown are declared to be the Treasurer, the Secretary, the Collector (an office subsequently joined with that of Treasurer), the Justice-General, the Justice-Clerk, the Advocate, the Master of Requests, and the Clerk of Register. "Though these be called Officers of the Crown there, I conceive they differ not from the Officers of State, and these words *Officers of the Crown* and *Officers of State* are now equipollent terms, so far that all the Officers of State are Officers of the Crown by this Act. But the High Chamberlain, Constable, Admiral and Marishal are Officers of the Crown, but are not Officers of State; the speciality of Officers of State being, that in all Acts or Meetings which concern the State they sit as members by virtue of their office, as in Parliaments, Conventions, etc., where the Chamberlain and Admiral come not as such, nor the Constable and Marishals, if they were not Earls" (Mackenzie, *ibid.*). There appear to have been frequent rivalries for precedence amongst the Officers of State; in consequence of which King James, in Privy Council on 17 June 1617, declared that in Parliament only eight Officers of State should sit as such. These he ranked by Act of Council thus: Treasurer, Privy-Seal, Secretary, Register, Advocate, Justice-Clerk, Treasurer-Depute, Master of Requests. In several Parliaments, however, the Chancellor, the Collector, and the Comptroller sat as Officers of State, notwithstanding this Act (Mackenzie, *ibid.*). Now, of course, Officers of State, as such, have no right to seats in Parliament (Ersk. i. 3. 8).

At the present day the principal Officers of State are the Keepers of the Great and Privy Seals, the Lord Clerk-Register, the Lord Justice-Clerk, and the Lord Advocate. By 48 & 49 Vict. c. 61, s. 8, the Secretary for

Scotland is Keeper of the Great Seal, with all the powers, privileges, and liberties belonging to the same by law and custom.

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). See LORD ADVOCATE. As to former law and practice, see Shand, *Practice*, i. 240; *Lockhart*, 1752, Mor. 11993; and the learned opinion of Ld. Medwyn in *Ld. Dunglas*, 1836, 15 S. 314.

Old and New Extent.—See EXTENT.

Omissa et male appreciata.—See AD OMISSA, ETC.

Oneris ferendi, Servitude.—The *servitus oneris ferendi* was one of the principal urban servitudes recognised in Roman law. It was the right to use the wall or pillar of a neighbour to support one's house. Originally it was probably merely a right to rest the beams of the dominant tenement on the adjacent wall of the servient tenement; but in later times, when the system of flatted houses became common in Rome, the servitude was adapted to meet the new conditions, and its scope was greatly extended (*Dig.* 39. 2. 47). In Roman law the servitude is closely related to the *servitus tigni immittendi*, the right to let a beam into the wall of the servient tenement. The servitude *oneris ferendi*, however, differed not only from the servitude *tigni immittendi*, but also from all other servitudes, in carrying with it an obligation on the owner of the servient tenement to keep his property in such a state of repair as to render it adequate to discharge its function of support (*Dig.* 8. 5. 6). The origin of this peculiarity has been the subject of considerable controversy. Erskine, in his *Institutes* (ii. 9. 7), expresses the opinion that the peculiarity arose from the precise form of words used by the Romans in constituting the servitude: *Paries oneri ferundo, uti nunc est, ita sit* (*Dig.* 8. 2. 33).

In the law of Scotland this servitude is fully recognised. "The prime positive servitude of city tenements," observes Ld. Stair, "is the servitude of support, whereby the servient tenement is liable to bear any burden for the use of the dominant; and that either by laying on the weight upon its walls, or other parts thereof; or by putting in joists or other means of support in the walls of the same; or otherwise, this servitude may be by bearing the pressure, or putt, of any building for the use of the dominant tenement, as of a vault, or pend, or the like: such is the servitude of superstructure, whereby any building may be built upon the servient tenement" (Stair, ii. 7. 6). On the question whether the owner of the servient tenement is obliged to uphold or repair his tenement so as to make the servitude of support effectual, Stair concludes that the obligation to repair may be a part of the servitude passing with the servient tenement, even to singular successors, "if the constituent has granted this servitude so as to uphold it, or if by custom he hath been made to uphold it, not upon the account of his own tenement, but of the dominant"; but that, if such an obligation to repair is not so constituted by grant, or set up by custom, the servitude itself imports no obligation of repair on the owner of the servient tenement. In the latter case, the measure of the right of the owner of the dominant tenement, by reason of his servitude, is to repair the servient

tenement for his own use, and enforce a claim for recompense against the servient owner *in quantum lucratus* (Stair, ii. 7. 6). Both Erskine (*Inst.* ii. 9. 8) and Bell (*Prin.* s. 1003) follow Ld. Stair in holding that in Scotland, apart from custom or special contract, the servient owner is bound merely to suffer the burden, and is not bound to repair or maintain in sufficiency the wall on which the support is rested. Further, it would appear that, in case of an obligation to repair expressly constituted, separable from the servitude, singular successors will not be bound by it, unless it is kept up in the titles like other real burdens or conditions (*Nicolson*, 1708, Mor. 14516). In *Murray* (1715, Mor. 14521) the owner of a servient tenement burdened with a servitude of supporting the joists and laid-to chimneys of the dominant tenement, took down the gable of his house, which had got into a ruinous condition, with the result that the chimneys of the dominant tenement came down also. The owner of the dominant tenement thereupon brought an action to compel the servient owner to rebuild the wall and laid-to chimneys as before at his own expense. The texts of the Roman law were discussed at great length, and ultimately it was held that the servient owner was, in any case, liable in the expense of taking down the wall and the chimneys, and was bound to rebuild the wall as before, but that he was not liable in the expense of re-erecting the laid-to chimneys, if he could show that the former condition of the wall was ruinous, so that its demolition was a matter of necessity and not of mere convenience.

In rebuilding an old tenement within burgh, it has been held that strict conformity to the old plan is unnecessary; but it was remitted to men of skill to ascertain that under the new plan a servitude *oneris ferendi* was not increased, nor any injury done to the servient tenement (*Young*, 1831, 9 S. 500). The rights and obligations of the owners of flats or lands in flatted houses or tenements, and the relations of their owners *inter se*, involve principles more complex than the simple rules of servitudes, and are determined by the doctrine "of common interest" (see COMMON INTEREST).

[Bankt. ii. 7. 7; Stair, ii. 7. 6; Ersk. ii. 9. 7; Bell, *Prin.* 1003; Rankine on *Landownership*, ch. 33.]

See TIGNI IMMITTENDI, SERVITUDE.

Onerous Deeds.—See CONSIDERATION.

Onus probandi.—See AFFIRMANTI INCUMBIT PROBATIO; PRESUMPTIONS. See also EVIDENCE.

Open Charters are charters the executive clause in which has not been exhausted (see FEU-CHARTER, vol. v. p. 265). The term may also be used with special reference to what are otherwise known as "assignable charters," that is to say, a charter which authorises, or does not prohibit, assignation thereof before infeftment. This was a matter of great importance before 1874 in connection with casualties. It arose as regards both original charters and writs by progress. The point was, that until infeftment there is no vassal (see INFEFTMENT, vol. vi. p. 327). It is still very general to insert in charters stipulations on this subject. These commonly are (1) that assignees before infeftment are excluded, and (2) that the charter must be feudalised within a short period, say three months. It is not known that any question has been raised as to the validity of such clauses, but it is obvious,

especially as regards the first, that there may be a plea on the want of interest on the part of the superior. It is, however, convenient in point of fact that feu-rights should be feudalised, for otherwise the superior may get into difficulty over the warrandice therein contained. Thus suppose a proprietor grants a feu-right; it is not feudalised; the estate is thereafter sold: under such circumstances it does not appear sufficient to qualify the *warrandice* in the conveyance of the estate by an exception of feu-rights in general terms; it would appear necessary to qualify the *conveyance* by excepting the particular feu-right, so far, that is, as regards the *dominium utile* of the feu.

Open Doors, Letters of.—These were executorial letters passing the signet which were formerly issued when a messenger employed to execute a *poinding* (*q.v.*) returned an execution setting forth that the debtor's goods, or some of them, were within lockfast places, and so were inaccessible to the messenger. On this execution (called an Execution of Lockfast Doors) being returned, letters of open doors were issued as a matter of course. These letters, after reciting the facts, gave new warrant for poinding, and continued, "and for that purpose, if needful, that ye *make* shut and lockfast houses, gates and doors, and other lockfast places, *open and patent*, and use Our keys thereto according to the order and practice observed in the like cases," etc. (*Juridical Styles*, iii. 373). Messengers who forcibly entered without such warrant were liable in damages (*Sinclair*, Mor. 13966). But no letters were required to enable messengers to open presses or closets in a house to which they had lawfully obtained entrance (*Muirhead*, Elchies, "Poinding," No. 3); or where entrance could be made without violence, as by removing wood piled up against a door (*Steven*, Mor. 10539).

By the Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), all extracts of decrees issued by the Court of Session (s. 1) or by the Sheriff Courts (s. 9) shall contain warrant to poind, and, for that purpose, to open shut and lockfast places. This has in practice done away with the need for letters of open doors, but as the older practice was expressly saved by the Debtors (Scotland) Act, 1838, it is still competent to poind on letters of horning, in which case letters of open doors might still be necessary.

Letters of caption have always contained warrant to open shut and lockfast places.

[Stair, iv. 47. 40; More, *Notes*, ccccxxii; Bankt. vol. iii. p. 25, s. 8; Ersk. iii. 6. 25; Campbell on *Citation and Diligence*, 255.]

See also POINDING.

Open Doors at Trials.—See DOORS, CLOSED.

Open Policy.—See MARINE INSURANCE (vol. viii. p. 222).

Opening Letters.—See POST OFFICE OFFENCES.

Opinion Evidence.—The opinions of witnesses are not in general admissible as evidence. The *ratio* of the rule is that the witnesses are not to usurp the function of the tribunal, whose it is to determine matters of fact (Best, *Evidence*, ss. 511, 512). Thus, where the point was

whether certain words were used in their ordinary sense, it was held that the proper form of the question was not "What did you understand by those words?" but "Was there anything to prevent those words from conveying the meaning which they would ordinarily convey?" (*Daines*, 3 Ex. 200, per Pollock, C. B.; see also *Apthorpe*, 1882, 10 R. 344; Dickson, s. 391).

The rule yields, however, where the subject-matter of the inquiry is such that the tribunal is presumably less capable of forming an opinion regarding it than are experts, *i.e.* persons especially conversant with it, either practically or theoretically (Best, *Evidence*, s. 513; Taylor, *Evidence*, s. 1417, note 4). Under this exception the opinions of medical men (Dickson, s. 397), picture dealers (*M'Lennan*, 1843, 5 D. 1032), sporting men (*Gibson*, 1848, 11 D. 343), lighthouse-keepers (*Williams*, 1884, 11 R. 982), antiquaries (*Tracy Peerage*, 10 Cl. & Fin. 191), mechanical engineers (*The "Frerano,"* 1895, 22 R. 237), engravers (*Hamilton*, 1869, 8 M. 323), and the like (see Taylor, *Evidence*, ss. 1417, 1418) have been admitted, the fact that the witness was an expert having been first ascertained (see Greenleaf, *Evidence*, 15th ed., p. 577, note (*b*)). The opinion of such a person is admissible only on points regarding which his special knowledge entitles him to speak (*Morrison*, 1862, 24 D. 625, per Ld. J.-C. Inglis; *Connecticut Mutual Life Insur. Co.*, 111 U. S. Rep. 612); and, accordingly, in a prosecution for rape it was held inadmissible to ask a medical witness whether, on the supposition of the woman being a virgin, it was possible for the pannel to master her when one of his hands was behind her back and the other on her mouth (*Henderson*, 1836, 1 Swin. 316). Sometimes it is difficult to determine whether a particular point does or does not involve special knowledge (see *Baker & Adams*, 1856, 18 D. 691; Taylor, *Evidence*, s. 1420). Since scientific witnesses must know the facts as to which they are to speak, it is not in general a ground for their exclusion that they have been informed of the facts to be proved, or have seen the witnesses or their precognitions. They should not, however, be permitted to see the precognitions of other skilled witnesses whose opinions are to be taken on the same point (*Richardson*, 1824, S. 125; *Mitchell*, 1850, J. Shaw, 293; *Fraser*, 1841, 3 D. 1132. As to the limits of this practice, see *M'Lure*, 1846, Arkley, 448).

It is within the discretion of the Court (*Granger*, 1878, 4 Coup. 86) to allow the presence of medical witnesses during the trial, on special application (*Smith*, 1857, 2 Irv. 641; *Murray*, 1858, 3 Irv. 262; *Pritchard*, 1865, 5 Irv. 88), provided that they are withdrawn while any evidence of medical opinion is being given (*Mackenzie*, 1827, Syme, 158; *Braids*, 1834, 6 Sc. Jur. 220; *Donaldson*, 1836, Bell's *Notes*, 269; *Murray, ut supra*; *Pritchard, ut supra*; *Laurie*, 1889, 2 White, 326). Subject to this proviso, the evidence of the deceased's medical attendant has been admitted in a murder trial, not only as to the opinion which he had formed on the whole evidence as to the cause of death, but as to facts to which he alone could speak (*Pritchard, ut supra*). But it is incompetent to examine such a witness, who has been in Court during the trial, as to matters of fact to which other witnesses have spoken (*Newlands*, 1833, Bell's *Notes*, 269; *Jeffrey*, 1838, 2 Swin. 113).

Books of science are not evidence. The proper mode of proving what is set forth therein is by the examination of scientific witnesses. Such a witness may refresh his memory by referring to authoritative works of science; *e.g.* a lawyer may refer to text-books, decisions, statutes, etc., for that purpose. Further, passages from such works may be made evidence, if the witness depone that he agrees with the views therein expressed (*Sussex*

Peerage case, 11 Cl. & Fin. 114; *Darby*, 1 H. & W. 1; Dickson, s. 1224; Taylor, *Evidence*, ss. 1422, 1423). See WITNESS.

Medical or scientific facts or appearances "are generally so minute and detailed that they cannot with safety be intrusted to the memory of the witness. But much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection" (2 Alison, 541). Such reports are admitted in the daily practice of the criminal Courts; are made evidence by being read over by the witness in the box and sworn to by him, and are libelled on and lodged with the Clerk of Court like the other productions in the case (Dickson, ss. 1779, 1780; *Macpherson*, 1845, 2 Br. 450; *Macnamara*, 1861, 4 Irv. 131).

In the case of contracts *in re mercatoria*, the evidence of experts is frequently admitted in order to explain technicalities, or to supply customary conditions to which the parties have presumably consented (*Schuurmans*, 1832, 10 S. 839; see PAROLE).

Foreign law, *i.e.* law other than Scots law (see FOREIGN), must be proved as matter of fact (*Sussex Peerage* case, *ut supra*; *Mortimer*, 1835, 14 S. 94). A person will be regarded as qualified to give evidence on the point only if he be a professional lawyer belonging to the country of which the law is in question, or be *peritus jure officii* (*Sussex Peerage* case, *ut supra*). Knowledge of the law of a foreign country acquired merely by study at a university in this country is not regarded as sufficient (*Bristow*, 5 Ex. 275; *re Bonelli*, L. R. 1 P. D. 69). Where the law in question is that of an English colony, in which English law is administered, the opinion of English counsel has been taken (*Thomson's Trs.*, 1851, 14 D. 217, where the previous authorities are cited). Where the opinions differ, the Court must deal with the point just as in any other case of conflicting evidence (*Kerr*, 1840, 2 D. 1001; see *Dalrymple*, 2 Hag. Con. 54). There are statutory facilities for the ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof (22 & 23 Vict. c. 63; see *Lord*, 1860, 23 D. 111; *De Blonay*, 1863, 1 M. 1147; see M'Laren, *Wills*, s. 107), and of the law of foreign countries when pleaded in Courts within Her Majesty's dominions (24 Vict. c. 11). See FOREIGN.

The opinion of experts is frequently obtained under a remit from the Court (see Mackay, *Manual*, pp. 274 *et seq.* As to remits made with and without consent of parties, see, in addition to the authorities there cited, *Allan*, 1891, 18 R. 784; *Mags. of Kilmarnock*, 1897, 24 R. 388). A pure question of law is not the proper subject of a remit (*Mushet*, 1851, 13 D. 715; *Quinn*, 1888, 15 R. 776; cf. *Philp*, 1838, 16 S. 427), save when made for the purpose of ascertaining the law of a foreign country (*Rutherford*, 1838, 1 D. 111; *Fyffe*, 1840, 2 D. 1001; *Welsh*, 1844, 7 D. 213). In *Maberley & Co.*, 1834, 12 S. 902, it was observed that in a case sent to a jury foreign law must be proved by witnesses (see *Rutherford, ut supra*). When the persons to whom the remit is made differ in opinion, the proper course is to remit to other persons (*Fyffe, ut supra*). An opinion will not be remitted for reconsideration unless it be incomplete, or proceed upon some error in fact, or be affected by some irregularity of procedure (*Cranstoun*, 1839, 1 D. 521; *Welsh, ut supra*; cf. *Galbreath*, 1843, 5 D. 423). If the opinions returned be clear and unanimous, the Court will apply them as conclusive of the point remitted (*Stein's Assignees*, 1831, 5 W. & S. 47; *Cranstoun, ut supra*; *Baird*, 1854, 16 D. 1088; see *Tayler*, 1847, 9 D. 1504; *Thomson's Trs.*, 1851, 14 D. 217). But observe that where the point is one of English or Irish law, although the Scots Courts will treat the opinion as conclusive, the House of Lords, being not merely a Scots, but an English

and Irish, Court of Appeal, will not hold themselves bound by it (*Stein's Assignees, ut supra*).

The identification of persons and things (see COMPARATIO LITERARUM; IDENTIFICATION) is in every case the result of a process of comparison. "You compare in your mind the man you have seen with the man you see at the trial" (*Fryer*, 13 Jur. 542, per Parke, B.); and the opinion as to his identity rests on observation of a number of complex facts which are present or absent in the subjects of comparison. It is matter of common practice to admit evidence to the effect that cries heard were those of a man or of a woman, as the case may be (Macdonald, *Crimes*, 466); that a man appeared to be pleased, confused, excited, or the like; that a building looked old, or fresh, or decayed (Best, *Evidence*, s. 517). It is the result of the comparison which is material to the inquiry—not the complex facts which lead to that result, and which, owing to their nature, cannot be brought before the Court (*ib.*). Of course the witness may be cross-examined as to the grounds of his opinion (*ib.*; cf. Dickson, s. 401; see *Shiells*, 1846, Arkley, 171).

A witness may be examined as to his opinion when the question is not whether it is well- or ill-founded, but whether he holds it (*Humphreys*, 1839, Swin. 110); and in the case of *Hamilton*, 1827, 4 Mur. 240, it was held competent to ask the President of the College of Surgeons whether in his opinion statements made by a medical man regarding a professional matter were true, the point in issue being whether the person in making them knew them to be false (see Dickson, 393; *Kingan*, 1828, 4 Mur. 488).

[Dickson, ss. 391–401, 410, 1596, 1597, 1760; Taylor, *Evidence*, ss. 1414–1426; Kirkpatrick, *Evidence*, ss. 84–87.]

See COMPARATIO LITERARUM; PAROLE EVIDENCE; WITNESS.

Oppression.—See SUSPENSION.

Ordinary, Lord.—In the Court of Session the Courts of first instance are presided over by five Lords Ordinary, the senior of whom takes his place in either the First or Second Division on the death or resignation of any appeal judge, other than the Lord President or Lord Justice-Clerk. The pursuer in an action has the right to call his case before any Lord Ordinary he pleases, but this right is limited by the power of the Lord President to transfer causes from one Lord Ordinary to another (20 & 21 Vict. c. 56, s. 1). In case of the temporary absence of a Lord Ordinary, another judge may call his motion roll without transference. The junior Lord Ordinary has sole jurisdiction in all summary petitions and applications not incidental to actions actually depending at the time of presenting the same (*ib.* s. 4); his judgments in such petitions are subject to review (*Soutar*, 1890, 18 R. 86); he is also Lord Ordinary on the Bills, and does all Bill Chamber work during session (see BILL CHAMBER). In addition, he conducts all sequestration proceedings in the Court of Session not appropriated to the Inner House. The second junior Lord Ordinary is judge in all teind causes formerly appropriated to the junior Lord Ordinary (1 & 2 Vict. c. 118, s. 2; 53 Geo. III. c. 64, s. 3; 6 Geo. IV. c. 120, s. 54; 31 & 32 Vict. c. 96, ss. 14, 20). The third junior Lord Ordinary is judge in Exchequer causes, except in such cases as are expressly excepted by the Act 19 & 20 Vict. c. 56, s. 3. Two Lords Ordinary, specially appointed, sit on appeals under the Lands Valuation Acts, while one Lord Ordinary sits

along with two Inner House judges to hear registration appeals. Two judges, who may or may not be Lords Ordinary, sit on election petitions.

The summary petitions brought before the junior Lord Ordinary in the first instance are :—

1. Entail petitions.

2. Petitions under the General Railway and Lands Clauses Acts, and any local or personal Acts.

3. Petitions relative to money consigned under statute, subject to the order of the Court of Session.

4. Petition for the appointment of factors and curators, or by these persons for special powers, or exoneration and discharge.

5. Petitions under the Pupils Protection Act.

6. All summary petitions not incidental to a depending litigation.

See Petition.

Outer House.—See Session, Court of.

Outlawry.—Outlawry is the condition resulting from sentence of fugitation pronounced against a criminal by the High Court of Justiciary on account of his failure, without just excuse, to obey a citation to appear before that Court. If there has been *bonâ fide* inability to obey the citation, and evidence to this effect is adduced, sentence of fugitation will not be pronounced (*Alcock*, 1856, 2 Irv. 615).

When a person has been outlawed, he forfeits almost the whole of the legal rights which he enjoyed as a free citizen. He is debarred from giving evidence as a witness, he cannot act as a juryman, nor can he be a party to any legal process, civil or criminal. He cannot invoke the protection of the law, so long as his outlawry subsists. He is prohibited from holding any place of trust. He may be denounced as a rebel. If this denunciation takes place, his moveable estate is escheated, and, if he remains a rebel for a year, the profits of his heritage are forfeited to his superior during the lifetime of the rebel. The outlaw, however, may dispose absolutely of the fee of his heritable estate (*Macrae*, 1839, Macl. & R. 645).

The prosecutor may also obtain letters of caption against the outlaw, and imprison him if he can be found within the kingdom. An outlaw who has thus been apprehended cannot be liberated on bail, whatever the nature of the crime may have been with which he was originally charged.

[Stair, iv. 3. 30; Ersk. iii. 7. 37; Hume, ii. 270; Alison, ii. 349; Macdonald, 428.]

See Fugitation.

Outsucken Multures.—Outsucken (or out-town) multures were the payments in kind for grinding grain charged to those who resorted to a mill without being under obligation to do so, they being outside the astricted area (sucken or town). They may thus be regarded as the ordinary market value of the services rendered. The rate was frequently a peck in six firlots (one twenty-fourth) (Statuta Gildæ, xxii.; Thoms. Acts, i. 435), but it appears sometimes as one twenty-first, and sometimes as one thirty-second. It was, of course, liable to adjustment between the parties.

As the resort of those outside the sucken to the mill was purely

voluntary, no proof of prescriptive payment of outsucken multures was of any avail to establish astriction (*Hamilton*, 1686, Mor. 15988, 3 B. S. 655).

See MULTURES; THIRLAGE.

Oversman.—An oversman is a person appointed to act as umpire in an arbitration and to decide the questions submitted in the event of the arbiters failing to agree. He must be appointed either directly by the parties-submitters, or indirectly through the arbiters, or by the Court. Arbiters have power to name an oversman unless otherwise contracted in the submission, and, should they fail to agree, the Court will make an appointment on the application of either party (57 & 58 Vict. c. 40, s. 4). The competent and usual practice in such cases is for the arbiters to name an oversman immediately on accepting office, and before the submission has been proceeded with (*Bryson*, 1823, 2 S. 382); and he usually sits with the arbiters to hear the evidence and arguments in the cause (Bell, *Arbitration*, 191).

In choosing an oversman the arbiters must apply their minds to the merits of their nominee, and they may not appoint any person who has an interest in the question at issue, or a share in a company which is one of the parties to the reference (*Smith*, 1887, 14 R. 931). In this case the arbiters had considered the names of two gentlemen. They agreed that both the men were good, but each preferred his own choice. So they drew lots and appointed oversman him whom chance selected. The Court held that the appointment was good in so far as the method of selection went. Ld. Lees summed up the law thus:—

"As to the question of casting lots the law stands upon a clear principle. It requires that both arbiters shall exercise a judgment upon the clear principle—the fitness of the person selected. A bare selection by lot cannot therefore be supported. If however each arbiter exercises his judgment as to the fitness of two persons, and both agree that both of these are fit and proper for the office, it is no objection that lots have been cast as to which of them shall be appointed. In such a case it is essential that both of the persons for whom lots have been cast must have been selected by each of the arbiters as fit for the appointment." His lordship referred to *in re Cassel*, 9 B. M. B. & C. 624; *Hodson*, 7 Dowl. P. R. 369; *European and American S. S. Co.*, 8 Scott's C. B. Reports, N. S. 397; Bell on *Arbitration*; *Neale*, 16 East, 31; *Hopper*, 1866, 2 Q. B. 367.

Oversmen are also appointed in references under the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19). Sec. 26 of this Act provides that the arbiters shall appoint an oversman before entering upon the reference; and in the event of their failing to do so within seven days, then an appointment will be made by the Lord Ordinary, on petition by either of the parties (s. 27).

The oversman acts only in the event of the arbiters differing in opinion. In that case he becomes sole arbiter of the questions at issue, and the functions of the arbiters become extinct (Bell on *Arbitration*, 189; Bell, *Conveyancing*, i. 383; Menzies, 402; *Lang*, 1855, 2 Macq. 93). His powers are called into operation by a formal act of devolution on the part of the arbiters. The devolution should be in writing, but need not be probative (*Telfer*, 1823, 2 S. 167). In one case the Court sustained the devolution where the arbiters had written separate holograph letters to the oversman, stating that they had disagreed, and the oversman thereupon considered the submission and made an award (*Mackenzie*, 1868, 40 Jur. 499); and Mr. Bell discusses cases where the devolution was inferred from the terms of the arbiters' award

(*Arbitration*, 192–195). But the undoubted course is a formal minute of devolution, signed by the arbiters and accepted by the oversman. If an arbiter refuse to execute a minute of devolution, it is competent to compel him by process in the Sheriff Court (*Sinclar*, 1884, 11 R. 1159).

The devolution should devolve upon the oversman the whole of the questions remaining undecided, and not merely the points upon which the arbiters disagree. For the office of the arbiters becomes defunct by their act of devolution; and if they have neglected to devolve certain questions, it is no longer possible to obtain a judgment upon the whole submission from the oversman, who has become, as already said, sole arbiter (*Lang, ut supra*; *Runciman*, 1831, 9 S. 629). The parties are entitled either to a judgment on the whole submission by the arbiters, or to a judgment on the whole case by the oversman. But where the arbiters had agreed on certain points and disagreed on others, and then devolved the submission on the oversman, an award wherein he adopted the findings of the arbiters on the questions as to which they concurred, and decided for himself only the points of difference, was held to be good, because the submitters had got the decision of all the arbiters they had chosen on all the points in dispute (*Nivison*, 1883, 11 R. 182).

In the event of the oversman dying after devolution and before he has issued an award, the submission falls (Bell on *Arbitration*, 189). The oversman should issue notes of his proposed findings.

See Arbitration.

Overtures.—See Act of Assembly; Church Courts.

Oysters.—See Fishings.

Pactum.—An informal exchange of consent was not enough, in the ordinary case, to make a *contractus* in Roman law, unless it were attended by a *causa civilis* which the law recognised. This *causa* constituted the mark, varying for different classes of contract, which distinguished any particular class of agreements from the common herd of *pacta* and made them actionable. Informal agreements, not clothed with a *causa*, and not coming within any of the privileged classes of *pacta*, were called *nuda pacta*, and could not be sued on. *Ex nudo pacto inter cives Romanos actio non nascitur* (Paul, *Sent.* rec. ii. 14. 1). At the same time, an agreement of this sort afforded a good plea in defence. *Nuda pactio obligationem non parit, sed parit exceptionem* (*Dig.* ii. 14. 7. 4). Indeed, according to Savigny, a *nudum pactum* in Roman law possessed all the incidents of a natural obligation. See Obligation in Roman Law.

Nevertheless certain *pacta* were enforceable by action. By way of carrying out the metaphor in the expression *nudum pactum*, these are called *pacta vestita*. Of these some were actionable even by the classical civil law; others were actionable by the prætorian law; and a third class became actionable only by the later imperial legislation.

The pacts actionable in the classical law were those known as *pacta adjecta*, *i.e.* agreements accessory to a *negotium bonæ fidei*. A *negotium*

bonæ fidei binds the parties to do all that is required by *bona fides*, and this carries with it an obligation to do what was undertaken in any accessory agreement entered into at the time of the principal contract. Thus if the parties to a contract of sale agree in an accessory pact that, in default of punctual performance, the defaulting party shall pay a certain penalty, the pact is enforceable, *i.e.* the penalty is recoverable by an action on the contract of sale. *In bonæ fidei contractibus ita demum ex pacto actio competit, si ex continenti fiat* (*C.* 2. 3. 13).

The pacts actionable in the prætorian law are known as *prætoria pacta*. Thus the prætors rendered actionable the so-called *constitutum debiti*, a promise to pay a subsisting debt, whether it be one's own debt (*constitutum debiti proprii*) or the debt of another (*constitutum debiti alieni*). The appropriate remedy on this pact was the *actio de pecunia constituta*.

Pacts rendered actionable by the later imperial law are *pacta legitima*. Thus an informal agreement to give a donation (*pactum donationis*) was binding in Justinian's time, up to the extent of five hundred solidi. So in Justinian's time an informal undertaking to give a *dos* constituted the *dos*, and was enforceable. Even after all these extensions, however, matters stood thus: "The stipulation, as the only formal agreement existing in Justinian's time, gave a right of action. Certain particular classes of agreements also gave a right of action, even if informally made. All other informal agreements (*nuda pacta*) gave no right of action. This last proposition, that *nuda pacta* gave no right of action, may be regarded as the most characteristic principle of the Roman law of contract" (Savigny, *Oblig.* ii. 231).

The term *nudum pactum* is sometimes used in Roman law in a special meaning, to express an agreement not followed by delivery, as in the well-known passage: *Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur* (*C.* 2. 3. 20).

In England *nudum pactum* means an agreement made without consideration. The change in the meaning of the term from its use in Roman law to its use in English law, is traced in Pollock on *Contract*, pp. 695 *et seq.* The law of England recognises no promise, unless it be under seal, for which there is no consideration, and, consequently, the topic of consideration is dealt with in great detail in English and American books on contract. In Scotland no preceding consideration is essential to the validity of a promise, and hence no distinction is recognised between *pacta nuda* and *non nuda*. If it is proved that an obligation was undertaken, the granter can be compelled to fulfil it, or is subjected in damages for non-fulfilment, whether a consideration has been given for the obligation or not (Bell, *Prin.* ss. 8, 64). In *Williamson*, 1845, 8 D. 156, it was held that the quality of *nudum pactum*, or the fact that consideration was wanting to a contract, was of the essence of the contract, to be dealt with according to the law of the place where the contract was made, and was not mere matter of remedy, to be regulated by the law of the country where the remedy is sought; accordingly, the Scots Courts will not enforce a *nudum pactum* made in England.

A *pactum illicitum* is an agreement which the law does not enforce on the ground that it is *contra legem* or *contra bonos mores*, or contrary to public policy. See ILLEGAL AND IMMORAL CONTRACTS; GAMING AND BETTING; LOTTERY.

Some of the more important pacts are dealt with under separate heads. See PACTUM DE NON PETENDO; PACTUM DE QUOTA LITIS; PACTUM DE RETROVENDENDO. See also LEX COMMISSORIA and EXCEPTIO NON NUMERATÆ PECUNIÆ.

Pactum de non petendo is an agreement not to enforce an obligation. This pact practically superseded the formal modes of discharge of the earlier Roman law, *e.g. acceptilatio.* Its advantages were that, unlike *acceptilatio,* it might be conditional, and it applied to all sorts of obligations, however constituted. As a rule, such a pact conferred upon the debtor only an *exceptio* (*exceptio de non petendo*) to the creditor's action; but, in certain cases, it served wholly to extinguish the debtor's liability, *e.g.* in actions *injuriarum* and *furti,* and in natural obligations (*Dig.* 2. 14. 17. 1; 46. 3. 95. 4). A distinction of some importance was that between a pact not to sue *in certum tempus,* giving rise merely to a dilatory *exceptio,* and a pact not to sue *in perpetuum,* giving rise to a peremptory *exceptio.* Another distinction was that between a pact *in personam,* in favour only of a definite person, such as the person making it, and a pact *in rem,* operating in favour of all parties bound in the obligation (*Dig.* 2. 14. 7. 8).

This exception has been imported from the Roman law into the law of Scotland. In discussing the defence based on the *pactum de non petendo,* Stair explains: "If it be only temporary, for a short time, it does not exclude a decreet, but only the present effect thereof, whereby the decreet is granted conditionally, to pay or perform at the time to which the delay is granted; but it maketh the pursuer liable to the expenses of plea, *plus petendo tempore* (that is, of having sought before the agreed-on time). And, being dilatory, it must be instantly verified; yet, if it be a long delay, it will procure a time to prove it, and will absolve the defender from that process, seeing he is not obliged to lie under the process for so long delay; and therefore a new citation will not revive that process; yet it will not hinder a new process to be raised after the time of delay is past" (Stair, iv. 40. 31).

The distinction between a *pactum de non petendo* and an absolute discharge is practically important in the law of cautionry. If a creditor discharges a principal debtor, the cautioners of the principal debtor are liberated; but a discharge of the principal debtor will not liberate the cautioners if it is granted subject to a reservation of the creditor's rights against the cautioners, for then the discharge is construed merely as a *pactum de non petendo,* by which the cautioners' rights are in no way prejudiced (per Ld. Chan. Hatherley in *Green,* 1869, L. R. 4 Ch. App. 204). Where, for example, the holder of a bill, after it had been dishonoured and duly protested, granted a discharge to the acceptors of all claims and demands competent to him against them, "reserving entire my claims against any obligants" other than "the acceptors," it was held that this was a *pactum de non petendo* and that the indorsers were not discharged (*Muir,* 1873, 1 R. 91; affd. 1875, 2 R. (H. L.) 148). A creditor, it was explained, may agree with the principal debtor not to enforce his remedies against the principal debtor; and, if he does so, reserving his rights against those liable in the second degree, there will be no discharge of those persons so liable (per Ld. Chan. Cairns in *Muir,* 1875, 2 R. (H. L.) at 149).

The cases illustrating the distinction between the effects of an absolute discharge and a *pactum de non petendo* on the liability of cautioners are collected in Gloag and Irvine, *Rights in Security,* p. 908.

Pactum de quota litis, in Roman law, was an agreement by which one person undertook to conduct the lawsuit of another, receiving a certain share of the proceeds. Such an agreement was void, although an agreement to advance money in loan to support a litigation was valid, if

nothing but the money lent with lawful interest was to be returned (*C.* 4. 35. 20; *D.* 2. 14. 53; *D.* 17. 1. 7; *D.* 18. 7. 1. 6).

This principle has been adopted by the law of Scotland, so that an agreement between an advocate or agent and a client that the former should receive, instead of the usual honorarium or fees, a share of the property forming the subject of litigation, is void as a *pactum illicitum* (Stair, i. 10. 8; Bankt. i. 11. 11, and iv. 3. 23). Thus a contract between an agent and a client, by which the former became bound to carry on the plea until its determination by the Court of Session, in consideration of one-third of the sum which should be recovered, and two-thirds of the expenses, was held to be void, and the agent was suspended for some months (*M'Kenzie*, 1774, 5 Bro. Supp. 528). In *Johnston*, 1831, 9 S. 364, an agreement between a person who, though he was not a practitioner in any Court, acted as legal adviser to a party, and the party for whom he acted as legal adviser, that the subject of litigation should be divided between them, was set aside on similar grounds, though the claim of the legal adviser for suitable remuneration for his trouble was expressly reserved. In this case Ld. J.-C. Boyle and Ld. Cringletie expressed the opinion that the *pactum de quota litis* of the Roman law is the common law of Scotland. Ld. Meadowbank, on the other hand, thought that there was no evidence that the law as to *pactum de quota litis* had any other foundation in Scots law than the Statute 1594, c. 220, "which all our authorities clearly consider to mean *pactum de quota litis*." (As to this Statute, which forbids the purchase of depending pleas, see Buying of Pleas.) An agreement that an agent shall retain part of the subject of a lawsuit is not a *pactum de quota litis*, if it is not entered into until after the conclusion of the action (*Hume*, 1675, Mor. 9496; Stair, i. 10. 8). It is the better opinion that an agreement between agent and client, under which the former is to get a percentage or commission on the amount or value of the property recovered by him, is illegal as being a *pactum de quota litis* (*Farrell*, 1857, 19 D. 1000; but see *York Buildings Co.*, 1821, 1 S. 57 (N. E. 58); affd. 1824, 2 S. 233; *Glasford*, 1823, 2 S. 417 (N. E. 372).

In England the *maintenance* of a suit of another without having any interest in the suit, and *champerty* or the purchase of an interest in the suit of another in consideration, or for the purpose, of maintaining it, are offences at common law; and they are further prohibited by Statutes, which for the most part are declaratory of the common law. Also agreements involving maintenance or champerty are illegal and void (*Grell*, 16 C. B. N. S. 73; see Addison, *Law of Contracts*, 9th ed., pp. 75, 76). The prohibitions of the law of England against maintenance and champerty are unknown to the law of Scotland; and, in Scotland, a non-professional man may legally bargain that, in consideration of his advancing the money required to carry on a lawsuit, he shall receive a share of the amount or subject recovered (*Rucker*, 1826, 4 S. 438 (N. E. 443); *Waddell*, 1843, 6 D. 160).

Pactum de retrovendendo was an agreement between buyer and seller that the buyer should be bound to sell the property back again to the seller either on a certain contingency or on demand. In the ordinary case, the price at which the subject was to be resold was fixed at the time of the original sale. If it were not so fixed, the price was either presumed to be that paid in the original sale, or it was determined by arbitration. The time within which the seller could demand a resale was usually matter of express arrangement in the pact; but, failing such

arrangement, his right of enforcing the pact was subject to the ordinary limitation of thirty years (Pothier, *Contrat de Vente*, 391 *et seq.*). If the buyer, in contravention of the pact, sold and delivered the subject to some third person, and thereby rendered himself unable to reconvey it to the seller on his tendering the purchase-money, the seller had an action for damages against the buyer for his breach of contract, but had no rights against the third person to whom the property had been alienated. The buyer did not require to account for fruits which he gathered from the property while it was vested in him, for the *pactum de retrovendendo* did not operate like a resolutive condition (Pothier, 429).

In Scotland there are no examples of an agreement of this sort being made regarding moveable property; but agreements for repurchase, adjected to the sale of heritable property, are not unknown. The right of pre-emption reserved by a superior is an example of such an agreement, though it differs from the pact of the civil law in certain particulars, *e.g.* in the exercise of the right not depending on the will of the superior, the seller, alone. The right of reversion, which the reverser in a wadset had, differed from the right of the seller in a *pactum de retrovendendo*, in that the reverser might redeem the subject even after the lapse of the prescribed time, and at any time before declarator of the irritancy (Stair, ii. 10. 1; Ersk. ii. 8. 2; Brown on *Sale*, p. 429).

An agreement for a right of repurchase seems to have been very often annexed to sales of land in France. Accordingly this pact, under the name of "Droit de Réméré," is treated very fully by Pothier (*Contrat de Vente*, 385–444), and forms the subject of no fewer than fifteen articles (1659–1673) in the Code Civil.

Paintings and Pictures.—The legal questions which may arise in regard to these fall under one or other of the following headings: (1) Questions affecting the property in the materials used in the composition of the picture; (2) questions relating to the heritable or moveable character of the finished work; (3) questions of copyright.

1. *Questions as to the Property in the Materials.*—Where one paints a picture—it may be with colours which are not his own—upon a surface which belongs to another, questions of ownership arise which fall to be determined according to the rules of Accession (*q.v.*). As regards the pigments, the answer is simple. A new article having been produced, the ownership of these is sunk in that of the article, subject, of course, to compensation to their owner. The remaining question is more complicated. If the ground, board, or tablet of the picture belong to one, and the same be painted upon by another, whether for his own use or for that of a third party, it is clear that "there doth not continue two distinct properties,—one of the board and the other of the picture,—nor an interest in communion by proportion of the interests, but the property of the whole falleth to one" (Stair, ii. 1. 39). To which it falls is determined by the following rules: (1) If the picture be painted upon a wall or other immoveable, its ownership becomes identified with that of its groundwork. (2) Wherever, too, the picture is designed for the ornamentation of its groundwork (as, *e.g.*, a cabinet or the like), the painting goes to the proprietor of the article upon which it is painted. But (3) if a picture is drawn upon a board or canvas which is merely used to provide a surface for its execution, convenience dictates that the board or other surface should be deemed the accessory, and the painting the principal subject,—the painter, accordingly, being entitled to the ownership of the

whole. (4) In all cases the owner of the whole is liable to pay to the other the amount in *quantum lucratus est*; and that even although the painting be done by one who knew that the ground was not his own—this mere fact not being enough to raise the presumption of an intention of donation (Stair, *loc. cit.*; Bankt. i. 509).

2. *Questions as to Heritable or Moveable Nature of Paintings.*—These involve considerations not exactly identical with those arising under the last head. In cases, no doubt, where the ownership of the material becomes accessory to the painting, it may be taken as a general rule that the subject is moveable; but it does not follow, conversely, that where the ownership of the groundwork draws with it that of the painting, the whole is necessarily heritable (cf., *e.g.*, the case of a cabinet). The leading Scottish case on this subject is that of *Cochrane* (1891, 18 R. 1208), in which was considered the English judgment in *Beck* v. *Rebow* (1706, 1 Pere Williams 92). *Cochrane's* case related to the ownership of two pictures—portraits of no great value,—and to a third picture, a portrait of King Charles II., alleged to be by Sir Peter Lely, which was, if genuine, of some value. The two former pictures were in heavy frames, not hung, but screwed into the wall, with a dust moulding concealing the screws. The larger picture was inserted in a mirror frame designed in harmony with the general scheme of decoration of the wall in which it stood. The panelling under the smaller picture was left in a rough state, and there was none under the larger, its backing being the stone wall of the apartment. All the pictures were on ordinary stretcher frames. The whole three pictures were held, in a question with the purchaser of the house in which they stood, to be removeable. The *criteria* to which importance seems to have been attached were the following: (1st) The subjects in dispute were evidently primarily works of art, and not mere decorative panels. (2nd) The pictures and the frames together formed an independent chattel, capable of removal without injury to the apartment. (3rd) Even were this doubtful in the case of the large picture, it and its stretcher frame were removeable by slipping them out of the gilt frame. (4th) In point of fact, all the pictures had been removed for the purposes of cleaning. (5th) The degree of attachment to the walls was not greater than was fairly required for the security of the pictures. (Lastly) *In dubio*, the question as to the larger picture was to be looked at in the light of the general character of the whole subjects. In *Beck's* case a similar test, viz. whether the articles were not mere matter of furniture and ornamentation, was regarded as conclusive. Where, however, the painting is of the nature of a panel or fresco, its ownership would pass as accessory to the ownership of the wall which it is designed to adorn. While, in *Cochrane's* case, the question was between seller and purchaser, it was indicated that the *criteria* there applied would also have been substantially applicable as between heir and executor (see per Ld. Kyllachy, *loc. cit.* p. 1212); but it was pointed out that in many cases of sale the question might fall to be determined upon a construction of the strict terms of the whole contract, in the light of such circumstances as the price paid and the value of the pictures (per Lds. Kyllachy and M'Laren). (Cf. also *Care*, 1705, 2 Vern. 508; *Fisher*, 1845, 4 Bell's App. 286; *D'Eyncourt*, 1866, L. R. 3 Eq. 382; *Birch*, 1834, 2 A. & E. 37; *Dowall*, 1874, 1 R. 1180; *Harvey*, Buller's *Nisi Prius Rep.*, 7th ed., 34; Amos and Ferrard on *Fixtures*, 181, 245, 254.)

Paintings and pictures fall within the category of HEIRSHIP MOVEABLES (*q.v.*). Professor More states that pictures, though often included in an entail, would probably not be effectually excluded thereby from the diligence of creditors of the heir in possession (More, *Notes*, clxxx). This must be

restricted to such pictures as do not form part of the heritable subject under the foregoing rules. In regard to the subjects to which the dictum is applicable, however, there seems equal reason to hold that the entail would be ineffectual to preclude voluntary alienation by the heir in possession.

3. *Questions of Copyright.*—The maker of any work of art has complete control over it until it is published. After publication, the copyright of paintings and pictures (drawings and photographs) is regulated by the Act 25 & 26 Vict. c. 68, by which it is secured to the author (and his assigns) for his lifetime and seven years thereafter; and that of prints, etchings, and engravings, by 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; and 15 & 16 Vict. c. 12, s. 14, which provide for a copyright in these of twenty-eight years. A print from a picture protected under the Act of 1862 shares in the protection given thereby to the picture (*Tuck*, 1882, 51 L. J. N. S. 363). For detailed treatment of the provisions of these Acts, see *sub voce* COPYRIGHT.

Pandects.—See ROMAN LAW (TEXTS).

Panel.—*Panel* or *pannel* is the term used in Scottish criminal practice to denote an accused person. It is only from the time of his appearance that the accused comes to fall properly under the appellation of panel (Hume, ii. 265, note 4), "which, and not *prisoner* nor *defender*, is his proper style and appellation in our practice" (*ibid.*). It appears that there was at one time a disposition on the part of the Bar to introduce the style of "defender," probably because this sounded less obnoxious in the ears of clients. This innovation was, however, repressed by the Act of Adjournal of 18 November 1695, by which it was ordained that the panel's advocates "in all their written debates" should "title the defender by the name of panel, as has been always in use before the Justice Court, and not by the name of defender" (Adam, *Procedure Acts*, 159).

The style *panel* is not invariably, or even generally, used in modern practice; and it is noteworthy that it does not once occur in the Criminal Procedure (Scotland) Act, 1887—the words "person accused" being used throughout that statute. Nor is the word used in the Bail Act, 1888.

[See INDICTMENT; PLEA OF PANEL; CRIMINAL PROSECUTION; etc.]

Paraphernalia.—This term properly denotes the property of the wife which is over and above the *dos* or φερνή. In the Roman law the husband enjoyed the fruits of the *dos* during the marriage. The rest of the wife's estate remained her own property, and was called her *paraphernalia* (*Dig.* 23. 3. 9; *Code*, 5. 14. 8).

In Scots law, by a somewhat loose analogy, the expression was borrowed to describe that portion of the wife's estate which did not fall under the *Jus mariti* (*q.v.*).

By the old law the moveable estate of the wife was conveyed to the husband at the marriage by universal assignation, and moveables acquired by her during the marriage fell in like manner under the *jus mariti*. From this generality were excepted the wife's clothes and ornaments peculiar to her person, and not suitable for a man's use, such as necklaces, chains, bracelets, and the like—the *mundus* or *vestitus muliebris* (*Dicks*, 1695, Mor. 5821). These are styled her *paraphernalia*.

And by a slight extension repositories, such as cabinets and wardrobes, specially destined and appropriated for holding the wife's clothing or ornaments were included *inter paraphernalia* (*Pitcairn*, 1716, Mor. 5825; *Cameron*, 1870, 13 S. L. R. 278, correcting *Dicks* on this point).

Articles of this limited class, as strictly personal to the wife, are said to be paraphernal *ex sua natura*. It is immaterial from what source the wife acquires them (*Black*, 1803, Hume, 210; *Cameron*, *ut supra*; Fraser, *H. & W.* ii. 775). Even if presented to the wife by the husband during the marriage, they are not revocable, like other donations (Ersk. i. 6. 15; Fraser, *l.c.*; see DONATIONS INTER VIRUM ET UXOREM). But the presumption that they were really gifted may be rebutted, as when it is shown that a jewel which a wife possesses is an heirloom (*Leven*, 1683, Mor. 5803), or that the husband, being a merchant, allowed his wife to wear diamonds which formed part of his stock, without intending them to become her property (*Dicks*, *ut supra*; *Craig*, Mor. 5819; Fraser, *H. & W.* ii. 773).

The class of paraphernalia will not be enlarged. A lady's dressing-plate or tea-plate are not paraphernal (*Wigton*, 1748, Elch. *voce* "Husband and Wife," No. 30, Mor. 5771; *Gemmil*, 1735, Mor. 5997; and see *Cameron*, *ut supra*). In a special case a sum of money was found to be *surrogatum* for paraphernalia (*Alexander's Trs.*, 1894, 2 S. L. T. No. 195).

Articles not strictly paraphernal, because suitable for the use of either sex, but of closely similar character to proper *paraphernalia*, *e.g.* a watch or a ring, will be reckoned *inter paraphernalia* if presented to the bride before or on the day of the marriage. But on the dissolution of that marriage they become again ordinary moveables, and if the wife enters into a second marriage must be presented anew if they are to reacquire their paraphernal quality (Ersk. i. 6. 15; *Dicks*, *ut supra*).

Articles of this class, not being paraphernal by nature, may be presented by the husband to the wife during the marriage. In that case they are revocable by him *stante matrimonio*. It was held in *Dicks*, Mor. 5821, that they could not be revoked by him after the wife's death. (See also a Sheriff Court case, *M'Kellar*, 1886, 4 S. C. R. 78.)

If this is sound, they differ in that respect from other donations (*Rae*, 1875, 2 R. 676). But this distinction is not approved of by Erskine (i. 6. 15) or Fraser (*H. & W.* ii. 774). Paraphernalia are not excluded from the HUSBAND'S RIGHT OF ADMINISTRATION (*q.v.*). Accordingly, a wife cannot dispose of them *inter vivos*, or pledge them without her husband's consent (*Anon.*, 5 Bro. Supp. 811; *Gemmil*, *ut supra*; but see Fraser, *H. & W.* i. 806). She may test upon them (*Young*, 1880, 7 R. 760); and if she dies intestate they descend to her next of kin (Ersk. i. 6. 41 *in fin.*).

Articles of household furniture given to a wife by her friends before the marriage are not paraphernal (*Hewat*, 1803, Hume, 210; as to the presumption of ownership of furniture in house occupied by the spouses, see *Adam*, 1894, 21 R. 676; *Mitchell*, 1894, 21 R. 586; and see MARRIED WOMEN'S PROPERTY ACT).

It is thought that marriage presents sent to the bride now remain her separate property in virtue of the Married Women's Property Act (*q.v.*; see, in the Sheriff Court, *Duncan*, 1888, 4 S. C. R. 246; *M'Intosh*, 1888, 4 S. C. R. 317; *contra*, *Strain*, 1886, 2 S. C. R. 108). The English law as to paraphernalia is different (*Tasker*, [1895] P. 1).

Since the Married Women's Property Act, 1881, the wife's moveable estate no longer falls under the *jus mariti*. The law of *paraphernalia* has become, therefore, of slight importance in marriages after the commencement of that Act. It would still apply to jewels or other things,

properly paraphernal, presented to the wife by the husband during the marriage.

[Ersk. i. 6. 15, 27; Bell, *Prin.* 1554; More, *Notes*, xviii; Fraser, *H. & W.* ii. 770; Walton, *H. & W.* 259.]

Pardon.—A sentence of the Supreme Court, or a judgment of an inferior Court which has not been reversed by the Supreme Court, falls to be carried out unless the Crown or Parliament intervenes. It is competent for Parliament to pass a statute reversing the sentence of a criminal Court (Hume, ii. 504; Alison, ii. 677); but this method of review is now obsolete. The royal prerogatives include the privilege of pardoning crimes, and an appeal to the royal mercy is now the invariable method adopted to obtain the mitigation or commutation of a sentence pronounced in a criminal Court. In considering and disposing of appeals for pardon from Scotland, the Crown is advised by the Secretary of State for Scotland, who may make any inquiries into the circumstances of the case which he thinks proper, and may give effect to any petitions in favour of the condemned person which may have been forwarded to him. Any person interested in the fate of a condemned prisoner may sign a petition in favour of a commutation of his sentence. A pardon may be absolute or conditional. The usual instance of a conditional pardon is where a person condemned to death has been pardoned on condition that he be kept in penal servitude for life. A pardon, when granted, is transmitted from the Secretary of State, and is applied by the Supreme Court, who issue the necessary orders to those who have the convict in custody. These orders may be signed by one judge, and the accused need not be present when they are issued. In the case of a conditional pardon, the deliverance of the Court grants the warrants for enforcing the conditions. The only effect of a pardon is to free an offender from the public penalty which the sentence of a criminal Court has adjudged him to pay: it does not deprive an injured person of any claim of damages he may have against the person who has been pardoned.

[1457, c. 74: 1528, c. 7; 1592, c. 155; 1593, c. 174; Ersk. iv. 4. 105; Hume, i. 285; ii. 496; Alison, ii. 677; Macdonald, 552; Anderson, *Criminal Law*, 267.]

Parent and Child.—The law on this subject has been treated so fully in various articles dealing with particular branches of the law into which it may be subdivided, that it is not necessary to treat it in detail here.

The law as to the STATUS of children, that is, whether they are legitimate or illegitimate, is discussed in the articles BASTARD; AFFILIATION; PATER EST QUEM NUPTIÆ DEMONSTRANT. See also PRESUMPTIONS.

These articles deal with legitimacy arising from lawful marriage, but the status of legitimacy may also belong to children born of a putative marriage, which is in reality null, if the parties to the marriage or either of them *bonâ fide* believed that they could marry, and entered into the marriage in ignorance of an impediment which prevented it. If the parties were within the forbidden degrees of relationship, or if one of them was married, or if a previous marriage of one of them was still subsisting, the children born of the invalid marriage may be held to be legitimate (Fraser, *Parent and Child*, 2nd ed., 22) (*Petrie*, 1896, 4 S. L. T. 94). The law of Scotland on this point differs from that of England. As to the good faith which is required on the part of the parents or one of them—in the case of

Petrie, the marriage took place on the *bonâ fide* belief on the part of the husband that the wife's former husband was dead. That was sufficient to make the child legitimate. But in another case where a woman had married the husband of her deceased aunt, it was held by the whole Court that an averment that she had done so in the *bonâ fide* belief that such a marriage was lawful, was irrelevant in a question as to the legitimacy of a son of the marriage (*Purves' Trustees*, 1895, 22 R. 513). It has been laid down by some writers that the status of legitimacy may arise from *bona fides*, even if there has been no putative marriage; for instance, it is said that a child born of a woman as the result of a rape perpetrated on her is legitimate. Lord Fraser (*Parent and Child*, p. 30) expresses a doubt as to the soundness of the doctrine of legitimacy arising from *bona fides* alone.

As to legitimation of children *per subsequens matrimonium* and otherwise, see LEGITIMATION.

As to the rights of parents or either of them to custody of, or access to, children, see CUSTODY OF CHILDREN.

As to the duty of parents to aliment their children, and of children to aliment their parents, see ALIMENT; and as to aliment of illegitimate children, see also AFFILIATION and BASTARD.

Besides the duty to aliment their parents, children owe to them the duties of reverence and obedience, not only while they are living in family with their parents, but also after their *forisfamiliation*. Even in Lord Stair's time a parent had no civil remedy to enforce these duties. "After emancipation those duties are so far diminished that little remaineth except that natural reverence, tenderness, and obsequiousness that children do still owe to all their parents in due order: which, though it hath no civil remedy, yet remains as a natural obligation to observe the parents' commands throughout their posterity; as in that notable example of the Rechabites, Jer. xxxv., is clear, where they observed their father's command in a free thing, though inconvenient, viz. to drink no wine, to build no houses, etc." (*Stair* i. 5. 8). See CURSING OF PARENTS.

As to the general powers of parents over children, see PATRIA POTESTAS and FORISFAMILIATION. The legal right of a parent to inflict reasonable personal chastisement on his children is not open to doubt, and the right may be delegated (*Cleary*, [1893], 1 Q B. 465). It has not been definitely decided at what time such authority ceases (*Harvey*, 1860, 22 D. 1198).

A father is not liable for the delict or quasi-delict of his child, just as a husband is not liable for that of his wife. Thus, if a child breaks windows, the father cannot be compelled to pay for them (Bankt. I. x. 4). A father may be sued for debts incurred by his son, if the debts were for necessaries supplied to him—that is, if they were of the nature of alimentary debts which the father was bound to pay, for a father, being bound to aliment his child, is held to have given authority to the latter to contract for necessaries where the parental obligation is not otherwise fulfilled (Fraser, *Parent and Child*, 95). As to what are necessaries, it is held that the goods furnished must be suitable in quantity and quality to the rank and condition of the child.

As to the rights of children to the estate of their deceased parents, see LEGITIM; and as to rights of parents to their children's estate, see SUCCESSION.

As to the legal status of children, and how they sue and are sued, see PUPIL, MINOR, and as to their guardianship, see TUTOR, CURATOR.

Parish.—The division of Scotland into parishes is ecclesiastical in origin, but is now also of importance in matters of civil administration. The division is exhaustive; "it would be inconsistent with the law of Scotland to hold that any lands are extra-parochial" (*Ross*, 1824, 3 S. 115; cf. *Stevenson*, 1879, 7 R. at p. 275). This fact, and the circumstance that such matters of local administration as poor relief and education, which are now civil obligations, were formerly regarded as pious duties, and were managed under ecclesiastical supervision, go far to explain how the parish, at first an ecclesiastical division, has come also to be an area for the purposes of local government.

I. The ecclesiastical parish is the district attached to the parish church, its inhabitants being entitled to the services of the parish minister, and its heritors being bound to provide what is necessary for the ministrations of religion (Duncan, *Par. Ecc. Law*, ch. i.). The origin of the division into parishes is obscure. Parishes are landward, burghal, or mixed. Landward parishes are those which are wholly or mainly rural in character. Burghal parishes are those which are wholly comprised within a burgh—whether a royal burgh or a burgh of regality or barony. Mixed parishes—landward-burghal, or burghal-landward—are those in which there is both a rural part and a town or village of considerable extent, whether a burgh or not (*Boswell*, 1837, 15 S. 1148; and cf. as to such parishes, *Crieff* case, 1781, Mor. 7924; *Peterhead* case, 1802, 4 Pat. App. 356; *Auld*, 1828, 6 S. 1087). According as a parish falls under one or other of these classes, the rights and duties of minister and heritors vary. See GLEBE, vol. vi. p. 123; HERITORS, vi. p. 195; MANSE, viii. p. 202.

From 1617 (c. 3) onwards, successive Commissions of Parliament altered parish areas by uniting small parishes, dividing large ones, erecting new parishes, etc. By 1707, c. 9, these powers were conferred on the Court of Session as Lords Commissioners of Teinds. The Court of Teinds may unite small parishes, erect new parishes, and alter parish boundaries. The boundaries thus determined were the parish boundaries for all purposes, unless the decree expressly stated otherwise, *e.g.* there might be disjunction and annexation *quoad sacra tantum*. The Act 7 & 8 Vict. c. 44 introduced fresh provisions as to such matters, and also legalised (what the General Assembly had previously attempted without success to do, as *inter spiritualia*) the erection of *quoad sacra* parishes. As to the alteration of the boundaries of a parish *quoad sacra*, see *Baird*, 1893, 20 R. 973. See DISJUNCTION AND ANNEXATION, iv. p. 248; DISJUNCTION AND ERECTION, iv. p. 249; PARISH QUOAD SACRA.

The Act 7 & 8 Vict. c. 44 also legalised the erection of a parish *quoad sacra* without territory in the case of Gaelic congregations in the Lowlands (ss. 12, 13; *Society for Propagating Christian Knowledge*, 1850, 12 D. 1216).

Cases of disputed parish boundaries raise questions of fact which are decided according to the ordinary rules of evidence (see cases in Shaw's *Teind Cases*; Connell on *Parishes*). So proof of immemorial usage was held to establish the union *quoad omnia* of two parishes originally separate (*Campbell*, 1852, 15 D. 5). But when lands which originally formed part of one parish are alleged to have been disjoined and annexed to another, the onus lies on the party alleging disjunction to prove that this was done by decree of the Commissioners of Teinds (*Irvine*, 1824, 3 S. 173). Where a stream is the boundary, diversion of the stream does not alter the boundary (*Knox*, 1870, 8 M. 397). See Duncan, *Par. Ecc. Law*, ch. i.; Black, *Par. Ecc. Law*, ch. i.

II. The civil parish was at first simply the parish *quoad omnia*. The

Poor Law Act, 1845 (8 & 9 Vict. c. 83), contains no definition of "parish." It was not necessary. The parishes were adopted as they stood, all erections or annexations *quoad sacra tantum* being disregarded. But the division into parishes *quoad omnia* now holds good in many districts only in questions relating to teinds and ecclesiastical arrangements and jurisdictions. For on the one hand the parochial division for ecclesiastical purposes has been largely altered by the erection of parishes *quoad sacra*, etc. On the other hand, the provisions in the Local Government Acts of 1889 and 1894 for the alteration of areas (52 & 53 Vict. c. 50, ss. 45–51 and 96, and 57 & 58 Vict. c. 58, s. 46) have resulted, and may yet result, in important changes in parochial areas for purposes of local government. As to the nature and effects of such changes, see *Inspector of Galashiels*, 1892, 19 R. 758, and 1894, 21 R. 391; *Parish Council of Edinburgh*, 1898, 5 S. L. T. 333; Shennan's *Boundaries of Counties, etc.*, Introduction.

It must be borne in mind that the area of the civil parish may vary for different purposes of local administration. It is universally the area for poor-law purposes and for defraying the expenses of the Vaccination Act (26 & 27 Vict. c. 108). For the purposes of education, parishes do not include any portions of royal or parliamentary burghs, or of the towns mentioned in Sched. A of the Act of 1872 (35 & 36 Vict. c. 62); and where parishes or parts of parishes are united either *quoad omnia* or *quoad sacra*, such united parishes or *quoad sacra* parishes are parishes for the purposes of the Act (ss. 9, 10, 11). For registration of births, etc., parishes do not include burghs royal or parliamentary, and their areas may be altered by the erection of registration districts (17 & 18 Vict. c. 80, ss. 8, 10, 66, 76). Under the Burial Grounds Act (18 & 19 Vict. c. 68), the parish is the area, except within burghs which have the burgh parliamentary franchise. Under the Roads and Bridges Act, 1878 (41 & 42 Vict. c. 51, s. 3), the parish—which may be the area of assessment—is declared to be exclusive of any burgh or police burgh wholly or partly situated within it. The same holds good of the Public Libraries Act (50 & 51 Vict. c. 42).

Parish Council.—Parish Councils were created by the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58). They superseded the Parochial Boards (*q.v.*) on and after 15 May 1895. Every poor-law parish or combination in Scotland has a parish council.

I. Constitution.

The parish council is elected triennially. All qualified parish electors (including women, married or unmarried) are eligible as parish councillors, unless they are (*a*) disqualified from holding public office by the general law of the kingdom, or (*b*) debarred from sitting on the parish council by reason of holding office under the council, or of being concerned in contracts with the council (s. 20).

The number of councillors on a parish council varies from five to thirty-one. The numbers have been fixed for the various parishes, and the councillors apportioned to the parish wards (where there are wards), by the county councils and the municipal authorities within whose jurisdiction the respective parishes lay, under the supervision of the Local Government Board for Scotland. These authorities may revise such determination from time to time under the same supervision (s. 9).

In parishes partly rural and partly urban (*i.e.* partly in a royal, parliamentary, or police burgh), the parish councillors for the rural ward or wards

form the landward committee, to which certain special powers are given. If the number of rural parish councillors in such a parish is less than five, the Local Government Board may order the election of additional rural councillors in order to make the landward committee large enough for the transaction of its business. Where this is done, all the members of this augmented landward committee are elected at the parish council election and they choose from among themselves the necessary number of rural parish councillors to sit on the parish council (s. 23).

Election.—See PARISH COUNCIL ELECTIONS.

The parish council consists of the duly elected parish councillors. It is an incorporation with power to sue and be sued, and has perpetual succession (s. 32).

The term of office is three years, and all the councillors go out of office together, viz. (*a*) in parishes wholly urban (*i.e.* wholly in royal, parliamentary, or police burghs), on the first Tuesday of November in 1898, and every third year thereafter: (*b*) in all other parishes, on the first Tuesday of December in 1898, and every third year thereafter (ss. 14, 15, and 56).

Failure to attend the meetings of the parish council for more than six months consecutively vacates the office of the offending councillor, except in the case of illness or for some reason approved by the parish council (s. 41).

Casual vacancies in the council are to be filled up as soon as practicable by the council, notice being given to each councillor seven days before the meeting. A councillor thus appointed holds office only for the remainder of the vacating councillor's term of office (s. 19, subs. 2 and 4). Where there is an augmented landward committee (as above explained), it fills up any casual vacancy in the committee or among the rural parish councillors (s. 23, subs. 2). In other parishes that are partly rural and partly urban, a casual vacancy among rural parish councillors is filled up by the votes of the rural parish councillors only (60 & 61 Vict. c. 49).

If the casual vacancies at one time are so numerous as to incapacitate the parish council from acting, the Local Government Board may order a new election, and may arrange for the temporary management of the business of the council (s. 18).

II. BUSINESS AND PROCEEDINGS.

"The *quorum* of a parish council shall be one-fourth of the whole number of the council, but shall in no case be less than three" (s. 19, subs. 3).

The *chairman* is elected by the council annually at the statutory meeting in December from among the councillors. The retiring chairman is eligible for re-election. Before filling up a casual vacancy in the office of chairman, seven days' notice of the proposal to do so must be issued to each councillor. In the chairman's absence the councillors appoint one of themselves chairman of the meeting. The chairman has a casting vote as well as a deliberative vote (s. 19). The chairman of a parish council (unless disqualified by sex or otherwise) is *ex officio* a justice of the peace for the county in which the parish is situated (s. 40).

Meetings.—Every parish council must meet annually within ten days after the first Tuesday of December (s. 19, subs. 6). This is the statutory meeting, and is summoned by the clerk by written notice sent to each parish councillor, stating the hour and place of meeting (s. 17, subs. 2). There must also be a meeting in July for framing the parish budget for the year (s. 37). Each parish council makes its own regulations as to the summon-

ing, time, place, and management of its meetings, or of the meetings of its committees, and as to the conduct of its business generally (s. 19, subs. 2).

The parish council provides the necessary offices, furniture, books, etc., required for the conduct of its business (s. 48). It may use any room in a State-aided school, or any room maintained out of a parish rate, free of charge, except for the reasonable and necessary expenses of the custodian, subject to the conditions stated in sec. 31. But the powers conferred by the Act for the acquisition of buildings for offices extend only to rural parish councils and to landward committees, and cannot be taken advantage of by urban parish councils.

The parish council may appoint a clerk at a reasonable salary, but failing such appointment the inspector of poor acts as clerk (s. 19, subs. 2). The parish councils took over the officials of the parochial boards, and have the same powers of appointing officials as the parochial boards had (ss. 50 and 51).

The parish council can delegate any of its functions to committees (or join with other local authorities in doing so), except only the power of raising money by rate or loan (ss. 33 and 34). No committee, unless reappointed, holds office beyond the next statutory meeting. Parish councils may also join with other local authorities in making arrangements with regard to the conduct and management of their business, including the collection of rates (s. 51, subs. 3).

The financial year ends on May 15, and the local annual budget is adjusted at a meeting of the council to be held in July (ss. 36 and 37). Two sets of accounts are prescribed, viz. the general parish fund account, which relates to all matters and powers transferred from parochial boards to parish councils, and the special parish fund account, which relates to the new powers conferred by the Act of 1894 on rural parish councils and landward committees. Separate bank accounts are to be kept for these funds, and they must be so managed as to "prevent a rate from being applied to any purpose to which it is not properly applicable." Cheques are to be signed by two councillors, and countersigned by the clerk (s. 35). All rates are levied and recovered in the same manner as the poor-rate. The parish council has the same powers of borrowing as a parochial board had; but if the loans outstanding exceed in amount one-fifth of the rateable value of the parish, no further loan may be raised, except a temporary one on the security of assessments due and unpaid. A parish council must transmit annually to the Secretary for Scotland a return showing the amount of loans outstanding and the steps taken to discharge them (s. 38).

The accounts of every parish council are audited annually by auditors appointed by the Local Government Board, the procedure prescribed in secs. 68 to 70 of the Local Government (Scotland) Act, 1889, being adopted (s. 36, incorporating 52 & 53 Vict. c. 50, ss. 68–70).

Where there is a landward committee, it is this body, and not the parish council, which exercises the new powers conferred by Part IV. of the Act of 1894, and also the powers of the Public Libraries Act, 1887. For these purposes the landward committee exercises all the powers of the parish council, except that of raising money, and, accordingly, the provisions above described as to the quorum, chairman, clerk, accounts, etc., of parish councils apply *mutatis mutandis* to landward committees. But if the landward committee requires money for carrying out the new powers conferred by the Act, it must certify the amount required to the parish council not later than June 12 in each year. The parish council is then required to raise the amount required, and pay it over to the landward committee (s. 27).

III. Powers and Duties.

Parish councils took up all the powers and duties, property and liabilities of the parochial boards (ss. 21, 22, 48–50, 52, 53), and additional powers and duties have been conferred by the Act of 1894 and by later legislation. The following is a brief summary of them; but, in regard to the more important, reference must be made to the articles dealing with them in detail:—

(*A*). *Conferred on Parish Councils Generally.*—1. *Poor-Law Administration.*—This is the most important branch of parochial administration. The inspector of poor is appointed by the parish council, and is their chief official. He works under their directions, though he is also responsible to the Local Government Board. The parish council must meet on the first Tuesday of February and the first Tuesday of August in each year to revise and adjust the roll of paupers and their allowances. The erection of poorhouses is undertaken by parish councils, subject to the Board's approval. A parish council may contribute from the poor-rates to any public infirmary, dispensary, lying-in hospital, or asylum for lunatics, for blind, or for deaf and dumb. See Poor Law.

2. *Parish Trusts* (57 & 58 Vict. c. 58, s. 30).—There is a parish trust for the purposes of this section, when trustees hold any property wholly or mainly for the benefit of inhabitants of a parish as such, or for any public purpose connected with the parish other than—

(*a*) for an ecclesiastical charity (see s. 54);

(*b*) for an educational endowment within the meaning of the Educational Endowments (Scotland) Act, 1882 (*q.v.*, vol. iv. p. 382);

(*c*) for the use or benefit of the poor of the parish within the meaning of sec. 52 of the Poor Law (Scotland) Act, 1845.

In the case of parish trusts as thus defined, certain powers of administration are conferred on parish councils.

A. Where the trust applies to one parish only—

(1) The trustees may denude in favour of the parish council or its nominees. This course requires the consent of both parties.

(2) The parish council may appoint additional trustees, the number to be fixed by agreement, and failing agreement, by the Local Government Board. This course is not open, unless the Board so order, where any of the existing trustees are persons elected by inhabitants of the parish, or are county or town councillors or burgh commissioners.

(3) When the trustees are the kirk-session, or the heritors and kirk-session, of a parish, or the kirk-session, or deacon's court, or managers, or vestry of any religious body to the number, whether alone or conjoined with others, of not less than six persons, the management of the trust is given to a committee consisting of three of themselves appointed by the trustees, and so many additional persons appointed by the parish council as the Board may approve.

B. Where the trust extends to two or more parishes, the parish councils interested may, if the Board so decide, appoint additional trustees in such manner and rotation and on such conditions as the Board may sanction.

Trustees appointed under these provisions hold office for not more than three years, but may be reappointed. During his tenure of office a trustee and his wife and children are debarred from receiving any benefit from the trust.

These provisions do not apply to any charity till after forty years from its foundation, or to any existing charity one of the donors of which is alive, until forty years from the passing of the Act, except with such donor's consent.

3. *Protection of Infants and Children.*—(1) Under the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), parish councils may prosecute offences against the Act, but in Scotland this is invariably done by the public prosecutor. Expenses incurred by the parish council in enforcing the Act, and in affording temporary maintenance in a poorhouse or elsewhere to children ill-used, are defrayed out of the poor-rate. See CRUELTY TO CHILDREN, vol. iv. p. 16.

(2) Under the Infant Life Protection Act, 1897 (60 & 61 Vict. c. 57), the local authority in Scotland is the parish council, and the expenses of administering the Act fall on the poor-rate. The parish council must inquire from time to time whether there are any persons in the parish who retain or receive infants for hire or reward. If any such are found, the parish council must arrange for the periodical inspection of the infants and for supervision to secure proper treatment of them. The parish council must fix the number of infants under five years old which may be retained in this manner in any house. Parish councils may combine in the administration of the Act. They are required also to give public notice of the provisions of the Act. See PROTECTION OF INFANT LIFE.

4. *Vaccination.*—Parish councils administer the Vaccination Act (26 & 27 Vict. c. 108) in conformity with the regulations of the Local Government Board. Each parish council must appoint a registered medical practitioner for the parish, and must enforce compulsory vaccination within the parish. The expenses fall on the poor-rate. See VACCINATION.

5. *Registration of Births, Deaths, and Marriages*—The parish council has the appointment and remuneration of the local registrar, except within (*a*) royal or parliamentary burghs, and (*b*) special registration districts formed out of portions of two or more parishes. There is a special rate (the registration rate) leviable for the payment of the expenses of administering the Registration Acts. See REGISTRATION OF BIRTHS, ETC.

6. *Kirkyards and Burial-Grounds.*—(1) The kirkyard may be transferred by the heritors to the parish council, to be held subject to existing rights and purposes. Neither party can be compelled to assent to the transference. The transference, if carried out, divests the heritors of all the rights of management, and vests these in the parish council. The heritors, however, remain liable for existing debts, and may assess for repayment of them. The expenses of management after the transference fall on the poor-rate. But the heritors' power to enlarge, and to assess for the enlargement of, the kirkyard is not transferred, and accordingly any enlargement of a transferred kirkyard must be effected under the Burial Grounds Act, 1855 (57 & 58 Vict. c. 58, s. 30, subs. 6).

(2) *Burial-Grounds*—Under the Burial Grounds Act, 1855 (18 & 19 Vict. c. 68), parish councils are the local authorities except within burghs having the burgh parliamentary franchise, as the limits of these are defined for valuation purposes. In parishes which are only partly within such burghs, the Sheriff determines whether for this purpose the local authority is to be the parish council or the municipal authority. The expenses are met by levying a burial-grounds rate. See BURYING-PLACE, vol. ii. p. 271.

7. *Rights of Way* (57 & 58 Vict. c. 58, s. 42).—A parish council may make representations to the district committee with a view to the protection or preservation of any public right of way within the district, or beneficial to the inhabitants. If the district committee does not take proceedings, the parish council may bring the matter before the county council by petition. A parish council, or anyone with their consent, may erect and maintain guide-posts and direction-notices on any right of way within the parish. There is no express provision for defraying any expenses which a parish council may incur in this way.

8. *Special Sanitary Districts* (57 & 58 Vict. c. 58, s. 44, and 60 & 61 Vict. c. 38, s. 38).—In a county, one or more parish councils may make a requisition in writing to the district committee, calling on them to form special districts for lighting, or scavenging, or public baths and wash-houses, or for all or any of these purposes. See DISTRICTS, vol. iv. p. 301.

In Orkney and Shetland a parish council may requisition the district committee for the formation of special districts for small piers and harbours and boat-slips (59 & 60 Vict. c. 32).

9. *Public Health*—A parish council may make written application to the Local Government Board to inquire into the sanitary condition of any district (60 & 61 Vict. c. 38, s. 6). If a public health local authority neglect its duties, a parish council may give written notice to the local authority of the things neglected, and, after fourteen days, may apply by summary petition to the Sheriff (*ib.* s. 146).

10. *Alteration of Parish Areas* (57 & 58 Vict. c. 58, s. 46, referring to 52 & 53 Vict. c. 50, s. 51).—A parish council may make a representation to the Secretary for Scotland praying for alteration of the area of the parish, whether by changing the boundaries, uniting parishes, creating new parishes, dividing parishes, or other method. As to the effect of an order uniting parishes, see *Scaton*, 1896, 23 R. 763; *Parish Council of Edinburgh*, 1898, 5 S. L. T. No. 333. As to its effect on parochial settlements, see *Inspector of Galashiels*, 1892, 19 R. 758, and 1894, 21 R. 391.

11. *Local Rates, Relief of Rates, etc.*—(1) *Assessments.*—The parish council lays on the assessments sanctioned by the various statutes which it administers. All are levied and recovered in the manner prescribed in respect of the poor-rate, but, though levied in one demand-note, the amounts applicable to the several purposes must be separately indicated, *e.g.* poor-rate, registration rate, burial-grounds rate, etc. The assessment may be yearly or half-yearly, and a supplementary assessment may be made if necessary. There is power to borrow temporarily, to the extent of one-half, on the security of rates due but unpaid. A collector of rates is appointed, the office being usually given to the inspector of poor. The power given by the Poor Law Act to classify lands and heritages is taken away by the Agricultural Rates, etc., Act, 1896 (59 & 60 Vict. c. 37), and since 15 May 1897 all classifications have ceased to be of any force, except a small number certified in terms of that Act. Under the same Act, assessment according to established usage is no longer competent.

The parish council is also required to levy the education rate along with and in the same manner as the poor-rate, and to hand over the proceeds to the school board without any deduction for the cost of collection (35 & 36 Vict. c. 62, s. 41, and 41 & 42 Vict. c. 78, s. 32).

Under the Valuation Act (17 & 18 Vict. c. 91, s. 18) a parish council may be required to pay to the county (or town) council the parish's pro-

portion of the expense of making up the valuation roll, and it has power to assess therefor along with the poor-rate.

Provision was also made by the Act of 1894 (s. 44, subs. 7) for having the public health rate collected along with the poor-rate. But, useful as such a provision was when the public health assessment was laid on in the same manner as the poor-rate, it is no longer of any value now that the public health rate is levied in counties in the same manner as the road rate (60 & 61 Vict. c. 38, s. 135).

(2) *Relief of Rates.*—Contributions from imperial funds are made in aid of the cost of poor-law medical relief, and trained sick-nursing in poor-houses, and in aid of the maintenance of pauper lunatics (52 & 53 Vict. c. 50, s. 22, and 55 & 56 Vict. c. 51, s. 2, subs. 3). A contribution is also made in relief of local rates leviable by parish councils (55 & 56 Vict. c. 51, s. 2, subs. 4). Sums thus payable are paid to parish councils under the direction of the Secretary for Scotland. Further, by the Agricultural Rates, etc., Act, 1896 (59 & 60 Vict. c. 37), agricultural lands are to be assessed for the tenants' proportion of local rates at three-eighths of their annual value, and an amount corresponding to the remaining five-eighths is paid from imperial funds to the local authorities.

(3) The Local Authorities Loans (Scotland) Acts (54 & 55 Vict. c. 34, and 56 & 57 Vict. c. 8) may be adopted by parish councils; but their provisions would be of little use in the case of the vast majority of parishes.

(4) The Local Taxation (Scotland) Returns Act, 1881 (44 & 45 Vict. c. 6), requires parish councils to make such annual financial returns as the Secretary for Scotland requires.

12. *Appointment of Representative to District Committee.*—In a parish which is partly landward and partly burghal (*i.e.* partly within a royal or a parliamentary burgh), it is the landward committee which elects the representative to the district committee under sec. 78 of the Local Government (Scotland) Act, 1889 (57 & 58 Vict. c. 58, s. 19, subs. 7). In all other cases it is the parish council which elects. Accordingly, in a parish which is partly rural and partly within a police burgh, it is the parish council, not the landward committee, which elects the representative.

(*B*). *Conferred on Rural Parish Councils and Landward Committees.*—Although some of the powers above enumerated are available only in rural districts, yet in the case of a parish partly urban and partly rural they are exercised by the parish council, not by the landward committee. On the other hand, the exercise of the powers and duties now to be enumerated is expressly confined to rural parish councils and to landward committees. In what follows, what is said of parish councils applies fully to landward committees.

1. *Buildings* (including the necessary land) may be provided or acquired for public offices or for any purpose connected with the business and powers of the parish council (57 & 58 Vict. c. 58, s. 24, subs. 1 (*a*)). This is a wider power than sec. 48 confers on parish councils generally.

2. A parish council may "provide or acquire, maintain, lay out, and improve grounds for *public recreation*" (*ib.* s. 24, subs. 1 (*b*)).

3. Any *right of way*, whether within the parish or in an adjoining parish, the acquisition of which is beneficial to the inhabitants of the parish or of any part thereof, may be acquired by the parish council by agreement (*ib.* s. 24, subs. 1 (*e*)).

4. The parish council may accept and hold any *gifts of property* for the benefit of the parish (*ib.* s. 24, subs. 1 (*d*)).

5. The parish council may "execute any works (including works of

maintenance or improvement) incidental to or consequential on the exercise of any of the foregoing powers, or in relation to any property of the parish council" (*ib.* s. 24, subs. 1 (*e*)).

6. The parish council may "contribute towards the expense of doing any of the things above mentioned, or agree or combine with any other parish council, or other authority or person, to do, or contribute towards the expense of doing, any of the things above mentioned (*ib.* s. 24, subs. 1 (*f*)).

7. *Alienation* of land or buildings by sale or exchange, or letting for more than a year, is not valid without the consent of the Local Government Board (*ib.* s. 24, subs. 2).

8. *Public ways* within the parish may be maintained by the parish council, unless they are such as the road authorities are bound to maintain. But the exercise of this power is not to relieve others of any liability to repair or maintain, nor is it to involve the parish council in any liability for damages owing to the condition of the road (*ib.* s. 29).

9. *Public Health.*—The parish council may appeal to the county council against proceedings or orders of the district committee under sec. 17, subs. 2 (*c*) of the Local Government (Scotland) Act, 1889, as amended by 60 & 61 Vict. c. 38, ss. 122 and 131, and it may make a representation to the Local Government Board under sec. 53, subs. 2 of the Act of 1889. These powers are conferred by 57 & 58 Vict. c. 58, s. 24, subs. 3, and are additional to the powers above noted as conferred by the Public Health Act, 1897, on parish councils generally, which supersede the powers first enumerated in that subsection.

10. *Housing of the Working Classes.*—The Local Government (Scotland) Act, 1894, s. 24, subs. 6, also authorises a parish council to make complaints as to unhealthy dwellings, and representations as to obstructive buildings, under secs. 31 and 38 of the Housing of Working Classes Act, 1890 (*q.v.*, vol. vi. p. 238).

11. *Small Holdings* (57 & 58 Vict. c. 58, s. 24, subs. 5).—A parish council may present a petition to the county council with a view to bringing Part I. of the Small Holdings Act, 1892 (55 & 56 Vict. c. 31, s. 5), into operation. Where the Act is in operation and there is a committee for the management of the holdings, two representatives from the parish council of the parish in which the holdings are situated are appointed to act on that committee in place of the elected members referred to in sec. 24 of the Small Holdings Act. See SMALL HOLDINGS.

12. *Allotments.*—A parish council may make a written representation to the county council with a view to proceedings under the Allotments Act, 1892 (55 & 56 Vict. c. 54). If allotments are provided, the parish council are the *allotment managers* (57 & 58 Vict. c. 58, s. 24, subs. 4). Parish councils may also lease land for allotments and for common pasture, and they have certain compulsory powers of leasing (*ib.* s. 26). See ALLOTMENTS, vol. i. p. 209.

13. *Acquisition of Land.*—When a parish council desiring to acquire land can do so by agreement, the provisions of the Lands Clauses Acts (8 & 9 Vict. c. 19, and 23 & 24 Vict. c. 106), except those relating to the purchase of lands otherwise than by agreement, apply (57 & 58 Vict. c. 58, s. 25, subs. 1). If the council cannot obtain land for an authorised purpose on reasonable terms by agreement, certain powers of compulsory acquisition are given. The procedure is by provisional order made by the county council after public inquiry, and confirmed (or disallowed) by the Local Government Board. Questions of disputed compensation are decided by a sole arbiter. The procedure is fully detailed in sec. 25 of the Local

Government (Scotland) Act, 1894. The procedure in obtaining an order for compulsorily leasing land for allotments is detailed in sec. 26 of the same Act.

14. *Post Office Guarantees* (54 & 55 Vict. c. 46, s. 8; 58 & 59 Vict. c. 18; 60 & 61 Vict. c. 41, s. 2).—A parish council may guarantee the Postmaster-General against loss sustained by him through the establishment of any additional post office or telegraph office, or the provision of any additional facilities, postal or otherwise. Any expenses fall on the special parish rate (*infra*).

15. *Expenses* incurred by rural parish councils and landward committees through the exercise of the preceding powers are to be defrayed out of a special parish rate, which must not exceed sixpence in the pound (57 & 58 Vict. c. 58, s. 27). The parish council may borrow on the security of this rate with consent of the Local Government Board (*ib.* s. 28). Where there is a landward committee, it certifies to the parish council annually before 12 June the amount required to be raised for these purposes, and the parish council levies the rate, and hands over the proceeds to the landward committee. Similarly, in borrowing, it is the parish council which raises the loan.

16. *Public Libraries* (50 & 51 Vict. c. 42).—The parish council or landward committee (57 & 58 Vict. c. 58, s. 23, subs. 2) is local authority under the Public Libraries Act (see LIBRARIES, vol. viii. p. 44). The election of the public library committee (of whom half are parish councillors and half parish householders who are not councillors) should take place at the statutory meeting of the parish council in December. The expenses are defrayed out of a library rate, which must not exceed one penny in the pound.

[Shennan, *Parish Councillor's Handbook*; M'Dougall and Dodds, *Parish Council Guide*; Graham, *Poor Law and Parish Council Acts.*]

Parish Council Elections.—Under the Local Government (Scotland) Act, 1894, a new elective body in every poor-law parish or combination was created to take the place of the parochial board. Its election is by ballot (s. 10 (3)), and the procedure to be followed thereat is that applicable to county council and municipal elections, so far as consistent with the necessary variations introduced by Part II. secs. 8–20 of the L. G. Act, 1894 (ss. 14 (4), 15 (4)).

The Act is difficult and confusing in dealing with elections, as the distinction of parishes into landward and burghal requires constantly to be kept in view. Generally stated, the election procedure relative to "landward" parishes is that applicable to county councils, and to burghal, that applicable to municipal elections; and although county council procedure is founded on municipal procedure to a certain extent, yet variations so constantly crop up that a parish council election may be said almost to be conducted under two entirely separate systems of procedure.

Parish Wards.—Parishes may be divided into one or more wards, and (1) where a parish is in part landward (rural) and in part burghal (urban) (for definition of terms landward and burghal, see sec. 54), each part must form a separate parish ward or wards; (2) a police burgh, or any part thereof, must form a separate ward or wards; and (3) where a parish has been divided into county council electoral divisions, each division, so far as within the parish, and excluding any police burgh or part thereof, must form a separate ward or wards (s. 13 (1) (2) (3)). In other words, the division of a parish

into wards must be so carried out that the boundaries shall in no case cut the boundaries of a royal burgh, a police burgh, or a county council electoral division.

Number of Parish Councillors.—There shall not be fewer than five nor more than thirty-one for any parish (s. 9 (3)). The exact number, and their allocation among the wards, is fixed by the different authorities themselves, subject to approval by the Local Government Board for Scotland; *e.g.*, in parishes wholly landward, number fixed by the county council; in parishes wholly burghal, by the town council; in parishes wholly in a police burgh, by the burgh commissioners; and in parishes partly landward and partly burghal, by the county council, town council, and burgh commissioners acting jointly. Failing agreement, the number is fixed by the Board (s. 9 (1), *a*, *b*, *c*, *d*).

Qualification of Parish Councillors.—All councillors must be elected from among the parish electors (s. 19 (1)). Women, married or single, are eligible (s. 20 (3)); and a woman may be appointed a representative by the parish council on a district committee of a county council where a county is not divided into districts (*ib.*). The same disqualifications attach to parish councillors as to county councillors with regard to holding places of profit under the council (see *supra*). Sec. 9 (2) of the L. G. Act, 1889, and sec. 20 (11) of the Act 1894, are identical, substituting, of course, "parish council" for "county council," and with the addition, in the latter Act, of the words, "or water, or right of water supply" in sec. 20 (2) (*a*), and an altogether new subdivision (*c*), dealing with ownership of stone, gravel, etc., for making or repairing roads or bridges.

Candidates or their supporters may hold meetings in public school-rooms at all reasonable times, but not during ordinary school hours; or in other rooms maintained out of a parish rate, subject only to payment of any expense reasonably incurred by the person in control over the room, and of any damage caused (s. 31).

Electors.—The electoral qualification is the same as in the case of county council and municipal elections. The *parish council register* is just that portion of the county council register or the municipal register which is applicable to the parish, with this addition, that provision is made for inserting in the parish council register the names of those who have the requisite qualification in more than one parish in the same county or town (57 & 58 Vict. c. 58, s. 12). In addition to the disqualifications which prevent registration as a county council elector or a municipal elector, the Act of 1894 (*supra*) disqualifies electors who have not paid the special parish rate (s. 27), within one year of service of the demand note, from voting at a parish council election (s. 10).

The Date of Election of Parish Councils.—The first election took place in April 1895; the next election takes place in 1898, and every third year thereafter.

In 1898 and every third year thereafter the election of a parish council (1) *in burghal parishes and wards* takes place simultaneously with the municipal election, *i.e.* on the first Tuesday of November; (2) *in landward parishes and wards* simultaneously with the county council election, *i.e.* the first Tuesday of December (ss. 14, 15).

In parishes partly burghal and partly landward, therefore, the parish councillors for the burghal wards are elected on November, but do not take office until December, when the parish councillors for the landward wards have been elected.

The Returning Officer has practically the same duties and responsibilities

in a parish council election as he has in a municipal or county council election (see MUNICIPAL, COUNTY COUNCIL, PARLIAMENTARY ELECTIONS). In elections in *burghal parishes and parish wards* the returning officer for the municipal election is the returning officer for parish council elections, and the presiding officers and clerks are the same for both elections (s. 15). In elections in *landward parishes and parish wards*, the returning officer for the county council election is the returning officer for the parish council election, and the elections are managed by him with the same staff of officials (s. 14 (1)). In the event of equality of votes between candidates for any vacancy, the returning officer may give a casting vote (s. 18), and he may also appoint a deputy for the general purposes of the election.

Notice of Election and Nomination.—In *landward parishes and wards*, notice of election must be given by the returning officer not later than 4 p.m. on the third Tuesday (*i.e.* three weeks) preceding the day of election (*i.e.* the first Tuesday of December) (s. 16 (1)). In *burghal parishes and wards*, apparently no notice of election is necessary, as under the Municipal Act it is not provided for. But under sec. 17 (1) the returning officer must make and publish such arrangements as he shall think fit for the purpose of enabling nomination papers and notices of withdrawal to be obtained, and, when filled up, how and where to be returned. Notice of the nominations must be given not later than the Friday before the election (1) in *burghal wards*, affixed to church doors and council chambers, also, if necessary in newspapers; (2) and in *landward wards*, in the same manner as is done in county council elections.

The nomination paper must be signed by at least two parish electors, and also by the candidate himself, or by someone acting with his authority (s. 17 (3), Sched. II., where form is given). Nominations of candidates must be lodged with the town clerk, in burghal parishes and wards, by 4 p.m. on the Tuesday before the election. In landward parishes and wards they must be lodged with the returning officer by 4 p.m. on the second Tuesday before the election (s. 16). Notice of withdrawal must be given to the returning officer, *in landward parishes and wards*, not later than 4 p.m. on the Tuesday immediately preceding day of election, signed by person nominated, or by someone on his behalf (s. 16 (3)): *in burghal parishes and wards*, not later than 4 p.m. on the Thursday immediately preceding the election (s. 40 Burgh Police Act, 1892). In this case it is probable that the notice requires to be signed by the candidate and his proposer or seconder, or else to be signed by the proposer and seconder and one of the five assenters required by that Act. Withdrawal is incompetent when its effect is to reduce the total number of persons nominated below the number necessary to fill the vacancies (s. 16 (3)). Form of withdrawal given in Sched. III. of the Act.

Notice must be given when there is no contest, and the returning officer arranges for nomination papers and notices of withdrawal to be obtained at some place in or near the parish (s. 17 (1)).

The Poll.—As already explained, the poll takes place either concurrently with that in municipal or in county council elections, according as the ward is burghal or landward. There are thus two separate elections on the same day, in the same polling station, and under the same presiding officer. The Act does not provide how this is to be done in detail. Either two ballot-boxes with separate ballot papers may be used, or one ballot-box for both elections, the ballot papers being distinguished by different colours. The latter seems the least confusing method. An elector cannot give more than

one vote to a candidate, nor can he give more votes in all than there are vacancies to be filled (s. 10 (2)).

The poll remains open from 8 a.m. to 8 p.m., and the counting of the votes is conducted in the same way as at parliamentary elections (see PARLIAMENTARY ELECTIONS). There is no special provision as to the declaration of the poll, except by reference to municipal practice incorporated into county council election procedure. In municipal elections the result must be declared on the day following the election, between the hours of 12 and 2 (3 & 4 Will. IV. c. 76, s. 10). It may not always be possible to declare the poll the day following the election even in burghal parishes and wards, but the result should be declared as soon as possible, and the return of those duly elected made by the returning officer to the parish council clerk, whose duty it is to summon them to the parish council meeting (s. 17 (2)). There is no formal acceptance of office. Every candidate by signing his nomination paper signifies his willingness to accept office, if elected.

Casual Vacancies, viz. those caused by death, resignation, disqualification, or "absence for six months without excuse approved by council," are filled up by the parish council (s. 19 (2) (4)); and although there is no provision that persons so appointed should have the qualification of a parish elector, the whole tenor of the Act suggests that they should be so qualified.

The Expense of the Election, in so far as it is applicable to the parish council election, is a debt due by the parish council to the municipal authority or the county council, as the case may be. Any dispute as to the amount is settled by the Local Government Board. The expense of elections is a charge on the poor-rate (ss. 14, 15). The Board decides all questions that arise as to the management of elections, and may order a new election when the election has not been timeous or complete (s. 18).

The Corrupt Practices Act of 1890 (53 & 54 Vict. c. 55) applies to parish council elections, election petitions, etc.

See CORRUPT AND ILLEGAL PRACTICES; PARISH COUNCIL; COUNTY COUNCIL; FRANCHISE.

[Patten, Macdougall, and Dodds' *Parish Council Guide*; Shennan's *Parish Councillor's Guide-Book*.]

Parish Quoad Sacra.—By Acts of Assembly of 1833 and 1834 the General Assembly of the Church of Scotland enacted that the districts attached to Parliamentary Churches (*q.v.*) and chapels of ease should be disjoined from the parishes of which they formed part, and erected into separate parishes *quoad sacra*. The *Stewarton* case, however (*Cuninghame*, 1843, 5 D. 427), decided that the Church had no power to allocate and assign parishes *quoad sacra*, or in any way to innovate on the existing parochial state of the parish, and the General Assembly of 1843 repealed these Acts. In the following year the Act of Parliament was passed (7 & 8 Vict. c. 44) by which the disjunction and erection of parishes *quoad sacra* was made legally possible.

1. *The Erection of Parishes Quoad Sacra.*—The statutes are 7 & 8 Vict. c. 44, ss. 8–11, 14; 31 & 32 Vict. c. 30 (united parishes); 39 & 40 Vict. c. 11. See DISJUNCTION AND ERECTION, vol. iv. p. 249. In addition to what is there stated, the following points are to be noted:—

By the United Parishes Act, 1868 (*supra*), in a united parish which has two or more churches, if an endowment is provided, one of those churches may be accepted as the church of a new parish *quoad sacra* without pro-

vision for its maintenance being required, since the heritors remain liable therefor. The Act 39 & 40 Vict. c. 11 makes it competent for the Teind Court, on proof of the consent of the presbytery, to attach one of the glebes of a united parish which has more glebes than one to a *quoad sacra* parish formed wholly out of such united parish (*Min. of Brydekirk*, 1877, 4 R. 798). The glebe may be so attached either at the time of the erection of the parish *quoad sacra*, or subsequently. Special facilities are given for erecting Parliamentary Churches (*q.v.*) and their districts into parishes *quoad sacra* (8 & 9 Vict. c, 44. s. 14).

The erection of a parish *quoad sacra* is a question on which the Court exercises its discretion after inquiry. It is "the policy of the Act to convert well-established chapels of ease into parish churches *quoad sacra*" (*Pearson*, 1862, 24 D. 1357), but the Court will not as matter of course disjoin and erect a parish *quoad sacra* on the parties providing church and endowment (*Irvine*, 1873, 11 M. 409). Accordingly, the Court has refused petitions where good cause was not shown, or the expediency of the erection was doubtful (*Stevenson*, 1855, 17 D. 592; *Irvine, supra*; *Murray*, 1874, 1 R. 482); and it will grant petitions, if well founded, notwithstanding opposition (*Pearson, supra*; *Stevenson*, 1879, 7 R. 270). As to intimation, where the proposed *quoad sacra* parish is situated wholly within an existing *quoad sacra* parish, see *Whitelaw*, 1875, 3 R. 88. The requirement that the site of the proposed church shall be inalienably secured is not satisfied by a 999 years' lease (*Donaldson*, 1873, 11 M. 489). The extension of an existing *quoad sacra* parish is competent under the Act 1707, c. 9 (*Baird*, 1893, 20 R. 973).

2. *Effect of the Erection.*—The erection being *quoad sacra tantum*, only ecclesiastical rights and liabilities are affected. The heritors remain liable for the parochial ecclesiastical burdens of the old parish, these being *inter civilia* (*Magistrates of Fortrose*, 1880, 8 R. 124; cf. *Reid*, 1850, 12 D. 1211, at p. 1215, per Ld. J.-C. Hope). But the ministers and elders of a parish *quoad sacra* "have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland" (7 & 8 Vict. c. 44, s. 8). Hence the proclamation of banns being *inter sacra*, it is one of the functions of the office of the minister of a parish *quoad sacra* (*Hutton*, 1876, 3 R. H. L. 9). The minister of a *quoad sacra* church is entitled and bound to become a contributor to the Ministers' Widows' Fund (*Maclagan*, 1887, 14 R. 1083; but see PARLIAMENTARY CHURCHES); and vacant stipend of a parish *quoad sacra* is payable to that fund (*Cheyne*, 1863, 1 M. 963). As to ministers, cf. also *Buchanan's Trs.*, 1886, 14 R. 284.

As to disjunction and annexation *quoad sacra tantum*, see DISJUNCTION AND ANNEXATION, vol. iv. p. 248. See Elliot, *Erection of Parishes Quoad Sacra, etc.*

Parliament.—The word *parliamentum* was applied for the first time to the Great Council of England by Mathew Paris about the year 1246. At that date the Great Council was the name given to the national assembly which, under the influence of feudal ideas, had succeeded to the powers exercised from the earliest Anglo-Saxon times by the Witenagemote. Parliament in its modern form may be said to date from 1295, in which year Edward I. summoned "the great and model parliament." To this Parliament were summoned representatives of the three estates of the realm—the Clergy, the Lords, and the Commons. In law, Parliament is still a representative assembly of the three estates of the realm, for all the three

estates are still summoned; but the clergy, reluctant from the first to obey the royal summons to send representatives to Parliament, have for centuries entirely ceased to do so. In 1664 the clergy ceased to grant separate subsidies, and the old distinction between clergy and laity in the imposition of taxation came to an end. The clergy acquired in return, by tacit consent, what they had not before enjoyed, the right to vote for knights of the shire, as freeholders, in respect of their glebes. The Lords Spiritual still sit in the Upper House, but they do not vote as a separate order. Down to 1707, Scotland had an independent Parliament. The three estates of the kingdom of Scotland sat together in one house, but the functions of legislation and the conduct of business were left for the most part to a permanent committee, known as the Lords of the Articles (see ARTICLES, LORDS OF THE). Legislative independence was conceded to the Irish Parliament in 1782, but by the Act of Union this Parliament ceased. Thus the English Parliament became the Parliament of the United Kingdom. The history of Parliament is practically coincident with the Constitutional history of England (on this subject, see the *Constitutional Histories of England* by Stubbs, Hallam, and May).

The Parliament of the United Kingdom is the supreme legislative body of the nation. In the fullest sense of the term it consists of the Crown, the Lords, and the Commons, all of whom must concur in legislation. In a narrower and stricter sense it includes the two Houses only, the veto of the Crown having been practically obsolete since its last exercise by Queen Anne. In the narrowest, but inaccurate, sense, the word Parliament is applied to the House of Commons only, a use of the term due to the fact that that House has the greater power of the two. The history, powers, and privileges of the House of Lords and House of Commons are dealt with under LORDS, HOUSE OF; COMMONS, HOUSE OF.

"Omnipotence" of Parliament.—An outstanding peculiarity of the British Parliament is its so-called "omnipotence." In foreign countries the powers of the Legislature are limited by a written constitution, and acts of the Legislature in excess of the powers conferred by the constitution may be set aside by the Courts of law. The British Parliament, on the other hand, is supreme and absolute, and no British Court can set aside any act of Parliament on the ground that it is beyond the constitutional competence of Parliament.

Officers.—The Speaker of the House of Commons, who is chosen by the members from among their own number, at the opening of a new Parliament, is the president and spokesman of that House, with authority to keep order. He occupies a position of great dignity, and takes precedence as the First Commoner in the kingdom. The Chairman of Committees presides in Committee of the whole House, and is also empowered to act as Deputy-Speaker. The Sergeant-at-Arms is the executive officer of the Commons. The chief officer of the House of Lords is the Chancellor or Keeper of the Great Seal, who sits on the woolsack and acts as Speaker for formal purposes.

The judges of the High Court of Justice, the Attorney- and Solicitor-General, and the Queen's Ancient Serjeant, are summoned to attend in the House of Lords, though in an inferior capacity, by "writs of attendance." It is in virtue of these writs of attendance, and not as Peers of Parliament, that the judges are called upon to give their opinions on points of law.

Writ of Summons.—The dissolution of one Parliament and the calling of another are effected by the same Royal Proclamation, issued by the

Queen on the advice of the Privy Council under the Great Seal. An order is then addressed by the Queen in Council to the Chancellors of Great Britain and Ireland to issue the necessary writs. The writs issued from the Crown Office are addressed to five classes of persons: the temporal peers of England, the spiritual peers of England, the temporal peers of Ireland, the law officers and judges of the High Court of England, and the returning officers of places entitled to elect members to serve in Parliament. The sixteen Scotch representative peers do not receive a writ of summons. They are elected, in pursuance of a separate proclamation (6 Anne, c. 23; 14 & 15 Vict. c. 87), at Holyrood, the Lord Clerk-Register certifying the return to the Clerk of the Crown in Chancery, who transmits it to the Clerk of the House of Lords (see PEERS, ELECTION OF SCOTTISH).

Constituencies.—In the House of Commons there are represented counties, boroughs, and universities. Under the plan of redistributing seats adopted in 1884–85, the more populous counties and boroughs are divided into districts, each of which elects a single member. England is represented by 233 members for counties, 227 members for boroughs, and 5 members for universities—total 465. Wales is represented by 19 members for counties and 11 members for boroughs—total 30. Scotland is represented by 39 members for counties, 31 members for boroughs, and 2 members for universities—total 72. Ireland is represented by 85 members for counties, 16 members for boroughs, and 2 members for universities—total 103. The grand total of members sent to the House of Commons by the constituencies of Great Britain and Ireland is 670.

The qualifications which entitle a person to be registered and to vote in a parliamentary election, the disqualifications of candidates, and the voluminous rules regulating the conduct of parliamentary elections, are treated in separate articles. See PARLIAMENTARY ELECTION; UNIVERSITY ELECTION; BALLOT; FRANCHISE; CORRUPT AND ILLEGAL PRACTICES; ELECTION PETITION; PARLIAMENT, MEMBER OF.

No Parliament may endure for more than seven years from the time when it is first summoned to meet. Triennial Parliaments were established by a law of 1641, but in 1716, immediately after the accession of George I., the period of seven years was fixed by the Septennial Act. Until 1867 the existence of Parliament was brought to an end by the demise of the Crown, but the Representation of the People Act, 1867, makes the duration of a Parliament independent of a demise of the Crown.

Adjournment, Prorogation, Dissolution.—The adjournment of either House takes place at its own discretion, and brings about a cessation of the business of that House for a period of hours, days, or weeks. Business pending at the time of the adjournment is taken up at the point at which it dropped, when the House meets again. Prorogation takes place by the exercise of the royal prerogative. It ends the session of both Houses simultaneously; and any Bill which is not ripe for the royal assent at the date of prorogation, must once more begin at the earliest stage when Parliament is summoned again. A dissolution brings the existence of Parliament to an end. Parliament is usually dissolved by an exercise of the royal prerogative; but if it is not dissolved by royal prerogative, it expires by efflux of time at the end of seven years.

A Bill, which has passed through all the necessary stages in Parliament, becomes an Act of Parliament on receiving the royal assent. The royal assent may be given by the Queen in person, or by commission. An Act of Parliament comes into force as soon as it receives the royal assent, unless some other time is stated in the Act itself. A Bill cannot be introduced

twice in the same session. Each House may obtain information from the executive departments by means of parliamentary returns.

[For the history of Parliament, see the works of Stubbs, Hallam, Gneist, Taswell-Langmead, and May, on the *Constitutional History of England*. For the laws, privileges, and customs of Parliament, see Anson's *Law and Custom of the Constitution*, 3rd ed., 1897; May's *Law, Privileges, and Proceedings of Parliament* (19th ed., 1893). See also Todd, *Parliamentary Government in England*, 2nd ed., 1887.]

Parliament, Members of.—The different classes of persons to whom writs of summons to Parliament are addressed are enumerated *sub voce* PARLIAMENT. This article deals with the position of only one of these classes, viz. the members of the House of Commons.

The writs for the election of members of the House of Commons are addressed to the returning officers of the places entitled to elect members to serve in Parliament. The writs are in a modern form provided by the Ballot Act of 1872. The Clerk of the House of Commons receives from the Clerk of the Crown a list of the returns made to the writs issued, the returns themselves being retained for reference in the Crown Office during the continuance of a Parliament.

In order to give a member a title to sit in the House, he must take an oath of allegiance, or make a declaration of allegiance. The Oaths Act, 1888 (51 & 52 Vict. c. 46, s. 1), enables any person to make affirmation in all cases wherein an oath is required, provided he states either that he has no religious belief, or that it is contrary to his religious belief to take an oath.

Disqualifications.—There are various classes of persons who are disqualified for membership of Parliament. Thus aliens cannot sit in either House. Neither an English nor a Scotch peer may sit in the House of Commons (see case of *Ld. Wolmer*, who succeeded to the Earldom of Selborne, 1895, Hansard, 4th ser., xxxiii. 1058, 1728); but an Irish peer may sit for any county or borough of Great Britain, so long as he is not one of the representatives of the Irish peers in the House of Lords (39 & 40 Geo. III. c. 67, art. 4).

The clergy of the Established Churches in Scotland and England, and the clergy of the Roman Catholic Church, are disqualified (41 Geo. III. c. 63; 10 Geo. IV. c. 7, s. 9). Again, there are numerous offices under the Crown the acceptance of which wholly disqualifies the occupant from sitting in Parliament. In this number are included all offices under the Crown created since 25th October 1705 (6 Anne, c. 7), and not specially exempted by statute. Judges of the Court of Session are disqualified by 7 Geo. II. c. 16, s. 4: Sheriffs-Depute in Scotland, by 21 Geo. II. c. 19, s. 11; and returning officers in Scotland, by 38 & 39 Vict. c. 77, s. 5. Again, there are certain offices the acceptance of which vacates a seat in Parliament, though the holder of the office is eligible for re-election. In this number are included offices in existence before 25th October 1705, as well as certain offices more recently created, in regard to which there are express statutory provisions to this effect. Persons who hold pensions from the Crown are disqualified; but the holders of civil service and diplomatic pensions are exempted from this rule (32 & 33 Vict. c. 15; 32 & 33 Vict. c. 43, s. 17). Other classes of persons who are disqualified are Government contractors (22 Geo. III. c. 45); persons found guilty of treason or felony who have not been pardoned or served their term of punishment; persons found guilty of corrupt practices

at a parliamentary election; insane persons (49 Vict. c. 16); minors (7 & 8 Will. III. c. 25, s. 8, and the Act of Union, 5 Anne, c. 8); and bankrupts.

In former times Roman Catholics, Jews, Quakers, atheists, etc., were excluded from Parliament by the terms of the parliamentary oath required from members as a condition precedent to the right to sit and vote. These disqualifications have gradually become extinct through the operation of a series of statutes, of which the last was the Oaths Act in 1888 (51 & 52 Vict. c. 46). Other extinct grounds of disqualification were the requirement of residence by the member within the constituency which he represented, and the requirement of a property qualification, consisting of an estate in land which, in the case of a knight of the shire, must be worth £500 *per annum*, and in the case of a burgess, £200 *per annum*. The requirement of residence finally ceased in 1771, and all the previous statutes relating to the property qualification were repealed in 1858 (34 & 35 Vict. c. 116).

Retiral of Members.—A member of Parliament cannot resign his seat. A member who wishes to retire from Parliament applies for certain old offices, which, being in the gift of the Treasury, are granted as matter of course, and which, in virtue of the disability attaching to them, operate to vacate the seat. Among such offices are the stewardship of the CHILTERN HUNDREDS (*q.v.*), the escheatorship of Munster, and the stewardship of the Manor of Northstead. The House of Commons can by resolution expel a member, and order the Speaker to issue his warrant for a new writ for the seat from which the member has been expelled; but it cannot prevent the re-election of the expelled member. (A succinct account of the *Wilkes* controversy, which finally settled this principle, is to be found in May's *Constitutional History of England*, i. 414.)

Privileges of Members.—There are certain "ancient and undoubted" privileges of members of the House of Commons which are formally demanded by the Speaker at the commencement of each Parliament, and granted by the Crown through the Chancellor. Of these the most important are freedom from arrest and freedom of speech. The privilege of freedom from arrest belongs to members during the continuance of the session, and for forty days before its commencement and after its conclusion. The privilege of freedom of speech was of slow growth, but it has been confirmed by judicial sanction in various famous cases (*Haxey's* case, *Strode's* case, *Eliot's* case), as well as by an express provision in the Bill of Rights (1 Will. & Mary, c. 2, s. 2). The privilege secures freedom merely from outside interference; it does not prevent the House exercising control over the language of its members, and enforcing this control by censure, by suspension from the service of the House, or, in extreme cases of abuse of speech, by expulsion. (The rules for enforcing order in debate are summarised in May's *Parliamentary Practice*, 10th ed. ch. xii.) The House has the power to exclude strangers from its debates, and to prohibit publication of its proceedings. Since the famous conflict between the House of Commons and the City of London in 1771, following on the arrest of a printer of debates by a messenger of the House, the practice of reporting debates has continued to be permitted with impunity: but the reports of debates are still made and published on sufferance. In addition to the privileges claimed by the Speaker at the commencement of each Parliament, the House of Commons superintends its own constitution by issuing writs when vacancies occur during the existence of a Parliament, and by pronouncing on the existence of legal disqualifications in persons returned to Parliament. Until 1868 the House of Commons itself determined questions arising where an election was controverted on the

ground that a candidate, properly qualified, had been improperly returned by persons not entitled to vote, or by votes procured by illegal and corrupt practices. The trial of controverted elections is now, however, conducted, not by a committee of the House, but by two judges of the High Court, sitting in the borough or county whose representation is in dispute, who certify the decision to the Speaker of the House.

See PARLIAMENT; COMMONS, HOUSE OF; FRANCHISE; PARLIAMENTARY ELECTION; CORRUPT AND ILLEGAL PRACTICES.

Parliamentary Churches.—These were erected under the provisions of 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90. The latter Act repealed the whole of the former except secs. 2 and 3, which dealt with the appointment of commissioners and officers.

This legislation proceeded on the preamble that "in the Highlands and Islands of Scotland many of the parishes are so extensive that it is impossible for many of the inhabitants to attend divine service at the parish church, and it is also impossible for the ministers serving the cure thereof to visit the more distant inhabitants of those parishes." To remedy this state of matters Parliament voted £50,000, out of which not more than forty churches, with ministers' residences, etc., attached, might be built, and not more than ten existing occasional places of worship (not being parish churches) might be put in repair, and ministers' residences provided (5 Geo. IV. c. 90, ss. 27, 28). The churches thus erected or repaired are known as parliamentary churches.

By secs. 3–7 provision was made as to the manner of applying for such a church, and for defining the districts to which the labours of its minister were to be confined. The stipend, which was not to exceed £120, was made payable out of Exchequer (s. 13). One-third of the pews must be free. Pew-rents can be applied only in repairing the church and the manse, and are to be so applied to these buildings in proportion to their first cost (ss. 18–22). A limited liability for repairs is placed on the heritors who applied for the church, and their heirs and successors, and on the minister (s. 18). The minister "has no control over repairs on the church buildings carried out by the heritors at their own expense" (*Macdougall*, 1892, 20 R. 105).

The minister of a parliamentary church discharges within the district all the duties of a minister of the Church of Scotland, except the right and duty of Church discipline (s. 15). His rights, and those of his widow and executors, are generally those attaching to parochial clergy (ss. 23–25), making allowance for the facts that the district is not disjoined from the parish, and that a parliamentary church has no kirk-session of its own (s. 25). He is not, however, entitled to become a contributor to the Ministers' Widows' Fund (*Irvine*, 1838, 16 S. 1024, reversing *Gordon*, 1836, 14 S. 509), even if, after his induction, the charge has been erected into a *quoad sacra* parish (*Grant*, 1849, 11 D. 1370; *aliter* if he was inducted after the erection *quoad sacra*). The minister and kirk-session of the parish to which the district belonged are to provide for the attendance at the parliamentary church of elders resident in the district (s. 16), and the minister of that church and these elders make the usual collections, and keep accounts of their receipts and disbursements (s. 17).

These parliamentary churches were the forerunners of *quoad sacra* parishes; and in the Act of 1844 which sanctioned the erection of the latter (7 & 8 Vict. c. 44), sec. 14 provides for erecting a district attached to a

parliamentary church into a parish *quoad sacra* without requiring further evidence of the providing of church, manse, stipend, etc., while sec. 15 enables such districts to be erected into parishes *quoad omnia*. Under sec. 14 the heritors' obligation to repair under 5 Geo. IV. c. 90 remains; under sec. 15 it disappears, and the liability rests on the heritors of the parish.

Of the forty-two parliamentary church districts created under 5 Geo. IV. c. 90, forty have been made parishes *quoad sacra*.

[See DISJUNCTION AND ERECTION, vol. iv. p. 249; PARISH QUOAD SACRA.]

Parliamentary Elections, Procedure at.—By the Ballot Act of 1872 (35 & 36 Vict. c. 33), which introduced for the first time into parliamentary elections the principle of secret voting, a great change in the method of electing members of Parliament was effected. Previously, the public nomination on the hustings, and the other incidents of the election were too frequently attended with rioting and violence, and success depended to a very large extent upon such methods as intimidation and bribery in all its forms. It was to stop these evils that the Ballot Act was passed; and though the ballot, or secret voting, is not in itself a perfect safeguard, the Act has worked with great satisfaction. Elections are now carried out with regularity and order, and corruption is comparatively unknown. The form of the Ballot Act is somewhat peculiar. It consists partly of sections in the form ordinarily to be found in statutes, and partly of a series of directions in the form of rules.

The provisions of the Act apply equally to municipal elections, subject to the necessary modifications introduced by Part II. of the Act (clauses 20 to 23 inclusive) [see MUNICIPAL ELECTIONS, PROCEDURE AT], and by more recent statutes to county council, parish council, and school board elections. The object of this article is mainly, though not exclusively, intended to explain the procedure necessary at a parliamentary election.

Returning Officer.—The returning officer is the Sheriff of the county, and in a district of burghs, the Sheriff of the county in which the chief town of the group is situated; failing him, the Sheriff-Substitute (5 & 6 Will. IV. c. 78, s. 11). He may appoint a deputy returning officer if he is returning officer for more than one county (s. 8, B. A.); but it has been doubted whether, in the case of a bye-election in one only of the counties, this appointment of a deputy is legal (*Ivory*, 1895, 23 R. 155, per Ld. Stormonth Darling, at 161). The charges of the returning officer, and the remuneration of deputy returning officers, are regulated by 48 & 49 Vict. c. 62, and 54 & 55 Vict. c. 49.

Writ.—The form of a writ for a county or burgh election is given in the 2nd Schedule of the Act. It issues from the office of the Clerk of the Crown in Chancery, and is addressed to the Sheriff of the county, by whom a receipt must be given to the postmaster (53 Geo. III. c. 89, s. 1). The writ requires to be indorsed either by the Sheriff, his Substitute (5 & 6 Will. IV. c. 78, s. 11), or by some other person duly authorised by the Sheriff to do so (s. 8).

Notice of Election.—Notice of election requires to be given by the returning officer, in the case of a county or district of burghs election, within two days after receipt of writ, and in the case of a burgh election, on the same day of receipt, or on the day following, in the manner prescribed by Rule 1 of the Ballot Act. The notice of election states when the nomination is to take place, which must be, (1) *in a county or district of burghs election*, not later than the *ninth* day after receipt of the writ, with an interval of not less than

three clear days between the day on which notice is given and the day of nomination: (2) *in a burgh*, not later than the *fourth* day after the receipt of the writ, with an interval of not less than two clear days between the day on which the notice is given and the day of nomination (R. 2). The poll must take place, (1) *in a county or district of burghs*, on a day *not less than two, nor more than six*, clear days after the day of nomination, exclusive of Sundays: (2) *in a burgh*, on a day *not more than three clear days* after the day of nomination, exclusive of Sundays (R. 14). Sundays, Christmas Day, Good Friday, and any day set apart for a public fast or thanksgiving, are excluded in making this calculation (R. 56). There are special provisions with regard to Orkney and Shetland and the Wick Burghs (R. 61). Mistakes in the notice of election may invalidate the election or not, according to whether or not such mistake has affected the result of the election. And it is not necessarily fatal that the poll has been held on the wrong day (*East Clare*, 1892, 4 O'M. & H. 162: Day's *Election Cases*, 1892–93, 161; *Athlone*, 1843, Barron and Arnold's *Election Cases*, 122. See also *Howes*, 1876, 1 C. P. D. 670).

Agents.—Each candidate may have one election agent only, or may himself act as such. In counties one sub-agent, paid by the candidate, may be appointed for each polling district, and for each polling station in county and burgh elections, one polling agent only is allowed (R. 59, B. A.; C. I P. P. Act, 1883, Sched. I. (3)). Paid election agents, sub-agents, polling agents, clerks, messengers, although electors, may not vote (C. I. P. P. Act, 1883, Sched. I. (7)).

Nomination.—The nomination of a candidate must be in writing, subscribed by two electors of the constituency as proposer and seconder, and eight other registered electors as assenters. If no more candidates are nominated than there are vacancies, those nominated are declared to be elected; if there are more, a poll must take place (s. 1, B. A.). The nomination is made before the Sheriff or his Substitute, in a convenient room (R. 58, B. A.), usually the Court-house, on the day advertised, during two hours between 10 and 3 as duly advertised. And he must attend for one hour thereafter to receive and decide upon any objections (Rr. 4 and 12, B. A.). Objections under Rule 6 deal with insufficient description or designation of the candidate on the nomination paper, and must be made at, or immediately after, the delivery of the paper. Designation by initials is not sufficient (*Mather*, 1876, 1 C. P. D. 596). An abbreviation, such as Wm. for William, has been held good (*Henry*, 1883, 12 Q. B. D. 257). Objection of any other kind must be taken within the hour after the time appointed for the nomination, and if disallowed, the decision is final; if sustained, it is open to review on petition (R. 13, B. A.). Objections relating to the candidate's qualification ought not to be entertained by the returning officer (*Worcester*, 1880, 3 O'M. & H. 186; *Corporation of Bangor*, 1886, 18 Q. B. D. 349), except in such cases where the incapacity is inherently obvious, as at Camberwell in 1885, where the nomination of a lady was rejected by the returning officer, and his right to do so was never questioned. The duties of nomination may be performed by a person specially appointed, other than the Sheriff-Substitute (s. 8, B. A.). A candidate, his proposer and seconder, and one other person (usually his agent) may attend at the nomination. No others are permitted (R. 8, B. A.); and the nomination paper must be delivered to the returning officer by the candidate himself, or by his proposer or seconder (s. 1, B. A.). Delivery by an agent is bad (*Monks*, 1876, 1 C. P. D. 683). It is a common practice to nominate the same candidate more than once, each

time using a different proposer and seconder, and assenters. This is to prevent trouble if the first nomination is bad, say because some of the subscribers are not electors. A bad nomination cannot void a good nomination of the same person (*Northcote*, 1875, L. R. 10 C. P. 484). Notice of the nomination must immediately be given (R. 11); but the nomination can be withdrawn by the candidate within the two hours by a signed notice to that effect to the returning officer (s. 1), and such notice of withdrawal requires to be published (R. 10). If the candidate dies after nomination but before the poll, the returning officer countermands the poll, and begins afresh as if the writ had been received on the day of the death. A fresh nomination is unnecessary, however, in the case of the surviving candidate or candidates who had already been nominated (s. 1). Form of nomination paper is given in the 2nd Sched., and it must contain names, abode, rank, profession or calling, and the surname must come first (R. 6). Forms may be obtained by any elector from the returning officer on any day prior to the nomination, during the hours fixed by him in accordance with Rule 7. If there is to be a contest, the returning officer gives notice of the polling day, the candidates nominated, the order in which their names will appear on ballot paper, etc. (R. 9), and also the situations of the polling stations, and the description of voters entitled to vote at each, and in what manner the ballot papers may be marked (R. 19).

Security.—At a contested election security must be given by a candidate for his share of the returning officer's expenses, and if not given by him in due time he is deemed to be withdrawn (41 & 42 Vict. c. 41, s. 3, subs. 3). The time for giving security is during the one hour after the two hours of the nomination (*ib.* s. 3, subs. 1 and 2), and the amount necessary is fixed by 48 & 49 Vict. c. 62, s. 3. Security may be given in notes or monies; or with the consent of the returning officer, in any other manner.

Presiding Officers and Clerks.—The returning officer appoints the presiding officers and clerks (R. 21), and provides each polling station with the requisite materials, *i.e.* ballot papers, register, stamping instrument, etc. (R. 20; s. 8), and so far as practicable makes use of the ballot-boxes, fittings, and compartments provided for county council, municipal, or school board elections (s. 14, Ballot Act, 54 & 55 Vict. c. 49, s. 5).

The remuneration of presiding officers and clerks is fixed by 54 & 55 Vict. c. 49; and in a parliamentary election anyone is eligible except those who have been acting for any of the candidates during the existing election, or whose partner, clerk, or employer has been so acting, or who have been employed by any person in or about the election (R. 49, B. A.). There is nothing to prevent a presiding officer or clerk from voting, if he is an elector, but it is safer and more prudent that he should not do so.

Ballot papers are numbered on the back, and show the names and description of the candidates on the front. They are attached to a counterfoil, with the same number printed on the face (s. 3). Form given in 2nd Schedule.

Tendered ballot papers are the same in form as the ordinary, but different in colour, are used chiefly in cases of personation, and are not put into the ballot-box, but handed to the presiding officer, who deals with them according to the terms of Rule 27. Tendered ballot papers may sometimes be used in cases other than personation. Thus, in cases where the disqualification is obvious, say a woman, minor, etc., whose names are on the register, and who insist on voting, it is better to have such votes ear-marked in this way, and save all the trouble and expense of a recount and scrutiny afterwards. Each polling station shall contain one screened

compartment for every 150 voters (R. 16), in which must be fixed a copy of the notice "Directions to Voters" given in the 2nd Schedule.

The Poll.—The poll commences at 8 a.m. and continues till 8 p.m. (48 & 49 Vict. c. 10), and may be adjourned in case of riot or open violence by the Sheriff or the presiding officer (s. 10, B. A.; see *Roxburgh* case, 1838, Fale. & F. 503; *Spilsbury*, 1808, 1 Taun. p. 146; *Harwich*, 1851, 1 P. R. & D. 314). It may be closed by consent of all parties (16 & 17 Vict. c. 28, s. 9). If the poll is opened or closed irregularly, that is to say, in any other manner than authorised by statute, *e.g.* opened at 8.45 instead of 8 o'clock, the general rule is to void or sustain the election according as the result of the election has or has not been affected thereby (*Hackney*, 1874, 2 O'M. & H. p. 77; *Westminster*, 8 Jour. of House of Commons, 280; *Limerick*, 1833, Perry and Knapp's *Elect. Cas.* 355; *Drogheda*, 1874, 2 O'M. & H. 120).

In the Polling Booth—Procedure.—At the time of voting, the paper is marked on both sides by the presiding officer with the official mark, which is secret and cannot be used again for seven years (R. 20). The paper is delivered to the voter in the polling station, and the number of the voter on the register is marked on the counterfoil by the presiding officer, so that the vote may be identified on a scrutiny. The voter secretly marks the paper with a X against the name of the candidate he votes for, folds it up so as to conceal his vote, then places it in the ballot-box in the presence of the presiding officer, after having shown to him the official mark on the back (s. 2). It is the presiding officer's duty to see that the official mark is on the back when being put into the box (*Pickering*, 1873, L. R. 8 C. P. 489; *Thornbury*, 1886, L. R. 16 Q. B. D. 739, p. 752). The presiding officer also marks the register, to show that the voter has received a ballot paper. When he has voted, the voter must quit the polling station (R. 25): and if he refuses, he may be ejected at the instance of the presiding officer (s. 9, B. A.). It is his duty to keep order in the polling booth: and if anyone is disorderly, he may be ejected, even though he be the candidate (*Clementson*, 1875, L. R. 10 C. P. 209).

If a voter is incapacitated by blindness or other physical cause, or, when the poll is on a Saturday, declares himself a Jew, the presiding officer marks the paper as requested by the voter, puts it in the box, and records the fact on a schedule or form supplied to him for that purpose called "List of Votes marked by Presiding officer." If the voter declares himself unable to read, the presiding officer clears the room of all voters, reads over the "declaration form" provided (to which the voter appends his marks), marks the voter's paper as directed, puts it in the box, and records the fact on the list mentioned above (R. 26).

Presiding officers and clerks are liable for misconduct (s. 11, B. A.). A presiding officer is not liable for the clerk's mistakes (*Pickering*, 1873, L. R. 8 C. P. 489). Where B., by clerk's mistake, got C.'s number and ballot paper, and voted on it, B.'s vote was held good, and C.'s tendered vote was also added (*Gloucester*, Day's *Elect. Cas.* 1892, 50). If a presiding officer fails to mark the back of the ballot paper with the official mark, thus rendering the vote void, he is liable in an action to the candidate who has thereby lost the election (*Pickering, supra*).

Tendered votes are used in the following circumstances: When a person represents himself to be a particular elector, and applies for a ballot paper after another person has already voted as such elector. The presiding officer gives him a tendered ballot paper on his duly answering the questions allowed to be put, should he be required to do so (s. 10, R. 27, B. A., Corrupt

Pract. Act, 1880, s. 3). There are other cases where a tendered vote is more suitable than an ordinary vote; *e.g.* where disqualification is obvious although name on register, a woman or a minor. If an ordinary vote is given, it may lead to a recount and a scrutiny, whereas, if a tendered vote is given, it is kept apart, and its value can be adjudicated upon afterwards with little trouble and expense by the proper authorities. Tendered votes are not put in the ballot-box, but indorsed by presiding officer with voter's name and number on the register, and put in a separate packet, and a record of this is made in the Tendered Votes List supplied to the presiding officer (R. 27). These tendered votes are not counted by the returning officer at the counting of the votes, and do not affect the result of an election, except in the case of a scrutiny ordered by the Court where personation is alleged to have taken place or where the Court thinks some form of investigation should be made into what actually took place.

Spoilt Papers.—A ballot paper inadvertently spoiled by the voter may be exchanged for a new one, and the presiding officer is required to preserve separately the papers so spoilt, and to account for them in the Ballot Paper Account made up at the close of the poll (R. 28).

Ballot papers in the box, spoiled papers, unused papers, and tendered papers must be accounted for to the returning officer in the Ballot Paper Account made up by the presiding officer; and at the close of the poll he must seal up the ballot-box, place in separate sealed packets the unused and spoilt papers; the tendered ballot papers (used); the marked copy of the register; the counterfoils of the ballot papers; the tendered votes list; the marked votes list; the declarations of inability to read; which must be delivered by him to the returning officer.

Persons disqualified from Voting.—The following persons are disqualified at common law or by statute from voting in a parliamentary election, and their votes are void on a scrutiny:—

(1) Minors. (2) Women. (3) Insane persons. (4) Aliens.

(5) Sheriffs, sheriff-substitutes, sheriff-clerks, and sheriff-clerk deputes in their *county* elections.

(6) Sheriffs, town clerks, and town clerk deputes in their *burgh* elections (s. 36, Reform Act, 1832).

(7) Burgh and county assessors in their respective elections (19 & 20 Vict. c. 58, s. 8; 48 Vict. c. 8, s. 8 (6)).

(8) Peers, but not their eldest sons (Reform Act, 1832, ss. 7, 37).

(9) Persons who have failed to pay poor's rates before 20th June of any year (31 & 32 Vict. c. 48, ss. 3, 6; 48 Vict. c. 3, ss. 2, 7, 14).

(10) Persons in receipt of parochial relief; but a pauper who is on the roll is entitled to vote (*Anstruther*, 1886, 13 R. 577).

(11) Election agents, sub-agents, polling agents, clerks, messengers or other persons paid by the candidates (Corr. Pract. Act, 1883, Sched. I. part i. (7)).

(12) Persons guilty of corrupt or illegal practices during the time the disqualification lasts (Corr. Pract. Act, 1883, s. 6 (3) (*a*)).

If the names of such persons are on the register, it seems the presiding officer cannot refuse to allow them to vote (*Worcester*, 1880, 3 O'M. & H. 186). If they do so, however, he should make some record of the circumstances, for the information of the returning officer if necessary, or give a tendered vote to the applicant, which, although intended primarily for cases of personation only, would in the circumstances be held to be a reasonable course to follow.

Agents of candidates are allowed to be present in the polling station (R. 21), but they, as well as the officials, are sworn to secrecy (R. 54) as regards who have voted, and how, and they are prohibited from interfering with any voter, or inducing him to show his vote (s. 4). So also all persons present at the counting of the votes are required to take the declaration of secrecy (R. 54).

Counting the Votes.—The candidates and their agents are entitled to be present at the counting of the votes (Rr. 31, 33), and notice must be given by the returning officer to them of the time and place (R. 32).

The names and addresses of such persons as are appointed agents must be sent in writing to the returning officer one clear day at least before the opening of the poll (R. 52), and these must be published by him. If an agent dies or is incapable of acting during the time of election, another agent may be appointed by the candidate (R. 53). The returning officer may, in addition to any clerks, appoint competent persons to assist him in counting the votes (R. 48, B. A.).

At the counting, the boxes are opened, and the votes in each are first counted by the enumerators, in order to compare with the Ballot Paper Account relative to that box. If the ballot paper accounts are all correct as shown by the first count, all the votes from all the boxes are then mixed together and distributed to the enumerators for the final count, care being taken prior to the general mixing that no persons shall be enabled to see the numbers printed on the back of the ballot papers (R. 34, B. A.).

Doubtful Votes.—Doubtful papers are laid aside, and adjudicated upon by the returning officer, whose decision is final subject to reversal on petition, questioning the election or return (s. 2, B. A.). Ballot papers falling under any of the following heads must be rejected by him, marked "rejected," and reported on to the Clerk of the Crown in Chancery:—

(1) Want of official mark.
(2) Voting for more candidates than entitled to.
(3) Writing or mark by which voter can be identified.
(4) Unmarked or void from uncertainty (s. 2, R. 36, B. A.).

Papers marked on the back but not on the face are valid (*Thornbury* case, 1886, 16 Q. B. D. 746); and where the ink has penetrated clearly through the paper and is visible on the back, the vote is good (*Cirencester*, 1893, 4 O'M. & H. 194; Day's *Election Cases*, 1892–93, 155). The ruling case on identification is the *Cirencester* case, which considerably modified the effect of the older decisions, viz. *Wigtown* case, 1874, 1 R. 925; *Deans*, 1882, 9 R. 1077; *Woodward*, 1875, L. R. 10 C. P. 737. The rule now is, at anyrate in England, that the mark of identification which will vitiate a voting paper must be one by which the voter *can*, and not merely may, be identified. A paper marked with an oblique line has been held valid (*Woodward*, *supra*), in contradistinction to *Wigtown* case, 1874, 1 R. 925, and *Robertson*, 1876, 3 R. 978, where it was held invalid. So also one marked with a circle (*Buckrose Division*, 1886, 4 O'M. & H. 112; per *contra*, *Stepney*, 1886, 4 O'M. & H. 37). The true principle to apply to all such irregular forms is that laid down by the *Cirencester* case, 1893, 4 O'M. & H. 191, that no vote should be rejected if the mind of the voter can be gathered from the mark he made. (For illustrations of doubtful votes, see Day's *Election Cases*, 1892–93, pp. 54–60; Blair's *Election Manual*.)

Equality of Votes.—Where there is an equality of votes, the returning officer (and it would appear his deputy also, s. 8, B. A.), if a registered elector in the constituency, may give a casting vote (s. 2, B. A.), which must be exercised before the poll has been declared (*Renfrew*, 1874, 2 O'M.

& H. 213; 1 R. 834). If he does not choose to vote, he makes a double return.

Recount.—A recount is practically a new form of procedure, and may be had to rectify a miscount by the returning officer, upon petition to either Division of the Court of Session (*Renfrew*, *supra*; *Greenock*, 1892: Day, *Elect. Cases*, 1892–93, p. 21; *South Edinburgh*, 1895). In *Greenock*, the sole ground upon which the petition was brought, and the seat claimed, was that there had been a miscount. Such a petition is clearly good as being a petition "complaining of an undue return" within the meaning of 31 & 32 Viet. c. 125.

Indorsing and Return of Writ.—The returning officer must indorse on the writ, which is in his possession, the result of the election, and deliver it to the postmaster to be forwarded to the Clerk of the Crown (R. 44, Sched. II. B. A.).

Returns and Custody of Documents.—At the close of the counting of the votes, the counted and rejected papers are sealed up by the returning officer in separate packets, and the verification of the Ballot Paper Accounts is also completed (R. 37, B. A.). Two reports require to be made by the returning officer,—in Scotland, to the sheriff clerk (R. 59, B. A.); in England, to the clerk of the Crown in Chancery,—the first dealing with the votes rejected by him, and the second with reference to the verification of the Ballot Paper Accounts (Rr. 36, 37, B. A.). The papers connected with the election are then handed over, in packets indorsed with the nature of the contents, to the sheriff clerk, in whose possession they remain for a year, when they are destroyed, unless he is directed to preserve them by order of the House of Commons, or of a superior Court (Rr. 38, 39, B. A.).

All documents forwarded to the sheriff clerk, other than ballot papers, counterfoils, and rejected papers, which require a special order from the House of Commons or a judge of the superior Courts (Rr. 40, 41, B. A.), may be inspected on payment of such fees, and subject to such regulations as may be sanctioned by the Treasury (R. 42, B. A.). The production of documents by the sheriff clerk upon an order of Court is conclusive evidence that they belong to the specified election, and the production of a ballot paper and corresponding counterfoil is *primâ facie* evidence that the person who voted by such ballot paper was the person who, at the time of such election, had affixed to his name in the register of voters the same number as that written on the counterfoil (R. 43, B. A.).

Personation.—Personation is a statutory offence in Scotland (s. 26, B. A.), and any person accused thereof may be tried in the High Court or before the Sheriff, and if convicted is liable to two years' imprisonment with hard labour, besides the disabilities imposed by the C. P. P. Act, 1883, s. 6, viz. incapacity for seven years to vote at an election, to hold any public or judicial office, or to sit in the House of Commons.

Personation is defined in sec. 24, B. A., thus:—"A person shall be deemed to be guilty of . . . personation who . . . applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who, having voted once at any such election, applies at the same election for a ballot paper in his own name"; and those who aid and abet the commission of the offence are liable to the same penalties as the person committing the offence. But the offence must be committed "corruptly" (*Stepney*, 1886, 4 O'M. & H. 43; *Gloucester*, 1873; *St. Andrews*, 1886; *Regina* v. *Fox*, 1887, 16 Cox. Cr. Ca. 166). Its effect, if unconnected with the candidate, does not unseat (*Belfast*, 1886, 4 O'M. & H. 108). The vote is merely struck off. If committed by a candidate or his

agent, it vacates the seat (s. 24, B. A.; *Gloucester*, 1873, 2 O'M. & H. 64). Personators may be arrested at the instance of the presiding officer at the polling station (s. 9, B. A.), or at the request of the agent or agents present at the time the vote is tendered (s. 15, B. A.); and the prosecutions proceed either at the instance of the Lord Advocate or the procurator-fiscal in the Sheriff Court (s. 26, B. A.). Such cases are usually tried in the Sheriff Court.

Other Election Offences.—Other offences are introduced by the Ballot Act. Every person who forges or fraudulently defaces or destroys a nomination or ballot paper, or the official mark, or without due authority supplies a ballot paper to any person, or fraudulently substitutes another ballot paper for that issued to him, or takes a ballot paper out of the polling station, or without authority destroys or otherwise interferes with any ballot-box or packet of ballot papers in use for the election, shall be guilty of a misdemeanour, and be liable, if he is a returning officer, presiding officer, or clerk, to two years' imprisonment; if any other person, to six months' imprisonment, with or without hard labour (s. 3, B. A.). An attempt to commit any of these offences is punishable in the same manner. The Ballot Act is not applicable to elections in university constituencies. See UNIVERSITY, ELECTIONS.

Effect of Mistakes in Procedure.—The cases which have been decided show this, that whereas the rules and schedules of the Act are directory, and may be varied if they are not in fact substantially changed in the process, the enactments of the Act must be absolutely obeyed (*Thornbury*, 1886, 16 Q. B. D. 739; *Woodward*, 1875, L. R. 10 C. P. 746: *Philipps*, 1886, 17 Q. B. D. 812). The Act itself protects the offender as regards the rules, for it says no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule, or any mistake in the use of the forms in the second schedule, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election (s. 13).

[Rogers on *Elections*; Parker on *Elections*; Hedderwick's *Manual*; Leigh and Le Marchant on *Elections*: Nicolson on *Elections*; Day's *Election Cases*, 1892–93; Crichton on the *Ballot Act*; Blair's *Election Manual*.]

Parochial Board.—Prior to 1845 poor relief was administered in burghal parishes by the magistrates, in landward parishes by the heritors and kirk-session jointly, and in mixed parishes by magistrates, heritors, and kirk-session jointly. The Poor Law (Scotland) Act, 1845, directed that in every parish there should be a Parochial Board for the management of the poor (ss. 17, 22). By the Local Government (Scotland) Act, 1894, Parochial Boards were abolished from and after 15 May 1895, their place being taken by Parish Councils (*q.v.*).

The subject of Parochial Boards is thus mainly of historical interest. A leading feature of their history is the manner in which additional duties of administration were imposed on them, *e.g.* vaccination, burial-grounds, registration, public health, etc.

In all unassessed parishes the Parochial Board consisted of the persons who would have been entitled to administer the poor laws if the Act of 1845 had not been passed (ss. 17, 22).

In assessed parishes the constitution of the Board varied as the parish was burghal or not. In burghal parishes the Parochial Board consisted of

four persons nominated by the magistrates, four nominated by the kirk-session, and a number, not exceeding thirty, elected by the ratepayers under a graduated franchise. In all other assessed parishes the Parochial Board consisted of (1) all owners of heritage in the parish of the yearly value of £20 or upwards; (2) the provost and bailies of any royal burgh in the parish; (3) not more than six of the kirk-session; and (4) such number of elected members as the Board of Supervision might fix. In the case of the last mentioned, the right of voting at elections was restricted to ratepayers who were not qualified to be members of the Board in their own right, and the franchise was graduated as in burghal parishes (8 & 9 Vict. c. 83, ss. 17–30). Many of the Parochial Boards as thus constituted were most unwieldy bodies. One contained over 2000 members. See PARISH COUNCILS.

Parochial Relief.—See POOR; POOR LAW.

Parole Evidence.—Evidence is either real or oral or documentary (EVIDENCE). In this article "parole" is used as synonymous with "oral" (see Best, *Evidence*, s. 223, note (*a*); Kirkpatrick, *Digest*, s. 6).

The rule which requires the best evidence demands that the contents of a document, which can be produced, shall be proved by the document itself, and not by parole or other extrinsic evidence. Accordingly, such evidence is inadmissible to prove what the law requires to be in writing, *i.e.* where the law confines the proof of certain facts to the official narratives or public registers whose province it is to record them (BEST EVIDENCE; CITATION; EXECUTION; NOTARIAL INSTRUMENTS; RECORDS OF COURTS OF LAW; REGISTRATION, STATUTE), or prescribes writing as essential to the constitution of an obligation (HERITAGE, PROOF OF OBLIGATIONS REGARDING; LEASE; REI INTERVENTUS), or to the proof, as distinguished from the constitution thereof (see MARRIAGE; MASTER AND SERVANT; MOVEABLES, PROOF OF OBLIGATIONS REGARDING; TRUST); or where writing is required by statute, *e.g.* in the case of contracts for the transference of ships, and of goods in a bonded warehouse, and of conveyances of copyright. Parole evidence is also inadmissible when the question is as to the existence or terms of documents, where either is material to the issue, or as to the contents of a writing to which the parties to a transaction have reduced it, in order to constitute a record of their deliberate intention, and, thereby, secure themselves against bad faith or lapse of memory (BEST EVIDENCE). In the latter case the form of the writing is immaterial—it may be a formal deed or an informal document, *e.g.* a letter, minute, or memorandum (see, *e.g.*, *Union Canal Co.*, 1834, 12 S. 304; 1835, 1 S. & M'L. 117). Save in these cases, and those in which the law restricts the proof to the writ or oath of party, all facts may be proved by parole; and, even in the excepted cases, such evidence is admissible, if there be a relevant averment of fraud or the like (see (2) below); or, where a judicial record is concerned, of a wrong, which affects the essential justice of the cause (see RECORDS OF COURTS OF LAW).

Further, it is to be noted that the applicability of the general rule depends on the nature of the issue. Thus while evidence that a man's verbal and written statements regarding a transaction are in conflict is not, in general, admissible to show that the latter do not accurately set forth the terms agreed on, it is otherwise in a question of his mental capacity (*Marianski*, 1854, 1 Macq. 766).

Subject to these observations, a document made in accordance with the requirement of the law, or at the instance of the parties to the transaction which it embodies, is the best evidence of its existence and of its terms; and, accordingly, parole or other extrinsic evidence is, in general, inadmissible either to prove its contents, or to contradict, modify, or explain it.

In England, where the document is made at the instance of the parties to the transaction which it records, the rule is not enforced to the prejudice of persons strangers to the deed (Taylor, *Evidence*, ss. 1149, 1150, who observes that this exception is sometimes rested on the principle which admits extrinsic evidence to ascertain an independent collateral fact explanatory of the instrument. Cf. *Drummond*, 1697, Mor. 12329: *Smollet*, 1793, Mor. 12354; *Kilpatrick*, 1841, 4 D. 109; *N. B. Insurance Co.*, 1864, 3 M. 1; *Moore*, 1879, 6 R. 930), or in regard to recitals of formal matter (Taylor, *ib.*; see *Bristow*, L. R. 3 App. Ca. 641; *Jardine*, 1830, 8 S. 937; *Steedman*, 1879, 7 R. 111: *Jarvie's Tr.*, 1887, 14 R. 411).

As to the admissibility of evidence of custom or trade usage in construing a written contract, see CUSTOM OF TRADE. See also Dickson, ss. 1090–1099; Taylor, *Evidence*, ss. 1160–1169, 1187–1192.

Observe that it is competent to contradict or otherwise modify the terms of a writing by the oath of the person founding upon it, or by his writ subsequent to it (*Gibb*, 1829, 7 S. 677; *Lawson*, 1825, 3 S. 536; 1829, 7 S. 380; *Gordon*, 1833, 11 S. 696; *Law*, 1835, 13 S. 396; *Stewart*, 1841, 3 D. 668; *Philip*, 1869, 7 M. 859; *Sinclair*, 1869, 7 M. 934; *Stewart*, 1871, 9 M. 616: Dickson, ss. 1100–1103; Tait, *Evidence*, 225, 226).

As to the effect of a judicial admission, see *Thomas*, 1834, 12 S. 285; ADMISSIONS AND CONFESSIONS (*a*).

This article deals with the rule only in its application to private writings. Its applications to official instruments and registers are dealt with in the articles devoted to those documents (see BEST EVIDENCE; CITATION; COPIES AND EXTRACTS; EXECUTIONS; JOURNALS OF PARLIAMENT; NOTARIAL INSTRUMENT; RECORD OF COURT OF LAW; REGISTRATION; STATUTE; TRANSUMPT).

(1) *The rule does not operate to confine the consideration of the Court to a single writing.*—Several instruments may be indissolubly linked together not only by formal reference but by identity of purpose and mutuality of obligation (*Brown's Trs.*, 1852, 14 D. 675, 711, per Ld. Robertson). One writing may be incorporated in another by express reference, *e.g.* estate regulations (*Gordon*, 1828, 3 W. & S. 1), a list of legatees (*Sprot*, 1855, 17 D. 840, where the question was raised whether such a list must be signed; *Cooper's Trs.*, 1860, 22 D. 380), and a list of debts (*Atkinson*, 1833, 11 S. 429) may be made part respectively of a lease, a testament, and a composition contract: and nothing is more common than incorporation of a plan by reference (*Glassell*, 1806, 5 Pat. App. 104; see *Campbell*, 1841, 3 D. 639. *N. B. Railway Co.*, 1879, 6 R. 640; and *Currie*, 1888, 16 R. 237, were cases where there were discrepancies between descriptive boundaries and measurements and plans). Where a contract refers to a plan, the plan is part of the contract, but only to the extent to which, and for the purposes for which, the latter refers to the former (*N. B. Railway Co.*, 1846, 5 Bell's App. 184, 201, per Ld. Cottenham; *Barr*, 1851, 16 D. 1049; *Keith*, 1881, 12 R. 66). Not infrequently the terms of a contract are to be gathered from a correspondence (*e.g. Wilson*, 1851, 14 D. 1); and it is the rule that all *mortis causâ* deeds, exhausting the testator's succession, are, at his death, to be read together as one settlement, and are to receive effect according to his true intention as gathered from reading them all in connection (*Richmond's Trs.*,

1864, 3 M. 95, 113, per Ld. Benholme; *Banks*, 1882, 9 R. 1046: *Trotters*, 1884, 12 R. 155; cf. *Robertson*, 1840, 2 D. 279; Dickson, s. 1048. As to the competency of looking at deleted words in a holograph testamentary writing in order to ascertain the testator's intention, see *Adv.-Gen. v. Smith*, 1852, 14 D. 585; *Mags. of Dundee*, 1858, 3 Macq. 134; *Pattison's Trs.*, 1888, 16 R. 73). So, too, where a charter of novodamus bore that it was granted as the result of a compromise of disputes arising out of the disconformity of charters, it seems to have been thought competent in a question as to the nature of the innovation to refer to the charters (*Mags. of Inverkeithing*, 1874, 2 R. 48; *Hughes*, 1 Bli. 287). It follows from these principles that, where one document incorporates another, a person will not be allowed to found upon the former and disregard the latter, if the latter be of such a nature as to affect the meaning of the former (*Thom*, 1850, 13 D. 134, per Ld. Fullerton). But this rule of construction will not apply unless it be clear from the main deed that the parties to it intended it to be construed along with some other writing or writings (*Buchanan & Co.*, 1895, 23 R. 264). Thus the mere exhibition of a plan to an intending feuar is insufficient to make it part of the feu-contract (*Feoffees of Heriot's Hospital*, 2 Dow, 301; *Gordon*, 6 Dow, 87; *Barr*, 1854, 16 D. 1049; cf. *Scott*, 1827, 6 S. 233. In the two cases first cited, and in Ld. Deas' judgment in *Alexander*, 1871, 9 M. 599, 612, the limitations of Ld. Mansfield's observations in *Deas*, 1772, 2 Pat. App. 259, are indicated. As to conditions imported into a ticket by reference, cf. *Stewart*, 33 L. J. Ex. 199, with *Stevenson*, 1873, 1 R. 215; 1875, 2 R. (H. L.) 71, and *Watkins*, L. R. 10 Q. B. D. 178).

When a document is referred to in an instrument, it is competent to prove by parole that a particular document is the one referred to (*Inglis*, 1831, 5 W. & S. 785; *Walker*, 1858, 20 D. 1102; *Horsfall*, 2 Coop. 115; *Cave*, L. R. 7 Q. B. D. 125). And when the terms of several documents relating to a single transaction, which has not been embodied in a formal contract, indicate that they express the parties' intention only if read together, parole proof of *rei interventus* is admissible (*Russell*, 1835, 13 S. 752; *Campbell*, 1867, 5 M. 636; 1870, 8 M. (H. L.) 40).

(2) *Parole or other extrinsic evidence* (see above as to writ or oath of party) *is inadmissible to prove that a document does not accurately set forth the transaction which it embodies.*—Thus such evidence is inadmissible to contradict the statement in a deed that the price was paid (*Gordon*, 1833, 11 S. 696), or that a valuation had been made at the tenant's entry (*Lawson*, 1825, 3 S. 536), or as to the cause of granting (*Bruce*, 1696, Mor. 12329; *Ellies*, 1693, 4 Bro. Supp. 40; *Deas*, 1710, Mor. 921, 12336), or to prove that the obligation which bore to be absolute was conditional (*Watson*, 1834, 12 S. 588; *Pattinson*, 1844, 6 D. 944; *Hilson*, 1870, 9 M. 18; *Thompson*, 1871, 10 M. 178; *M'Phersons*, 1881, 9 R. 306. Compare with these cases, *Dodds*, 1822, 2 S. 81, where the question was not as to the obligatory character of the document, and *Pym*, 6 El. & Bl. 370, where the question was one of delivery. See also *Wright*, 1871, 9 M. 516), or had been discharged (*Skinner*, 1886, 13 R. 823), or that the description in a feu-charter had been modified by an understanding between the parties (*Shaw Stewart*, 1864, 3 M. 16; *N. B. Rwy. Co.*, 1879, 6 R. 640; cf. *Girdwood*, 1873, 11 M. 647; and see *Gregson*, 1897, 24 R. 1081), or that money had been paid not as the receipt for it bore, but in implement of a different arrangement (*Anderson, Garrow, & Co.*, 1845, 7 D. 268; *Smith*, 1869, 7 M. 863; *Henry*, 1884, 11 R. 713. As to the case last cited, see below), or that a general discharge did not include a particular debt (*Harris*, 1822, 1 S. 370: cf. *Kendal & Co.*, 1766, Mor. 12351), or, in a question with the creditor, that a person sub-

scribing as principal was really a cautioner (*Drysdale*, 1839, 1 D. 409), or factor (*Anderson*, 1830, 8 S. 304).

Where, however, it is not the intent of the document to regulate the rights of the obligants *inter se*, parole is admissible in regard to those rights (*Drummond*, 1697, Mor. 12329; *Smollet*, 1793, Mor. 12354; *Kilpatrick*, 1841, 4 D. 109; *N. B. Insurance Co.*, 1864, 3 M. 1; *Moore*, 1879, 6 R. 930).

Such evidence cannot be received to add a stipulation to a written contract, *e.g.* to a disposition of heritage (see *Stewart's Trs.*, 1875, 3 R. 192), or to a lease (*Alexander*, 1847, 9 D. 524; *M'Gregor*, 1862, 24 D. 1006; *Stewart*, 1871, 9 M. 616), or to articles of roup (*Lang*, 1832, 10 S. 777; see *Christie*, 1880, 7 R. 729). But while this rule holds where the document constitutes a completed contract (see, *e.g.*, *Pollock & Dickson*, 1828, 7 S. 189), it is otherwise where *ex facie* of the deed there is a palpable omission; and, accordingly, where a missive of set contained no term of endurance, but implied by its terms an agreement for more than a year, and had been followed by substantial *rei interventus*, it was held competent to supply by parole the terms agreed on (*M'Leod*, 1808, Hume, D. 840; *Russell*, 1835, 13 S. 752; *Mansfield*, 1856, 18 D. 989; *Wilson*, 1876, 3 R. 527; *Barbour*, 1891, 18 R. 610; cf. *Buchanan & Co.*, 1895, 23 R. 264; *Renison*, 1898, 35 S. L. R. 445).

The general principle supports the doctrine that the execution of a formal conveyance, even when it bears to be in implement of a previous contract, supersedes that contract *in toto*, however formal it may be, and becomes the sole measure of the rights and liabilities of the contracting parties (*Inglis*, 1878, 5 R. (H. L.) 87; *Lee*, 1883, 10 R. (H. L.) 91; *Orr*, 1893, 20 R. (H. L.) 27; cf. *Leith Heritages Co.*, 1876, 3 R. 789). It has been applied where the antecedent documents were letters (*Millers*, 1822, 1 Sh. App. 308; *Forlong*, 1838, 3 Sh. & M'L. 177; *Stewart*, 1842, 1 Bell's App. 796), deeds (*Smith, Laing, & Co.*, 1876, 3 R. 281; see *Lockhart*, 1840, 2 D. 377, 424, per Ld. Moncreiff; *Blair*, 1849, 12 D. 97, 108, *per cand.*), drafts (*Drysdale*, 1839, 1 D. 409; *Hogg*, 1864, 2 M. 848), missives (*Hughes*, 1 Bli. 287; *Sivright*, 1828, 7 S. 210; *Carruthers*, 1836, 14 S. 464; *Robertson's Trs.*, 1873, 1 R. 323), telegrams (*Mackenzie*, 1883, 10 R. 705), instructions for the preparation of a will (*M'Leod*, 1841, 3 D. 1288; *Blair*, 1849, 12 D. 97; *Farquhar*, 1875, 3 R. 71), and arbiter's notes (*Fergusson*, 1828, 6 S. 1006; *Mackenzie*, 1840, 3 D. 318; *Brakinrig*, 1841, 4 D. 274; *Lang*, 1852, 15 D. 38; *Highland Ry. Co.*, 1896, 23 R. (H. L.) 80). In regard to the case last mentioned, there seems to be an exception to the rule where it appears *ex facie* of the decree arbitral that it is *ultra fines compromissi* (cf. *Fergusson, ut supra*, with *Steele*, 22 June 1809, F. C.; and see *Buccleugh*, L. R. 5 H. L. 418; *Rogerson*, 1885, 12 R. 583; *Glasgow City & District Ry. Co.*, 1886, 13 R. 609), or where an *error calculi* is averred (*Morrison*, 1825, 1 W. & S. 143). As to the case of words in a contract deleted before signature, see *Inglis*, 1878, 5 R. (H. L.) 87. As to the case of words deleted in a testamentary writing, see *Magistrates of Dundee*, 1858, 3 Macq. 134; *Pattison's Trs.*, 1888, 16 R. 73.

When one of the parties to a completed agreement, contained in informal writings, demands that it shall be reduced to the form of a deed, these writings are admissible in a question whether the terms of the deed to be executed accurately express the original agreement (*Campbell*, 1842, 4 D. 1310; *Dallas*, 1833, 11 D. 1058; cf. *Dewar*, 1892, 20 R. 203; and see *Mills*, 1827, 5 S. 930; 1828, 3 W. & S. 218).

While a formal written contract cannot be altered or varied by mere verbal statements, averments of acquiescence in operations inconsistent with its terms may be admitted to proof (*Wark*, 1856, 18 D. 772; 1859,

3 Macq. 467; *Sutherland*, 1860, 22 D. 665; *Kirkpatrick*, 1880, 8 R. 327; *Barr's Trs.*, 1886, 13 R. 1055; see also Dickson, ss. 1026–1028; and ADMISSIONS AND CONFESSIONS (*h*)).

Further, evidence extraneous to the original agreement is competent when it is adduced not to contradict that agreement, but to set up a collateral (*Drummond*, 1697, Mor. 12329; *Smollet*, 1793, Mor. 12354; *Kilpatrick*, 1841, 4 D. 109; *N. B. Insurance Co.*, 1864, 3 M. 1; *Morrow & Fell*, 1873, 45 Sc. Jur. 334; *Moore*, 1879, 6 R. 930; *Hamilton & Co.*, 1889, 16 R. 1022; cf. *Alexander*, 1847, 9 D. 524; see also Dickson, ss. 1034, 1035; Taylor, *Evidence*, ss. 1134, 1135), or original and independent, agreement (*Kirkpatrick*, 1880, 8 R. 327; *Garden*, 1892, 20 R. 896; cf. *Buchanan & Co.*, 1895, 23 R. 264).

The proof of allegations impeaching the accuracy of a deed will not be limited to writ or oath where the person founding on it admits on record, or by writ or oath, that it gives an inaccurate account of the facts (*Grant's Trs.*, 1875, 2 R. 377; Dickson, s. 1035); and the same principle justifies the reception of parole proof of the non-implement of a condition, where there is a like admission that the deed was granted *sub conditione* (*Wilkies*, 1618, Mor. 12407; *Aikman*, 1665, Mor. 12311; *Gun*, 1714, Mor. 12337; Dickson, s. 1036).

"Parole evidence that there was jotting or writing, however formal, in certain terms, not signed by the parties who were making the arrangement, and that the arrangement which they ultimately came to was in accordance with that writing, is, in my opinion, just evidence of a parole agreement. It is proved by parole and nothing else" (*Dewar*, 1892, 20 R. 203, per Ld. Young; *Christie*, 1880, 7 R. 729; see also Taylor, *Evidence*, s. 1134). It is thought that this principle does not sanction the admission of parole evidence of deviations from a lease, where the tenant has continued in possession after its expiry (Rankine, *Leases*, p. 104; *contra*, Dickson, ss. 207, 1037; Tait, *Evidence*, 222).

Further, the general rule yields where there is an averment of incapacity on the part of the granter of the deed in question (see *Pollok*, 1875, 2 R. 497), or of absence of valid consent by those subscribing (see *Crawford*, 1827, 2 W. & S. 608; *Gelot*, 1870, 8 M. 649), or of essential error (*Steuart's Trs.*, 1875, 3 R. 192), or of fraud (*M'Cowan*, 1852, 14 D. 968; 1853, 15 D. 494; Dickson, s. 578), or of misrepresentation (*Harvey & Co.*, 1883, 10 R. 680), or of circumstances attending the possession of a document, such as to render it desirable for the ends of justice that inquiry into the facts should not be restricted (*Ferguson, Davidson, & Co.*, 1880, 7 R. 502; *Henry*, 1884, 11 R. 713; cf. *Crawford*, 1823, 2 S. 243; *Robertson*, 1840, 2 D. 279, 294, per Ld. Fullerton; *M'Vean*, 1873, 11 M. 506; *Pym*, 6 El. & Bl. 370), or where it is averred that the document is a mere device to cover some transaction other than that of which it bears to be the record (*Stewart*, 1841, 2 Rob. 547; *Lockyer*, 1846, 8 D. 582; *Fleming*, 1859, 21 D. 1034; *Forster*, 1869, 7 M. 797; 1872, 10 M. (H. L.) 68; *Surtees*, 1873, 11 M. 384; *Maloy*, 1885, 12 R. 431; *Imrie*, 1891, 19 R. 185; Fraser, *H. & W.* 416; *Smith*, 1869, 7 M. 863; see *Robertson*, 1896, 24 R. 120, per Ld. Kincairney and Ld. Moncreiff). See also *Steedman*, 1879, 7 R. 111, as to circumstances in which it was held competent to get behind the statement in a transfer of stock in order to ascertain the real state of the facts.

(3) *To what extent and in what circumstances is it competent to adduce parole or other extrinsic evidence to explain writings?*

As to the general principles to be observed in the construction of documents, see Wigram, *Admissibility of Extrinsic Evidence*, 4th ed.; Jarman,

Wills, 5th ed., pp. 379 *et seq.*: 1 Bell, *Com.* 432 *et seq.*; Bell, *Prin.* ss. 524, 1694, 1871: Dickson, ss. 1052 *et seq.*: M'Laren, *Wills*, ss. 679 *et seq.*

The leading rule in construing wills, statutes, and all written instruments is to adhere to the grammatical and ordinary sense of the words, "unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further" (*Gray*, 6 H. L. Cas. 106, per Ld. Wensleydale: *Caledonian Railway Co.*, 1881, 8 R. (H. L.) 23, 30, per Ld. Blackburn: 1 Bell, *Com.* 432). Thus where the legal import of a destination is clear, and there is nothing in the deed to control it, parole or other extrinsic evidence is inadmissible to construe it (*Selkirk*, 1762, M. 4358, 4369, 12350; 1779, 2 Pat. App. 449; *Blair*, 1849, 12 D. 97; Dickson, ss. 1056, 1057: as to the application of the principle to statutes, see *Baird's Trs.*, 1888, 15 R. 682; *Fleming*, 1897, 24 R. 281; and cf. *Mackenzie*, 1887, 14 R. (J. C.) 19, with *Macfarlane*, 1824, 3 Mur. 409; see also Hardcastle, *Construction of Statute Law*, 2nd ed., pp. 142 *et seq.*, and STATUTE). Accordingly, the first question is, What is the ordinary sense of the words used?

It may be that the sense has been fixed by statute. If so, the words when used in a writing will be construed in the statutory sense (*Thomson*, 1841, 3 D. 625), unless the writing invests them with a meaning other than the statutory meaning (*Robertson*, 1858, 20 D. 1170; cf. *Hunter*, 1886, 13 R. 883). If the parties to a transaction make plain in what sense they have used an expression in one part of a writing or writings embodying it, that sense will be attributed to the expression wherever it occurs in the same connection in other parts of the writing or writings (*Ker*, 1810, 5 Pat. App. 320; *Keiller*, 1824, 3 S. 396; cf. *Hunter*, 1862, 24 D. 1011; Dickson, s. 1083).

In these cases, any dubiety as to the meaning of the words used is solved by reference to the documents in which they occur. There are, however, cases in which doubt may arise, and to which the application of this method is unavailing. In all of them it is competent to inquire what were the facts and circumstances in regard to which the words in question were used (see *Inglis*, 1878, 5 R. (H. L.) 87, 103, per Ld. Blackburn; and cf. *N. B. Oil & Candle Co.*, 1868, 6 M. 835; *Easson*, 1879, 7 R. 251; *Dunsmore*, 1879, 7 R. 261; *Doe* v. *Beynon*, 12 A. & E. 431. As to the *media* of proof, see *Forlong*, 1838, 3 S. & M'L. 177: *Blair*, 1849, 12 D. 97: *Trs. of the Free Church of Scotland*, 1887, 14 R. 333; Dickson, ss. 1068, 1069: Taylor, *Evidence*, s. 1197 *et seq.*). Thus in a question as to the construction of a contract, the Court is entitled to consider such evidence as will place it in the same state of knowledge as was possessed by the parties at the time when the contract was entered upon (*Forlong*, *ut supra*; *Carricks*, 1850, 12 D. 812: *Thorburn*, 1863, 1 M. 1169; *Bank of Scotland*, 1891, 18 R. 957: *Brand*, 1892, 19 R. 768: cf. *Scot. Union Ins. Co.*, 1842, 1 Bell's App. 183: *Leith Heritages Co.*, 1876, 3 R. 789); and the same principle has received effect in the case of a declaration of trust (*Evans*, 1871, 9 M. 801). In a case of the construction of a testament (*Trs. of the Free Church of Scotland*, *ut supra*), it was observed by Ld. Pres. Inglis that "anything in the nature of a declaration of intention, or any statement of the testator's from which an inference can be drawn, subsequent to the execution of his testamentary papers, appears to me to be quite inadmissible. On the other hand, we are entitled to inquire into the facts affecting the position of the testator at the time when he made his statement, and also at the time when he made his codicil. We are entitled to know, for example, what was the amount of his

estate at each period according to his own estimate, because considerable light may be thus obtained in ascertaining his intention as expressed in his testamentary writings under reference to the fact that his estate was of greater or less value at one period than at another." In short, and to use a familiar expression, the judge is entitled "to seat himself in the chair of the testator making his will" (*Campbell*, 1880, 7 R. (H. L.) 100, 106, per Ld. Hatherley; see *Renton*, 1876, 3 R. 1142, and (*c*) below).

The meaning of an expression may be uncertain, either (*a*) because it is unintelligible, or (*b*) because it is susceptible of two or more meanings, or (*c*) because the persons or things to which it points require to be identified.

(*a*) It may be that a foreign language is employed, or that the document contains words unknown to ordinary phraseology, or words written in cipher. In the first case, the document is read by the Court through the medium of a proved translation (M'Laren, *Wills*, s. 684). It has been observed that "where a written contract is made in a foreign country, and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and, fourthly, evidence of any peculiar rules of construction, if any such rules exist, of the foreign law. With this assistance, the Court must interpret the contract itself on ordinary principles of construction" (*Di Sora*, 10 H. L. Cas. 633, per Ld. Cranworth. See FOREIGN; OPINION EVIDENCE). Extrinsic evidence is admitted in the second case for purposes of interpretation (*Mackenzie*, 1825, 4 S. 146 ("soum"); *Watson*, 1839, 1 D. 1254 ("cutting-shop"); *Goblet*, 3 Sim. 24 ("bankers," "mods."). Such evidence is admitted in the case of nicknames (*Doe* v. *Hiscock*, 5 Mee. & W. 368; *Lee*, 4 Hare, 251; see also *Ker*, 1810, 5 Pat. App. 320, where Ld. Eldon held it competent, in construing an ancient deed, to look at other instruments of the same period, in order to ascertain how certain terms were employed by conveyancers of that time), and, in the third case, to show what is the meaning of the cipher (*Kell*, 23 Beav. 195). As to words erased, see *Glassford's Tr.*, 1864, 2 M. 1317; ERASURES.

(*b*) If an expression be susceptible of two meanings,—of a plain, ordinary, and popular meaning, and of a technical or scientific meaning,—it is necessary to consider who are the persons who use it, and what is the subject-matter in relation to which it is used. "Where the granter ranks among the lower orders of the people, and is unassisted by men of skill in drawing the obligation, the words ought to be understood in the vulgar sense" (Ersk. iii. 3. 87; cf. Stair, iv. 42. 21). Where the document is framed by a skilled person, *verba sunt interpretanda contra proferentem, qui potuit mentem apertius explicasse* (Stair and Ersk. *ut supra*; *Life Association of Scotland*, 1873, 11 M. 351; *Dryer*, 1883, 10 R. 585; 1884, 11 R. (H. L.) 41). Again, if the expression be employed in regard to the common transactions of life, the presumption is that it is to be understood in its plain, ordinary, and popular meaning. If it be employed in reference to the art, science, trade, business, sect, or locality to which its technical or scientific meaning is appropriate, the presumption is that it is to be understood in that meaning (*Robertson*, 4 East, 130; *Shore*, 9 Cl. & Fin. 355, 525; *Sailing Ship "Garston" Co.*, L. R. 15 Q. B. D. 580; *Owners of "Afton,"* 1887, 14 R. 544; *sub nom. Hunter*, 1888, 15 R. (H. L.) 72; *Mackill & Co.*, 1888, 16 R. (H. L.) 1). In the latter case, the evidence of those concerned with the art, etc., to which the document relates, is admissible to show that, according to the recognised usage of that art, etc., a particular conventional meaning is attached to the expression in question (Dickson,

s. 1060; Taylor, *Evidence*, s. 1161). Thus where a testatrix described the objects of her bounty as "godly preachers of Christ's Holy Gospel," it was held competent to prove in what sense the words were applied in the religious denomination to which she belonged (*Shore, ut supra*; cf. *Arnell*, 1841, 3 D. 1150). It is to be observed, however, that when it is proposed to lead general evidence as to the meaning of words of contract, there should be "a distinct averment on record as to the particular words to which the proof is to be directed, and the precise technical or trade meaning which the person making the averment desires to attribute to them" (*Sutton & Co.*, 1890, 17 R. (H. L.) 40, per Ld. Watson). Further, the proof of technical character which usage has stamped upon the expression must be so clear as to exclude doubt on the part of the Court (1 Bell, *Com.* 433). Of course the evidence of usage is admitted to explain, not to contradict, the document (*Muncey*, 1 H. & N. 216; cf. *Buckle*, L. R. 2 Ex. 333; cf. *Sinclair*, 1868, 7 M. 273); and, accordingly, such evidence is incompetent where it appears from the terms of the instrument that the parties did not intend to be bound by the custom in question (*Hutton*, 1 M. & W. 466).

As to the amount and character of the evidence required to establish an averment of usage, see EVIDENCE, i. (3); OPINION EVIDENCE; Taylor, *Evidence*, s. 1188).

The following list of expressions which have been interpreted by usage is taken from Dickson, s. 1061, and Taylor, *Evidence*, ss. 1162, 1163:—

"Agents to merchants" (*Hutchinson*, L. R. 8 C. P. 482); "all faults" (*Whitney*, 118 Mass. 242); "arrived in dock" (*Steamship Co. "Nordin,"* L. R. 1 C. P. D. 654); "bale of gambier" (*Gorrissen*, 2 C. B. N. S. 681); "barrel" (*Miller*, 100 Mass. 518); "best oil" (*Lucas*, El. B. & E. 907); "by telegraphic authority as agents" (*Lilly & Co.*, L. R. [1892] 1 Q. B. 456); "corn" (*Scott*, 2 Bos. & P. N. R. 213; Park, *Marine Insur.* 245); "cotton in bales" (*Taylor*, 2 C. & P. 525); "crop of flax" (*Goodrich*, 5 Lans. (N. Y.) 230); "current funds" (*Thorington*, 8 Wall (U. S.) 1); "days" (*Cochrane*, 3 Esp. 121); "duly honoured" (*Lucas*, 7 Taunt. 164); "expected to arrive about November next" (*Bold*, 1 Mee. & W. 343); "f. o. b." (*Silberman*, 96 N. Y. 524); "freight" (*Peisch*, 1 Mason, 11; *Gibbon*, 2 Moore (C. P.) 224; *Lewis*, 7 Man. & G. 743); "fur" (*Astor*, 7 Cowen, 202); "general average" (*Miller*, 6 H. & N. 278; 7 H. & N. 954; see *Kidston*, L. R. 1 C. P. 535); "good barley" (*Hutchison*, 5 Mee. & W. 535); "grindable corn" (*Stobbs*, 1873, 11 M. 530); "inhabitant" (*R. v. Mashiter*, 6 Ad. & E. 153; *R. v. Davie*, 6 Ad. & E. 386); "in the month of October" (*Chaurand*, Pea. 43; see *Robertson*, 2 C. B. 412; *U. S. v. Breed*, 1 Sumn. 159); "in turn to deliver" (*Robertson, ut supra*; *Leidemann*, 14 C. B. 38); "level" (*Clayton*, 5 Ad. & E. 302); "months" (*Jolly*, 1 Esp. 186; see *Simpson*, 11 Q. B. 23); "no St. Lawrence" (*Dryer*, 1883, 10 R. 585; 1884, 11 R. (H. L.) 41); "on account of the vendor for the vendee" (*Bowman*, 2 Macl. & R. 85); "on his account" (*Johnston*, 11 Ad. & E. 549); "payable in trade" (*Dudley*, 111 Mass. 31); "pig iron" (*Mackenzie*, 1856, 3 Macq. 22); "port" (*Sailing-ship "Garston" Co.*, L. R. 15 Q. B. D. 500; *Owners of "Afton,"* 1887, *ut supra*); "regular turns of lading" (*Leidemann, ut supra*); "salt" (*Journu*, Park, *Marine Insur.* 245); "Scotch iron of best quality" (*Fleming & Co.*, 1882, 9 R. 473); "spitting of blood" (*Singleton*, 66 Mo. 63); "street" (*Elliott*, 2 Ex. 725); "ten packets of Kent hops at five pounds" (*Spicer*, 1 Q. B. 424); "thousand" (*Smith*, 3 Barn. & Adol. 729; see *Shore*, 9 Cl. & Fin. 355, 525); "to depart with convoy" (*Lethulier's* case, 2 Salk. 443; see *Shore, ut supra*); "weekly accounts" (*Myers*, 3 El. & El. 306); "weeks" (*Grant*, 15 Mee. & W. 737; see *Myers, ut supra*); "wet" (*Warde*, 1 C. B. N. S. 88).

In *Symonds*, 6 C. B. N. S. 691, "the rule seems to have been strained to its utmost extent" (Taylor, *Evidence*, s. 1162, note 2).

It is to be observed that while such evidence is admissible in order to explain the terms of art employed, the construction of the document is for the Court (*Kirkland & Son*, 1859, 3 Macq. 766). In the words of Parke, B., "when the appropriate meaning of the words occurring in the deed has been ascertained, then the deed is to be read as if the equivalent expressions were substituted; and no other evidence of the peculiar sect or religious

opinions or any other circumstances attending the parties to the deed, is admissible to explain or control its meaning" (*Shore, ut supra*; see *Smith*, 15 Mee. & W. 561, and Dickson, ss. 1064, 1066; Taylor, *Evidence*, s. 1193).

(c) *In order to identify the persons to whom, or the things to which, a deed relates, it is competent to inquire into every material fact concerning those persons or things, or the circumstances of the granter* (see Wigram, *Extrinsic Evidence*, Prop. v.).

The designation or description may point with such precision to a certain person or thing as to be applicable only to that person or thing. In such a case, extrinsic evidence is inadmissible in order to show that the granter of the deed had some other person or thing in view (*Miller*, 8 Bing. 244). It is admissible, however, where it is doubtful whether certain lands are or are not included in the description (*Waterpark*, 7 H. L. Cas. 650; see *King*, 1844, 6 D. 821; 1846, 5 Bell, 82; *E. of Leven and Melville*, 1861, 23 D. 1038). Such a question is most properly determined by evidence of possession under titles containing the description in issue (M'Laren, *Wills*, s. 701; see *Gregson*, 1897, 24 R. 1081, per Ld. M'Laren). This principle has been frequently applied in the interpretation of ancient writings. Thus Ld. Wynford observes that "there can be no means of getting at the meaning of old instruments so satisfactorily as that of seeing how the parties acted under them at the time they were made, and have since continued to act" (*Heriot's Hospital*, 1830, 4 W. & S. 98; see also *A.-G.* v. *Drummond*, 1 Dru. & War. 368, per Ld. Sugden; *Ld. Adv.* v. *Sinclair*, 1865, 3 M. 981; *Baroness Gray*, 1876, 3 R. 1031, 1068; Dickson, s. 1087; Taylor, *Evidence*, ss. 1204, 1205). Effect has been given to this principle in the case both of private (*Girdwood*, 1829, 7 S. 840; 1830, 9 S. 170) and public statutes of ancient date (*Mags. of Dunbar*, 1835, 1 S. & M'L. 134, 195, where Ld. Brougham states the limitations of application; *Fergusson*, 1851, 12 D. 1145; 1852, 1 Macq. 232; cf. *Presbytery of Elgin*, 1861, 23 D. 287). But a recent statute must be construed according to its own terms, "and not according to the views which interested parties may have hitherto taken" (*Clyde Navigation Trs.*, 1883, 10 R. (H. L.) 77, 83, per Ld. Watson). Extrinsic evidence is also admitted where it is doubtful whether a specific person answers to a general *designatio personarum* (*Mags. of Dundee*, 1858, 3 Macq. 134; *Shore*, 9 Cl. & Fin. 355; *M'Intyre*, 1863, 2 M. 94).

Again, the designation or description may in itself, and in the absence of any explanation, be inapplicable to any specific person or being. In such a case, extrinsic evidence will be received in order to show the circumstances of the granter at the time of making the instrument (*Beaumont*, 2 P. Wms. 141; *Still*, 6 Madd. 192; see above). Thus it has been held competent to prove that in his lifetime the granter had applied the designation in question to a specific person (*Lee*, 4 Hare, 250).

Further, the designation or description may be partly applicable and partly inapplicable to a specific person or thing. In such a case, the brocard *falsa demonstratio non nocet, si de corpore constat* applies, and extrinsic evidence is admissible to show that, as the applicable part is sufficiently precise for the purposes of identification, the inapplicable part may be disregarded (*Ld. Adv.* v. *Forbes*, 1751, 1 Pat. App. 482; *Keiller*, 1824, 3 S. 396; 1826, 4 S. 724; *Synod of Aberdeen*, 1847, 9 D. 745; *Maclaine*, 1852, 14 D. 870; *Forbes' Trs.*, 1893, 20 R. 248; Wigram, *Extrinsic Evidence*, 4th ed., p. 68; Taylor, *Evidence*, ss. 1194–1201; Dickson, s. 1074; M'Laren, *Wills*, ss. 689–701).

After evidence has been led as to the circumstances affecting the granting of, and the persons and things designated and described in, a

deed, and in explanation of the language in which it is couched, if the intention of the parties to it remains unintelligible, it is incompetent, subject to the exceptions to be immediately noticed, to lead evidence in proof of their intention (see *Blair*, 1849, 12 D. 97; Dickson, s. 1076; M'Laren, *Wills*, ss. 722–724: Wigram, *Extrinsic Evidence*, 4th ed., p. 99).

(i.) The first exception to be noted is the case of a latent ambiguity. Of ambiguities "there are two kinds, which are to be dealt with differently; an ambiguity patent or apparent on the face of the contract, which, unless it can be solved by the context and nature of the contract, may be fatal: and a latent ambiguity, arising not from the words, but in their application: and, in this case, extraneous evidence is admissible to clear up the difficulty" (Bell, *Prin.* s. 524; *Morton*, 1830, 4 W. & S. 386, per Ld. Ch. Brougham; *Logans*, 1831, 5 W. & S. 242, *per curiam*). In the case of a latent ambiguity, a designation or description, which is expressed in terms neither ambiguous nor obscure, is shown to be applicable not only to one, but to any one of several persons or things. Evidence *dehors* the instrument has raised the doubt: it is competent to go *dehors* the instrument to settle it (*Logans, ut supra*). Accordingly, parole declarations either before (*Doe* v. *Hiscocks*, 5 Mee. & W. 363), or after (*Doe* v. *Allen*, 12 Ad. & Ell. 451) the execution of the deed are admissible; "but there is a very great difference upon the point whether they are all equally weighty and efficacious. A declaration at the time of making a will is of more consequence than one afterwards; and a declaration after the will as to what 'the testator' had done is entitled to more credit than one before the will as to what he intended to do; for that intention may very well be altered, but he knows what he has done" (*Trimmer*, 7 Ves. 517, per Ld. Ch. Eldon: *Doe* v. *Needs*, 2 M. & W. 129; M'Laren, *Wills*, ss. 715–724; Taylor, *Evidence*, ss. 1206 *et seq.*; Dickson, ss. 1077–1084).

(ii.) In Scotland, such evidence has been admitted in questions as to the evacuation of destinations by general settlements (see *Farquhar*, 1875, 3 R. 71; *Gray*, 1878, 5 R. 820; *Campbell*, 1878, 6 R. 310; 1880, 7 R. (H. L.) 100, where the earlier cases are collected and discussed. See also M'Laren, *Wills*, ss. 861 *et seq.*; Dickson, s. 1067).

(iii.) When a legal presumption exists which is contrary to the apparent intention of a will, extrinsic evidence is admitted in order to ascertain whether the presumption which law has raised is or is not well founded. This rule has been regarded as applicable in Scotland in the case of the presumption that a settlement which makes no provision for children *nascituri* is revoked on the birth of a child to the testator after the date of the settlement. It is only when evidence has been admitted to rebut such a presumption, that evidence is admissible to fortify it (*Elder's Trs.*, 1894, 21 R. 704; *M'Kie's Tutor*, 1897, 24 R. 526).

(iv.) In a question whether one only of several provisions or legacies to the same effect is or is not to be held operative, it seems very doubtful whether direct evidence of the testator's intention is admissible in Scotland (cf. *Haviland*, 1895, 22 R. 396; 1896, 23 R. (H. L.) 6, with *Livingston*, 1864, 3 M. 20; *Campbell*, 1865, 3 M. 360; *Royal Infirmary of Edinburgh*, 1891, 9 R. 352; M'Laren, *Wills*, ss. 712, 713; Dickson, ss. 1085, 1086. See also *Horsburgh*, 1847, 9 D. 329, and *Wilson*, L. R. 7 Ch. App. 448. *Falconer*, 1721, Rob. App. 377, 397, is considered erroneous by M'Laren, *Wills*, s. 712).

[Dickson, ss. 1015–1103; Taylor, *Evidence*, ss. 1128–1231; Best, *Evidence*, ss. 226–228; Stephen, *Digest*, art. 90–92; M'Laren, *Wills*, ss. 679–726.]

Partibus.—The partibus is the note on the margin of the summons, when lodged for calling, of the names and designations of the pursuer and his counsel and agent. It specifies both the Lord Ordinary and the Division to which the cause is to belong. It is provided by A. S., 14 Oct. 1868, that "every summons, in order to be called during session, shall be lodged with the Clerk on the lawful day preceding that on which it is to be called, accompanied by a copy of the partibus, in plain legible writing." By A. S., 11 July 1828, s. 27, it is provided that "along with the summons, advocation, or suspension, there shall be lodged an inventory of the process and a copy (in plain legible writing) of the partibus, as written on the summons or letters; which partibus shall contain the name and designation of the pursuer, advocator, or suspender, or of each pursuer, advocator, or suspender, if there be only two; or, if more, the name and designation of the party first named, with the words 'and others'; and if the defenders, respondents, or chargers are not more than three, their names and designations, one or more, shall be inserted in the partibus, but if more than three, the partibus shall contain the name and designation of the party first named, with the words 'and others as per roll': referring to a separate roll of all the defenders, respondents, and chargers; which roll, together with a copy thereof, shall at the same time be lodged with the Clerk." The marking on the partibus fixes the Division. It is of vital importance that the partibus should be correct (*Earl of Craven*, 1854, 16 D. 811). The partibus is evidence that the summons has been called, and after a lapse of time constitutes a presumption that it has been executed (*Walker*, 1827, 5 S. 240).

Particeps criminis.—See Accessary; Art and Part; Accomplice.

Partnership.—Partnership is now largely regulated by the Partnership Act, 1890 (53 & 54 Vict. c. 39). This statute, with the exception of the law relating to the bankruptcy of a firm and its partners, is intended to codify the law of partnership, and it will be convenient in this article to follow the order it adopts.

The subject will therefore be considered under the following heads:—

I. Nature of Partnership.
II. Relations of Partners to Persons dealing with them.
III. Relations of Partners to one another.
IV. Dissolution of Partnership and its Consequences.
V. Bankruptcy of Partnership and of the Individual Partners.

I. Nature of Partnership.

The contract of partnership arose on account of the necessity of combination in order to carry on the costly undertakings and enterprises which require greater capital and more skill and energy than one individual would naturally possess. The essential conditions of the contract are: (1) the voluntary agreement of two or more persons to carry on a business in common with a view to profit; (2) the implied mandate or power of each partner to act for the partnership and bind it in the line of its business: (3) the responsibility, joint and several, of each partner for all partnership obligations; (4) the interest each partner has in the stock or assets of the firm, which belong to the partners *pro indiviso*, and is held by them in

trust for payment, in the first place, of the debts of the firm, and in the second place, for division among themselves.

Partnership is a consensual contract: and although many partnerships are entered into by means of written agreements, still writing is not necessary for the constitution of the contract, and is merely resorted to in order to preserve evidence of the contract and of any special provisions or conditions the partners may have agreed to.

Partnership being a consensual contract, can therefore be proved by any evidence of consent, either expressed or inferred from facts and circumstances.

Again, "in partnership there is a voluntary association of two or more persons for the acquisition of gain or profit, with a contribution for that end of stipulated shares of goods, money, skill, and industry, accompanied by an unlimited mandate or power of each partner to bind the company in the line of its trade, and a guarantee to third parties of all the engagements undertaken in the social name" (2 Bell, *Com.* 499; cf. Bell, *Prin.* 351).

Again, the Partnership Act defines partnership as the relation which subsists between persons carrying on a business in common with a view to profit (s. 1).

The idea at the root of this definition, which is taken from Lindley on *Partnership*, p. 10, is that it is not the carrying on of a business with a view to profit which makes partnership: it is the relation that results from that act.

In other words, as people cannot carry on business with a view to profit without either expressly or impliedly agreeing to do so in a certain way, it is this express or implied agreement that is called partnership.

It also follows from the nature as well as the definition of partnership, that there must be at least two parties to the contract. The expression, therefore, "sole partner" of a firm, though a convenient enough expression in some cases, is, legally speaking, quite meaningless (see 2 Bell, *Com.* 514; *Nairn, ib.* 514; *Reid*, 1828, 6 S. 1120). Any contract, however, such as a contract of service, can be validly entered into with a person trading under a firm name when he is the sole partner (*Campbell*, 1827, 5 S. 335).

Again, the executor of a so-called sole partner trading under a firm name was held entitled to recover debts incurred to the firm (*Mills*, 1830, 9 S. 111). A cautioner for a single trader trading under a firm name is also liable for the debts contracted in the firm name (*Booth*, 1823, 2 S. 311). Such a cautioner is also liable for goods supplied to that partner in his own name (*Rose*, 1833, 11 S. 344).

Whether, however, a partnership has been formed, is of course a question of fact, and the following cases are referred to for illustration: *Fraser*, 1848, 10 D. 1402; *Moore*, 1879, 6 R. 930; *Stott*, 1878, 5 R. 1104; see also *Holding Out* (*infra*, 162).

It would now appear, moreover, that, looking to the terms of this section (32 (*b*)) of the Partnership Act, a *joint adventure*, which was formerly considered as distinguishable from partnership in certain respects, must now be considered as indistinguishable from it. It was thus defined: 'Joint adventure or joint trade is a limited partnership confined to a particular adventure, speculation, course of trade, or voyage; and in which the partners, either latent or known, use no firm or social name, and incur no responsibility beyond the limits of the adventure" (Bell, *Prin.* 392, cf. *Pyper*, 1878, 6 R. 143).

Such contracts are partnerships (*Davidson*, 1815, 3 Dow, 218), and whatever was the worth of this distinction it is of no importance now. In some kinds of partnership, perhaps, among which are joint adventures or partnerships for a single adventure or undertaking (s. 32 (*b*)), the mandate of any partner authorising him to bind the rest may be more limited than in an ordinary partnership for a fixed or indefinite period, but that circumstance does not prevent the contract being formed. See JOINT ADVENTURE.

Again, in determining whether a partnership does or does not exist, regard shall be had to the following rules:—

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(*b*) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(*c*) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(*d*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(*e*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such (s. 2).

Subsecs. 2 and 3 of this section require a word of explanation.

Subsec. (2).—Gross returns in this subsection are to be contrasted with "profits" in subsection 3. The former, it is understood, mean gross profits, and the latter net profits (Lindley, *Partnership*, p. 37). Gross returns may be shared among a variety of persons, who may or may not have a joint or common right or interest in the property from which they are

derived. When parties dividing the gross returns have a common right in the property from which they are derived, the relationship so created is easily distinguishable as a rule from partnership. For instance, *pro indiviso* proprietors are not partners unless they agree to form a partnership (cf. s. 20 (3), *infra*, 167). When, however, those sharing gross returns are not all interested in the property or concern from which they are derived, difficult questions have arisen. It was formerly erroneously supposed that sharing profits proved that a partnership existed. Now that that view, as we shall immediately see, is no longer held even in regard to the sharing of net profits, this subsection gives adequate protection to those sharing gross returns. But even under the law as formerly understood, more was required than merely sharing gross returns (cf. *Cox*, 1860, 8 H. L. 268; *Englesham & Co.*, 1875, 2 R. 960). At the same time, it is the substance of the agreement that is looked to, and the subsection merely states that the sharing of gross returns does not *of itself* create a partnership.

Subsec. (3).—It was formerly supposed, both in England and Scotland, that a right to share in the profits of a business was a conclusive proof of partnership (*Cunningham*, 2 Pat. 1765, 114; *Bolton*, 1787, 3 Pat. 70; *Waugh*, 1793, 2 Black. H. 235); but in the leading case of *Cox*, 1860, 8 H. L. Cas. 268, it was decided that the mere right to share profits did not of itself constitute the person, who had the right to a share of the profits, a partner. There must be the relation of principal and agent between the person who receives the profits and the partner before there can be partnership. Thus Ld. Cranworth, p. 306, says: "The real ground of the liability (of a person as a partner) is that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable for the trade obligations and entitled to its profits, or a share of them. It is not strictly correct to say that his right to share in the profits makes him liable for the debts of the firm. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable for the other, namely, the fact that the trade has been carried on on his behalf, *i.e.* that he stood in the relation of principal towards the persons, acting ostensibly as the traders, by whom the liabilities have been incurred and under whose management the profits have been made."

Division (*d*) of *subsec.* 3, which deals with the presumption that follows from sharing profits, corresponds to sec. 1 of Bovill's Act (28 & 29 Vict. c. 86), and it is with regard to it that most discussion has arisen. It must now be admitted that that Act was passed in ignorance of the state of the law. It was always understood that interest on a loan to a firm varying with the profits did not constitute partnership, and in 1860 it was finally decided that a mere right to a share of profits did not either. It would thus seem that Bovill's Act rather restricted the common law, seeing agreements under it, as well as those under this subsection, must be in writing. Thus see *Mollwo, March, & Co.*, 1872, 4 P. C. 419; *ex parte Tennant*, 1877, 6 Ch. D. 303.

It must also be borne in mind that even if the agreement appears to be made in terms of sec. 2 (3) (*d*), yet if, from the real nature of the arrangement, it appears that the essential relations which exist between partners were created, a lender will be liable as a partner, and will not be able to plead the statute as a bar to his liability (see *Pooley*, 1876, 5 Ch. Div. 458).

Though the lender of the loan and the seller of the goodwill mentioned in section 2 of the Partnership Act are not necessarily to be considered as partners, their rights as creditors, at least when they are under the Act, are postponed to those of the other creditors of the borrower

of the money or purchaser of the goodwill. Such contracts are sometimes termed limited partnerships. (The phrase "adjudication in bankruptcy" used in this section is equivalent to award of sequestration in Scotland (Bankruptcy Act, 1888, s. 20).)

Finally, there are many relationships which have some of the attributes of partnership, and which yet are quite distinct. Thus parties standing in the relation of principal and agent are not partners, nor are members of a club or other association.

Persons disqualified from becoming Partners. — Though partnership is the relation which subsists between persons carrying on a business in common with a view to profit, it is not every person or combination of persons who can enter into the contract, or, at least, who can come under the provisions of the Partnership Act. Those who are incapable of becoming partners may be divided into two classes: (1) those incapable in respect of sec. 1 (2) of the Act, whom we may term incapable by statute, and (2) those incapable at common law.

(1) As to the former class, it is provided in sec. 1 as follows:—

1. The relation between members of any company or association which is—

(*a*) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies: or

(*b*) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

(*c*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries:

is not a partnership within the meaning of this Act.

Such associations or companies do not come within the operation of the Partnership Act, although they are in all essential respects partnerships; and they will in future, as they have been for a long time in the past, be known as companies, and undertakings which are regulated by the Partnership Act will be called "partnerships" or "firms." It will be all the more easy to use this nomenclature, as it is at present in general use both among lawyers and mercantile men.

(2) Incapable at Common Law.—(*a*) We shall commence with the incapacity *arising from age*.

By the law of Scotland age is generically divided into majority and minority. Minority is more strictly divided into pupillarity and minority.

Pupillarity is the period of life extending from birth to twelve years in females and fourteen years in males.

Minority is the period of life extending from twelve years of age in females and fourteen years of age in males until twenty-one years of age.

Majority is attained on the completion of twenty-one years of age.

As to capacity of persons at these various ages. A pupil is held in law to have no person, and all acts necessary are done by tutors. Hence the maxim, *Tutor datur personæ curator rei.*

A pupil cannot, therefore, become a partner, though he may be beneficially interested in a share of a partnership (Fraser, *Parent and Child*, 150).

A minor has a person, though an immature one. He may have curators appointed, in which case acts done without their consent are null, or he may in certain cases act alone. Generally speaking, a minor, when he has no curators, can enter into any contract not affecting heritage. He or she can, in particular, become a partner and be liable for the firm's debts (see *Duncanson*, 1715, Mor. 8928; *Wilson*, 1816, 6 Pat. 222).

Although a minor can enter into the contract of partnership without the necessity of choosing curators, the contract is reducible by him after he comes of age on proof of enorm lesion. This right, however, he must exercise within four years of his majority; hence it is called *anni utiles* or *quadriennium utile*. It is also barred by ratification at any time after majority. If, however, the minor have curators and enter into contracts without their consent, the contracts with few exceptions are null and may be set aside at any time (Fraser, *Parent and Child*, 385, 386).

It need scarcely be added that all possible disqualification arising from age ceases on majority.

(*b*) Besides pupils, all other persons incapable of giving consent are incapable of becoming partners; thus idiots and lunatics cannot enter into partnership, "but they may continue to enjoy the share of a partnership which has pre-existed" (2 Bell, *Com.* 513).

In other words, no idiot or lunatic can become a partner, but if a partner of an existing firm become insane, this does not *ipso facto* annul the partnership. The insanity of a partner, however, always was at common law, and is now by sec. 35 of the Partnership Act, a reason for having an existing partnership dissolved.

(*c*) *Marriage of a Female Partner.*—An unmarried woman can become a partner in a firm, but formerly her marriage would have dissolved it (2 Bell, *Com.* 524). The reason for this rule was that a wife could not continue in a firm without her husband becoming a partner in it, because by the marriage he not only became her curator and administrator-in-law, but by the *jus mariti* all her moveable property became his. If, therefore, the partnership had not been dissolved, the husband would have become a partner in his wife's firm, and that of course could not happen without the consent of the other partners. Accordingly, marriage dissolved a firm just as effectually as if the female partner had died (*Russell*, 1874, 2 R. 93). Whether recent legislation has removed this disability is doubtful. On the one hand, a wife's capacity has been greatly increased by the series of statutes ending with the Married Women's Property Act, 1881. Under it the *jus mariti* is abolished, and also the right of administration, to the extent of enabling the wife to obtain payment of the income of her moveable property on her own receipt. On the other hand, a husband is still his wife's curator, and his right of administration is only abolished to the extent just mentioned.

There has been no case since the Act was passed. When such a case occurs, the decision of it will turn on the question whether a wife's person is still so sunk in her husband's that her marriage would introduce a new partner into the firm. It is thought that a marriage would not now have that result, and therefore that a firm is not dissolved by it. This at least, it is thought, would be the decision in the case of a firm to the assets of which the female partner contributed not capital but skill. However this may be, the marriage of a female partner would most probably give the other partners a right to apply to the Court, under sec. 35, to have the partnership dissolved (see *infra*, *Dissolution*).

Whatever be the rule as to an antenuptial partnership, it seems clear that a husband can prevent his wife from entering into a partnership after marriage, as his curatorial power still exists; and he and she could also petition for the dissolution of one existing at the time of the marriage (cf. *Ferguson's Tr.*, 1883, 11 R. 261).

Again, under the former law a husband and wife could not become partners (*Marara*, 1848, 10 D. 707; 1 Fraser, *H. & W.* 513), and there is no reason to suppose that the law has been altered.

In England the law was formerly the same as in this country, but now it is altered, and a married woman can become a partner (Married Women's Property Act, 1882; Lindley on *Partnership*, 575).

(*d*) *Aliens.*—The only other class whose right to enter into the contract of partnership is affected at all by the common law that we need refer to, is that of aliens.

Aliens can enter into contracts with native-born subjects of the Queen, either within the territorial limits of the British Empire or without those limits. They may also enter into any contract between themselves, which will be enforceable in the Courts of this country; and may sue or be sued, if jurisdiction be founded against them, just in the same way as any native-born subject. They may thus enter into partnership in this country either with native-born subjects or between themselves, and obtain the full protection of the law. This is an accurate statement of their rights during peace. When war breaks out there is a change. Neutrals still recognise the obligations entered into between subjects of belligerent States, but the Courts of the belligerent nations will not enforce the contracts of those voluntarily resident within the enemy's territory during the continuance of the war. They are thus suspended during the war. It is to be noted that it is not the nationality of the person that affects the contract: it is where he is resident. Thus, in partnership, a partnership between aliens resident in this country is not affected by a war between us and the country to which they belong. Nor is it affected by a war between us and the alien's country, if the alien is voluntarily resident in a neutral country. On the other hand, a contract between native-born subjects, some of whom are resident in an enemy's territory, cannot be enforced during war at the instance of those who are resident in the enemy's territory. As partnership does not differ from any other contract, it is suspended during war; and although war does not dissolve a partnership, it is thought that a suspension of the rights of partners on account of war would be a reason for having it dissolved, under sec. 35, if this were desired by the partners resident in this country.

As all obligations enforceable between the inhabitants of belligerent States are suspended during war, it follows that during war no contracts can be made between them. Therefore during war a partnership cannot be formed between a person resident in this country and one resident within the belligerent State. See Clark on *Partnership*, vol. i. pp. 27, 28; Lindley, *Partnership*, p. 80; Wheaton, *International Law*, 419; *Neustra Signora de los dolores*, 1809; Edwards' Adm. 60; *ex parte Boussmaker*, 1806, 13 Ves. 71.

Meaning of Firm.—When a partnership has been formed, the persons who have entered into it are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm name.

In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members (s. 4). See Firm Name.

That a firm is a legal person, distinct from the partners who compose it, is a very ancient doctrine in the law of Scotland. Thus see Stair, i. 16; Ersk. iii. 3; ii. 2; 2 Bell, *Com.* 507.

As already noticed, there must be at least two partners in a partnership; and if there be not, the firm is not a separate *persona* from the

trader. If, however, a partnership be formed, the firm is a separate *persona*: and except in the case of a firm with a descriptive name it can sue and be sued in the firm name without the addition of the names of the partners composing it (*Forsyth*, 1834, 13 S. 42). In that case arrestments *ad fundandum jurisdictionem* had been used against the firm of John Hare & Co. without calling any individual partners, and that firm had thereafter been sued. A question was submitted to the whole Court, viz. "Whether the action or diligence can be sustained, inasmuch as both are directed merely against John Hare & Co., without calling the individual partners of the company?"

The following quotation is from the opinion of the consulted judges:— "Upon this point, too, we are of opinion that the plea of the defenders is ill-founded. As a mercantile company is understood, in the law of Scotland, to be a separate person, capable of maintaining the relations of debtor and creditor, distinct from those held by the individual partners, and as the firm or company name forms the designation of that separate person and of the whole individuals in their social character, under which name obligations are effectually contracted by and to the company, there does not appear to us to be any legal inconsistency or incongruity in allowing action or diligence, either at the instance of, or directed against, a partnership by its firm."

An English firm against whom jurisdiction has been founded by arrestment can be sued in its firm name, although this could not have been done in England (*Paton*, 1873, 10 S. L. R. 461). On the other hand, jurisdiction against a partner of an English firm cannot be founded in Scotland by arresting a debt due by a Scotch debtor to his firm (*Parnell*, 1889, 16 R. 917).

It also naturally follows that the individual partners of a firm can be charged upon a decree directed against a firm (*Thomson*, 2 July 1812, F. C.). In such cases it is the messenger's business to discover who the partners are.

When, however, a firm has a descriptive name, the matter is different. It is a separate person, but it cannot sue in the social name without the addition of at least three of the individual partners, if there be so many. The reason why three individual partners' names must be conjoined with the descriptive social name is on account of the supposed rule "tres faciunt collegium" (see *London, Leith, etc.*, 1841, 3 D. 1045; *Culcreugh Cotton Co.*, 1822, 2 S. 47).

If, however, the firm consist of only two partners, the instance is good if their names are conjoined. When a descriptive firm consisted only of two partners, one was held entitled to use the name of his co-partner in order to get an instance (*Antermony Coal Co.*, 1866, 4 M. 1017).

The same rule holds when descriptive firm is sued (*Scott*, 1827, 5 S. 414).

The words "but an individual partner may be charged on a decree or diligence directed against the firm," etc., apply not only to firms the names of which are composed of individual names (see *Thomson*, 2 July 1812, F. C.; *Wallace*, 1841, 3 D. 1047), but also to firms with descriptive names, provided they had originally been properly cited (*Maclean*, 1836, 15 S. 236).

It also follows from this rule that partners are actually either the debtors or creditors of the firm they are partners of. This distinguishes our idea of a firm from the English notion, which does not recognise a firm as a distinct person from the members composing it, although a firm is

so treated by the universal practice of merchants (Pollock, *Digest of Law of Partnership*, 20).

Again, in Scotland one firm can sue another firm even though one or more persons are common to both. If it can be done in England, it can only be by recognising the firm as a distinct person (see *ex parte Corbett*, 14 Ch. D. 126).

II. Relations of Partners to Persons dealing with them.

Having seen what is the nature of partnership, the next point to be considered is that of the relations existing between the firm and the partners composing it on the one hand, and persons dealing with or having claims against it or them on the other. The statute deals with these relations from the two points of view, namely: in the first place, the liability of the firm and the partners for the acts of each partner (*Agency of Partners*); and, in the second place, the liability of each partner for the acts of the firm and of his partners, so far as binding on it. This liability, as we shall see, may be either liability for debts and obligations or liability for wrongs.

It should be carefully borne in mind that all the rules that regulate the relations between a firm and persons dealing with it are matters of public law, and cannot be modified by any agreement made among the partners themselves.

(1) *Agency of Partners.*—Every partner is agent of the firm and of his other partners for the purpose of the business of the partnership, "and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners" (s. 5). That each partner is *præpositus negotiis societatis*, and as such is entitled to bind the firm by any acts he does on its behalf, has always been the rule in Scotland (see 2 Bell, *Com.* 503; Bell, *Prin.* ss. 354, 355; Ersk. iii. 3. 20). In other words, "one partner can bind the company by acknowledging that he contracted for the company" (per Ld. Glenlee in *Nisbet's Trs.*, 7 S. 310).

Partners are thus not only co-debtors: each partner can bind the firm by acts which he does for its behoof. Payment of a debt, for instance, to a partner is payment to his firm (*Nicols*, 1878, 6 R. 217).

The act of the partner, however, in order to bind the firm, must be one "for carrying on in the usual way business of the kind carried on by the firm."

This test means that if the act is one which a partner might have performed in the ordinary course of business, the firm is bound (*Kennedy*, 22 Dec. 1814, F. C.).

In trading firms, for instance, each partner can bind the firm by accepting bills of exchange or granting promissory notes (*Turnbull*, 1822, 1 S. 353; *Drew*, 1865, 3 M. 384).

In firms which are not trading concerns, it has been laid down that there is no such implied power. It has thus been held in England, though it is doubful if it would be held in Scotland, that a partner of a firm of solicitors has no authority to bind his firm by bills or notes (see *Hedley*, 1842, L. J. 11 Q. B. 293: *Garland*, 1873, 8 Ex. 216).

It would be impossible to state in detail what acts in different kinds of businesses, when done by a partner, will bind the firm. The test in all cases is the scope of the mandate. Again, partners have the same authority as agents to bind their principals. Therefore there can be no doubt as to their authority to sell, pledge, or otherwise dispose of partnership property

in the ordinary way of business. It is not necessary that the authority should be express: it is implied in all cases where the partner has the power to bind the firm (*Lockhart*, 1876, 4 R. 859: *Mains*, 1894, 22 R. 329).

Where the act of the partner is clearly not one done in the ordinary course of business, the firm is not bound. Thus it has been held that a partner has no power to bind his firm to submit a claim to arbitration (*Lumsden*, 1728, Mor. 14567).

Of course if the person dealing with the partner knows that he has no authority, or does not know or believe him to be a partner, the firm is not bound (s. 5) (*Moncrieffe*, 1797, 3 Pat. 595; *Crum*, 1858, 20 D. 751; *Yorkshire Banking Co.*, 5 C. P. D. 109). Moreover, the person dealing with the partner must not act in bad faith (*Miller*, 22 Jan. 1811, F. C.; *Paterson Brothers*, 1891, 18 R. 403). On the other hand, the firm cannot retain an advantage which a partner would not have been able to retain (*Scottish Pacific Mining Co.*, 1888, 15 R. 290).

The converse of the rule that a partner has power to bind the firm in the manner above stated, is that the act or instrument he does or executes in the firm name is binding on the firm and all the partners (s. 6). The act or instrument must be one which the partner has authority to do or execute; but if it be such an act or instrument, the firm is bound. This has always been the rule in Scotland (see *Bank of Scotland*, 1813, 1 Dow, 40: *Blair Iron Co.*, 1855, 1 Paterson, 609; *Nisbet*, 1869, 7 M. 1097). The firm, in fact, can only state the same defences as the individual partner could have done. The instrument, however, if it is to bind the firm, must be duly executed, as the law relating to the execution of deeds and negotiable instruments has not been altered (*ib.*). Thus deeds that can be signed in the firm name must, in order to bind the firm, be executed before witnesses in the ordinary way (Conveyancing Act, 1874, s. 38). On the other hand, the signature of the name of a firm (to a bill of exchange) is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm (Bills of Exchange Act, 1882, s. 23 (2)). On the subject of "deeds" binding on a firm, see *Bryan*, 1892, 19 R. 490: cf. *Paterson*, 1897, 25 R. 144. Where, however, one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound unless the individual partner was specially authorised by the other partners (s. 7).

Another point that may be noticed in connection with the rule that each partner is an agent of the firm, is that "if it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement" (s. 8). But although a firm is not liable, as we have seen, for the acts of a partner, in certain circumstances, the individual partner is himself personally liable for the obligations he has undertaken (s. 7).

The Act only deals with the relations of partners to persons dealing with them. But a firm may also, of course, appoint agents, factors, and other representatives to act on its behalf. When it does so it is in the position of a principal, and is entitled to all the rights and subject to all the liabilities of a person occupying that position. In particular, the acts of the agent may bind the firm in the same way as any other principal. An illustration of this is given in sec. 6, where it is enacted that "the act or instrument . . . by any person thereto authorised, whether a partner or not, is binding

on the firm." In addition to this, a partner may appoint an agent whose acts will bind the firm, provided the partner had power, express or implied, to make the appointment.

There are two additional points in connection with the power of a partner to bind the firm which had better be mentioned now.

(*a*) *Admissions and Representations of Partners.*—An admission or representation by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm (s. 15). The admission does not bind the firm, but is merely evidence against it, which may or may not be considered conclusive.

An admission by a representative of a deceased partner is also evidence, but not probably so strong as the admission of a partner himself (see *Nisbet's Trs.*, 1829, 7 S. 307). In that case, after the firm had been dissolved by the death of the two partners of which it was composed, an admission by a son of one partner was held not sufficient to overcome the triennial prescription which the representatives of the other partner pleaded.

The admission or representation also, it should be noted, must be "in the ordinary course of business." These words qualify the section, and probably mean that an admission by a partner is evidence against a firm when the admission regards the ordinary course of business, just in the same way as an act of a partner, within the meaning of sec. 5, is binding on the firm.

(*b*) Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs, operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner (s. 16).

The general rule as to *intimation or notice* is thus stated by Stair, iii. 1. 10: "Where there are many *correi debendi*, principal or cautioners, intimation made to any will be sufficient as to all; yet this will not exclude payment made by another of the debtors *bonâ fide*, to whom no intimation was made (*Had.*, 23 Feb. 1610, Lyon; *contra*, *Law*, 1786): to secure which it is safest for assignees to intimate to all the *correi debendi*" (see Ersk. iii. 5. 5; *Keir*, 1739, Mor. 738).

As regards intimation or notice to partners, a partner's rights are more extensive than those of *correi debendi*, as each partner is agent for his firm and his other partners, and therefore intimation to one partner is intimation to the firm.

It is thought that, looking to the position of this section in the division of the statute, "Relations of partners to persons dealing with them," it only applies when the notice is given by a third party. Otherwise it alters the law as laid down in *Hill*, 1846, 8 D. 472.

In that case one partner assigned his share of the partnership stock. This was intimated to the partner who was *de facto* the managing partner. On the bankruptcy of the assigning partner it was held that this was not sufficient intimation, and that intimation ought to have been made to each partner (cf. *Russell*, 1827, 5 S. 891; affd. 5 W. & S. 256).

The words "except in the case of a fraud on the firm committed by or with the consent of that partner" properly limit the section. In the English case of *Williamson*, 9 Ch. Div. 535, Jessel, M. R., truly remarked: "It is not true that the knowledge of a fraud by a partner is necessarily the knowledge of the firm." Many illustrations of this statement could be given. The one he gave was: Suppose a clerk were bribed to pass short measure, and then became a partner and continued the fraud, his knowledge would not be knowledge by his firm.

(2) *Liability of Partners for Debts and Obligations.*—Another leading principle regulating the relations of partners to persons dealing with them is that of the liability of each partner for all the debts and obligations of the firm, as well as for the wrongful acts or omissions of any partner, so far as binding on it. As regards debts and obligations in Scotland, this liability has always been a joint and several one. Thus: "They (*i.e.* partners) are liable *singuli in solidum*, and more as guarantors than as principals. But they (were not), like cautioners, entitled to the benefit of discussion. The non-payment on the part of the company at once raises their responsibility. Like other mercantile guarantors, they are conditional debtors if the debt is not paid at the day" (2 Bell, *Com.* 507).

The law of Scotland thus considers partners as cautioners who may become each severally liable for the partnership debts. Partnership obligations are thus, strictly speaking, not merely the joint and several obligations of the partners: they are the debts of the firm which the partners guarantee. The debt must therefore first be constituted against the firm; but that being done, the joint and several liability of the partners at once arises. This rule results from the principle, which has been already explained, that a firm is a separate person in law (s. 4). As long, therefore, as a firm remains solvent, the partners are not called on to pay firm debts; but as long as any partner is solvent, all the creditors of the firm are paid in full. We shall see later, that on the dissolution of a firm (s. 32) the partners' obligation for the partnership debts resolves itself into a pure joint and several obligation in those cases where the debt has not been constituted against the firm prior to its dissolution (*Muir*, 1862, 24 D. 1119).

In the Act the rule is thus stated: "Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable, in a due course of administration, for such debts and obligations, so far as they remain unsatisfied, but subject in England and Ireland to the prior payment of his separate debts" (s. 9). This section is ambiguously expressed. The word "jointly," so far as England and Ireland are concerned, is used in the English meaning of the word, and so far as Scotland is concerned it is used seemingly in the Scotch meaning. In England, when two or more persons are bound "jointly," each is liable for the whole debt, yet they are considered as forming one person, and therefore all must be sued together. A discharge of one will discharge all. The one who pays has a right of relief against the others; and on the death of one, his liability passes to the survivors in all cases except that of partnership, which we are just about to explain (Sweet, *Law Dictionary*).

In Scotland a joint liability is a *pro ratâ* liability (Bell, *Prin.* 51).

On the other hand, jointly and severally is in this section used in the Scotch meaning of the phrase, and not in the English. In England a joint and several liability is one where the creditor may *sue* one or more of the debtors separately, or all of them jointly, at his option (Sweet, *Law Dictionary*). In Scotland, though of course a debtor bound jointly and severally is liable *in solidum* (Bell, *Prin.* s. 56), yet when the obligation is not constituted by writing or decree, the creditor cannot sue an individual debtor, but must call all the co-obligants within the jurisdiction before the several liability can be enforced against any one debtor (*Neilson*, 1890, 17 R. 608). It is thus very similar to a joint liability in England. These remarks, it is thought, are well founded, as sec. 46 saves the rules of the common law, except so far as inconsistent with the Act.

Applying these remarks to the section, it is seen that in England partners are liable "jointly," as the phrase is there interpreted; and after the death of a partner his estate remains liable for the partnership debts, in which respect the liability of partners differs from the ordinary case of debtors bound jointly (Lindley, *Partnership*, 203; *King*, 13 M. & W. 495; *Kendal*, 1879, 4 App. Ca. 504).

In Scotland, on the other hand, it might seem at first sight as if the law were altered, and that a creditor is no longer bound to constitute his debt against a firm before charging any partner. This, however, it is thought, cannot have been intended; because, as we have seen, unless the obligation has been constituted by writing or decree, the creditor must call all the partners in order to constitute his debt; and as such a remedy is no better certainly than the old common-law remedy, it is not to be supposed that any change has been introduced, especially as the common-law remedy is safeguarded in sec. 4 (2).

As we shall see later, the estate of a deceasing partner remains liable for the partnership debts incurred while he was a partner, so far as these remain unpaid.

(3) *Liability of Partners for Wrongs.*—Besides liability for debts and obligations, a firm is liable for the wrongful acts or omissions of the partners composing it, and for those of other persons, such as servants or agents, for whom it is responsible (*Wright & Greig*, 1890, 17 R. 596). As regards a firm's liability for the wrongful acts of persons other than partners, nothing need be said here. It is in that respect in the same position as any other principal as regards an agent, or any master as regards a servant.

As regards wrongful acts or omissions of partners, a firm has always been liable for these in Scotland (2 Bell, *Com.*, 506; *Jardine*, 1864, 2 M. 1101; *National Exchange Co.*, 2 Macq. 903; *Traill*, 1875, 3 R. 770). The same rule holds in England (*Barwick*, 3 Ex. 259).

In the Act the rule is thus stated: Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act (s. 10). When the wrongful act is one of fraud, the particular partner who has committed the fraud must be specified on record, as fraud is a personal matter (*Thomson & Co.*, 1895, 22 R. 432). This, however, is little more than a matter of pleading; for an action for a wrongful act, such as judicial slander, is well laid if directed against a firm alone, without libelling the individual person (*Gordon*, 1886, 14 R. 75).

If the wrongful act consists in fraudulent representations made to induce a person to enter into a contract, he can set aside the contract or recover damages, provided he himself is in a position to rescind the contract. But, as we shall see afterwards, if the firm be bankrupt, and therefore restitution cannot be given, then damages cannot be claimed (*Houldsworth*, 1880, 7 R. (H. L.) 53).

In addition to the general statement of the rule, the Act provides that—

(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is

misapplied by one or more of the partners while it is in the custody of the firm ;

the firm is liable to make good the loss (s. 11).

When a firm is liable under either sec. 10 or sec. 11, the partners are also liable jointly and severally (s. 12). It is thought, for the reasons given when dealing with sec. 9, that the law of Scotland is not altered, and the claim must first be constituted against the firm. Of course the partner who does the wrong is liable personally. On the other hand, if a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein :

Provided as follows :—

(1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust ; and

(2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control (s. 13 ; see *M'Adam*, 1872, 11 M. 33).

(4) *Persons Liable as Partners—Holding Out.*—A person may become a partner in a firm by holding himself out as one. In other words, a person may be barred by his conduct from denying that he is a partner. Thus :—

Everyone who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm is liable as a partner (s. 14).

Liability by "holding out" is well recognised in the law of Scotland (2 Bell, *Com.* 513). Similarly, if a firm hold out an individual as a partner, they are liable for his acts just as if he were one (*Moyes*, 1829, 7 S. 793). What is sufficient to constitute liability by holding out is a question of circumstances. In one case suffering his name to remain over a shop-door after dissolution of a firm in conjunction with that of his former partner was held sufficient (*Williams*, 1812, 2 Stark, 290). If, however, holding out be proved, the person so holding himself out is liable to all who, relying on his being a partner, gave credit to the firm. It has even been held in England that such a person is liable in damages for an accident caused by a servant of the firm (*Stables*, 1825, 1 C. & P. 614). This, however, is not a necessary consequence of the rule, and the case would probably not be followed in Scotland (Lindley, *Partnership*, 75) ; for liability by holding out is, it is thought, intended to be limited to liability for debts and obligations.

Liability by "holding out" can only arise in questions with third parties. Thus an action by two out of three partners of a firm constituted by written contract to have it declared that the father of the third partner was also a partner, was held not relevant at their instance, as the father was not a partner in a question with them (*Clippens Shale Oil Co.*, 1876, 3 R. 651).

Again, in conformity with the maxim, *Socius mei socii meus socius non est*, the representation must be that the person is a partner of the firm, and not merely a partner of one of the partners (*Fairholm*, 1725, Mor. 14558, 3 Ross, *L. C.* 697).

The principle of holding out is, however, subject to this qualification, that on the death of a partner the mere fact that the business is continued in the old firm name does not of itself render his executors liable for debts contracted after his death (sec. 14 (2) ; *Morrison*, 1869, 8 M. 500).

(5) *Liability of Incoming Partners.*—A partner is not only liable for the debts and obligations incurred by the firm during the time he is a

partner: he may also be liable for the debts incurred before he became one. Thus the new firm may agree to take over the debts and obligations of the old firm, in which case the new partner becomes liable for them, though a creditor of the old firm may have no *jus quæsitum* to enforce such an agreement, and may be obliged to sue the old firm (*Henderson*, 1894, 22 R. 51). Again, "if parties take over a going concern without stipulation as to their respective interests, it is to be implied that they take over the debts and liabilities" of the old firm (per Lord President in *M'Keand*, 1861, 23 D. p. 858). This is also the opinion of Ld. J.-C. Inglis, p. 853. "Now what was the true nature of that transaction? That comes to be the next question. It was just this, that Mr. Laird, being in business as a trader, . . . thought it desirable to give his two shopmen a small interest in the business, for the purpose of stimulating their zeal and energy in the promotion of the interests of his concern . . . But was it ever heard before that when a transaction was entered into, the beginning and end and whole meaning and distinctive character of which amounted to this, that the two shopmen were to have each one-eighth share in the business as part of their remuneration for their services, that that constitutes a new company to the effect of handing over to the new firm the whole stock of the individual trader, and depriving the prior trade creditors of that individual trader of all recourse against his stock and property . . . Now, it humbly appears to me that when parties take up a going business in that way, and take the stock, they must also take the liabilities." See also *Miller*, 1861, 23 D. 359. It is, however, in all cases a question of circumstances, and must be established by presumption or by proof of facts and circumstances (per Ld. Adam, *Heddle's Executrix*, 1888, 15 R. 698). In that case it was held that the new firm had taken over the debts of the old one. The reverse was held in *Nelmes*, 1883, 10 R. 974, and *Stephen's Trs.*, 1889, 16 R. 779; cf. *Tully*, 1891, 19 R. 65. The presumption, however, to judge from the terms of sec. 17 (1), is against the new firm being liable for the old firm's debts.

(6) *Liability of Outgoing Partners for Debts incurred Prior to Retirement.*—A partner who retires from a firm does not thereby cease to be liable for partnership debts and obligations incurred before his retirement (s. 17 (2)). In fact, nothing short of either actual payment, or an agreement with the creditors of the old firm to free him and accept the new firm as their debtor, will free a retiring partner. No agreement with his partners can free him—not even if he leave enough money to pay the partnership debts, and take a bond from his partners that they will do so (*Milliken* v. *Love*, Hume, 754; *Dalgleish & Fleming*, 1791, Mor. 14595).

If a retiring partner make such an agreement with the firm's creditors as we have just spoken of, he may be freed. The agreement may either be express, or inferred as a fact from the course of dealing between the creditors and the new firm (s. 17 (3)). It must be with a creditor who accepts the new firm as his debtor in lieu of the retiring partner, and, in addition, discharges the retiring partner of all liability. There must, in fact, be delegation before the retiring partner will be freed from liability. Thus the mere fact of accepting partial payment, and a bill for the balance from the new firm, of an account due by a retiring partner, was held, on the bill not being met, not to free the retiring partner, as he had not been discharged of liability (*Pollock & Co.*, 1863, 2 M. 14). In that case the new firm who granted the bill was treated simply as a cautioner of the retiring partner, and not as a person who has been accepted as debtor in his place. What acts will be held sufficient proof of an implied agreement to accept the new firm in place of the retiring partner is in all cases a question of circum-

stances. The creditor was held to have freed the retiring partner of liability in *Buchanan & Co.*, 1779, Mor. 3402; *Davidson*, 1733, Mor. 7061: *Pearston*, 1859, 19 D. 197; see also the English case of *Bilborough*, 1876, 5 Ch. D. 255. The reverse was held in *Campbell*, 1847, 7 D. 548; *Muir*, 1860, 22 D. 1070. Though it is generally the interest of a creditor to hold the retiring partner liable, it may be his interest to try to make the new firm liable (see *Rolfe and The Bank of Australasia*, 1865, 1 P. C. App. 27). In other words, it may be the creditor's interest to prove that there has been delegation.

A creditor, however, it is thought, would be held to have freed a retiring partner if he elect to sue the new firm, or rank on its estate if it be sequestrated—at least unless he reserve his claim against the partner who has retired (*Scarf*, 7 App. Ca. 345; *Black*, 1886, 13 R. 243). The mode in which a retiring partner frees himself from liability for obligations incurred *subsequent* to his retirement will be considered when treating of dissolution of partnership (p. 171).

(7) *Revocation of Cautionary Obligation.*—A cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm (s. 18). A firm may assume new partners, or a partner may retire: but if either of these events happen, a cautionary obligation given to it, or to a third person regarding it, is revoked, unless it is otherwise agreed. The term agreement, as used in this section, includes, it is thought, an implied agreement or an agreement inferred from facts and circumstances (*Aytoun*, 1844, 6 D. 1409; cf. *Padon*, 1826, 5 S. 175).

A cautionary obligation is an accessory obligation. There must exist a principal obligation by a debtor to a creditor; but when there is such an obligation, there may exist the accessory obligation of cautionry. Under it the cautioner undertakes to perform the obligation to the creditor if the debtor fails to do so.

When constituted, the obligation continues until it is recalled by the cautioner, or he is discharged, or until it prescribes. A cautioner is discharged when the principal obligation is fulfilled, and in other ways we need not refer to (*Stocks*, 1890, 17 R. 1122). He is also discharged by a change in the nature of the obligation he is guaranteeing. It is under this heading that the section before us is to be classed.

This section supersedes sec. 7 of the Mercantile Law Amendment (Scotland) Act and sec. 4 of the English Mercantile Law Amendment Act, which are repealed by sec. 48.

It is to be noted that this section deals exclusively with a guaranty or cautionary obligation given in respect of the transactions of a firm.

The repealed sections regulate guarantees: (sec. 7 of the Scottish Act) "to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm," (and sec. 4 of the English Act) "of a firm consisting of two or more persons, or of a single person trading under the name of a firm."

It would thus appear that the effect on a guaranty or cautionary obligation given in respect of the transactions of a single person trading under a firm name, and who assumes a partner, must fall to be decided by the rules of the common law.

At common law it is thought the assumption by a trader, trading under a firm name, of a partner would not necessarily free a cautioner of the firm. See 2 Bell, *Com.* 525–6; *Aytoun*, 1844, 6 D. 1409; *Spens*, 1822, 1 S. 516; *Alexander*, 1890, 17 R. 571, Ld. Kinnear, p. 575.

The concluding sections of the repealed statutes provide "unless the intention of the parties that such guarantee . . . ("promise" in the English Act) shall continue to be binding . . . shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

In this section the words are "in the absence of agreement to the contrary."

Unless "agreement" here means the same as "express stipulation or necessary implication" in the repealed sections, the old cases on this subject will not apply. It is thought, however, "agreement" as here used is not limited to an express agreement.

Two other points may be mentioned:

(1) When a firm and other individuals are cautioners, the firm is treated as one cautioner, and not as consisting of as many cautioners as it has partners. It is otherwise when each partner is specially bound as a cautioner (cf. *Christie*, 1826, 4 S. 368; *M'Bride*, 1865, 4 M. 73).

(2) A cautioner, in seeking relief from his debtor, can sue a latent partner of his debtor even though he may not have been aware of the existence of the partner when he became cautioner.

In other words, a cautioner's right of relief is against the assets of his debtor; and a latent partner, being liable for the firm debts, he must relieve the cautioner (*M'Leod*, 1839, 1 D. 1121).

III. Relations of Partners to one another.

Having considered, in the first place, what the nature of the contract of partnership is, and, in the second place, what are the relations of partners to persons dealing with them, we now come to consider their rights and duties in relation to one another. The relations of partners to one another differ in one essential particular, at least, from those in which they stand to persons dealing with them; for while in the latter case no agreement among the partners can modify the relations in which they stand to persons dealing with them, in the former case the relations in which they stand to one another can be modified at pleasure by any agreement, either express or implied from facts and circumstances. Thus if partners have any special conditions they wish to trade under, they may execute a contract of copartnery (forms of this deed are given in the *Jurid. Styles*, ii. 100 *et seq.*), in which these will be set forth. But such a deed is not necessary, nor even is writing of any kind; for the consent to vary the common law or statutory rules "may be either express or inferred from a course of dealing" (s. 19). If, however, no special conditions be agreed to, the Partnership Act and the common law will regulate the mutual rights and duties of partners. These relate chiefly to (1) the contributions to the capital of the firm; (2) the division of profits; (3) the management of the concern; (4) the mutual accountability of each partner and the firm to all the other partners. The subjects of dissolution and retirement and bankruptcy, as they concern other persons besides partners, will be treated separately.

(1) *Contributions of Stock or Capital* which are made by the partners may be made "in all the possible variety of proportions and modes in money, in goods, in the premises to be used, in skill and attendance, or even in personal influence. It may be declared divisible on dissolution, as the parties choose to settle." If no condition regarding any residue be made, it is divisible in the proportion in which profits are shared (s. 44 (b) 4).

When a partner contributes his share, it becomes, not the joint pro-

perty of the partners, but the property of the firm, which is a legal person distinct from the partners composing it. And the only claim which the partner has in respect of it is a claim against the firm to repay him his share after the partnership obligations have been satisfied. It follows from this, that if creditors of a partner want to proceed against a partner they do not poind or adjudge any moveable or heritable estate as belonging to the partner, but arrest his share in the hands of the firm (*Rae*, 1742, Mor. 716; *Neilson*, 1745, Mor. 723; cf. *Parnell*, 1889, 16 R. 917).

If a partner fail to advance his share, he is debtor to the firm. If he advance more than his share, he is a creditor of the firm, though of course he is barred from competing with the firm's creditors. He is also a creditor of the partners for this sum, from each one of whom he may demand a proportional share of the debt. In this respect he differs from a stranger creditor, to whom each partner is liable *in solidum* (2 Bell, *Com.* 536).

As to what is partnership property, it is provided that all property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, shall be deemed partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement (s. 20 (1)). And unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm (s. 21). These rules are also the common-law rules, and are intended to enable a firm to prevent a partner, or person claiming through him, from retaining property which belongs to the firm of which he or his author is a member (2 Bell, *Com.* 500–2; *Forrester*, 1875, 2 R. 755: *Davie*, 1880, 8 R. 319). They, however, only give the firm or those in its right a *titulus transferendi dominii*. They give the firm merely the right to enforce its claim to the property in question. When its right is denied, it must prove that the property belongs to the firm.

Parole proof, however, is all that is required in proper partnership questions: and no difficulty exists as regards moveables, for possession of them by a partner is presumed to be possession by such partner on behalf of the firm. Parole proof, again, suffices to prove that money in the possession of one partner belongs to the firm (*General Assembly of Baptist Church*, 1841, 3 D. 1030); or that a partner in whose name a title to land has been taken has acquired it for his firm (*Horne*, 1877, 4 R. 977). On the other hand, if the action is really and in substance a declarator of trust, the proof will be restricted to proof by writ or oath, even although the pursuers are a firm and the defender one of the partners of it (*Barton*, 1816, 8 D. 1011; *Laird*, 1886, 12 R. 294). When heritable estate belongs to a firm, it devolves according to the rules applicable to heritage, but in trust for the firm (s. 20 (2)); and the title must accordingly be taken in the appropriate manner. Thus while a lease can be entered into by a firm *socio nomine* (*Dennistun, M'Nair, & Co.*, Mor. App. "Tack" No. 15), a title to heritage cannot be taken in name of a firm (*Morrison* v. *Miller*, 1818, Hume, 720). The title to heritable estate is generally taken in name of the partners, as trustees for the firm, and, although not absolutely necessary, title to a lease ought also to be taken in a similar manner, otherwise it will lapse on dissolution of the firm (*infra*, p. 172).

Though heritable property devolves according to the rules of heritable succession, it shall, unless the contrary intention appears, be treated, as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors

or administrators, as personal or moveable, and not real or heritable estate (s. 22). This has long been the rule in Scotland (*Sime*, 1 Mar. 1804, F. C.; affd. 5 Pat. 525; *Murray*, 5 Feb. 1805, F. C.; *Corse*, Dec. 10, 1802, F. C.; *Minto*, 1832, 11 S. 632; *Irvine*, 1851, 13 D. 1367).

Finally, as regards partnership property, the following rule as regards Scotland has been introduced by the Act: Where co-owners of any heritable estate, not being itself partnership property, are partners as to profits made by the use of estate, and purchase other land or estate out of the profits, to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners but as co-owners, for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase (s. 20 (3); cf. *supra*, p. 152; Lindley, *Partnership*, p. 342).

(2) *Profits and Losses.*—Subject to any agreement, express or implied, between partners, they are all entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise, sustained by the firm (s. 24 (1)). This was also the rule at common law (2 Bell, *Com.* 503). *Struthers*, 2 W. & S. 153; *Blair*, 1828, 6 S. 836; *Aberdeen Town and County Bank*, 1860, 22 D. 44; *Ferguson*, 1836, 14 S. 871; *Aitchison*, 1876, 4 R. 899, are cases as to sharing profits; and *Barr's Trustee*, 1886, 13 R. 1055, is one as to sharing losses.

An agreement, express or implied, that losses are to be borne in unequal proportions can only be given effect to while the firm remain solvent.

Again, a firm must indemnify every partner who makes payments or incurs personal liabilities (*a*) in the ordinary and proper conduct of its business, or (*b*) in doing anything necessarily done for its preservation (s. 24 (2); *Keith*, 1840, 2 D. 633; *Orr & Co.*, 1840, 2 D. 1092). When a claim of relief is made, it must be by an action of count and reckoning, for one partner cannot use summary diligence against another (*Cavan*, 1832, 10 S. 550; *Pearson*, 1867, 5 M. 301).

Again, payments or advances made by a partner beyond the amount of capital he has agreed to subscribe, shall bear interest at the rate of five per cent. (s. 24 (3)); and interest on the capital is only to be paid out of profits (24 (4)).

(3) *Management.*—Subject to agreement, express or implied, every partner may take part in the management of the business (s. 24 (5)). But a partner cannot delegate this right to a manager (*Paul*, 1826, 4 S. 572). Nor can the manager appointed to represent the trustees of a deceased partner do partnership acts, such as signing the name of the firm (*Beveridge*, 1872, 10 M. (H. L.) 1).

Again, no partner, apart from agreement, is entitled to remuneration for acting in the partnership business (s. 24 (6)); nor for winding it up (*Berry*, 1832, 10 S. 792; Bell, *Prin.* 370; *Beath*, 1826, 2 W. & S. 25). An agreement to give remuneration, however, can be inferred from the actings of the parties (*Faulds*, 1867, 5 M. 373).

Delectus personæ.—Again, no person may be introduced as a partner without the consent of all existing partners (s. 24 (7)). This rule depends on the exuberant trust reposed by the partners in each other (Bell, *Prin.* 358). At the same time, an agreement that a new partner, such as the heir of deceasing partner, shall become a partner, is binding (*Warner*, 1815, Mor. 14603; affd. 3 Dow, 76; *Hill*, 1865, 3 M. 541). A partner, however, as we shall see, may assign the beneficial interest in a firm to an assignee (*Cassels*, 1881, 8 R. (H. L.) 1).

Again, no majority of partners can expel a partner, unless power to do so has been conferred by express agreement (s. 25).

Such a power, if conferred on a majority, will be strictly construed (*Munro*, 8 June 1813, F. C.).

A majority, however, decides, when differences arise among partners; but subject to this, that they may not alter the nature of the business without the consent of all the existing partners (s. 24 (8): *Maxton*, 1838, 1 D. 367; cf. *Clements*, 1878, 8 Ch. D. 129). The dissenting minority can, as a rule, enforce their right by interdict (*Cunninghame*, 1824, 2 Sh. App. 225). And at least, *inter socios*, they would not be liable for loss occasioned by the change (*Montgomery*, Hume, 748).

Again, partnership books are, unless there is an agreement to the contrary, to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them (s. 24 (9)). A partner may also in special circumstances ask that they be remitted to an accountant, to report (*Fyfe Bank*, 1831, 9 S. 693; *Cameron*, 1855, 17 D. 1142; cf. *Blair*, 1888, 15 R. 1094). Although there is no common-law obligation to keep books, they are almost always kept by merchants. It is, moreover, a crime if any trader, who at the date of his bankruptcy is indebted to an amount exceeding £200, has not kept the usual business books (43 & 44 Vict. c. 34, s. 14 A, 6).

(4) *Accountability.*—Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives (s. 28). This duty, of course, existed at common law; and under it a partner could raise a general action of accounting, or sue for a balance arising on a certain branch of the business (*M'Intyre*, 1831, 9 S. 284; *Lawson*, 1872, 11 M. 168); but he cannot use summary diligence against a partner (*Pearson*, 1867, 5 M. 301, *supra*, 167).

The right to demand an accounting, however, can be modified by agreement, such as that a balance-sheet, when signed, should be accepted as correct both by partners and their representatives. In such cases the agreement will come in place of the obligation to account (*Pollock, Gilmour, & Co.*, 1850, 13 D. 640; *M'Laren*, 1862, 24 D. 577). And of course the right to make such an agreement as will bind partners and their representatives still exists.

Again, if any partner, without the consent of his copartners, derives a benefit from the use of the partnership property, name, or connection, he must account for it to the firm. And the same duty of accountability exists in respect of profits made by a partner after a firm has been dissolved and before it has been wound up (s. 29). This rule is well established (*M'Niven*, 1868, 7 M. 181; *Featherstonhaugh*, 1811, 17 Ves. 308). And, apart from the statute, there is no doubt a partner cannot receive any private profit when acting on behalf of his firm. He would have, for instance, to repay to his firm any commission he may have earned when he was really acting on its behalf (*Manners*, 1884, 11 R. 899; cf. *Scottish Pacific Coast Mining Co.*, 1888, 15 R. 290).

Again, a partner cannot compete in trade with his partners without their consent; and if he does, he must account to them for any profits he may make (s. 30). Analogous to this rule is the rule which prevents the seller of the goodwill of a business from competing with the purchaser (see *infra*, IV. p. 175, where this point is discussed). A partner may, however, assign his share in a partnership, unless prevented by agreement.

If he do, the assignee is not a partner, and has no right to interfere in the management, or require accounts, or inspect the books. All he is entitled to is the cedent's share of the profits. When a dissolution occurs, the assignee gets the cedent's share of the assets; and to find out what it amounts to he is, after the dissolution, entitled to examine the accounts (s. 31; *Lonsdale Hematite Iron Co.*, 1873, 1 R. 417; *Cassels*, 1881, 8 R. (H. L.) 1).

IV. Termination or Dissolution of Partnership and its Consequences.

(1) *When Dissolution can take Place.*—Partnership is a contract in which the utmost confidence or "exuberant trust" is placed in each partner. Accordingly, it can, apart from agreement, be dissolved whenever that confidence can no longer be placed in any partner, or is withdrawn. The following is a list of the different circumstances under which partnership may be terminated:—

(i.) Partnership may therefore be dissolved by the expiration of the term fixed for its endurance (s. 32 (a)). It may, however, continue as a partnership at will, subject only to this, that the rights and duties of the partners remain the same as they were before the expiration of the term, so far as they are consistent with the incidents of a partnership at will (s. 27). A partnership, moreover, for a term of years is presumed to continue after the expiry of the term, unless dissolved (*ib.*). The rights and duties mentioned in sec. 27 refer, it is thought, to the sharing of profits, and the rules as to management (cf. *Neilson*, 1886, 13 R. (H. L.) 50; *Brown*, 1886, 13 R. 515). Any partnership, again, even during its term, may also be dissolved by agreement among the partners; and the agreement will be binding unless it be reduced on the ground of fraud, undue influence, or inadequacy of consideration (*Tennent*, 1870, 8 M. (H. L.) 10).

(ii.) Partnership is also dissolved when its object is accomplished. Thus if it be for a joint adventure, trade, or undertaking, it terminates when the voyage or adventure is finished (s. 32 (b)).

Joint adventure was formerly considered as distinguishable from partnership, but, as has been already pointed out, it is now indistinguishable from it (Joint Adventure).

(iii.) Partnership entered into for an indefinite time can be dissolved by any partner giving notice of his intention to do so. This is called renunciation in Bell, *Com.* It is to be noted that not only does the partner retire, but the partnership itself is dissolved, agreeably to the maxim, *Cum aliquis renunciaverit societati, solvitur societas.* The partner dissolving may name the date when the dissolution shall come about; if he does not, it occurs when the notice is received. It is not necessary that the notice be in writing; but as it is provided that where the partnership has been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient, it is prudent, in such circumstances at least, to give it in writing. It is thought also that the time given in the notice must be reasonable (s. 26) (*Marshall*, 26 Jan. 1815, F. C.; Bell, *Prin.* 378).

(iv.) Death also dissolves partnership, unless the partners have otherwise agreed (2 Bell, *Com.* 524; s. 33). An agreement, to obviate the result of death, may decide that the partner's interest merely in the firm be paid out to his representatives, or it may provide that the heir of the deceasing partner be assumed as a partner (cf. *Alexander*, 1891, 17 R. 571). As we shall see later, the death of a partner is a public fact,

and neither customers nor the public require notice of it in order to free his representatives from liability for debts incurred thereafter (*Christie*, 1841, 2 Rob. 118; *Oswald*, 1879, 6 R. 461).

(v.) Subject, as in the last case, to any agreement among the partners, a partnership is also dissolved when any partner is sequestrated under the Bankruptcy (Scotland) Acts, or when a decree of *cessio bonorum* is issued against any partner (ss. 33 and 47; 2 Bell, *Com.* 524). Insolvency or notour bankruptcy alone does not have this result; nor does the granting of a trust deed for behoof of creditors, though Mr. Bell states the opposite (*Munro*, 8 June 1813, F. C.).

The partners may nevertheless arrange that insolvency shall not dissolve the partnership (*Haiman*, 1880, 7 R. 380). Sequestration and cessio are public acts, and therefore no further notice need be given to customers or strangers (2 Bell, *Com.* 530; see *infra*, 171).

(vi.) A partnership is also dissolved when it becomes unlawful either for the business of the firm to be carried on, or for the partners to carry it on in partnership (s. 34). No case has occurred in Scotland to which this section of the Partnership Act would apply; but it does not introduce any new rule, for clearly illegality would be a ground of dissolution (cf. *Gordon*, 1845, 4 Bell's App. 254, where a contract of copartnery of pawnbrokers was reduced on account of a breach of the Pawnbrokers Act; see also *in re South Wales Atlantic Steamship Co.*, 1875, 2 Ch. D. 763; Lindley, *Partnership*, 99).

(vii.) The marriage of a female partner formerly dissolved a partnership, as the marriage introduced a new partner, which, as we have seen, cannot be done without the consent of all the partners (*Russell*, 1874, 2 R. 93). As has already been pointed out when dealing with the capacity of persons to become partners, it is doubtful whether or not the law has been changed by the Married Women's Property Act, 1881. Probably, however, such a marriage would be a reason sufficient to induce the Court to dissolve the partnership under sec. 35.

(viii.) Incapacity by disease, including under that name both physical infirmity and insanity, does not dissolve partnership, but it was probably a reason for having it dissolved by the Court (2 Bell, *Com.* 525), though there are no Scotch cases in which this has been done (*Eadie*, 1885, 12 R. 660). This matter, and also all other grounds which give the Court a right to interfere, are set forth in the following section (35):—

(ix.) On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:—

(*a*) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner:

(*b*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract:

(*c*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business:

(*d*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or other-

wise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him (*Harrison*, 1856, 21 Beav. 482; cf. *Hall*, 1850, 12 Beav. 414).

(*e*) When the business of the partnership can only be carried on at a loss (*Miller*, 1875, 3 R. 242):

(*f*) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

This section only applies where there is a partnership for a term of years, or where there is a joint adventure which is not yet finished or completed. In such cases the Court may decree a dissolution if circumstances can bring it within the scope of the section, and such a power the Court always had (2 Bell, *Com.* 525). But under the section the Court only intervenes on the application of a partner, and an application is understood in practice, and it is thought rightly, to mean a petition and not an action of declarator, though the latter action is still competent, as the section is only permissive (*Thomson, Petr.*, 1893, 1 S. L. T. 73; cf. *Russell*, 1874, 2 R. 93; *Gordon*, 1854, 4 Bell's App. 254).

The Court, moreover, does not, as formerly, merely appoint a judicial factor to wind up the partnership estate: it now decrees a dissolution. This is undoubtedly a novelty which must be attended to. The Court here means the Court of Session,—not the Sheriff Court,—and petitions under this section must be presented to the Junior Lord Ordinary. The Sheriff Court is excluded, it is thought, as it could not appoint a judicial factor to wind up a firm (Judicial Factors Act, 1880). See *infra*, 172–3.

(2) *Effect of Dissolution as regards Third Persons.*—(*a*) *Notice of Dissolution.*—Customers and the public have an interest in knowing if one or more partners have retired, or a firm has been dissolved, for the new firm may not have the same credit as the old; and where customers deal with a firm after a change in its constitution, they are not presumed to know that any partner has retired.

The general question of an incoming or outgoing partner's liabilities has been discussed in Division II. It now remains to point out in what circumstances notice is required to free a retiring partner or his representatives from liability for debts incurred subsequently to the dissolution or retirement. We have already seen that death of a partner, and sequestration or cessio of a partner or firm, dissolve the firm unless it has been otherwise agreed; and that in such cases no notice to anyone is required, for death and bankruptcy are public facts of which everyone must take notice (2 Bell, *Com.* 529–30; s. 36 (3)). When, however, the dissolution is by renunciation or agreement among the partners, or by the Court, the notice required is as follows:—

(*a*) In the case of customers, all must receive it, for they are entitled to treat all apparent members of the firm as being still members of it until they have notice of the change (s. 36 (1)). Apparent members are those known to the customer to be partners, and that whether other customers know of their existence or not. This rule, moreover, cannot be altered by any private agreement among the partners, such as one under which the retiring partner takes the firm bound to pay the old firm's debts (*Milliken*, Hume, 754). Neither the common law nor the statute state what the notice must consist of. It need not be in writing, and it is thought it means knowledge by the customer of the change. In fact each customer can plead that he did not know of the change (*Gardner*, 1862, 24 D. 315);

and any customer who has had notice is barred from claiming from the new firm (*Padon*, 1826, 5 S. 175; *Mann*, 1879, 6 R. 1078). This is an important point in bankruptcy, for one customer may know and another may not. A usual form of notice is a circular addressed to the customers, and proved to be posted or delivered.

(*b*) As regards strangers, that is, persons who had no dealings with the firm before the date of the dissolution, all that is required is that there should be an advertisement in the *Gazette*. In the case of firms having their principal place of business in Scotland, it is the *Edinburgh Gazette* (s. 32 (2)). This alters, or at least clears up, the common law under which a *Gazette* notice alone was not sufficient in all cases (2 Bell, *Com.* 532).

(*c*) When a dormant partner, that is, a person not known to the person dealing with the firm to be a partner of it, retires, no notice is required (s. 36 (3)). This alters the former law, under which notice was required similar to that given on the retirement of an ostensible partner (2 Bell, *Com.* 533). When notice of dissolution or retirement has to be given, any partner may give it, and may demand the concurrence of his partners for the performance of such acts as cannot be done without it (s. 37; *Hendry*, 32 Ch. D. 355). But as any partner in Scotland can give notice in the *Gazette* or otherwise without the sanction of his partners, this rule was hardly needed so far as Scotland is concerned.

(*d*) *Effect of Dissolution on Contracts.*—Business contracts entered into by a firm are not affected by a dissolution. The partners of the dissolved firm are responsible for all the obligations contracted in the firm's name. But no new contracts can be entered into, and some contracts, such as the contract of service between a firm and a servant, are terminated by dissolution. At least this is so when the dissolution is caused by the death of a partner (*Hoey*, 1867, 5 M. 814). The servant or employee, however, is entitled to wages or salary up to the next term. Again, a lease, if taken in name of a firm, alone lapses on dissolution (1 Bell, *Com.* 78; Rankine on *Leases*, 84; see *supra*, 166).

(3) *Winding up.*—While it is correct to say that dissolution, however brought about, ends or terminates partnership, still, until wound up, a firm continues to exist for that purpose, and for completing transactions begun but unfinished at the time of the dissolution; and partners have authority to do all acts necessary for accomplishing these purposes, except that a bankrupt partner cannot bind his firm by his acts unless his partners continue to treat him as a partner (s. 38). The authority of partners to bind the firm is therefore not ended until the winding up is completed; it is simply limited (*Gordon*, 1795, 3 Pat. 428). Thus no new transactions can be entered into. In particular, after dissolution no partner can, unless authorised to do so, put the firm's name to a bill of exchange (*Snodgrass*, 1846, 8 D. 390; *Goodwin*, 1890, 18 R. 193; cf. *Lewis*, 1841, 1 Q. B. (Ad. & Ellis) 349). Nor can one partner, after dissolution, bind the firm by admitting liability for a debt which has not been constituted prior to the dissolution (*M'Nab*, 1843, 5 D. 1014). Again, the continuity of a firm's account, apart from agreement, ends with dissolution (*Wotherspoon*, 1868, 6 M. 1052). On the other hand, all obligations undertaken prior to the dissolution of the firm must be implemented, and, in addition, the partners have authority to bind the firm for the expenses incurred in performing them (2 Bell, *Com.* 528). Subject, however, to the duty of implementing current obligations, it is provided that, "on the dissolution of a partnership, every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the

property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners of the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm (s. 39). This important section imposes on the Court, on cause shown, the duty of appointing a judicial factor to wind up the affairs of dissolved firms; and it is difficult to say whether the common law has been altered or not. There is no doubt as to the power of the Court to appoint a judicial factor (2 Bell, *Com.* 524). The only question is as to the circumstances under which the power will be exercised. Hitherto it has always been understood that the partners or surviving partners, unless disqualified by fault or incapacity, have a right, without applying to the Court, to wind up the affairs of the firm of which they are partners, and the Court will not interfere by appointing a factor as liquidator (*Young*, 1853, 1 Macq. 385). In particular, it will not appoint a factor merely because there are questions of accounting between the partners (*Gow*, 1877, 4 R. 928). On the other hand, it will appoint a factor when all the partners are dead (*Dixon*, 1832, 6 W. & S. 229), or when the partners are unfitted by fault or incapacity (*Dickie*, 1874, 1 R. 1030). The rule in England is the same, though there the Court apparently intervenes more frequently than here (Lindley, *Partnership*, 531 *et seq.*). On the whole, though the section states more broadly than any decided case that a partner has a right to apply to the Court, it is thought that the statute does not alter the law. It may, however, be a question whether an assignee of a partner whose rights are regulated by sec. 31, can apply to the Court to wind up a firm. It is thought that an assignee has no such right, but must enforce his claim by an action of accounting. It must also be noted that partners and others are not restricted to petitions under this section, but can, if necessary, use other forms of action, such as accounting, interdict, reductions, or do whatever is necessary to vindicate their rights. Furthermore, though it is not stated, there can be no doubt that, by agreement, partners or representatives of partners can obviate the operation of this section (cf. *M'Kenzie*, 1872, 10 M. 861). This section, finally, must be contrasted with sec. 35. That section only applies to applications by partners, while sec. 39 applies also to applications by persons claiming through partners.

(4) *Firm's Assets.*—Whether the winding up be done by the partners themselves or by the Court, the first thing to do is to realise the firm's assets. When the partners themselves are realising the estate, the firm's property must be publicly sold, unless it is otherwise agreed; for the other partners or their representatives are not bound to accept the value that may be put on the firm's assets by the partners who are managing the liquidation (*Marshall*, 23 Feb. 1816, F. C.; *Stewart*, 1835, 14 S. 72). There can be little doubt, also, that a judicial factor, when one is appointed by the Court to wind up a firm, would be bound to follow the same course. This is a proper place, therefore, to point out what a firm's assets consist of. It would be impossible to give a list of partnership assets, but they will include the original stock-in-trade; heritable property, including leases; in shipping firms, ships; the claims the firm has against its debtors, whether these be strangers or partners; the goodwill of the concern (2 Bell, *Com.* 535). We have already seen that all property acquired for or on account of a firm becomes partnership property, and must be held by the firm for behoof of the partners (s. 20); but that while this is so, the laws regulating the mode

of completing the title to property have not been altered, and in particular the title to heritable property must be completed in the appropriate manner (*ib.*). Again, the Merchant Shipping Act, 1894, ss. 1 to 5, regulates how ships are owned. The principal provisions are that a ship, or shares in a ship, can only be owned by individuals, or by joint owners not exceeding five in number, who are considered as one person, or by a corporation, which is also treated as one person. But while this is so, and while the register of ships does not recognise trusts, one individual may be a trustee for others. Therefore when a firm owns a ship, it—even though in Scotland it is a legal person—cannot appear on the register as the owner of it. It must accordingly have the ship or the shares registered in the name of a partner, who will be a trustee for it, or in the individual names of the partners as joint owners, if they be less than five in number.

The next item mentioned consists of the claims the firm has against its debtors. These may be either persons dealing with the firm, or partners. As regards the former class, nothing need be said. They are clearly liable in payment to the dissolved firm. As regards partners, it falls to be noted that sec. 39 treats a partner who is indebted to his firm in the way the law of Scotland treats them. That is to say, they are debtors to the firm considered as a separate legal person. Again, it may be noted that they have rights under sec. 24, which we have already considered, regarding advances made by them to the firm. Their rights as regards pleading compensation will be treated under *Bankruptcy*. The only other item we need consider is goodwill.

(5) *Goodwill.*—In itself goodwill is the enhanced value which a business acquires on account of the good-will or favour with which the public regard it. This goodwill may depend on the nature of the business that is carried on, as the goodwill that attaches to some firm as the makers of some well-known and widely-distributed article of commerce, or to a professional man's practice. At least it is not the case that a professional partnership may not acquire a goodwill (*Bain*, 1878, 5 R., per Ld. Gifford, p. 424). Goodwill, again, may depend on the premises, as being most suitable for the particular business, as the goodwill that would attach to a well-known restaurant situated in a central position in a large town. Goodwill, again, may depend on the name of the firm, or be dependent on the trade mark that gives the article manufactured its value. Goodwill, finally, may be composed of one or more, or of all of these elements. The article manufactured, the place where it is made, the person who makes it, and the trade mark which distinguishes it, all combine to make up what is called goodwill. The goodwill may be of large value or of very small value. It may belong to an individual trader, to a partnership, or a company registered under the Companies Acts, or formed or incorporated by Act of Parliament, letters patent, or royal charter.

In partnership law questions regarding goodwill arise chiefly on the dissolution of a firm when its assets are realised. Dissolution, as we have seen, may, apart from agreement, take place either by the death, bankruptcy, retirement of a partner, or winding up of a partnership. When dissolution of a partnership takes place, the rule is well established, both in Scotland and England, that the goodwill is an asset of the firm, and must be sold for the benefit of all concerned (Bell, *Com.* ii. 535; Bell, *Prin.* 379; *M'Cormick*, 1822, 1 S. 511; *M'Whannel*, 1830, 8 S. 914; *Smith*, 1859, 27 Beav. 146; Lindley on *Partnership*, 441).

In England this rule has been further fortified by a decision to the effect that, pending the proceedings for the sale of the goodwill, one partner can

restrain another from using the partnership name (*Turner*, 1861, 3 Giff. 442). This right on the part of a dissolved firm is quite separate from the right that any one partner might, and probably would, have to prevent another partner, after a partnership had been dissolved, from using his name, if such use of it had the effect of rendering him liable as a partner for the new firm's debts. If it were otherwise, he would have no right to interfere (*Scott*, 1872, 20 W. R. 508; *Churton*, 1858, 7 W. R. 365; *Levy*, 1878, 10 Ch. D. 436).

The next point to be noticed, is that if the goodwill is not sold, each partner of a dissolved firm is, unless otherwise prevented, entitled to use the firm's name, and carry on his business under it (*Banks*, 1865, 34 Beav. 566).

Another point to be noticed, is as to the effect of the sale of the goodwill, or, in other words, what is included under goodwill. A sale of goodwill is a different thing from an agreement not to carry on a business. It does not prevent the seller from continuing to trade. A distinction, however, falls to be drawn from the case of a voluntary from that of an involuntary sale. When the sale is voluntary, that is to say, a sale by a solvent trader, he is to a certain extent prevented from competing with the purchaser; for it has now been decided that under the sale of goodwill the good faith of the bargain must be observed, and there is more sold than the mere "probability that the old customers will resort to the old place" (per Ld. Eldon in *Chrutrell*, 1809, 17 Ves. 335). A seller may therefore still start a rival business to the one he has sold, but he may not solicit his old customers, and will be interdicted from doing so (*Trego*, [1896] App. Cas. 7; cf. *Labouchere*, 1873, 13 Eq. 322; *Pearson*, 1884, 27 Ch. D. 145). On the other hand, when the sale is involuntary, that is to say, a sale by the trustee on the bankrupt estate of a trader, the trader's freedom of action would probably hardly be interfered with at all. This matter may be otherwise regulated by special agreement. For instance, the seller may bind himself not to carry on a business in opposition to that of the purchaser; and when the restraint on the seller's liberty of action is restricted to a particular place, such a bargain is good (*Watson*, 1863, 1 M. 1110). An agreement, however, to pay a partner compensation on his retirement does not necessarily prevent that partner from continuing in business (*M'Kirdy*, 1854, 16 D. 1013). When, however, the name of a firm has been sold, the seller may be interdicted from continuing to trade under it, even though it is his own name (*Smith*, 1889, 16 R. 36; *Miller*, 1895, 22 R. 833).

Goodwill may vary in value from being only of a nominal value up to being worth a very large sum, and the share of it which is due to the representatives of a deceased partner is moveable property, and is therefore due to the executor, and not to the heir. It may be, however, that the heir will obtain the benefit of the goodwill, or of a part of it; thus if the heritage belonging to the firm has not been converted in terms of sec. 22, the increased value which the property has on account of being the actual site where the business has been carried on, will go to the heir (*Bell*, 1884, 12 R. 85; *M'Farlane*, 1891, 18 R. 939).

From the peculiar nature of goodwill, it may not form an asset of a trader's estate, but may belong to his representatives (*Bain*, 1878, 5 R. 416). In that case the goodwill was successfully claimed by a surgeon's widow from his creditors.

Before finishing this part of the subject, certain rules introduced by the Partnership Act regarding assets may be mentioned.

(6) *Provisions regarding Apportionment of Premium.*—Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(*b*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium (s. 40).

There are no Scotch cases illustrating this rule. It does not apply to partnerships at will; nor to partnerships continuing after the term fixed has expired. It is thought it could be obviated by an agreement that in no case should the premium be returned. Several cases, however, have occurred in England (*Attwood*, 1868, 3 Ch. App. 369; cf. *Ferns*, 1885, 28 Ch. D. 409).

(7) *Effect of Fraud or Misrepresentation on a Partnership Contract.*—Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a*) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(*b*) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(*c*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm (s. 41).

This section only applies where there is a partnership contract, and is without prejudice to any other remedies the defrauded partner may have. There is no doubt, in such cases, fraud or misrepresentation entitle the innocent partner to be indemnified. This section and the general remedies of defrauded partners are only available while the firm remains solvent (*Houldsworth*, 1880, 7 R. (H. L.) 53).

(8) *Profits made after Dissolution.*—Where a partner dies, retires, or ceases to be a partner, the firm is, as we have seen, in the ordinary case, apart from agreement, dissolved and wound up. When, however, instead of being wound up, and without any final settlement of accounts, it is carried on by the surviving partners, they are, unless it is otherwise agreed, bound to pay to the outgoing partner or his representatives, until there is a settlement of accounts between them, the share of profits effeiring to his share of the partnership assets, or, in the option of the outgoing partner or his representatives, to five per cent. interest on such share.

The obligation of paying profits in such cases is in accordance with the existing law (*Laird*, 1855, 17 D. 984). The alternative right of demanding five per cent. interest is an additional remedy introduced by sec. 42. The outgoing partner or representatives of a deceased partner can also make use of these rights even in cases where the surviving or continuing partners have the option of purchasing the interest of the outgoing or deceasing partner, unless all the conditions of the option are complied with (s. 42). Not only are outgoing partners entitled to profits in the manner above described, but beneficiaries under a trust may be entitled to the profits made by trustees

who trade with their money, or to the highest rate of interest (*Cochrane*, 1855–7, 17 D. 321, 19 D. 1019). When, however, the question arises not between the firm and the representatives of a deceased partner, but between them and someone, such as a child of the deceased partner claiming legitim, then the child or other person will only be entitled to interest, not to profits. At least it is thought that this would be so if there had been a settlement of accounts between the representatives and the firm, and thereafter legitim or any other debt was claimed. The reason being that creditors of a deceased person are only entitled to interest on their debts till paid (cf. *Minto*, 1832, 11 S. 633; *M'Murray*, 1852, 14 D. 1048).

(9) *Retiring or Deceased Partner's Share.*—When a firm is not dissolved by the retirement or death of a partner, the share that is due to the retiring partner, or the representatives of the deceased partner, is a debt which accrues from the moment when the partner retires or dies. This is the ordinary rule, but it may be otherwise arranged (s. 43; *Ewing*, 1882, 10 R. (H. L.) 1; cf. *Knox*, L. R. 5 H. L. 656). The proper mode of finding out what is due is by an action of accounting; summary diligence, for instance, cannot be used by one partner against another (*Blackwood*, 1858, 20 D. 631; *Hamilton*, 1871, 9 M. 805).

(10) *Distribution of Assets and Final Settlement of Accounts after Dissolution.*—This matter is regulated as follows:—

In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:—

(*a*) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

(*b*) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein:
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:
3. In paying to each partner rateably what is due from the firm to him in respect of capital:
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible (s. 44).

This section substantially enacts what is the common law (2 Bell, *Com.* 535). As to (*a*), see *Johnston*, 1844, 6 D. 626; *Nowell*, 1869, 7 Eq. 538; *Binnie*, 1886, 12 App. Ca. 160; *Whitcomb*, 1875, 20 Am. Rep. 311. As to (*b*), 2.: *Keith*, 1840, 2 D. 633; *Wood*, 1866, 1 Ch. App. 36. As to (*b*), 4.: *Birch*, 1889, 14 App. Ca. 525.

It is to be noted that this section only applies when the partnership is solvent. It may also be altered by agreement.

Note on the Partnership Act.—Secs. 45 to 50 are under the heading Supplemental, and one or two remarks will suffice for them. The Act came into operation on first January 1891 (s. 49). Court, when used in it, includes every Court and judge having jurisdiction in the case (s. 45). In Scotland this must, it is thought, mean the Court of Session, when an application to the Court in order to dissolve a firm is required, or the other remedies given in secs. 31, 35, and 40 are relied on, and in all cases where an action of declarator is necessary, as a declarator of illegality under sec. 34. In

cases, on the other hand, when what is sought is payment of a sum of money, the action is competent in the Sheriff Court (*supra*, under sec. 39).

Again, the rules of equity and common law applicable to partnership shall continue in force, except so far as they are inconsistent with its express provisions (s. 46). This section, by safeguarding the rules of equity and common law, renders it impossible to neglect the authority of cases decided prior to the Act coming into force.

It has already been pointed out that bankruptcy of a firm and of an individual mean sequestration under the Bankruptcy (Scotland) Acts, and also, in the case of an individual, the issue against him of a decree of *cessio bonorum*. It is, besides, expressly provided that the rules of the law of Scotland relating to bankruptcy are unaltered by the Act (s. 47).

V. Bankruptcy.

Except as a cause of dissolution, and a clause which defines bankruptcy to mean sequestration, or, in the case of an individual, the issue against him of a decree of *cessio bonorum*, and safeguards the rules of the law of Scotland on the subject, bankruptcy is not mentioned in the Partnership Act. As the subject is treated in a special article, only the points peculiar to partnership are here mentioned.

Bankruptcy means either the state in which a person is who is unable to pay his debts, whether this be simple insolvency or notour bankruptcy, or, in a stricter sense, the state a person is in when he has been deprived by his creditors of the management of his estates, that is, when he has been sequestrated, or a decree of *cessio* has been issued. The aims of these processes are (1) to substitute the joint action of the creditors for the individual action of each creditor, (2) to prevent the bankrupt from alienating his property on the eve of bankruptcy, (3) to divide his estate equitably among his creditors (see Bankruptcy).

Partnership is undoubtedly subject to the whole of the law affecting bankruptcy. A firm, seeing it is a legal person, is subject to the bankruptcy laws in the same way as an individual. Thus the Act 1621, c. 18, against unlawful dispositions and alienations made by dyvours and bankrupts, applies to the acts of firms. So also does the Act 1696, c. 5, for declaring notour bankrupt (2 Bell, *Com.* 158), though that question is no longer of importance, as the Bankruptcy Acts certainly do (Bankruptcy Act, 1856, s. 4). Again, as a firm is a legal person distinct from the partners composing it, there are three different states of circumstances which may arise.

(1) *A Partner may become Bankrupt and the Firm remain Solvent.*—When this occurs, the partner may either be a creditor of or a debtor to his firm.

(*a*) When the partner is a creditor, his creditors are entitled to claim his share of the stock and profits of the partnership, and repayment of any advances he may have made to it. But the debts due by the firm must first be deducted, as the creditors of the firm have a right superior to that of the creditors of a partner. The amount due to the partner or his creditors is, as has been shown, fixed at the moment of bankruptcy. The firm is then dissolved, unless an agreement has been made to the contrary (*supra*, s. 33); and the amount due cannot be increased or diminished after that event, except in so far as the acts done in winding up the firm may affect it. In adjusting claims when bankruptcy occurs under these circumstances, a claim that a solvent partner may have against the bankrupt partner who is a creditor of his firm cannot be compensated by the firm deducting it and only paying the balance (if any) of the bankrupt's

share to his creditors (*Galdie*, 1774, Mor. 14598). The firm must pay its debt in full.

(*b*) When the partner who becomes bankrupt is a debtor to the firm, it ranks on his estate for the sum due to it, under deduction of the partner's share of the assets and profits of the concern. In adjusting claims under these circumstances, the firm cannot demand payment of their debt from a solvent partner who may be debtor to the bankrupt. They can only claim it from the bankrupt's estate, and the indebted partner must pay his debt. He is not allowed to offer a discharge of the firm debt in payment of the demand against himself (2 Bell, *Com.* 548).

(2) *A Firm may become Bankrupt and the Partners remain Solvent.*—When this occurs, the firm's creditors are paid in full, because partners are liable *singuli in solidum* for its obligations; but the partner who pays the debts has a right of relief against his co-partners for their shares, and, as we have seen, the contribution would be, apart from agreement, in the proportions in which profits are shared. Again, if some partners pay the debts and all the other partners fail, the partner who paid the debts will rank on their estates for their shares of the firm's debts, as in a case of joint cautionry. Again, any partner who is indebted to his firm must, in addition to paying his share of the firm's debts, also pay his own debt to it (2 Bell, *Com.* 548, 549).

(3) *Both the Firm and the Partners may be Bankrupt.*—When this happens, the whole assets of the firm fall to the firm's creditors, to the entire exclusion of the creditors of the individual partners until the former have been paid in full. Not only so, but if any partner is indebted to the firm, the trustee on its bankrupt estate can rank on the partner's estate *pari passu* with the private creditors of the bankrupt partner for the full amount of the debt due to the firm without deducting the value of the partner's interest in the firm (*Dunlop*, 1776, Mor. 14610; affd. 2 Pat. 437).

In addition, the firm's creditors, other than partners who may also be creditors, have a right to rank on the estates of the partners for any balance of their debts that may remain *pari passu* with the private creditors of that partner, under deduction only of the sums drawn from the partnership estate (Bankruptcy Act, 1856, s. 66). This differs from the rule in England, where each estate, that is, the firm's estate and the partner's estate, is applied in the first instance exclusively to the payment of its own creditors (see *Lacey*, 1872, 8 Ch. App. 441). It is unnecessary to say which is more equitable. Our rule follows naturally from the theory of a firm as a separate person, with the partners guaranteeing its obligations.

This rule only applies when there is a firm; it does not apply to the case of an individual trading under a firm name (*Cullen*, 1842, 4 D. 1522). Obviously, also, when a partner is a creditor of the firm, he has no claim against it until the other creditors have been paid in full (*Johnston*, 1844, 6 D. 626). Again, the creditors of the firm may be its own trade creditors, or the creditors of any partnership such as a joint adventure which the firm, in conjunction with any other firms or individuals, may have entered into. In the latter case, the creditors of the joint adventure rank first on the assets of the joint adventure; then, treating the firm as a partner of the joint adventure, they rank on its estate, under deduction of what they have received from the assets of the joint adventure, *pari passu*, with the firm's trade creditors. Finally, they rank on each partner's private estate, under deduction of what they receive from the firm's estate, for any balance remaining unpaid.

We have already seen how compensation operates when a partner becomes bankrupt—the firm remaining solvent. When both partners and firm are bankrupt, the following rules, generally speaking, apply:—

Compensation, or set-off as it is called in England, is the *contributio debiti et crediti*; and among solvent parties "the concurrence of two liquid debts may be made to operate as payment from the moment of concourse" (Bell, *Prin.* 572; Stair, i. 18. 6). When bankruptcy occurs, this rule is altered to the effect that compensation operates even though the debt due by the solvent party is not liquid (2 Bell, *Com.* 124). In partnership law compensation can naturally be pleaded in questions arising between a firm and a person dealing with it, just as in the case of any two persons who stand in the relation of debtor and creditor. When, however, the question occurs between a firm and its partners and the debtors or creditors of either the firm or the partners, although the general rule is that there is no concourse of debit and credit between the debts of the firm and those of the partners, it is admitted in certain cases.

1. When the firm is creditor of a third party who is creditor of a partner, that person cannot plead compensation on account of the debt due to him by the partner, but must pay the firm's debt in full (2 Bell, *Com.* 553; *Morrison*, 1822, 2 S. 68). If, however, the firm be dissolved, either by bankruptcy or otherwise, the third party can plead compensation to the extent of the share of the partner who is indebted to him (*Mitchell*, 1869, 7 M. 480).

2. When a firm is debtor to a third party and that person is debtor to one of the partners, the firm can plead compensation on account of the debt due to the partner by him. When, however, a firm in such circumstances is bankrupt or otherwise dissolved, compensation cannot be pleaded, and the debt must be paid (*Thomson*, 1855, 17 D. 739).

3. When a partner is sued for a partnership debt by a person who is debtor to him, he can plead compensation, and this although the firm be dissolved (*Lockhart*, 1842, 4 D. 1253).

4. When a partner is sued for a private debt by a debtor of the firm, he cannot plead compensation, but must pay his debt to his creditor. If, however, the firm is dissolved, the partner can plead compensation for the share due to him of the debt due to the firm by his creditor (*Heggie*, 1858, 21 D. 31; Goudy, *Bankruptcy*, 612 *et seq.*).

Distribution of Assets.—When a firm and its partners are bankrupt, their affairs may, just as those of an individual, be wound up, either extra-judicially or under the Bankruptcy Acts.

When an extra-judicial arrangement is resorted to, it generally takes the form of (1) a trust deed granted by the firm and the partners; (2) such a trust deed and deed of accession by the creditors; (3) a composition contract between the firm and its creditors. In all these cases the deed must be signed by all the partners, as no one partner has authority to bind the firm to such an act of extraordinary administration, and provision made for the apportionment of liability among, and discharge of, all the partners as well as the firm (2 Bell, *Com.* 561; Goudy, *Bankruptcy*, 498 *et seq.*). In other respects the extra-judicial winding up of the affairs of a firm is similar to what occurs when the affairs of an individual are so wound up.

Sequestration and Cessio bonorum are the methods of winding up the affairs of firms and partners under the Bankruptcy Acts. It appears to be a moot point whether a decree of cessio can issue against a firm. At anyrate, the Partnership Act does not contemplate such a process (s. 47). It is thought, however, it is competent (cf. Bankruptcy Act, 1856, s. 4,

and Debtors Act, 1880, s. 7), and if competent, the process would be conducted under the same regulations as are applicable to the case of an individual.

Consistently, with the theory of partnership, a firm can be rendered notour bankrupt. This state is constituted by (1) sequestration; (2) insolvency concurring with the same state of facts as render an individual notour bankrupt, or by any of the partners being rendered notour bankrupt for a partnership debt (Bankruptcy Act, 1856, s. 8). When it has been rendered notour bankrupt, there is the same *pari passu* ranking of diligence as in the case of individual debtors. A firm can also be sequestrated either along with the partners composing or by itself, and any partner may also be sequestrated without the firm being affected. Sequestration may be awarded (*a*) on the petition of the debtor himself with the concurrence of duly qualified creditors, or (*b*) on the petition of duly qualified creditors, provided in both cases the Court has jurisdiction, and in the latter case that the firm be notour bankrupt (s. 13; cf. *Stewart & M'Donald*, 1898, 6 S. L. R. 113).

Applying this to the case of partnership when a firm petitions itself, there must also be produced a mandate "signed by the party entitled to act for the firm." As, however, such an application is not an act of ordinary administration, it must be signed, or concurred in at least, by all the partners (Bankruptcy Act, 1856, ss. 21–25; 2 Bell, *Com.* 563). When, however, a firm itself petitions for the sequestration of a debtor, or concurs in a petition, it sues or concurs in its own name. Again, the creditor who concurs or petitions must be a proper partnership creditor. For instance, a partner who has advanced money to his firm is not such a creditor. Again, although a petition by a firm must be concurred in by properly qualified creditors, yet if the application is to sequestrate both the firm and the partners, all that is required is the concurrence of partnership creditors. The concurrence of creditors of the partners is not required. Again, a partner can be sequestrated for a partnership debt, but in that case the petitioning creditor must, in stating his claim, put a value on the estates of the firm, and deduct that value from his claim. Otherwise he would be a contingent creditor, and as such disqualified from petitioning. Again, citation is properly made in the case of a firm by leaving a copy of the petition or warrant at its place of business, provided a partner, clerk, or servant be there, or otherwise it must be made to one of the acting partners. Again, the firm, like an individual debtor, must be subject to the jurisdiction of the Supreme Courts of Scotland. This rule demands that the firm carry on business in Scotland. Again, when a firm and the partners are sequestrated, the creditors may elect one trustee for the estates of the firm and the partners, or separate trustees for the separate estates of the firm and the partners (s. 68). Again, a latent partner of a firm which has been sequestrated must disclose himself, otherwise he will lose all the benefits and privileges of the Bankruptcy Act (s. 94).

Ranking of Creditors.—As already stated, when a creditor claims to rank on a partner's estate for a firm debt, the trustee on the estate of the partner must put a value on his claim against the firm's estate and deduct such value from the claim, and only rank him for the balance. But, of course, this only applies to creditors who are not themselves partners, as no partner who is himself a creditor can rank until all other creditors are paid (*Johnston*, 1844, 6 D. 626).

Discharge.—A firm can be discharged on composition. One or more of the partners, or, if they are also sequestrated, their friends, may offer the composition. If it be made and accepted in the appropriate manner, the

partners, or such of them as offer the composition, will be discharged, under reservation of the claim of the creditors for the composition. But parties cannot, by massing the estates of two firms, with one or more partners common to both, obtain a discharge on composition of both firms (*M'Laren*, 1869, 7 M. 926). Again, whether the discharge be on composition or without composition, it is against practice to discharge the firm (*Steel*, 1855, 18 D. 34; cf. *Mellis*, 22 June 1815, F. C.). The reason for this is that as the partners guarantee the firm, they are freed from all liability on being discharged in the sequestration of their individual estates. The proper form is to discharge the partner as a partner and as an individual. The discharge of a partner as an individual is not sufficient to free him of his liability as a partner. But a discharge in favour of a person as an individual and a partner, while it frees him from liability for the debts of the firm that has been sequestrated, does not free him from liability for the debts of a separate firm he may be a partner of (*Clelland*, 1844, 6 D. 412). Again, one partner may obtain his discharge, as an individual and also as a partner, even though the other partners do not apply for their discharge (*Fraser, Petr.*, 27 May 1815, F.C.) Again, a discharge frees the bankrupt of all debts for which he was liable at the date of the sequestration; and when an individual trading under a firm name is discharged, he too is free of all debts, no matter how contracted (2 Bell, *Com.* 514 and 566). See BANKRUPTCY.

Parts and Pertinents are defined in Bell's *Principles* (s. 739) as "such accessory parts and fixtures and appendages to land or houses, or such separate possessions or privileges as accompany the occupation and use of the land, or have for forty years been so enjoyed along with it." (But as to period of forty years, see p. 187; and as to the concluding words "along with it," see the case of *Hunt*, 1867, 5 M. (H. L.) 1.) In considering the phrase "parts and pertinents," the questions suggest themselves whether the two words mean different things, and especially how, after conveying "all and *whole* the lands of X.," there can, in defiance of the axioms of Euclid, remain any "parts" of the lands not included in the "whole," and therefore still capable of being conveyed by the addition of the words "parts and pertinents." It will be observed that Bell endeavours to meet both of these questions by the use of the phrase "accessory parts." These matters are specially referred to because it does appear that there is room for a distinction between the two things "parts and pertinents," and that the distinction may possibly be attended with importance in connection with "bounding titles."

Parts.—It is obvious that the whole lands of X. must necessarily embrace every part of these lands. But the question is, what are the lands of X.? Let it be assumed that the proprietor is claiming a discontiguous piece of land as part of the estate: that there is no subordinate relation of use between it and the main part of the estate; that it can be proved against him that at one time the lands of X., as universally understood in the neighbourhood, did not include the area in dispute, and even, it may be, that at that time it was as universally known as part of the lands of Y.; and that he can produce no additional grant in his favour between that date and the present time. If he is to succeed, he must be able to prove that for the necessary period (see p. 187) he has possessed the disputed area, and not only possessed it, but possessed it as part of the lands of X. Such proof, however, is competent, and (assuming a sufficient title—see p. 186)

will be sufficient to extend the title so as to make that a part of the lands of X. which was not so originally.

Pertinents.—The differences suggested are: (1) that whereas such a "part" as has just been referred to is co-ordinate in character with the main part of the estate, and forms simply an extension thereof, a pertinent stands on a lower level, and is related to the property on a basis of subordinate use, of which examples are church seats, burying-places in parish churchyard, a cellar attached to a house, and a common right to a back-green; and (2) that whereas, when the necessary possession has operated, "the part" disappears in the "whole," the pertinent for ever remains something distinct from, and over and above, the property to which it is attached.

Parts and pertinents require to be considered in relation to (1) contract, and (2) prescriptive right.

Contract.

The question is, what is included in a contract of sale and purchase of heritable property? Property and rights may in this connection be distinguished according as (1) it is incompetent to alienate them at all or under the circumstances; (2) they may be alienated, but must be expressed; (3) they pass by implication, but may be expressly reserved; and (4) they pass by implication, and it is incompetent to reserve them.

1. The first of these classes consists of—

(1) Certain of the *regalia minora*, viz. navigable rivers and highways (Ersk. ii. 6. 17; Bell, *Convey.* 606). These it is incompetent to alienate. The same, of course, holds in the case of the *regalia majora*, but these are not pertinent to the present matter.

(2) *Water Rights.*—It appears that it is incompetent to communicate such rights to non-riparian owners where third parties are interested to object (Rankine, *Landownership*, 483). This would apply to (*a*) the case of the proprietor of an estate with a river frontage attempting to communicate a right to water-supply from the river, on a feu or sale of part of the estate not abutting upon the stream; and (*b*) the case of a proprietor of an estate on the shore of a loch attempting to communicate a right of boating or trout-fishing, on the alienation of a part of the estate not abutting on the loch (*Patrick*, 1867, 5 M. 683). In that case the contest was between a disponee of a small part and a singular successor in the estate. It was held that the privilege of trout-fishing could not be maintained against the singular successor. It was, however, indicated that if there had existed the relation of superior and vassal, the result might have been different. There was no question there with third parties, *i.e.* proprietors of *other* estates fronting the loch.

2. The second class—capable of, but requiring express alienation—includes—

(1) *Teinds*, if ever separated from the stock (see Teinds).

(2) *Regalia Minora.*—In Bell's *Prin.* s. 748, it is laid down that *regalia minora* (other than those which are inalienable as above mentioned), even when granted by the Crown to a vassal, are held not to be transferred from such vassal "unless expressly mentioned." (This must be taken only as a matter of contract, and not as a *dictum* on the ground of prescriptive right, for certain titles at least give a right to prescribe *regalia minora* though they are not mentioned: see Fishings; Ferries.) Such rights are salmon-fishings, ports, ferries, foreshores, wreck, mussel scalps, and oyster beds. It appears, however, very doubtful whether a contract for the sale of

an estate to which is attached a right of salmon-fishing would not by implication include that right, so as to entitle the purchaser to a conveyance thereof (see generally, *Lord Advocate*, 1874, 2 R. 27; *Earl of Breadalbane*, 1875, 2 R. 826).

(3) *All Moveable Effects.*—These are not strictly pertinent in this connection, but their great practical importance makes it essential to refer to them. As to what is and what is not heritable between seller and purchaser, see FIXTURES, vol. vi. p. 29. The following may be specially referred to:—(*a*) Ordinary house and shop fittings. This is a matter over which mistakes are very often apt to occur through the missives of purchase omitting to make express mention of fittings. The consequences may be serious, and the results are, in some instances, somewhat peculiar. Thus take the case of a tenement purchased for investment. Before the date of the sale the houses are all let, and the sale is subject to the existing tenancies; there is an omission to specify fittings in the offer: the results are, the fittings do not pass to the purchaser; he cannot be compelled by the seller to buy them; it does not appear that either seller or purchaser, or both, are entitled to remove them until the existing tenancies have expired, for the tenants have rented the subjects with the fittings, and cannot be required to submit even to the inconvenience of one set being removed and another substituted; apparently, therefore, the purchaser must either buy the fittings over and above, or he must allow the seller to receive some proportion of the rents, as effeiring to the fittings, until the tenancies respectively expire, when the seller will be entitled to remove them. But, especially in the case of investment purchases, where rental is one of the main points in the transaction, this result appears contrary to fair dealing; and see below, Erskine's *dictum* as to rental in case of steelbow. (*b*) STEELBOW (*q.v.*). Of these (which are now little known) Erskine (ii. 6. 12) says that they "could not, in the case of a sale of the lands, pass with them to the purchaser, from the nature of the subject; . . . but an assignation of that right in favour of the purchaser is implied from equity if the purchase be made by a rental."

In connection with all this class, *i.e.* things which may be alienated, but must be expressed, it goes without saying that an express clause should be inserted in the contract; and further, the terms of such clause will require some attention in order to secure (*a*) that it gives the purchaser all he relies upon, and (*b*) that it does not commit the seller to selling what is not his. Thus the simple clause "with fittings" may leave many questions as to whether the purchaser is entitled to claim what he expected; and on the other hand, in the case of a tenanted house, it may commit the seller to the position of selling all the fittings, while in point of fact many of them may belong to the tenant. So in the case of salmon-fishings (whether or not, as a point of law, it be essential to refer to them in the contract) the purchaser may get all the right the other has, and yet be utterly disappointed as to the nature and extent of the fishing-rights which he understood were to accompany his purchase.

In the case of fittings and moveable assets generally, if they are of sufficient value to make it worth while, it will be economical to put a separate value on them in the contract, to say nothing about them in the conveyance, to insert in the conveyance that part only of the price which is applicable to the heritage and to stamp it accordingly, and to take a separate receipt from the seller on 1d. stamp for the price of the moveables.

When creditors are selling under power of sale in heritable securities, it is important to observe that probably they have no power to sell the fittings.

That may depend on various elements, *e.g.* whether there is a clause of fittings in the bond; whether the creditor took possession before sequestration; and whether the fittings have been put in by the creditor during his period of possession in due course of administration.

3. In the third class of pertinents—those which pass by implication, but may be expressly reserved—the institutional writers make special mention of things which are so obviously "parts" of the property that we should not think of specially referring to them in this connection, *e.g.* houses, mills, woods, and coal. The only ones to which it appears necessary here to make special reference are the following:—

(1) *Gables.*—Where the seller has right to recover from an adjoining proprietor half of the cost of a mutual gable, that right is by implication carried by a disposition of the seller's property, and in proportion if part only of the seller's property is sold (*Hunter*, 1846, 8 D. 787). That is certainly not the usual intention; and when it is not, both the contract and the disposition should contain an express reservation. But, at the same time, if the right is intended to be carried, it should be expressly specified, for otherwise there may be practical difficulty in prevailing upon the adjoining proprietor to recognise the title to discharge the payment. See Common Gable.

(2) *Minerals in connection with Reservations.*—Where the superior has reserved the minerals, and thus holds (*a*) the property of the minerals, and (*b*) a superiority *quoad ultra*, it is obvious that when the superiority comes to be sold, if care be not taken, occasion may be given for a serious dispute as to whether the minerals are included in the sale. Such confusion is hardly likely to occur in the contract of sale if in a simple form, for there the subject of sale will probably be described as a superiority or feu-duty, neither of which, it is hardly necessary to say, could include the minerals. The confusion comes in through the ordinary form of a conveyance of a superiority, which is in form a grant of the lands themselves (*Orr*, 1893, 20 R. (H. L.) 27). Minerals being a part of the lands, a purchaser of an estate will not in ordinary circumstances be bound to proceed if it appears, after the contract has been entered into, that the seller cannot give a title to the minerals. And even in the case of a villa residence, a reservation of the minerals, with power to work them, would imply a state of matters inconsistent with the peaceful enjoyment of such a purchase, and would entitle the purchaser to resile. There is indeed a case which goes further than this, and in which it was held that a purchaser of a villa was not bound to proceed when the title disclosed a reservation of the minerals to the superior, who, however, was prohibited from working them without the vassal's consent (*Whyte*, 1879, 6 R. 699). Including the Lord Ordinary, the judges were equally divided. See also Locus, as to which, see *supra*, p. 183, and *infra*.

4. The last class of pertinents—those which cannot be reserved—embraces a right to a seat in the parish church (*Stephen*, 1887, 15 R. 72), and the right to a burying-place in the parish churchyard. To these may be added such water rights as are referred to on p. 183; that is to say, that on the sale of an estate abutting upon but not entirely surrounding a loch, it would appear to be incompetent for the seller, retaining no land fronting the loch, to reserve to himself right of fishing and boating in the loch; and even if the land did wholly surround the loch, while such a reservation might be effectual as between (*a*) superior and vassal in favour of the former, who, it will be observed, would not be divested, and (*b*) even as between disponer and disponee in favour of the former, it would appear

that in the latter case it would not be effectual against a singular successor in the property (see *Patrick*, *supra*).

Prescriptive Right.—(1) Title.

1. *Infeftment.*—The rule of the Act 1617, c. 12, applies, viz. that there must be infeftment as the basis of the title (*Dunbar*, 1714, Mor. 9640, 10817; *Brand*, 1841, 4 D. 292).

2. *Express Clause.*—It is not necessary that the words "parts and pertinents" should be expressed in the title, to lay a basis for prescription of "parts" and proper pertinents (*Gordon*, 1850, 13 D. 1, at p. 7). As to special rules in regard to the title to salmon-fishings, see Fishings, vol. vi. p. 11.

3. *Competition with Express Infeftment.*—Whether the clause of "parts and pertinents" be present or absent in A.'s title, it is not fatal to that title that the infeftment of his competitor B. includes the disputed subject *per expressum*; the result depends on the possession (*E. of Fife's Trs.*, 1830, 8 S. 326).

4. *Bounding Titles.*—The most important point of title is the effect to be attributed to a "bounding" infeftment. There is a considerable body of authority to the effect that a bounding charter precludes the acquisition, as part and pertinent, of any corporeal property beyond the bounds. The authorities will be found collected in *Gordon*, 1850, 13 D. 1, at pp. 7, 24. As regards "parts" in the sense attempted to be distinguished *supra* (p. 182), it is clear that this is correct. Thus, take the case of a grant of the lands of X., bounded on the north by the river Tay. If an attempt should be made to show that a farm on the north side of the river is part of the lands which are expressly stated all to be south of the river, no length or degree of possession can avail, for at the best it is in the face of, and contradicted by, the title. On the other hand, it is common ground that a bounding charter is no obstacle to prescription of incorporeal rights beyond the bounds, *e.g.* salmon-fishings (*E. of Zetland*, 1873, 11 M. 469) and servitudes (*Beaumont*, 1843, 5 D. 1337). And it is submitted that this last rule should fairly apply to all proper pertinents in the sense above stated (p. 183). Indeed, it may be said that the instances of church seats and burying-places are conclusive that that is so, but as the nature of the right to these is very peculiar, the instances are not perhaps very good. But take the case of a house described as forming the third or top flat of the tenement. That appears to be a bounding title as regards everything that is not on the third or top flat. But if the fact be (though not mentioned in the titles) that there is a cellar in front and a common back-green behind, and both of them have been possessed with, and of course as pertinent to, the house, could it be said that the titles were not sufficient to support the possession? Or, to take an instance more exactly fitting in with the usual examples of bounding titles, suppose the house is described as lying on the east side of a certain street, and (though not mentioned in the titles) the fact is (as sometimes happens) that there is a cellar or a common drying and bleaching green on the *west* side of the street appropriated to the tenement and used as such, could it be successfully maintained that the possession was useless because the rule of bounding titles excluded pertinents across the bounds? It is submitted that these questions ought properly to be answered in the negative. The ground of the opinion is, that there is here no attempt to extend or alter the bounds. It is not sought to make the cellar or the green part of the house, which is obviously impossible and absurd. The bounds remain in full force as identifying and bounding the main property, which remains to the end as at the beginning, and it is to

that property that the pertinents are attached. But while this opinion is suggested, it is recognised that there appears to be much authority against it. The case of *Gordon, supra*, and the prior case of *Hepburn* (1823, 2 S. 459), are, however, discounted by the fact that in both of them the title expressly limited not only the lands but also the pertinents to a specified parish, which was properly held conclusive against the acquisition of pertinents beyond that parish. It is significant to observe that the Lord Justice-Clerk (Hope) thought it proper to state in his judgment (at p. 5): "to that parish all the accessory rights, privileges, and pertinents are also expressly limited," and to refer (at p. 6) to the fact that the same limitation of pertinents was found in *Hepburn's* case. Other important cases are *Young* (1671, Mor. 9636) and *Mags. of St. Monance* (1845, 7 D. 582). In the former an infeftment in property described as on the east side of King's Close, Edinburgh, was held fatal to a claim to "a piece of ground on the west side of the close," but it does not appear that there was anything in the character of such ground or its use to make it an ordinary and natural supplement and pertinent to the main property. The *St. Monance* case seems stronger, for in it a claim to a "lumber-house" was similarly rejected, but the lumber-house was merely an incident of the claim, which went much further.

(2) Possession.

1. *Period.*—As with reference to title, so as regards possession, the ordinary rule of the statutory positive prescription operates, and accordingly the necessary periods are (*a*) forty years when the prescriptive possession commences with the title of an adjudger; (*b*) forty years in the case of servitudes; and (*c*) twenty years in all other cases (Rankine, *Landownership*, 180; 1874 Act, s. 34).

2. *Nature.*—It is not sufficient that the subject in dispute shall have been possessed *with* the principal property for the necessary period: it must have been possessed as part thereof or pertinent thereto (*Hunt*, 1867, 5 M. (H. L.) 1).

3. *Discontiguity.*—This is not fatal, subject to what has been stated above as to bounding charters (*Forsyth*, 1632, Mor. 9629; *Glendonmyne*, 1716, Mor. 9643; *Hunt, supra*).

4. *Degree.*—In cases of ambiguous possession the inclination will be (*a*) in favour of the competitor who is infeft *per expressum*, as against one who claims merely as part and pertinent; and (*b*) in favour of the competitor who claims in right of contiguous lands, as against one who does not (Ersk. ii. 6. 3).

[Stair, ii. 3. 26, 73 *et seq.*; ii. 12. 17; Ersk. ii. 6. 3 *et seq.*; Bell, *Prin.* 739 *et seq.*; Bell, *Convey.* 600.]

Passive Titles in Heritage.

GESTIO PRO HÆREDE.

By the common law of Scotland an heir serving to his ancestor incurred universal liability for his debts and obligations. But this *passive title*, as it was called, might be incurred without service by the person possessing the character of heir behaving "as none other than an heir legally served hath a right to do," by intromitting with the ancestor's heritage. It "has been established by a custom as ancient as the institution of the College of Justice, and was introduced to prevent or discourage the frequent frauds

practised by heirs, who, though they continued their ancestor's possession, were by our ancient usage liable only *in valorem* of their intromissions" (Ersk. iii. 8. 82). The theory of this rule of law was that apparent heirs would otherwise intromit with their ancestor's estate without legally entering and undertaking their obligations, "so that, though it may seem rigorous for a small intromission to make the intromitter liable for all the defunct's debts, how great soever, yet, it being so easy to abstain and the hazard known, the expediency and favour of the creditors preponderateth the wilful disadvantage of the debtor's heir" (Stair, iii. 6. 3). Accordingly, at one time very trifling acts of intromission on the part of an apparent heir might suffice to subject him to universal liability for his ancestor's debts. But where the intromission founded on was trifling, it was always a question of circumstances whether or not the passive title had been incurred. As Stair puts it (iii. 6. 4), "in this passive title the Lords have always taken great latitude." The cardinal principle was that behaviour was "*magis animi quam facti.*" It was thus possible to detect difference of "*animus*" although the overt facts as reported seem wonderfully similar. Accordingly, the decisions are hard to reconcile.

In more recent times this passive title was regarded by the Court as "odious," and universal liability was excluded (1) by any right in a third party taking the estate intromitted with out of the ancestor's person, (2) by any singular title in the heir, and (3) if the heir's intromission had been inconsiderable and without any marks of intention to defraud (1 Bell, *Com.* 704). Now, in consequence of the enactment of the Conveyancing Act of 1874 (37 & 38 Vict. c. 94) providing (s. 9) that personal rights to estates in land shall in future vest in the heir without service, and (s. 12) that the liability of an heir for his ancestor's debts shall be limited to the value of the estate to which he succeeds, this branch of the law is mainly of antiquarian interest. But rights of action arising prior to 1874 may subsist until extinguished by negative prescription.

The apparent heir might incur this passive title in the following ways:—

(1) *By intromission with the rents of the ancestor's heritage*, which may be taken as a typical instance. In early times the passive title was incurred even although the ancestor had been denuded by an apprising of the lands, if he had been allowed to remain in possession until his death, and the appriser had not authorised the apparent heir's intromission (*Gibson*, 1684, Mor. 9657). But it was not incurred if the appriser was infeft and in possession when the ancestor died (*Maxwell*, 1671, Mor. 9656 and 5306), or if the apparent heir had intromitted by the appriser's permission (*Jolly*, 1687, Mor. 9672). Latterly the rigour of the rule was much relaxed. Thus, in a modern case, the passive title was held not to have been incurred although the heir had taken possession and drawn the rents, because the ancestor was believed to be solvent until a year after his death, and there was an entire absence of fraudulent intent, the heir making over the whole estate to the creditors whenever the ancestor's insolvency was discovered. There was, however, a division of opinion on the Bench, some of the judges in the minority saying "that if this case were to be followed as a precedent, the doctrine of passive titles might be expunged altogether from our law books" (*Gardener*, 1802, Mor. 9840).

(2) *By intromission with the writs and evidents of the ancestor's estate*, because the rights of creditors might be defeated by the heir's destroying or tampering with these documents. It must be kept in view that, prior to the seventeenth century, there was no system of land registers such as has since prevailed: and in the absence of such registers there must have been vastly

greater opportunities of committing fraud by tampering with an ancestor's titles. Here, too, the modern tendency was to relax the strictness of the rule. Thus in one case, where an apparent heiress and her husband, described as "mean persons," had received the deceased's titles from his man of business and granted a receipt for them, the report bears that "the Lords in this case of poor, ignorant people, who made no use of these papers, assoilzied from the passive title," but only by a small majority (*Diggles*, 1706, Mor. 9676). In another case about the same date, the passive title was held not to have been incurred where the heir had taken possession of papers specially assigned to him (*Chalmers*, 1709, Mor. 9678); but the report significantly bears: "All were convinced that it was of dangerous consequence to allow such intromissions, and therefore deserved amendment and regulation by an Act of Sederunt *pro futuro*." Contrast with this a modern case (*Ferguson*, 1829, 7 S. 580), in which the heir was assoilzied, Ld. Glenlee observing that "the heir is entitled to look at every title, to see whether he will enter."

(3) *By intromission with the heirship moveables, or with the whole stock from which they would fall to be selected.*—No case is reported under this head since the seventeenth century. Liability on this ground must often have been attended with much hardship. Thus in one case (*Cleghorn*, 1630, Mor. 9664), the circumstances being otherwise suspicious, the apparent heir was held liable "because he had lain in defunct's bed, drunk in his mazer cup, and worn his green silk shanks." So in another case the apparent heir was held liable because, having made up an inventory of his father's moveables, he had failed to include in it and had intromitted with "his father's Bible, a musket, a sword, a stand of curtains, and two pillows, which were the best the father had, and which were heirship" (*Steven*, 1629, Mor. 9663). In such cases the intention to act as heir was considered as being of more importance than the extent of the intromission. It was a good defence to an action against the heir on this ground if the ancestor had died a rebel, and his escheat had been gifted and declared before the action was raised (Stair, iii. 6. 10); or if the apparent heir could establish that the moveables had been gifted to him, or that he had intromitted with them by leave of the donator (Stair, iii. 6. 11), or if the apparent heir, finding moveables belonging to the ancestor in his own house, had had them inventoried, or, if need were, sold by warrant of a judge (Stair, iii. 6. 12). As it was only the heir of line who was entitled to heirship moveables, no other heir could incur this passive title by intromission with moveables (Stair, iii. 6. 6; Bankt. iii. 6. 1). In all cases, and especially where it was sought to fix the apparent heir with liability in consequence of his intromission with the ancestor's heirship moveables, what the Court mainly considered was the *animus* with which he had intromitted—whether as one claiming the right of an heir, or merely for the purpose of preserving the estate (Bankt. iii. 6. 25).

It was only the apparent heir who could incur the passive title of *gestio pro hærede* (*Irvine*, 1626, Mor. 9649; Stair, iii. 6. 6; Bankt. iii. 6. 1; Ersk. iii. 8. 82). Moreover, the intromission founded on must have been in the character of heir. Thus the passive title was not incurred where the heir, holding a lease from the ancestor, continued in occupation after his death (*Reid*, 1667, Mor. 9656). So too the passive title was not incurred where the intromission was *bonâ fide* ascribed to a singular title (*Dunbar*, 1628, Mor. 9681; *Allan*, 1666, Mor. 9686; *Chalmers*, 1673, Mor. 9687; *Webster*, 1802, Hume, p. 436), even although this singular title was defective, because its existence displaced the presumed *animus* on the part of the apparent heir (*Ogilvy*, 1666, Mor. 9684).

Moreover, the apparent heir might intromit or act in various ways without incurring this passive title. Thus he did not incur liability—

(*a*) by voluntarily paying his father's debts (*Comy. of Dunkeld*, 1628, Mor. 9735), for that was an act purely beneficial to the creditors;

(*b*) nor by renouncing the succession in favour of the heir-male (*Scott*, 1666, Mor. 9693), for the ancestor's estate was equally open to diligence in the hands of the heir-male. See also another case which seems to have been decided on a similar ground (*Neroy*, 1676, Mor. 9694):

(*c*) nor by merely making up titles under the order of the Court, and disponing to the assignee under a commission of bankruptcy of the ancestor (*Hall*, 1670, Mor. 9730);

(*d*) nor by assuming the ancestor's title of honour (*Lord Semple*, 1622, Mor. 9706); nor by exercising some hereditary office annexed to the blood (*Bower*, 1682, 2 Bro. Supp. 18); for such behaviour could in no way injure the ancestor's estate or prejudice the rights of his creditors;

(*e*) nor where the intromission was purely formal, as by concurring in granting a deed affecting an estate from the beneficial interest in which he was excluded (*Gordon*, 1789, Mor. 9733, under remit by the House of Lords 1787, 3 Pat. 61; *Blair's Creditors*, 1791, Mor. 9734);

(*f*) nor where the apparent heir had succeeded to a lease of ordinary length excluding assignees and sub-tenants without the consent of the lessor (*Bain*, 1896, 23 R. 528); for here, too, the ancestor's creditors could in no way be prejudiced;

(*g*) nor where, the apparent heir being in pupillarity or minority, the intromission was by his tutor or curator, and the apparent heir did not homologate it by passing it in his accounts (Stair, iii. 6. 7; Bankt. iii. 6. 20). Similarly, the apparent heir was not liable where the intromissions had been by his factor under a general commission (Stair, *supra*; Bankt. *supra*).

(*h*) There are conflicting opinions as to how far an apparent heiress or her husband incurred liability in consequence of the husband's intromissions with the rents of the ancestor's estate, whether universally or merely *in valorem* (*Dingwall*, 1680, Mor. 9679; *Linthill*, 1703, Mor. 9679; Bankt. iii. 6. 20; Ersk. iii. 8. 83).

(*i*) In a question with another order of heirs, the apparent heir intromitting was liable only *in valorem* of his intromissions, because the passive title was introduced only for the security of creditors (Ersk. iii. 8. 86).

The passive title of *gestio pro hærede* was not incurred by the mere *animus* of assuming the position of heir. Thus it was not incurred by merely taking out brieves from Chancery with a view to serving heir (*Elcis*, 1670, Mor. 9738); nor where the heir was cognosced by a Burgh Court, but had not expede sasine (*Goodlet*, 1628, Mor. 9737). But it was sufficient to establish the passive title that the heir's return had been extracted by the sheriff clerk, although it had not passed the Chancellory (*Clark*, 1621, Mor. 9737; *Simpson*, 1627, Mor. 9737). So general service as heir of line, without actual intromission with the ancestor's estate, inferred, in a question with creditors, a universal passive title, while it stood unreduced (*Ayton's Creditors*, 1784, Mor. 9732): but *inter hæredes* it did not infer such passive title where nothing was carried by the service (*Earl of Fife*, 1828, 6 S. 698; *Mackay*, 1835, 13 S. 246).

As the passive title of *gestio pro hærede* was founded on delict, in consequence of the "apparent heir's disorderly entry and immixing himself with the heritage without order of law," it followed, according to the usual rule, that, unless established against the apparent heir during his lifetime, it did

not transmit against his representatives (*Drummond*, 1662, Mor. 9655; Stair, iii. 6. 17; Bankt. iii. 6. 22; Ersk. iii. 8. 91).

It has been questioned whether the apparent heir, sued on this passive title, can insist on the discussion of heirs who, had he entered, would have been liable before him, or on an assignation from the creditor in order that he may operate relief against them or the executor. Stair denies the apparent heir either right; but says that, unless his conduct has been bad or the creditor has an interest to object, the Court will as a rule compel the creditor, on payment, to assign his claim, and thus enable the apparent heir to work out his relief (Stair, iii. 6. 19). The later institutional writers adopt the view that the apparent heir can insist on discussion, and that, on payment, he is entitled to insist on an assignation being granted to him (Bankt. iii. 6. 23; Ersk. iii. 8. 92). Without an assignation he would have no active title enabling him to work out his relief.

Limited Passive Title.

As has been seen, the passive title of *gestio pro hærede*, where incurred, was universal, subjecting the apparent heir to liability for the full amount of all his ancestor's debts; but without incurring that passive title, the apparent heir might in the following cases become liable to individual creditors of his ancestor's:—

(1) If he persistently failed to renounce the succession on being charged to enter as heir, and allowed decree in absence to pass against him, he became personally liable to the creditor thus doing diligence (*Smith*, 1807, Hume, 439).

(2) If, when sued by a creditor of the ancestor's, he pleaded a peremptory defence, *e.g.* payment or prescription, he became liable (if the defence failed) to pay that creditor's debt, on the twofold ground that he had no interest to plead such a defence unless on the footing of his being heir, and that by his pleading it he might have prejudiced the creditor's chances of recovering from the ancestor's estate (*Forret*, 1715, Mor. 9713; *Renny*, 1742, Mor. 9721; *Gilmour*, 1821, 1 S. 216; *Kirkpatrick*, 1638, 16 S. 608; affd. 1841, 2 Rob. 475). The passive title thus incurred by the apparent heir never subjected him to liability to any creditor of the ancestor's other than the one whose action he opposed (*Murray*, 1629, Mor. 9707; *Whitelaw*, 1630, Mor. 9707; *Chalmers*, 1631, Mor. 9707; *Carfrae*, 1675, Mor. 9711). No liability was incurred by the apparent heir by merely pleading a dilatory defence as excluding the pursuer's title (*Wilson*, 1717, Mor. 9715), or an *ex facie* nullity on the ground of debt (*Renny*, 1742, Mor. 9721). After the old system of pleading dilatory defences separately from those on the merits was abolished, and it became necessary under the Judicature Act to state all defences at once, and was no longer competent to state peremptory defences after the preliminary defences had been repelled, the apparent heir ceased to incur a passive title by merely stating a peremptory defence (*Smith*, 1829, 7 S. 792).

Statutory Extensions of the Passive Title.

Various devices were from time to time had recourse to by apparent heirs with a view to enjoying their ancestor's estates without becoming liable for their obligations, and in order to defeat them it was found necessary to introduce new passive titles by statute. This legislation seems to have owed its origin to a case in which it was decided that an apparent heir did not incur a passive title by granting a simulate bond in order that the ancestor's estates might be adjudged, even although he there-

after acquired right to the adjudication thus led, and intromitted with the rents in virtue of it (*Glendonwyne*, 1662, Mor. 9738). The heir, in spite of the title thus acquired by him, was allowed to renounce on accounting for his intromissions, but the Lords thought the practice dangerous and inexpedient. They accordingly, on 28 February 1662, passed an Act of Sederunt declaring that "if any appearand heir shall grant bonds whereupon adjudications and apprysings shall be deduced to their owne behooff, or that the saids apprysings or adjudications shall return before or after the expireing of the legall reversions in the persons of the saids appearand heirs or any to their behoove, in either of these cases the saids comprysings and adjudications shall noways defend them against their predecessors' creditors, but that they shall be lyable as behaving themselves as heirs to their predecessors by intromission with the rents of their estates so adjudged and apprysed; nor shall it be lawfull to them to renounce to be heirs after such intromission." It will be observed that the Act of Sederunt applies to all adjudications led in respect of debts due by the apparent heir, and not only to adjudications on simulate bonds granted by him. It was immaterial that the debt adjudged for had been contracted before the ancestor's death (*Neroy*, 1676, Mor. 9741). But where the apparent heir had not possessed under the adjudication, he was allowed to renounce the succession on purging the adjudication or paying the value of the land apprised (*Jeffray*, 1676, Mor. 9741; *Blyth*, 1682, Mor. 9742). The provisions of this Act of Sederunt were extended by the Statute 1695, c. 24.

Passive Title under the Act 1695, c. 24.

By this Act, which enabled the apparent heir to take up the ancestor's estate without risk of universal liability for his debts by entering *cum beneficio inventarii* (see Beneficium inventarii), and thus deprived him of all excuse for making up tentative titles, it was provided that a passive title should be incurred in the following cases:—

(*a*) Where an apparent heir possesses any part of the ancestor's estate under a title vested in the person of any such near relative as he may also succeed to as heir, he incurs a universal passive title. The object of this provision was to prevent a common device of apparent heirs by means of which they could safely intromit with their ancestor's rents under cover of a colourable title taken through some other near relation.

(*b*) The statute also declared that a universal passive title should be incurred "if any apparent heir for hereafter shall, without being lawfully served or entered heir, either enter to possess his predecessor's estate or any part thereof, or shall purchase, by himself or any other to his behoof, any right hereto or to any legal diligence or other right affecting the same, whether redeemable or irredeemable, otherwise than the said estate is exposed to a lawful public roup, and as the highest offerer thereat without any collusion." It has been decided under this provision that the passive title is not incurred where adjudications of the ancestor's estate have been purchased, and possession thereon assumed during the ancestor's lifetime (*Macneil*, 1759, Mor. 9752), nor by the apparent heir's mere acquisition of rights affecting the ancestor's estate, unless followed by possession (*Calland*, 1796, Mor. 9759).

(*c*) The Act also made the extremely important provision, that "if any man since the 1st of January 1661 have served or shall hereafter serve himself heir; or by adjudication on his own bond hath, since the time foresaid succeeded, or shall hereafter succeed, not to his immediate predecessor but to one remoter, as passing by his father to his goodsire, or the like; then

and in that case he shall be liable for the debts and deeds of the person interjected to whom he was apparent heir, and who was in the possession of the lands and estate to which he is served for the space of three years, and that in so far as may extend to the value of the said lands and estate and no further, deducting the debts already paid." The object of this enactment was to protect persons giving credit to an apparent heir, who had succeeded to an estate and possessed it for three years, but had died without vesting himself with a title to it, with the result that on his death the next heir was in a position to carry off the estate from his creditors by passing him over and serving to the last owner who had made up a title. Very numerous decisions have been pronounced under this branch of the statute. The following are the principal points decided :—

(1) There must have been actual possession for three years by the interjected heir, or by someone in his right during his lifetime. Thus it was sufficient if the apparent heir had for three years uplifted an annual rent, and had granted a discharge and assignation of it: the subsequent heir passing him over could not challenge the discharge (*Lord Halkerton*, 1729, Mor. 9809). So the apparent heir of a wadsetter, drawing interset from the reverser in lieu of rent, was held to have possessed the wadset (*Johnston*, 1733, Mor. 9809). So too the possession of a disponee from the apparent heir during the latter's lifetime is treated as his possession (*Yule*, 1758, Mor. 5299; *Glen*, 1881, 9 R. 317). So too where there was competition for the succession to the estate, and the competitors had appointed a judicial factor under an agreement that the rents were to be divided between them pending the decision, the factor's possession was treated as being that of the successful apparent heir (*Corbett*, 1839, 1 D. 1038). On the other hand, it has been held not to have been the apparent heir's possession where his widow possessed after his death under a liferent right granted by him (*Johnston*, 1733, Mor. 9809); nor where the estate was possessed by a judicial factor under a sequestration of the ancestor's estate (*Buchan*, 1796, Hume, 432, and Mor. 9822); nor where trustees possessed without any feudal title for the purpose of paying off the ancestor's debts (*Donald*, 1835, 13 S. 574); nor where the estate has been possessed by a liferenter not deriving right from the apparent heir (*M'Caul's Creditors*, 1745, Mor. 9748; *Pitcairn*, 1752, Mor. 9749). Possession by a tutor for a pupil heir is equivalent to possession by the pupil himself (Bell, *Prin.* s. 1930). If the apparent heir has *de facto* had possession, the heir passing him by is not entitled to plead that he might have been excluded from possession, as, for instance, by a liferenter, or the husband of the former heir in virtue of his courtesy (*Heir of Kinminity*, 1756, 5 Bro. Supp. 853; *Knox*, 1759, Mor. 5276).

(2) It is not necessary that the heir against whom the statute is pleaded shall have made up his title by special service to an ancestor infeft. A general service infers liability even although expede merely with a view to reducing infeftments which would have been protected by the statute if the heir so serving had entered (*Carmichael*, 15 Nov. 1810, F. C.).

(3) The succeeding heir is not liable for the apparent heir's obligations if he too possesses merely on apparency (*Sinclair*, 1736, Mor. 9810; *Leith*, 1741, Mor. 9815; *Grant*, 1754, Mor. 9819; affd. 1755, 1 Pat. 605). But he is liable, although he has not served, if he has made up his title otherwise, as by clare constat, cognition and sasine, or adjudication on a trust bond (*Hay*, 1775, Mor. 9755; *Brown*, 1852, 14 D. 1041). It is not necessary that the deed on which adjudication has been led against the heir should be a formal bond. Any obligatory writing granted by him is sufficient. It

has been so decided when the adjudication proceeded on a disposition granted by the heir (*Murray*, 17 January 1811, F. C.).

(4) It has also been held that the statute applied where the heir, passing by the last apparent heir, also passed by the last ancestor infeft base, and served heir to a more distant ancestor publicly infeft (*Hay*, 1775, Mor. 9755). It was decided that in these circumstances it was not open to him to plead that his service was inept, and that he was possessing without a title, and thus not subject to the statutory liability.

(5) The possession of the apparent heir must have been on apparency, and not on some adverse title (Bell, *Prin.* s. 1930).

(6) The responsibility of the heir making up title is personal, and is limited to the value of the estate taken up by him, deducting debts already paid. It does not affect the estate or a *bonâ fide* purchaser from the heir (*Sympson*, 1707, Mor. 9807); but it does affect a disponee or adjudger acquiring right gratuitously through the heir (*Burns*, 1758, Mor. 5273). A lease granted by an apparent heir three years in possession is similarly ineffectual in a question with an adjudger (*Lowdon*, 1752, Mor. 5270; *Killilung*, 1760, 5 Bro. Supp. 877), or a disponee of the lands (*Gordon*, 1780, Mor. 10309). In a question with a succeeding heir such a lease is good (*Knox*, 1759, Mor. 5276). The claims of the apparent heir's creditors cannot be made real against the estate by inhibition used against him during his lifetime (*Sutherland*, 1786, Mor. 5294). The estate never was his, and therefore could not be attached by diligence used against him.

(7) It has been repeatedly held that the Act does not support purely gratuitous obligations by an apparent heir (*Marquis of Clydesdale*, 1726, Mor. 9809 and 1274; *Mitchell*, 1727, Mor. 9809; *Lindsay*, 1794, Hume, 429; *Erskine*, 1795, Hume, 431). It has been said that the statute, as being corrective of feudal maxims, has received a strict interpretation (Ersk. iii. 8. 94). But this view has been long abandoned, and indeed expressly repudiated (*Taylor*, 1854, 16 D. 885). Accordingly, it is quite settled that the Act may be pleaded by anyone in right of a rational obligation by the apparent heir. Thus, for instance, the Act supports rational obligations in the apparent heir's marriage contract (*Muirhead*, 1724, Mor. 9807); or reasonable testamentary provisions in favour of his family (*Russell*, 1852, 15 D. 192; *Orr*, 1871, 9 M. 500); or a deed granted in implement of a family agreement (*Duncan*, 1859, 22 D. 180); or a deed executed by a son desiring to give effect to his father's intentions (*Fleming's Trustees*, 1882, 9 R. 1013). It has even been held to support a deed bearing to be for love, favour, and affection, and in consideration of long services and attentions (*Adamson*, 1832, 11 S. 40: see also *Glen*, 1881, 9 R. 317); and a deed bearing to be gratuitous, but containing a clause of absolute warrandice (*Taylor*, 1854, 16 D. 885). It has also been held to support a liferent locality granted to his widow by an apparent heir under an entail permitting such a locality (*Countess of Glencairn*, 1800, Mor. App. "Heir-Apparent," No 1; affd. 1806, 5 Pat. 134), and a bond of provision in favour of younger children granted in conformity with an entail by an apparent heir under it (*Kennedy*, 1829, 7 S. 397), without inquiring whether he had other estates available to meet the provision.

(8) The Act was only intended to benefit the apparent heir's creditors, but not to relieve his representatives of liability for his obligations. The liability of the heir passing him by is therefore only subsidiary; and if he have paid the apparent heir's debts he can sue his representatives for relief (*Marquis of Clydesdale*, 1727, Mor. 1275), but not where the obligation refers to the particular lands to which he has made up title (*Ogilvy*, 16

Dec. 1817, F. C.). On the same principle that the Act was merely meant to benefit creditors where an apparent heir sold, and at his death over thirty years afterwards part of the price was still unpaid, it was held to belong to the succeeding heir, and not to the executor of the apparent heir. The purchaser was entitled to found on the statute as validating the sale to him, but the succeeding heir was entitled to the price unpaid as a surrogatum for the lands (*Emslie* v. *Groat*, 1817, Hume, 197). The heir sued on the statute can insist on the ancestor's creditors discussing any heir who is primarily liable. Thus one making up title under a destination to heirs-male can insist on the discussion of the heir of line (*Vint*, 1712, Mor. 3562), but he cannot insist on the apparent heir's executors being discussed before he is called on to pay, there being no right of discussion as between heir and executor (*Morris*, 1867, 6 M. 60, correcting Bankt. iii. 5. 109; Ersk. iii. 8. 94; and 1 Bell, *Com.* 709, 710).

(9) The Act merely introduces a passive title against the heir in possession, and thus can only reach subjects which he could burden. Where, therefore, a substitute heir has duly made up title under a strict entail, he will not be subjected to obligations granted in apparency by a preceding heir of entail, even although at the date when they were granted the entail had merely been feudalised, but was not recorded in the Register of Entails until afterwards (*Graham*, 1795, Mor. 15439), or although when the obligations were granted the entail had merely been recorded in the Register of Entails, but had not been feudalised (*Dickson*, 1801, Mor. App. "Tailzie," No. 7).

This provision of the Act of 1695 has now been in great measure superseded by the Conveyancing Act of 1874 (37 & 38 Vict. c. 94, s. 9), enacting that in future a personal right to estates in land shall vest in the heir without service. But it is still of importance in the case of rights derived from apparent heirs dying before 1874, or as affording an alternative remedy in the case of those dying after that date.

[Stair, iii. 6. 1–19; Bankt. iii. 6. 1–26; Ersk. iii. 8. 82–86, and 91–94; Bell, *Com.* i. 704, 705; More, *Notes on Stair*, "Heirs"; Bell, *Prin.* ss. 1919, 1920, 1923–1925, 1929, 1930; M'Laren, *Wills*, 2410–2415, 2428, 2429.]

Passive Titles in Heritage.

PRÆCEPTIO HÆREDITATIS.

If an heir-apparent during his ancestor's lifetime accepted a gratuitous conveyance of any part of his heritage, he incurred, on the ancestor's death, the passive title known as "*Præceptio hæreditatis.*" In virtue of this title he became personally liable for the full amount of the ancestor's debts contracted prior to the disposition or obligation to dispone in his favour (Stair, iii. 7. 1 and 4; Bankt. iii. 7. 1; Ersk. iii. 8. 87; 1 Bell, *Com.* 704). Doubts have indeed been expressed as to whether the heir's responsibility for such past debts was universal, or was limited to the value of the estate taken by him (Bell, *Prin.* s. 1918; M'Laren, *Wills*, s. 2426). This doubt is rested on two decisions (*Burnet*, 1693, Mor. 3040; *Henderson*, 1717, Mor. 9784). These decisions do not, however, turn on whether this passive title was or was not universal as to prior debts, but on the quite different considerations that it did not extend to future debts, and only arose on the ancestor's death. They do not, therefore, seem to afford any ground for the doubt. The institutional writers above cited lay it down quite distinctly that the heir's liability for past debts was unlimited; and the same view is clearly implied in the authorities after noted, to the effect that where the heir has

given substantial, although inadequate, consideration for the conveyance, he is liable only *in quantum lucratus est*. For debts contracted by the ancestor after the date of the conveyance, the heir was not liable. This passive title was introduced in order to protect the ancestor's creditors against gratuitous alienations of his heritage in favour of his heir. By accepting such a conveyance the heir was held to have acknowledged himself heir as at its date, and thus to have undertaken liability for all debts then existing. The heir accepting such a conveyance was said to be "*successor titulo lucrativo post contractum debitum*." This passive title was incurred by accepting a gratuitous conveyance of heritage of any description, even of heritable bonds (*Edgar*, 1665, Mor. 9777; *Hamilton*, 1679, Mor. 9780).

It was only the heir *alioqui successurus* who could incur this passive title. Moreover, it was necessary that at the date of the conveyance he should be the ancestor's heir-apparent. Thus a younger son accepting such a conveyance did not incur this passive title (*Hamilton*, 1662, Mor. 9775). Nor was it incurred by a disponee who was merely presumptive heir,—as, for instance, the immediate younger brother where the disponer was childless, —both because, owing to the birth of an heir of the disponer's body, he might never have succeeded as heir, and because in that case there was less likelihood of a conveyance being granted in fraud of creditors (*Scott*, 1665, Mor. 9775; *Lady Spencerfield*, 1672, Mor. 9779; *Seaton*, 1674, Mor. 5397; Stair, iii. 7. 5; Ersk. iii. 8. 90). This rule was, however, subject to two exceptions. Thus (1) a conveyance to the eldest son of an eldest son inferred the passive title on his part even although his father survived his grandfather, because in natural course he would ultimately succeed to the property (*Lady Smieton*, 1639, Mor. 9774; Stair, iii. 7. 5; Ersk. iii. 8. 90). So (2) although a daughter was always liable to be deprived of the character of heir by the birth of a son, yet if her father had no son living at the date of the conveyance to her, and died without a son, she incurred the passive title (*Orr*, 1634, Mor. 9767), "because perhaps a fraudulent intention is more easily presumed in favour of one's own issue than in favour of collaterals" (Ersk. iii. 8. 90). Even if the daughter thus taking was only one of several heirs-portioners, the result was the same. She was liable *in solidum* for debts contracted before the date of the conveyance (*Orr*, 1634, Mor. 9767).

On the general principle that it was only the heir *alioqui successurus* who incurred this title, an heir of line did not become liable by accepting a conveyance of lands destined to an heir of tailzie, nor an heir of tailzie by accepting lands destined to the heir of line (Stair, iii. 7. 7; Ersk. iii. 8. 92). On the other hand, a younger child who was the heir of the marriage incurred the passive title by accepting a conveyance of lands destined to such heir (*More*, 1681, Mor. 9781; *Elliot*, 1698, Mor. 9782). The passive title was not incurred merely because the lands had at one time belonged to the ancestor, but were conveyed to the heir by a third party (*Dunbar*, 1628, Mor. 9767). Where the conveyance by the ancestor was to a third party in trust for the heir, and the third party thereafter conveyed to the heir, the latter was held not to have incurred the passive title, but merely to be liable *in valorem* under the Act 1621, c. 18 (*Harper*, 1662, Mor. 9774), but this decision has been questioned (Ersk. iii. 8. 90). So too the heir accepting a conveyance of an estate purchased with the ancestor's money, but never vested in him, did not incur this passive title (Ersk. iii. 8. 92).

It was decided in an early case that the passive title was incurred by the heir's possessing on the conveyance during his ancestor's lifetime, although he abstained from possession after his death (*Gray*, 1625, 1 Bro. Supp. 25, and Mor. 9767); and in another early case, that it was incurred by

the heir's mere acceptance of the conveyance, without any possession of the lands, and although he offered to renounce (*Johnston*, 1676, Mor. 9780). These decisions are, however, it is thought, contrary to principle, and they are questioned by Erskine, who says (iii. 8. 87): "Though the heir should have possessed upon the right while the ancestor was alive, yet if he repudiate it immediately after his death, or abandon the subject to the creditors of the deceased, he ought to be secure against the passive title; but he is doubtless liable in that case to account to those creditors for all the profits of that right which he had received during the life of his ancestor." The heir, even although he cannot get rid of liability by renouncing (*Gray*, 1625, 1 Bro. Supp. 25), may reduce the conveyance in his favour on the ground of minority and lesion (*Courty*, 1637, Mor. 9790). Where the conveyance in favour of the heir has been reduced, he is not liable to the passive title (*Kinneir*, 1633, Mor. 9805; *Straiton*, 1636, Mor. 9806 and 5395).

It was only where the conveyance in his favour was gratuitous that the heir incurred this passive title. In order to avoid liability it was not necessary that the conveyance should have been entirely onerous. The rule was that the passive title was incurred if the consideration was grossly inadequate, as, for instance, half, or less than half, of the actual value (*Higgins*, 1678, Mor. 9795). Where the consideration, although inadequate, bore some relation to the real value, the heir was held liable only *in quantum lucratus*, or, in other words, to the extent that the price was deficient (*Courty*, 1637, Mor. 9790; *Lyon*, 1664, Mor. 9792; *Hadden*, 1676, Mor. 9794; *Higgins*, 1678, Mor. 9795). The mere recital of an adequate consideration in the conveyance did not prove that such consideration had been actually given. The heir must prove it (*Hadden, supra*; *Higgins, supra*). An indefinite obligation in a marriage contract to convey the lands to the heir of the marriage was not an onerous consideration for a conveyance granted in implement of it (*Higgins, supra*; *Gillespie*, 1705, Mor. 9796), so as to protect the heir taking the conveyance from the passive title; for in such a case the heir had a mere *spes successionis*. It was different where he had a *jus crediti* enforceable during the ancestor's lifetime (Ersk. iii. 8. 90).

Again, it was only for prior debts that the heir was liable *præceptione hæreditatis*. It was not necessary that the debt should have been constituted by bond or decree prior to the date of the conveyance. It was sufficient if the ground of debt was then in existence. Thus the heir was held liable for violent profits incurred by his father, where decree of removing had been obtained against him before he granted the conveyance, although decree for violent profits was not obtained until afterwards (*Ogilvie*, 1634, Mor. 9799). The same result followed where the father had incurred an account before granting the conveyance, and decree was afterwards obtained against him under a reference to oath (*Douglas*, 1714, Mor. 9804). So too where a wadsetter disponed lands to his heir, the latter was bound to make up a title and resign the wadset lands in favour of the reverser, his right of reversion, although conditional on payment of his debt, being anterior to the disposition (*Earl of Kinghorn*, 1668, Mor. 9800). Where the conveyance to the heir, although granted prior to the debt being contracted, was revocable and under reversion to the father on payment of a rose noble, the Court assoilzied the heir from the passive title, but reserved the creditor's right to reduce (*Hepburn*, 1674, Mor. 9803).

It was for a time doubted whether the date prior to which the debt must have been incurred was that of the conveyance to the heir or that of his infeftment; but it was ultimately settled that the heir is not liable for debts incurred after the date of the conveyance, although before the infeft-

ment (*Lighton*, 1637, Mor. 9800; *Smith*, 1780, Mor. 2322; Stair, iii. 8. 6; Bankt. iii. 7. 5; Ersk. iii. 8. 88). If the infeftment has been fraudulently delayed so as to induce credit to be given to the ancestor, the conveyance may be reduced (Stair, iii. 8. 6; Ersk. iii. 8. 88). Bankton seems to indicate (iii. 7. 10) that the heir may be liable upon this passive title in respect of debts incurred by the ancestor subsequent to the conveyance, but before the heir took either infeftment or possession; but there is no decision to that effect. It is thought that in such a case the creditor's only remedy would have been reduction. Where a father disponed to his heir under a reserved power to sell and contract debt, and the heir took infeftment but did not enter on possession until after his father's death, he was held liable only *in valorem* of the estate to a creditor whose debt was contracted after the disposition (*Abercrombie*, 1717, Mor. 4110).

If the heir who had accepted a conveyance from his ancestor served to him on his death, then, prior to the statutory limitation of an heir's liability, the ancestor's creditors would naturally insist on the unlimited passive title arising from service, instead of on the more limited passive title of *præceptio hæreditatis*.

Unlike *gestio pro hæredi*, the passive title of *præceptio hæreditatis* is founded not on delict but on presumed contract. Consequently the liability of the *successor titulo lucrativo*, although not constituted during his lifetime, transmits *in solidum* against his heir (*Duff*, 1686, Mor. 10342; Bankt. iii. 8. 9; Ersk. iii. 8. 91). Where the *successor titulo lucrativo* took infeftment but died in his father's lifetime, a difficult question arose as to the extent of the *successor's* heir's liability. As the *successor* died during his father's lifetime, he himself never incurred the passive title; but it was held that his heir, if he had served to him in the subjects taken *præceptione*, was liable for the ancestor's debts by implied contract, just as the "successor" would have been had he survived; but that if, without serving, the heir had merely drawn the rents, then his liability was only *in valorem* of his intromissions (*Henderson*, 1717, Mor. 9784).

As the passive title of *præceptio hæreditatis* was introduced merely for the protection of the ancestor's creditors, it cannot be pleaded by one heir against another, or by an executor against an heir. Thus if an heir has upon this title been compelled to pay a debt for which the executor is primarily liable, he is entitled to relief from him. So too the heir sued on this title by a creditor of the ancestor's can insist on his first discussing the heir primarily liable (Ersk. iii. 8. 92).

In many cases a creditor of the ancestor may have alternative remedies against the heir: by suing him personally on this passive title, or by reducing the conveyance in his favour under the Act 1621, c. 18. Where both remedies are open and the heir is solvent, the former is the stronger, because (*a*) the heir's liability is not limited to the value of the estate conveyed to him, and (*b*) it is immaterial whether or not the ancestor can be proved to have been solvent when the conveyance was granted, although that is a good defence to a reduction under the statute (Ersk. iv. 1. 32; *Wood*, 1823, 2 S. 555; *Bolden*, 1863, 1 M. 522). On the other hand, as there is no room for the passive title during the ancestor's lifetime, the creditor, so long as the ancestor lives, is necessarily restricted to the action of reduction.

It is thought that this passive title has been abolished by the Conveyancing Act of 1874 (37 & 38 Vict. c. 94, s. 12). That section, indeed, applies in terms only to the case of an heir succeeding to his ancestor's estate, while in the case of *præceptio hæreditatis* the heir takes not by succession, but by

conveyance. The principle of this passive title, however, as already indicated, is implied acknowledgment by the *successor* of the character and liabilities of heir as at the date of the conveyance in his favour. This would seem to infer that the *successor titulo lucrativo* undertakes no greater liability than is incident to the character of heir, and as an heir's liability is now limited to the value of the estate to which he succeeds, so the heir taking by conveyance should not be liable to a greater extent. The same result follows from the consideration that "the only reason for introducing passive titles was that creditors might not suffer by the devices of heirs who wilfully stood off from entering; and therefore if the heir who incurs a passive title be made liable as if he had entered, the creditors of the deceased can demand no more" (Ersk. iii. 8. 92). There remains the question whether the heir taking *præceptione hæreditatis* may not still be liable, up to the value of the estate taken by him, for debts previously incurred by his ancestor, although quite solvent when he granted the conveyance. As already pointed out, such solvency, if proved, would be a good defence to a reduction under the Act 1621, c. 18.

[Stair, bk. iii. tit. vii.; Bankt. bk. iii. tit. vii.; Ersk. iii. 8. 87–92; More, *Notes on Stair*, "Heirs"; 1 Bell, *Com.* 704; Bell, *Prin.* s. 1918; M'Laren, *Wills*, ss. 2426 and 2427.]

Pasturage.—See Common Pasturage.

Patent; Letters Patent for Inventions.—The chief Acts at present in force are the Patents, Designs, and Trade Marks Acts, 1883–88; these being the Patents, etc., Act of 1883 (46 & 47 Vict. c. 57), the Act of 1885 (48 & 49 Vict. c. 63), the Act of 1886 (49 & 50 Vict. c. 37), and the Act of 1888 (51 & 52 Vict. c. 50). The principal Acts previously operative were Ld. Brougham's Act, 1835 (5 & 6 Will. iv. c. 83), and the Patent Law Amendment Act of 1852 (15 & 16 Vict. c. 83). The foundation of the English Law of Patents is commonly said to be the sixth section of the Statute of Monopolies (21 Jac. i. c. 3, 1623–4). That statute was the result of a long struggle between Parliament and the Crown on the question of grants by the Crown of trade monopolies. These monopolies had the effect of restricting the liberty of the subject other than the grantee, and were a public grievance. Ultimately King James was persuaded to acquiesce in parliamentary form being given to a somewhat impatient declaration of his own which he had issued to curb the assiduity of suitors for the bestowal of grants of various kinds (see Gordon's *Monopolies by Patents*, 1897); and by the statute in question, grants of monopoly in restraint of trade were declared illegal. There were, however, certain monopolies which might operate actually in an opposite sense, and serve for the encouragement of trade; and by the sixth section of the statute, these were excepted from the general and exhaustive prohibitions of the preceding part of the statute, and were not authorised or declared legal, as is usually stated, but were left to the operation of the common law of England. The section runs—

> Provided alsoe [and be it declared and enacted] that any declaracion before mencioned shall not extend to any letters patent and graunts of privilege for the tearme of fowerteen yeares or under hereafter to be made of the sole working or makinge of any manner of new manufactures within this Realme to the true and first inventor and inventors of such manufactures which others at the tyme of makinge such letters patents and graunts shall

not use soe as alsoe they be not contrary to the lawe nor mischievous to the State by raisinge prices of commodities at home or hurt of trade or generallie inconvenient: the said fourteene yeares to be [accompted] from the date of the first letters patents or grant of such priviledge hereafter to be made but that the same shall be of such force as they should be if this Act had never byn made and of none other.

The class of monopolies thus excepted from the general prohibition coincides as nearly as may be with the class of monopolies which the English common law judges had held to be within the lawful operation of the royal prerogative. What these were may be fairly gathered from the remarks of Mr. Fuller, senior counsel for the defence in the great Case of Monopolies, *Darcy*, 1602. He said (Gordon's *Monop. by Pat.* p. 219)—

Now therefore I will show you how the Judges have heretofore allowed of monopoly patents which is that where any man by his own charge and industry or by his own wit or invention doth bring any new trade into the Realm or any Engine tending to the furtherance of a trade that never was used before and that for the good of the Realm; that in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his Invention to the Commonwealth; otherwise not.

This admission, made in the course of very vigorously opposing a monopoly for playing-cards, has always been quoted as if it had been part of the judgment of the Court: Mr. Gordon first pointed out the true source of the remark. But that it represents the common law of England is clear from its acceptance as authoritative by English judges (*e.g.* Tindal, C. J., in *Crane*, 1842). It is therefore probably the common law, and not the Statute of Monopolies, to which we have to look as defining the limits of the royal prerogative in regard to the restraint of trade. The Crown lawyers said the prerogative was unlimited; the common law judges affirmed it had certain limitations; the Statute of Monopolies ruled that the matter was one for the common law and the common law Courts.

In Scotland the Statute of Monopolies had at first no operation, at any rate directly. A custom grew up, however, of invoking the royal prerogative by petitions for grants of letters patent applicable to Scotland; these petitions were (in the same way as English applications were referred to the Attorney-General) referred to and reported on by the Lord Advocate (or the Solicitor-General); if the report was favourable, the Lord Advocate granted his warrant, and ultimately the letters patent, made out in Latin, were sealed with the seal *vice Sig. Magn. Scot.*, and issued to the petitioner (Webster, *Letters Patent*, p. 67). They contained a condition, the same as that introduced in England in the reign of Queen Anne, that a specification must be lodged within a certain period after the date of the letters patent; and this specification was, when received, enrolled in the Records of Chancery under the care of the Director of Chancery, as also were all deeds of assignment of patents (*Bloxam*, 3 S. 428 (p. 300 N. E.)). After 1835 the proviso was that the specification should be enrolled in the Court of Chancery (England), and transcripts were sent down to the Director of Chancery in Edinburgh. This system of separate patents for England and Scotland (and for Ireland) lasted until the year 1852 (Pat. Law Amend. Act). Meanwhile the Courts in Scotland had had occasion in several instances to consider the effect of grants of this kind, and they treated them in effect in the same way as the English judges were in the habit of doing, as exercises of the royal prerogative in Scotland, subject always to the limitations imposed by the common law of the land. Bankton (vol. i. p. 411) doubts their lawfulness; but this view was not taken by the Courts; and in *Neilson*, 4 D. 475, Ld. Cuninghame decided in the Outer House that

Article 6 of the Treaty of Union made it clear that England and Scotland were to be under the same prohibitions, restrictions, and regulations of trade, and that, "in virtue of that compact, the Statute of Monopolies has become law in Scotland." This decision was not objected to in any of the further proceedings in the Inner House and House of Lords in that case; and it has not been canvassed since (see also *Brown* in the House of Lords, 8 Cl. & Fin. 437; and the definitions of "invention" in the 1852 Act, s. 55, and the Act of 1883, s. 46). The result is that, so far as the principles of law are concerned, the Scottish and the English law of patents are the same; and in order to secure uniformity the Scottish Courts have considered themselves bound to follow the English rules, even where at variance with the principles of Scots law. A remarkable instance of this arose in *Templeton*, 10 D. 798. The English rule, arising from the application of the doctrine of the Crown having been deceived in the consideration for the grant (*Morgan*, 2 M. & W. 544, 561), is that if a patent be bad as regards a part, the whole is invalid. On Scottish principle it might be that *utile per inutile non vitiatur*. In that case Ld. Fullerton (p. 803) called the English rule "almost captious," and Ld. Jeffrey (p. 806) said it "has not my conscientious approbation," but it is the "rule of the law of England, which in cases of this nature we are bound to recognise."

The sections of the Act of 1883 which govern the position of the Scottish Courts are the following, together with sec. 109 relating to actions of reduction and quoted *infra*:—

Sec. 117. In and for the purposes of this Act, unless the context otherwise requires, ... "The Court" means (subject to the provisions for Scotland, Ireland, and the Isle of Man) Her Majesty's High Court of Justice in England.

Sec. 46. In and for the purposes of this Act in Scotland, . . . "injunction" means "interdict."

Sec. 107. In any action for infringement of a patent in Scotland the provisions of this Act, with respect to calling in the aid of an assessor (s. 28), shall apply, and the action shall be tried without a jury, unless the Court shall otherwise direct; but otherwise nothing shall affect the jurisdiction and forms of process of the Courts in Scotland in such an action or in any action or proceeding respecting a patent hitherto competent to those Courts. For the purposes of this section "Court of Appeal" shall mean any Court to which such action is appealed.

Sec. 108. In Scotland any offence [wrongly using the word "patented," etc., s. 105; falsifying, etc., the register, s. 93; wrongly using the Royal Arms, s. 106] under this Act declared to be punishable on summary conviction may be prosecuted in the Sheriff Court. [As to wrongly calling oneself a patent agent, see the Act of 1888, s. 1 (4), which does not seem to be incorporated in the principal Act, but provides for summary conviction; and *Lockwood*, 10 R. P. C.,[1] and 11 R. P. C. (H. L.); 20 R. and 21 R. (H. L.).]

Sec. 111. (1) The provisions of this Act conferring a special jurisdiction on the Court as defined by this Act, shall not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in Scotland . . . . in any proceedings relating to patents . . . .; and with reference to any such proceedings in Scotland, the term "the Court" shall mean any Lord Ordinary of the Court of Session, and the term "Court of Appeal" shall mean either Division of the said Court . . . . (2) If any rectification of a register under this Act is required in pursuance of any proceeding in a Court in Scotland . . . . a copy of the order, decree, or other authority for the rectification shall be served on the Comptroller, and he shall rectify the register accordingly. [Compare sec. 90, and Act 1888, sec. 23.]

Matters of procedure and forms of actions and pleadings have remained unaffected, or nearly so, by English example. Cases in which patent rights come in question follow practically the same established forms as those in

[1] "R. P. C." means the Official Reports of Patent, Design, and Trade Mark Cases, published at the Patent Office, Sale Branch, 38 Cursitor Street, Chancery Lane, London, W.C., under sec. 40 of the Patent Act of 1883.

which any other rights do so, without regard, on the whole, to the specialties of English practice in patent cases. An example of this is furnished by the "particulars of objections" which were introduced by sec. 5 of the Act of 1835. Up to that year both parties in a litigation in England concealed all information from one another, as far as possible, until the actual trial; and the requirement introduced by this section constituted an early step in the reform of English procedure. This section was held in *Neilson*, by the House of Lords (2 Bell's App. 18, 24), not to apply to Scotland, on the ground that no such remedy was required in Scotland, where the record already performed the required function; and the corresponding section (s. 29, 2) in the Act of 1883, now in force, has been treated in practice in the same way. The Act of 1883 does not affect any forms of process in use in Scotland (ss. 107 and 109 (2)). The decision in the House of Lords just mentioned was in affirmance of a refusal by the Court of Session to receive a paper apart, purporting to be particulars of objections under the statute, this refusal being on the ground that the record was the only proper means of giving notice of the facts intended to be proved (4 D. 1187, 5 D. 95, 96, 114, 121; *Kerr*, 7 M. 54, where an objection of disconformity, not on the record, was held inadmissible; *Harrison*, 2 R 124; and see *Rose's Co.*, 11 R. P. C. at 214, 215, and 21 R. 1107). In *Russell*, 16 S. 1155, prior use "by manufacturers of tubes in Glasgow or Edinburgh or elsewhere in Scotland" was held, under the circumstances, a sufficient averment. In *Neilson*, 2 Bell's App. 18, 24, it was held, in the House of Lords, that if in a Scotch record particular instances were given of a general averment with the words "in particular," the proof must be confined to these instances. In *Kerr*, 7 M. 58, it was indicated that the record is sufficient to enable the Court to guard against surprise; and in *Pickard*, 7 R. P. C. 367, Ld. Young said surprise is always a good ground on which to apply for time to lead evidence against matter suddenly raised. Again, we find that while there is a strong tendency on the part of the English Courts to require, when specifications of prior patents are set up as anticipations of the patent founded on, that the defendant shall specify the pages and lines on which he intends to rely, the Court of Session has consistently set its face against any such demand, and adhered to the principle that a specification can only be read as a whole (*Neilson*, 5 D.; *Harrison*, 2 R. 122). Again, the plea that the patentee is "not the true and first inventor" has not the same meaning in Scotland and in England. In England it now means that, assuming everything in favour of the alleged invention, the patentee is not the proper person to call himself the true and first inventor; in Scotland (*Sykes*, 4 M. 351) it means that the invention had been invented or published before the patentee's disclosure of it, so that he could not meet the condition laid down in sec. 6 of the Statute of Monopolies (cf. Ld. Brougham in *Neilson*, 2 Bell's App. 20; *Pickard*, 7 R. P. C. 367). The principles of law applicable to patent cases thus being the same in Scotland as in England, it seems that in the space available for the purposes of this article the maximum of utility would be secured by referring the reader to any of the standard works on the law of patents (Edmunds, Frost, Terrell, Higgins' *Digest*, Cunynghame, Lawson, etc.), and confining attention to the requisite procedure and pleadings.

By far the greater number of patent actions in Scotland are simple processes of Suspension and Interdict, without conclusions for damages. We give here a sketch of the necessary pleadings, in which it will probably be found that most of the points likely to arise in practice have been provided for and annotated, at anyrate to such an extent as will enable the practitioner

to get upon the track of the case-law which he will need. It is not good pleading (5 D. 99) for the complainer, by his statement of facts, to put in issue the novelty and utility of his patent, though this is often done: in the days of jury trials these were issues for the respondent (*Russell*, 16 S. 1157), because the patent was *primâ facie* proof of its own validity (5 D. 99), and the patentee could not undertake to prove the novelty. In *Sykes*, 4 M. 351, it was held that the existence of the letters patent, etc., ought to be admitted, and that to do this does not of itself admit their validity; and in that case the pleadings in a patent case were carefully considered. Under "no title to sue" came such matters as that the letters patent had not passed the Great Seal, or were not in proper form, or that no specification had been filed in compliance with the letters patent; these would be disposed of *in initio litis*. As to pleas for proof, these would divide into: (1) no infringement, (2) special defences; and these latter would divide into: (*a*) no subject-matter for a patent (a question of law, determinable only after hearing the evidence), (*b*) patentee not the true and first inventor of the invention (including prior invention and prior publication), (*c*) prior use ("prior public use" in the issue to the jury; see also 4 D. 1209), and (*d*) conditions of the grant not complied with. The defences now available embrace a wider scope than this; and most of them will be found in the following sketch of the points to be kept in mind in framing a record in an action of suspension and interdict. In this we shall suppose A. B. and C. D. to have patented "Improvements in the production of tar by distilling coal, and in apparatus therefor." The narrative would of course have to be shaped so as to bring the facts within one or other of the formulæ given. According to 5 D. 90–91, the invalidity should be pleaded by the respondent before the non-infringement, the plea of which admits or assumes the validity.

Note of Suspension and Interdict.

Unto the Right Honourable the Lords of Council and Session.

Note of suspension and interdict for , residing at , , in the County of , and , residing at , [*Glasgow*],—*Complainers*; against the Company Limited, whose registered office is at Street, [*Glasgow*]; and , Manager of the said company, and presently residing at , in the County of ,—*Respondents*.

That the complainers are under the necessity of applying to your Lordships for suspension and interdict against the respondents, as will appear to your Lordships from the annexed statement of facts and note of pleas in law. That the complainers consider that in the whole circumstances of the case they are entitled to have the note passed without caution or consignation; but if your Lordships think otherwise, they are willing to find caution acted in your Lordships' books in common form. May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents, conjunctly and severally, by themselves or by others, from directly or indirectly infringing or using or putting in practice during the continuance of the respective letters patent hereinafter mentioned, namely, the letters patent, dated and numbered of 18 , granted to [*the complainers*] *A. B.* and *C. D.*, for "[*title of the patent*]," and the letters patent dated and numbered of 18 , granted to [*the complainers*] *A. B.* and *C. D.*, for " ," by importing into the United Kingdom of Great Britain and Ireland, or the Isle of Man, or making, manufacturing, offering for sale, vending, disposing, using, exercising, or putting into practice, in whole or in part, without the consent, licence, or agreement of the complainers, the inventions, or any of them, forming the subject of the said letters patent, and described and claimed in the several specifications relative thereto; and to interdict, prohibit, and discharge the respondents, conjunctly and severally, by themselves or by others, during the continuance of the respective letters patent aforesaid, from directly or indirectly importing into the said United Kingdom or Isle of Man, and from directly or indirectly making, manufacturing, offering for sale, vending, using, exercising, or putting in practice in the said United Kingdom or Isle of Man,

without consent, licence, or agreement as aforesaid, any [*coal retorts*] or similar mechanism or apparatus for [*making tar by distilling coal*], made, constructed, applied, or working or capable of being worked (*Macdonald*, 10 R. P. C.) according to the methods or in the manner described and claimed in the said several specifications, or any of them, during the continuance thereof, or according to any method or in any manner substantially the same therewith, or constructed with, or embracing in its construction, any of the improvements claimed by the complainers and set forth in their said specifications, or any improvements substantially the same therewith; and to interdict, prohibit, and discharge the respondents, conjunctly and severally, by themselves or by others, during the continuance of the respective letters patent aforesaid, from directly or indirectly [*distilling coal*], without the consent, licence, or agreement as aforesaid, according to the methods or process or in the manner described and claimed in the said several specifications, or according to any method or process or in any manner substantially the same therewith; and to interdict, etc., from directly or indirectly, without the consent, etc., importing into, etc., and from, etc., making, vending, or using any [*tar*] made or manufactured in accordance with the inventions, or any of them, or by the methods or processes or in the manners or ways described and claimed in the said several specifications, or according to any method or process or in any manner or way substantially the same therewith; and without prejudice to the foregoing generality, to interdict, prohibit, and discharge the respondents as aforesaid, during the continuance of the said respective letters patent as aforesaid, from directly or indirectly making, using, or vending, without the consent, etc., the made and advertised for sale by them under the name of " ;" and to interdict, etc., etc., from, etc., selling or disposing at any time any wrongfully made, imported, [etc.] by them during the continuance of the said letters patent (*Crossley*, 1 R. P. C. 160; *Crossley*, 44 Ch. 25); and from further or otherwise infringing in any manner of way the rights and privileges and advantages granted by the said respective letters patent, or any of them, during the respective continuances thereof, and to grant interim interdict; or to do otherwise in the premises as to your Lordships shall seem proper.—*According to Justice, etc.* . . . . . *Agent for the Complainers.*

Statement of Facts for Complainers, and Answers thereto for Respondents.

1. The complainers are . The respondents are . [As to liability of directors of a company, *Betts*, L. R. 3 Ch. 429; *Spencer*, 6 R. P. C.]

2. By the letters patent granted to *A. B.* and *C. D.*, dated the of 18 , and numbered of that year, Her Majesty Queen Victoria did, for herself her heirs and successors, give and grant unto the said *A. B.* and *C. D.*, their executors, administrators, and assigns, the sole and exclusive privilege, during the term of fourteen years from the date of the said letters patent, of making, using, exercising, and vending within the United Kingdom and the Isle of Man an invention for "[*title of the patent*]." The said invention is particularly described in the specification relative to the said letters patent [of which a certified copy under sec. 100 [or sec. 89] of the Patents, etc., Act of 1883 is herewith produced, No. of process]. [*Similar narratives for the other patents, if more than one.*]

3. The complainers acquired the right to the said letters patent by and in virtue of [*narrate the progress of title*]. They were thereby vested in the said letters patent, and were registered in the Register of Patents in the Patent Office as proprietors of the same on the of 18 . [*Note.*—Assignees can sue, *Bloxam*, 3 S.; proprietors of part thereof, *Dunnicliff*, 7 C. B. N. S.; assignees of shares conjoined, *Neilson*, 6 D.; as to licensees, *Heap*, 6 R. P. C.]

4. On the of 18 , the Comptroller-General of Patents allowed *E. F.*, being at that date the person for the time being entitled to the benefit (ss. 18, 46 of the Act 1883) of the said letters patent, to amend the specification relative to the said letters patent pursuant to sec. 18 of the Patents, etc., Act of 1883 (*Knox*, 20 D. 650), and the said specification was amended accordingly. The said letters patent and relative specification as amended and as now vested in the complainers are now numbered * of the year 18 .

Ans. to Statements 1, 2, 3, *and* 4. The letters patent, specifications, amendments thereto, and deeds are referred to for their terms. *Quoad ultra* denied, under reference to the Statement of Facts for the Respondents.

5. On the of 18 , Her Majesty in Council extended the term of the said letters patent for a period of [five] years, running from the day of 18 .

Ans. 5. Admitted; but explained that [ ].

6. On the of 18 , the complainers granted the respondents a licence to [use] the said invention on the terms and conditions that [ ]. The respondents having violated the said terms and conditions by [ ], the complainers on the of 18 revoked the said licence (*Neilson*, 1 Bell's App. 219; *Ward*, 5 R. P. C.).

Ans. 6. The said licence is referred to for its terms. Admitted that, etc. *Quoad ultra* denied, under reference, etc.

7. It has recently come to the complainers' knowledge that, in contravention and infringement of the said letters patent as amended, the respondents have during the months of , and , in the year 18 , or during some part of said period (*Smith*, 17 D. 672), by their servants, etc., wrongfully (5 D. 90, 99) and without the consent, licence, or agreement (*see form of letters patent*) of the complainers, made, used, exercised, and vended (*Knox*, 20 D. 648), and, as the complainers believe and aver, are at present in course of wrongfully making, using, exercising, and vending the said patented invention (*Dudgeon*, 4 R. (H. L.), Lord Cairns, L. R. 3 App. Ca.; Frost on *Patents*, p. 403, note), or a material part (*Sykes*, 4 M. 351; *Newton*, 5 Exch.; *Sellers*, 5 Exch.) thereof for the purposes described in the specification thereof (*Moore*, per Ld. Blackburn, 1 R. P. C. 150), or the substance thereof (*Clark*, 10 Ch. D; *Proctor*, 36 Ch. D.; *Moore*, H. L. 7 R. P. C.; *Bovill*, Higg. Dig. 183; *Morgan*, 2 M. & W.; *Hill*, 1 Web. P. C. 229; *Walton*, 1 Web. P. C. 585; *Electric Co.*, 10 C. B.; *N. B. Rubber Co.*, 11 R. P. C.; *Benno Jaffé*, 11 R. P. C.), by importing from abroad (*Walton*, 29 L. J. C. P.; *Elmslie*, 39 L. J. Ch.; *Von Heyden*, 14 Ch. D.; see *Knox*, 20 D. 650), constructing, making, or manufacturing, or causing to be constructed, made, or manufactured (*Gibson*, 11 L. J. C. P.), and selling, making for sale (*Muntz*, 2 Web. P. C. 93), or offering for sale (*Oxley*, 8 C. B. N. S.) certain [*name the apparatus, etc.*], made substantially (*Incandescent*, 13 R. P. C. 301; *Jardine*, 13 R. P. C.; *Ticket Punch*, 12 R. P. C. 1 and 171) as described and claimed in claims 1 to 5 of the said amended specification, with immaterial variations (*Young*, 11 R. P. C.; *Cassel*, 11 R. P. C.), or in a way differing only colourably therefrom (*Dudgeon*, 4 R. (H. L.) 83; *Harrison*, 2 R.; *Stewart*, 11 R; *Henderson*, 9 R. and 10 R. (H. L.); *Murchland*, 20 R.; *White*, 14 R. P. C.), or comprising the characteristic and essential features thereof [*Lister*, 8 El. & Bl., *Clark*, 10 Ch. App. and 2 App. Ca., and *Harrison*, in H. L., 3 R. (H. L.), taken together: *Gwynne*, 2 R. P. C., 13 R.; *Dudgeon*, in H. L., 4 R. (H. L.); *Horseshoe*, 14 R.; *Miller*, in H. L., 9 R. P. C. 481; *White*, 14 R. P. C. 501 (one side instead of both); *Murchland*, 10 R. P. C. (water-valve = brass valve)], and have advertised and offered to make or supply [ ] constructed so as to infringe the said letters patent (*Gwynne*, 13 R., 2 and 3 R. P. C.). In particular, they did, on or about the of 18 , at , supply to , under the name of [*invoice name of machine, etc.*] [ ], not made by the complainers or with their consent, licence, or agreement, which [ ] are an infringement of the complainers' said letters patent, in respect that they [*state shortly what they do*], in a manner the same, or substantially the same, as the [ ] described in the said amended specification relative to complainers' said letters patent, and claimed therein as being the invention for which said letters patent were granted. Further [*other instances of making, selling, offering for sale, advertisement, etc.*]. The complainers believe and aver that the respondents have extensively constructed, manufactured, sold [ ] of a similar description. (*Note.*—As to infringement by improvements on a patented machine, see *Dudgeon*, 11 M.; *Neilson* v. *Harford*, 1 Web. P. C.; *Muntz*, 2 Web. P. C. 93; *Stevens*, 2 Web. P. C.; *Bateman*, Higg. Dig. 189; *Lister*, 8 El. & Bl.)

Ans. 7. Admitted that the respondents have, etc. *Quoad ultra* denied, under reference etc. [*Note.*—The denial is a denial of the infringement, not of the "wrongfully"; objections to the patent cannot be considered under this denial—*Neilson*, 5 D. 90.]

8. It has recently, etc. (*see* No. 7) . . . . abroad, manufacturing, making, or causing to be manufactured, made, and selling or offering for sale, certain [*tar*] manufactured or made in the manner described and claimed in the said amended specification relative to the complainers' said letters patent, or in a manner substantially the same therewith, and have advertised, etc. In particular, they have [*narrate the circumstances, giving time and place*]. The said [*tar*] is manufactured or made by means of apparatus and in a manner the same or substantially the same as that described and claimed in the

said specification of the complainers' said letters patent. [*Note.*—Product patentable: *Hutchison*, 15 R. 644; *Stevens*, 2 Web. P. C.; *Thierry*, in H. L. 14 R. P. C.]

9. It has recently, etc. (*see* No. 7) . . . . wrongfully and, etc., *used and vended*, and as the complainers believe, etc., ... wrongfully *using and vending*, the said patented invention, etc. . . . . by selling or offering for sale certain [ ] made, etc. In particular, they did [*time and place*] [offer for sale and] sell to certain [ ] not made, etc. The said [ ] [offered for sale and] sold as aforesaid was made or manufactured by the Co. at in the United States of America, or by some maker or manufacturer in America or elsewhere abroad, whose name and address are not known to the complainers (*Cartsburn*, 1 R. P. C.). The said [ ] was imported into this country from or elsewhere to the complainers unknown. Further, the respondents have sold, etc. [*give other instances*]. The complainers believe and aver that the respondents have extensively sold, etc. [ ] of a similar description [imported from abroad], and that they are at present in course of doing so.

10. It has recently, etc. (*see* No. 7) . . . . wrongfully, etc., ... *vended*, and as the complainers, etc. . . . . wrongfully *vending* the said patented invention, etc., by offering for sale, selling [*tar*] manufactured or made substantially in the manner described and claimed in claims 1 to 5 of the said amended specification with immaterial variations, or in a manner differing only colourably therefrom, or comprising the characteristic and essential features thereof, and have advertised, etc. In particular, they have sold [*give time and place*], and are still selling at [*place*], [*tar*] manufactured or made as aforesaid. The complainers believe and aver that said [*tar*] is made or manufactured by the Company at , in the United States of America, or by some maker or manufacturer in America or elsewhere abroad, whose name and address are not known to the complainers.

11. It has recently, etc. (*see* No. 7) . . . . of the complainers, used and exercised, and as, etc., are at present in course of wrongfully using and exercising the said patented invention, etc., by [*distilling coal*] in the manner described and claimed in the said amended specification relative to the said letters patent, or in a manner substantially the same therewith. In particular, they have [*narrate the circumstances, giving time and place*].

12. It has recently, etc. (*see* No. 7) . . . . wrongfully and, etc., *used*, and as, etc. . . . . wrongfully *using*, etc. . . . . by constructing or causing to be constructed at certain [*coal retorts*] made substantially, etc. . . . . specification, with immaterial variations, etc., and using the same for [*making tar by the distillation of coal*]. [*Narrate the circumstances, giving place and time.*] Further, they have [*narrate circumstances, giving place and time*]. The said [*coal retorts*] have been constructed, as the complainers believe and aver, under the superintendence of the respondent *Y. Z.*, from designs supplied by him.—By making essential component parts of the said invention and repairing a [ ] of the complainers' construction by applying the same thereto (*U. Teleph. Co.*, W. N. (1887) 193).—By using the said invention for another purpose, namely [ ], without invention in the adaptation thereof (*Cunnington*, L. R. 5 H. L.), and in a similar manner to that described and claimed in the specification relative to the said letters patent founded on.

13. It has recently, etc. (*see* No. 7) . . . . the respondents are in possession of, and are wrongfully using or intend wrongfully to use, certain [ ] wrongfully made during the continuance of the said letters patent substantially as described and claimed in the said amended specification, or in a way differing only colourably therefrom (*Adair*, 12 Ch. D.; *U. Teleph. Co.*, 26 Ch. D.; see *Proctor*, 6 R. P. C.).

14. The respondents cannot challenge or call in question the validity of the said letters patent in respect that they are (1) assignors of the said letters patent to the complainers under the said assignation of 18 (*Oldham*, Higg. Dig. 87; *Hocking*, H. L., 6 R. P. C. 69, 72); (2) licensees to manufacture, to use, to vend the said invention, under licence granted by the complainers, dated, etc. The respondents, as licensees aforesaid, have been using the said invention under the said licence. They have also been wrongfully using the said invention, and threaten still further so to use the same, all without reference to the said licence, which is for the term of years of the said letters patent. In particular, they have [*narrate the circumstances, giving time and place*], and they have refused and refuse in relation thereto to pay the royalties provided in said licence as a term thereof, all claims for which are hereby reserved (*Bowman*, 4 N. & M.; *Lawes*, 26 L. J. Q. B.; *Besseman*, 6 W. R.; *Smith*, 28 L. J. C. P.;

Norton, 7 H. & N.; *Grover*, 8 Jur. N. S.; *Crosthwaite*, 6 R. P. C.; cf. *Chanter*, 5 M. & N. (doubtful); (3) constructive licensees to manufacture, etc., under the following circumstances, namely, [ ] (*Kenny's Co.*, 37 L. T. R., N. S.; *Tweedale*, 13 R. P. C.). The respondents, as constructive licensees aforesaid, have been using, etc., *ut supra*. [*Note.*—It is better not to sue a licensee for infringement: an action of account, reckoning, and payment is proper (*Young*, 8 and 9 R. P. C.). In either case the licensee may examine the ambit of the patent to show that what he has done is outside it. A bankrupt may challenge the validity of his own patent as against his trustee in bankruptcy (*Jackson*, 17 R.; *Cropper*, H. L., 2 R. P. C.), and an assignor's partner may do so (*Heugh*, 25 W. R.).]

15. In reference to par. of the Statement of Facts for the Respondents, it is explained that . . . . (*e.g.*, *see Respondent*, No. 14).

16. In reference to respondents' statement, par. 16, it is explained that the complete specification referred to therein was accepted on the of 18 , which was subsequent to the date of the acts complained of. The said . . . . made his first application for a foreign patent in (Germany) on the of 18 , and made his application in the United Kingdom on the of 18 , which was more than seven months after the said first foreign application. (Sec. 103, Act 1883.)

17. In reference to respondents' statement, par. 17, it is explained that the said invention was exhibited at the said exhibition by the said *A. B.* and *C. D.*, or one of them; that the said exhibition was certified by the Board of Trade as an industrial or international exhibition, as is shown on page of the *Edinburgh Gazette* for 18 , produced herewith, No. of process; that the said publication of a description of the said invention in the for 18 was during the period of holding of the said exhibition; that the use of the said invention was at the said exhibition for the purposes thereof; that the use of the said invention by at , as is alleged, if any such use there were, was without the privity or consent of the said *A. B.* and *C. D.*, or either of them; and that the conditions of sec. 39 of the Patents, etc., Act of 1883 were duly complied with by the said *A. B.* and *C. D.* (See also the Act of 1886, s. 3).

18. In reference to respondents' statement, par. 18, it is explained that the said and were persons authorised by the Secretary of State to investigate the complainers' invention, or the merits thereof, the same being an invention for improvements in instruments or munitions of war within the meaning of sec. 4, subsec. 12 of the Patents, etc., Act, 1883. The said and were persons employed by the said *A. B.* and *C. D.* to assist them in perfecting the details of their invention, were persons employed by the said *A. B.* and *C. D.* to construct (an experimental model of) their invention for purposes of trial and experiment, for purposes of sale after application for letters patent (*Moss*, 3 R. P. C.; *Lewis*, 4 C. & P.), all under an obligation of confidentiality and secrecy (*Humpherson*, 4 R. P. C.). The said and were partners, servants, assistants of the said *A. B.* and *C. D.* in reference to the said invention, and were in a position and under a duty of confidentiality and secrecy (*Morgan*, 2 M. & W.; cf. *Patterson*, H. L., 3 App. Ca.; *Humpherson*, 4 R. P. C.).

19. [*Where respondents allege themselves to be working under a patent of their own.*] In reference to par. of Statement of Facts for the Respondents, the complainers believe and aver that the respondents intended to appropriate, and by the specification of their pretended letters patent did appropriate, the complainers' invention, with only such immaterial variations as would suffice to induce [*coal distillers*] and others [*holding the complainers' licences*] to suppose that theirs was a different invention (cf. *Montgomerie*, 11 R. P. C.).

20. The complainers have repeatedly required the respondents to desist from infringing the said letters patent, but they refuse to do so, and the present action has been rendered necessary. The complainers hereby reserve all claims for damages or an account of profits in respect of the said infringement.

Ans. Denied that the action is necessary. *Quoad ultra* admitted.

21. The validity of the said letters patent founded on came in question in an action between and before in the Court , and a certificate was granted by [*the Court or a judge*] that the validity of the patent had

come in question. The said certificate is herewith produced, No. of process (*Dick*, 13 R. P. C.; Act 1883, s. 31).

Ans. In the said action [*narrate non-appearance of parties, compromise, etc.*], and the said certificate granted by was obtained by the suppression of material facts (13 R. P. C. 561).

STATEMENT OF FACTS FOR RESPONDENTS.

1. The complainers have no rights in the said letters patent, in respect that [*assignations, etc.*], and they are not the proprietors, registered proprietors (*Chollett*, 26 L. J. Q. B.), of the said letters patent. (*Note.*—See *Grover*, 26 Sc. Jur. 543, as to the effect of an English assignment.)

2. The complainers have no rights under the said letters patent, in respect that the same and all privileges and advantages whatever thereby granted had, prior to the acts complained of, determined and become void through (1) the expiry of the term of the said letters patent; (2) through the non-payment of the fees by law required to be paid in respect to the said letters patent (the time for payment thereof not having been extended by the Comptroller-General under sec. 17 of the Patents, etc., Act of 1883); (3) through their failure (Act 1883, s. 26 (3)), prior to the acts complained of, to supply or cause to be supplied, for the public service, articles of the said invention duly required therefor, as by the terms and conditions of the said letters patent provided; (4) through abuse of the privileges and advantages granted by the said letters patent. [*Give particulars.*] [*Note.*—This last was a ground for revocation under the former English *scire facias*, and is therefore a ground of defence in an action for infringement (Act 1883, s. 26 (3).]

3. The complete specification relative to the letters patent founded on was first published by the Patent Office on the of 18 , subsequently to the date of the alleged infringements libelled (Act 1883, s. 13).

4. At the date of the commencement of this action the said letters patent had not been sealed, or the patent for the alleged invention granted to the complainers or their authors (Act 1883, s. 15).

5. The specification relative to the said letters patent was amended in pursuance of allowance to amend given on the of 18 , by [Sir Richard Webster] Her Majesty's Attorney-General [*or* Solicitor-General] for England, under the condition, lawfully imposed under sec. 18, subsec. 5 of the Patents, etc., Act of 1883, that no action should be brought for any infringement committed prior to the of 18 . The acts complained of were all prior to the said of 18 . (See *Harrison's Patent*, and *Smith's*, Macrory's *Patent Cases*; *Tranter's Patent*, Johnson's *Patentees' Manual*, 191.)

6. The specification relative to the said letters patent was amended in pursuance of leave to apply to the Comptroller-General of Patents for leave to amend the said specification, which leave to apply was granted by Lord , Ordinary, on the of 18 , in an action then pending between and , on certain terms lawfully imposed under sec. 19 of the Patents Act of 1883, namely, that no action should be brought for any infringement committed prior to the of 18 . The acts complained of were all prior to the said of 18 (*Andrew*, 9 R. P. C.).

7. The said letters patent were extended by Her Majesty in Council on the of 18 , under a condition, lawfully imposed under sec. 25 (5) of the Patents, etc., Act of 1883, that (no action should be brought in respect of any infringements of the said letters patent committed between the of 18 and the of 18 . The acts complained of were all done between the said dates).

8. The defenders have a right to make, use, exercise, and vend the said invention without let or hindrance, in respect that they are (1) joint-patentees thereof, and have not assigned their rights therein (*Mathers*, 35 L. J. Ch.); (2) co-owners thereof (*Steers*, 9 R. P. C.) jointly with the complainers in virtue of the following transmissions, namely [ ].

9. The respondents are in no way responsible for the acts of the said , who was not their servant, etc., etc.

10. The respondent is a mere workman, being [ ] (*Savage*, 13 R. P. C. 266; see *Townsend*, Higg. Dig. 168).

11. The complainers have since 18 been in full knowledge of the intention of the respondents to erect works and to put up the particular kind of [ ] now complained of. They have without remonstrance allowed the respondents to incur great expense in doing this.

The [ ] used by the respondents and now complained of were all used in the presence and with the consent of the complainers under the following circumstances, namely:—[ ] (*Henser*, 11 R. P. C.).

12. The acts complained of have all been done by and under the authority of a private Act of Parliament, & Vict. c. (*Bakewell's Pat.* 15 Mco. P. C.).

13. Neither the complainers nor their authors, nor any of them, were the true and first inventors, within the United Kingdom or the Isle of Man, of the alleged invention (4 D. 470) described and claimed in the letters patent and specifications libelled. *A. B.* and *C. D.*, in whose favour the letters patent libelled were granted, were not the true and first inventors of the said alleged invention, and the same was not the original invention of the said *A. B.* and *C. D.* (*Smith*, 17 D. 672), in respect that (1) the same was an invention made by , a workman in the employment of the said *A. B.* and *C. D.*, while the said was in their employment (*Barber*, 1 Web. P. C. 126); (2) the same had been communicated to them from abroad by a British subject, namely [of] (*Milligan*, 2 Jur. N. S.); (3) they had not themselves invented the said invention, but the same had in truth been communicated to them from abroad by , of , in , without their having sufficiently or at all improved upon the same as so communicated to them (cf. *Renard*, 10 L. T. N. S., 13 W. R.; *Milligan*, 2 Jur. N. S.; *Avery's Patent*, 36 Ch. D. 307—apparently a point undecided); (4) the same was not a communication to the said *A. B.* and *C. D.* from abroad, as the said letters patent bear, but was communicated to them within the United Kingdom or the Isle of Man by *G. H.* of , in the County of , the said *G. H.* not being a person abroad within the meaning of the patent law (*Elias*, 7 R. P. C.; *Marsden*, L. R. 3 Exch. D.). Further, the said alleged invention was not first published in the United Kingdom or the Isle of Man by the said *A. B.* and *C. D.* (*Pickard*, 17 R.; interloc. of Second Div. in *Rose*, 11 R. P. C.), or either of them, but was published and publicly known within the United Kingdom prior to the date of the said letters patent. [As to suggestions from persons employed in working out an invention, see *Kurtz*, 5 R. P. C.; *Bloxam*, 1 C. & P.; *Humpherson*, 4 R. P. C.; *Ticklepenny*, 5 R. P. C.; *Tennant's* case, 1 Carp. P. C.]

14. At the date of the said letters patent the said alleged invention was part of the stock of the public general knowledge, and the said alleged invention was not new, as to the public use and exercise thereof, in the United Kingdom of Great Britain and Ireland, and Isle of Man, or the proper subject of a grant of letters patent, having regard to the common and public knowledge at the date thereof. The principles of the said invention, claimed by the specification relative to the said letters patent, were generally known to manufacturers of [*coal retorts, tar*], and to scientific men, prior to the date of the said letters patent.

Ans.—The alleged want of novelty is only present, if at all, which the complainers deny, in claim 5, which claims an invention subordinate to the main invention, and capable only of being used therewith and not otherwise (*Krebs*, H. L. 1879, 13 R. P. C.; *Clippens*, H. L., 10 R. (H. L.); *Plimpton*, 6 Ch. D.; *Neilson*, L. R. 5 H. L. at p. 21; *Wenham*, 9 R. P. C.; *Adamant*, 14 R. P. C.).

15. The alleged invention, as described and claimed in the amended specification relative to the letters patent founded on by the complainers, was not new at the date of the said letters patent. Inventions or contrivances similar to or substantially the same as the said alleged invention were described, and disclosed, and published within the United Kingdom prior to the said date. (Word "published," *Prale*, 1 M. 451. Information given by prior publication must be an adequate disclosure: *Hills*, 31 L. J. Ch.; *Betts*, 10 H. L. Ca.; *Betts*, L. R. 3 Ch., 5 H. L.; *Winby*, 6 R. P. C.; *Otto*, 46 L. T. N. S.; *Ehrlich*, 5 R. P. C.; *Cassel*, 12 R. P. C.; *Shrewsbury*, 13 R. P. C. Sufficient if to scientific man: *Philpott*, 2 R. P. C.; *King Brown*, 17 R., 7 R. P. C., and in H. L., 9 R. P. C. 313, and 19 R. (H. L.). Not sufficient if further ingenuity required: *English and American*, 11 R. P. C. 367.) In particular, such inventions or contrivances were described, disclosed, and published as aforesaid in the specifications,

or specifications and drawings, relative to the letters patent following, all dated prior to the date of the letters patent founded on by the complainers, *videlicet* :—

(1) Letters Patent, Jones and Smith, dated April 1, 1840, No. 987 of 1840.

(7) Letters Patent, Brown, dated May 1, 1850, No. 6543 of 1850. (Provisional specification ; *only in provisional specifications before Jan.* 1, 1884.)

Also in the specifications of the following patents granted in foreign countries and published in the United Kingdom prior to the date of the said letters patent founded on, *videlicet* :—

(8) Patent of the United States of America granted to , No. , dated , deposited in the Patent Office Library, London, and accessible to the public there, on or about and from the of 18 .

(9) German Patent granted to , No. , dated , and deposited in due course in the Patent Office Library, London, in or about the month of 18 , and accessible to the public there prior to the date of the said letters patent founded on.

(10) French Patent of La Compagnie , represented by , numbered , taken on the 18 , and issued on the 18 , and deposited in the Patent Office Library, London, on or about the 18 , and accessible to the public there since that date.

Also in the following books and other publications (*Heurteloup*, 1 Web. P. C. ; *Stead*, 2 Web. P. C. 147 ; *Household*, 1 Web. P. C. 718 *n.* ; *Stead*, 2 Web. P. C. 126 ; *Lang*, 31 L. J. Ch. ; *Plimpton*, L. R. 3 Ch. D. ; *Plimpton*, L. R. 6 Ch. D. ; *U. Teleph. Co.*, L. R. 21 Ch. D. ; *Otto*, L. R. 31 Ch. D. ; *Harris*, L. R. 35 Ch. D ; *Pickard*, 17 R. ; 7 R. P. C.), *videlicet* :—

(11) The third edition of "(title of book)" by , published in London in the year , at page .

(12) A book entitled " ," second edition, published in Edinburgh in the year , at pages to , and at pages to .

(13) A book entitled " ," by , published at Berlin by Messrs. in the year , and imported into the United Kingdom and published therein in or about the month of 18 , by Messrs. of , London, prior to the date of the said letters patent founded on, at pages to .

(14) A newspaper entitled " ," for the day of 18 , printed in Austria, and containing a description of , exhibited at in the summer of 18 , the said newspaper having been imported into the United Kingdom by of , Edinburgh, and circulated therein prior to the date of the said letters patent founded on.

(15) An article entitled " ," by , in the " " for August 18 , published in London on the 25th July 18 .

(16) An article entitled " ," by ,in the " " for June 18 , published in Paris on the of 18 , and imported into the United Kingdom by Messrs. of , Edinburgh, and circulated therein in due course and prior to the date of the said letters patent founded on (*Pickard*, 17 R.).

(17) Circulars distributed at the Exhibition of held at [the Crystal Palace, London] during the months of 18 , the said circulars having been distributed by Messrs. prior to the date of the said letters patent founded on, and containing a description and drawings of .

(18) Circulars distributed at the Exhibition of , held in Paris from the 18 to the 18 , the said circulars containing a description and drawings of , and having been distributed as aforesaid by Messrs. , and imported into the United Kingdom and published therein on or about the of 18 by Messrs. of , in the County of .

Reference is also made to 's patent, No. , of the year , dated and to .

16. The letters patent founded on are anticipated by letters patent No. of 18 , for " ," which is an invention the same, or substantially the same, as the said alleged invention claimed by the complainers, granted on the of 18 to of , in the Republic of France, under Article IV. of the International Convention for the Protection of Industrial Property, signed at Paris the 20th March 1883, and of which ratifications were exchanged at Paris the 6th of June 1884, and Her Majesty's accession to the said International Convention, done at

Paris the 17th day of March 1884 and the 2nd April 1884, and Her Majesty's Order in Council, under sec. 103 of the Patents, etc., Act of 1883, dated 24th June 1884, and for the time being in force, the said letters patent being antedated under the said sec. 103 of the said Patents, etc., Act, and the said Convention, and the relative patent rules duly authorised by the Board of Trade, so as to bear date the of 18 . (*See Complainer*, 16.)

17. Inventions or contrivances similar to or substantially the same as the said alleged invention were disclosed and published within the United Kingdom prior to the date of the said letters patent founded on by the complainers by the manufacture or construction without secrecy, the publication, public exhibition (*Pennycook*, 9 R.; *Lifeboat*, 8 R. P. C.; *Hancock*, Higg. Dig. 266; as to exhibition of useless machine, see *Murray*, L. R. 7 Ch.; *Edison*, 4 R. P. C.; of scientific curiosities without known utility, *Edison, ib.*), exposure for sale (*Mullins*, 3 C. & K.; *Oxley*, 8 C. B. N. S.), sale (*Morgan*, 2 M. & W.; *Losh*, 1 Web. P. C.; *Gibson*, 1 Web. P. C.; *Carpenter*, 1 Web. P. C.; *Honiball*, 24 L. J. Ex.; *Hollins*, 5 R. P. C.), offering for hire, letting for hire of [*machines or articles, name and describe sufficiently*], made or arranged substantially in accordance with the said alleged invention, and substantially in the same manner as those described and claimed in the amended specification relative to the said letters patent founded on, by , at from the month of 18 to the month of 18 , or some part of said period; and the [ ] so [*manufactured, exhibited, etc.*] had been described in the [*Glasgow Herald*] of date 18 , and in the of date 18 . Further, [models of] [*coal retorts*] embodying the said alleged invention were publicly exhibited by [*exhibitor's name*] in the Exhibition, held at from the month of , both in the year 18 . (*See Complainer*, No. 17.)

18. The complainers' said alleged invention was communicated and disclosed by them to and [*design them*] at on or about the of 18 , or at anyrate prior to the date of the letters patent founded on. The said and were employed by the said *A. B.* and *C. D.*, or one of them, to make a [ ] in the way of their trade, by manufacture and sale, prior to the date of the said letters patent (*Humpherson*, 4 R. P. C.; *see Complainer*, No. 18.)

19. A method or process for [*distilling coal*], or a manner of doing the same, similar to or substantially the same as that described and claimed in the specification relative to the said letters patent founded on by the complainers, was disclosed and published within the United Kingdom prior to the date of the said letters patent, by the manufacture without secrecy of [*tar*] made substantially in accordance with the said alleged invention and according to the method, process, or manner described in the said amended specification founded on, by at from the month of 18 to the month of 18 , or some part of said period; by book, newspaper, article, circular, lecture, in which said process, method, or manner was described, on the of 18 (*Note.*—Patent for apparatus; "the object and merit is in the process"; *Clippens*, 10 R. (H. L.) 42).

20. [*Tar*] of the quality made by the use of the complainers' alleged invention was manufactured, and sold, and known in trade in this country prior to the date of the said letters patent founded on. The [*tar*] made by the apparatus constructed according to or by the process or method or in the manner described in the specification relative to the said letters patent differs in no respect from other [*tar*] known to the trade not made by the said apparatus, or by the said process or method, or in the said manner. The respondents have long dealt in such [*tar*], and have purchased large quantities of it in the open market, both at home and abroad, without interference by anyone. The said [*tar*] has been manufactured according to various processes, and several patents have been taken out for improvements in the apparatus connected therewith (*Cartsburn*, 1 R. P. C.). In particular, such [*tar*] was disclosed and published and made known in this country, by the manufacture thereof without secrecy, by at from the month of 18 to the month of 18 , by the exhibition thereof at on the of 18 , by the sale thereof at by in the years .

21. The alleged invention, specified, described, and claimed in the said amended specification relative to the said letters patent founded on by the complainers, was publicly used in the United Kingdom prior to the date of the said letters patent

(*Sykes*, 4 M. ; *Wilson*, 10 D. (held the prior use must be in the same manufacture ; a tobacco cutter cannot prove prior use of a paper cutter ; it may prove no originality of invention, p. 3) ; *Templeton*, 10 D. 4 and 798 (a combination must have been used as a whole) ; also *Finlay*, 19 D. 1090 ; *Neilson*, 6 D. 53 ; *Smith*, 19 D. 695 ; *Bailey*, 5 R. (H. L.) 179 ; *King Brown*, 17 R., 19 R. (H. L.) (very small public use found, doubted but not decided in the H. L., R. (H. L.) 197) ; *Neilson*, 4 D. ; *Carpenter*, 1 Web. P. C. ; *Stead*, 2 Web. P. C. 126 ; *Heath*, 2 Web. P. C. 268 ; *Betts*, 28 L. J. Q. B. ; *Harwood*, 29 L. J. Q. B. 202 (must be some knowledge and some intention) ; *Brereton*, 1 R. P. C. ; *Croysdale*, 1 R. P. C. ; *Humpherson*, 4 R. P. C. Secret use : *Hills*, 27 L. J. Ex. ; *Saxby*, 2 Griff. P. C. 54 ; *Smith*, 19 D. 695. Onus of proving publicity on the defender : *Dick*, 23 R., 13 R. P. C. Knowledge of composition of mixture not necessary : *Gill*, 1891, 23 R., 13 R. P. C. See as to abandoned experiments : *Neilson*, 4 D. 1209, 2 Bell's App. 15 ; *Jones*, 1 W. P. C. 122 ; *Cornish*, 1 Web. P. C. 519; *Galloway*, 1 Web. P. C. 521; *Kaye*, (H. L.) 5 R. P. C. ; *Morgan*, 5 R. P. C. 295 : mere experiments ; *Galloway*, 1 Web. P. C. ; *Hills*, 27 and 29 L. J. Ex. ; *Borill*, 2 Griff. 48 : experimental user ; *Neilson* v. *Houschill*, 4 D. 1209, *do. Baird*, 6 D. 53 ; *Useful Patents*, 2 R. P. C. ; *Winby*, 7 R. P. C. ; *Cornish*, 1 Web. P. C ; *Walton*, 1 Web. P. C. 613 ; *Humpherson*, 4 R. P. C. ; cf. *Adamson's Patent*, 25 L. J. Ch. : forgotten arts ; *Neilson* (50 years), 2 Bell's App. 16, 28 ; *Dick* (Ld. Kyllachy), 13 R. P. C. : machine useless ; *Murray*, 7 Ch. ; *Edison*, 4 R. P. C. ; *Goddard*, (H. L.) 10 R. P. C. : experimental use by other than the patentee ; *Westley*, 11 R. P. C. 602 : experimental trials necessarily more or less in public ; *Bentley*, 1 C. & K. ; cf. *Newall*, 4 C. B. N. S.). In particular, [*coal retorts*] in which the complainers' alleged invention was employed were used in and prior to the years by at their works at ; in and prior to the years by at , etc ; [*tar*] of a similar make or character was made or used by at in and prior to the years ; the process, or method, or manner of [*distilling coal*] described and claimed in the said amended specification was worked and used by at in and prior to the years . Further, [models of, *Lewis*, 4 C. & P. ; *Winby*, 7 R. P. C.] [*coal-retorts*] in which the complainers' alleged invention was embodied were used at the Exhibition held in in 18 , for the purpose of exhibition thereof, and were publicly exhibited there from the month of to the month of in that year by [*exhibitor's name*]. Further, the complainers' alleged invention was publicly used in the United Kingdom prior to the date of the said letters patent founded on, by the manufacture, construction, sale, offering to construct, offering to sell, advertising of [*coal retorts*] embodying the said alleged invention, by at in or about the year 18 . [*Note.*—Precise dates not necessary : 2 R. 122.]

22. The alleged invention [and particularly the alleged invention which formed the subject of claim of the said amended specification] does not constitute any manner of improvement (*Neilson*, 4 D.) in or upon [*coal retorts, distilling coal tar*] as previously known and used, and it is not practically useful (*i.e.* is not of *any* utility : *Neilson*, 4 D. 1211 ; *Philpott*, 2 R. P. C. ; *Morgan*, 1 Web. P. C. 167 ; *Tetley*, Macr. P. C. 63 ; *Thomson*, 6 R. P. C. 84, 87) for the purposes set forth (*Smith*, 17 D. 672), or beneficial or advantageous to the public for the purposes set forth (*Harrison*, 2 R. 122). The specification relative to the said letters patent founded on by the complainers discloses no invention of practical utility to the public for the purposes therein set forth (*Harrison*, 2 R.). The invention professed by the said amended specification to be disclosed cannot be applied to the [ ] shown in Fig. and described at lines to of page of the said amended specification, and the said alleged invention is wanting in practical utility to the public. [*Coal-retorts, the process of distilling coal*] made, worked, according to the complainers' said alleged invention are less useful than any of the various [*forms of coal retort, processes of distilling coal*] now in common use. The complainers' said alleged invention does not produce the effects claimed for it in the said amended specification, and the said effects (*Neilson*, 4 D. 1211) are not of any practical utility to the public. So much of complainers' said alleged invention as was new, was not of any public utility at the date of the said letters patent founded on, and has not come into use at all.

(*Note.*—Its not coming into use is immaterial if it would at its date be of some use : *Macnamara*, 2 Web. P. C. ; but affords a presumption against its utility : *Wright's Patent*, 1 Web. P. C. ; *Simister's Patent*, 4 Moo. P. C. ; *Bakewell's Patent*, 15 Moo. P. C. ; *Allan's Patent*, 4 Moo. P. C. ; which may be rebutted by showing pecuniary embarrassment, *Wright's Patent*, 1 Web. P. C. ; the nature of the invention, *Jones' Patent*, 1 Web. P. C. 577 ; or limited market, *Herbert's Patent*, 4 Moo. P. C. Inutility of an immaterial part does not invalidate : *Neilson*, 6 D. 58 ; *Lewis*, 1 Web. P. C. 490 ; *Haworth*, 1 Web. P. C. 483 ; *Morgan*, 6 L. J. Ex. ; see *Macdonald* (per Ld. Rutherfurd Clark), 11 R. P. C. 172. As to utility in the question of novelty, see 4 D. 1209.)

23. The said alleged invention is not at all times useful, as is professed in the said specification, but is dangerous when put in practice in the manner described in the said specification (*Easterbrook*, 2 R. P. C.) in respect that [ ].

24. The alleged invention described and claimed as aforesaid [and particularly the alleged invention which forms the subject of clause 3 of the said amended specification] is either impossible and wanting in utility, or is an invention which is not at all, or not sufficiently, described and ascertained in the said amended specification (*Monnet*, 14 R. P. C.).

25. One of the processes described and claimed in the said amended specification as a means of performing the said alleged invention, namely [the process of], is useless and unworkable in respect that [ ] (*Easterbrook*, 2 R. P. C.).

26. The alleged invention to which the said letters patent founded on relate was not at the date of the said letters patent the subject of letters patent and grant of privilege within sec. 6 of the Statute of Monopolies (Act 1883, s. 46), in respect that the said alleged invention, as described and claimed—

(1) is for a principle merely (*Boulton*, 1 Carp. P. C. 117; *Hornblower*, 1799, 8 T. R.; *R.* v. *Wheeler*, 2 B. & Ald.; *Bovill*, 7 El. & Bl.; *Edison Phonograph*, 11 R. P. C.; *United Telephone*, 21 Ch. D.; *Otto*, 46 L. T. N. S.; *Jupe*, 1 Web. P. C. 145, as corrected by *Neilson*, 1 Web. P. C. 309, and *Nobel's*, 11 R. P. C., 12 R. P. C.; *Neilson* v. *Househill* (Ld. J.-Cl. Hope), 4 D. 1201; *Neilson* v. *Baird*, 6 D. 53 (2), 56; *Badische*, H. L. 12 App. Ca. 710; *Automatic*, 6 R. P. C. 297).

(2) is for a (mathematical) theory only (*Young*, 1 R. P. C.).

(3) is contrary to public policy, or *contra bonos mores*, in respect that [ ].

(4) displayed no ingenuity or merit therein (*Templeton*, 10 D.; *Hutchison*, 15 R., "no invention"; *Rose's*, 11 R. P. C.; *Cera*, 11 R. P. C.; *Murchland*, 20 R.; *Leggott*, 10 R. P. C; *Saxby*, W. N. 1882; *Morgan*, H. L., 7 R. P. C.; *Macdonald*, 10 R. P. C. 392; *Edison Phonograph*, 11 R. P. C.; *Gosnell*, 5 R. P. C.; *Ehrlich*, 5 R. P. C.).

(5) displayed no exercise of the inventive faculty (*Riekmann*, H. L., 14 R. P. C. 115; *Macdonald*, 11 R. P. C. 172 (Ld. Rutherfurd Clark, "a new criterion"); definition of "invention," *Fawcett*, 13 R. P. C.; cf. *White*, 14 R. P. C.).

(6) displayed no sufficient invention (*Tatham*, Griff. 213; *Jensen*, 2 R. P. C.; *Blakey*, 6 R. P. C.; *Lister*, 3 R. P. C.).

(7) is a mere particular analogous use and application (*Harwood*, 11 H. L. Ca.; *Losh*, 1 Web. P. C.; *Muntz*, 2 Web. P. C. 93; *Reg.* v. *Cutler*, 3 C. & K.; *Horton*, 12 and 16 C. B. N. S.; *Ormson*, 33 L. J. C. P. 8 and 291; *Elias*, 7 R. P. C.; *Morgan*, H. L., 7 R. P. C.; cf. *Gadd*, H. L., 10 R. P. C.; *Siddell*, H. L., 7 R. P. C.; *American Braided*, H. L., 6 R. P. C.) to old and well-known subjects, namely [*coal retorts*], in a manner old and well known at the date of the letters patent founded on, of contrivances or devices, namely [ ], old, well known, and in common use at the said date in analogous subjects, namely [*coal retorts for producing coke*], without any novelty or invention in the mode of applying such old contrivances or devices to the purpose of the said alleged invention, namely [*distilling coal for the production of tar*], or any ingenuity or invention in the said use and application.

(8) is for the mere new use of an old and well-known contrivance, namely [*coal retorts*], in a manner and for a purpose analogous to the use of [*coal coking retorts*], for the [*production of coke*], old, well known, and in common use at the date of the said letters patent founded on, and that without any additional ingenuity having been shown in overcoming any fresh difficulties (*Gadd*, H. L., 10 R. P. C.). [Patents sustained, being simpler and more direct, *Boyd*, H. L., 9 R. P. C.; *Goddard*, H. L., 11 R. P. C.: as showing ingenuity, *Pow*, 9 Jur.; *Penn*, L. R. 2 Ch. ("out of the beaten track").]

(9) is not an improved [*coal retort*] produced by any new and ingenious application of a known contrivance, namely [ ] to [*coal retorts*] old, well known, and in common use at the date of the letters patent founded on (*Gadd*, *supra*).

(10) is a mere new use of [*coal retorts*], the same being old, well known, and in public use at the date of the letters patent founded on, without the exercise of any ingenuity or invention (*Gadd*, *supra*; *Bamlett*, Griff. 40; *Kay*, 2 Web. P. C. 71; *Pow*, 9 Jur.; *Bush*, 5 H. L. Ca.; *Ralston*, 11 H. L. Ca.; *Jordan*, L. R. 1 C. P.; *Cera*, 11 R. P. C.; *N. B. Rubber Co.*, 14 R. P. C.; *Pneumatic*, 14 R. P. C. 77, 573; *White*, 14 R. P. C.; cf. *Adamant*, 14 R. P. C.).

(11) is a mere discovery that [*coal retorts*] can be used for the purpose of [*making tar*], without any novelty in the mode of using them, or any new modification of the said [*coal retorts*], or the application of any mechanism thereto such as displays any merit, or ingenuity, or invention in such use or modification or application (*Lane Fox*, 9 R. P. C.; *Ralston*, 11 H. L. Ca.).

(12) is a mere discovery of the fact that following certain working directions and cautions in the old and well-known use of [*coal retorts*] for [*distilling coal*], in the working of the old and well-known process of [*distilling coal*], will lead to an improved result in respect of the quality of the [*tar*] produced, the said working directions and cautions being such as all persons using [*coal retorts*] for the purpose of [*distilling coal*] at the date of the said letters patent founded on had a right to follow and observe (*Patterson*, H. L., 3 App. Ca.; *Partington*, 12 R. P. C.).

(13) is so obvious to everyone of ordinary intelligence acquainted with the subject of the said letters patent founded on as to present no difficulty to any such person, and to admit no sufficient ingenuity or invention to support a grant of letters patent (*Lane Fox*, 9 R. P. C.; *Montgomerie*, 11 R. P. C. (plea repelled); *Macdonald*, 10 R. P. C.; *American Braided*, H. L., 6 R. P. C.; *Edison Phonograph*, 11 R. P. C.; see *Gadd*, *supra*; *White*, 14 R. P. C. 501, 735).

(14) is merely the adjustment of the distance between two of the parts of a known machine, namely [ ] (*Herrburger*, 6 R. P. C.; *Kay*, 8 Cl. & Fin.; *Tatham*, Griff. 213). [Similarly for size or shape—unless a law of nature otherwise inoperative is thereby allowed scope: *Edison*, 4 R. P. C.]

(15) is merely the use of a new material, namely [ ], for the purpose of [ ], the said use of the said new material involving no novelty and requiring no invention (*Brook*, 28 L. J. Q. B.; *Rushton*, 10 Eq.; *Patent Bottle Co.*, 5 C. B. N. S.).

(16) is no useful addition to the stock of public knowledge worthy the grant of a patent. Any [*coal distiller*] could have [*lengthened the flue to get a better draught*] without invention.

27. Having regard to the prior general knowledge, and to the information given to the public in the specifications and publications and by the prior use referred to in paragraphs hereof, the said alleged invention was, at the date of the said letters patent founded on, not the subject of a grant of letters patent within the meaning of the Act (*Thomson*, 8 R. P. C.; *Gaulard*, H. L., 7 R. P. C.; *Morris*, H. L., 12 R. P. C.).

28. The amended specification relative to the said letters patent founded on is misleading to persons of competent skill in the subject of the patent (*Edison*, 4 R. P. C. 107, 108) in respect that—

(1) the effects claimed for the alleged invention cannot be produced in the manner described and claimed therein, and the said alleged invention cannot be carried into effect as specified, described, and claimed (see *Dudgeon*, 11 M. 864).

(2) the complete specification is vague and ambiguous in its terms in respect that (*Neilson* v. *Baird*, 6 D. 53, 56; *Campion*, 3 B. & B.; *Neilson* v. *Harford*, 11 L. J. Ex.; *Lifeboat*, 8 R. P. C.).

(3) the claim is too wide, and is larger than the invention (*Jessop*, 1 Web. P. C.; *Rex* v. *Else*, 1 Web. P. C., in *Harrison*, 3 R. (H. L.) 66).

(4) the complete specification makes false suggestions (Act 1883, s. 26 (3)) in respect that [the referred to at page , lines , has no such action as is claimed: *Dudgeon*, 11 M.], that [one of the processes set forth, namely, that referred to at page , lines to , of the said amended specification is useless and unworkable (*Simpson*, 35 L. J. Ch.; *Kurtz*, 5 R. P. C. 161; see *Gandy*, 2 R. P. C.)].

(5) the directions given at pages , lines , for the preparation of are misleading, and cannot produce the effects alleged (12 R. P. C. 234).

(6) if the [ ] be constructed in accordance with the directions given in the said specification, the said alleged invention will be useless, unworkable, and misleading in its operation (12 R. P. C. 126).

(7) it does not, by the complete specification or by the claims, sufficiently distinguish between what was old or was in use and known prior to the said letters patent, and what was new and claimed as being the invention of the patentees *A. B.* and *C. D.* (*Sykes*, 1 M. 351; *United Horseshoe*, 2 R. P. C.). [The

plea is repelled if it is found that the claim is distinct (*Montgomerie*, 11 R. P. C.), or "well drawn to express what is new" (*White*, 14 R. P. C.), or sufficiently described by text and drawings (*Pickard*, 7 R. P. C., 17 R.). Not necessary to specify what parts of new combination are old: *Kaye*, H. L., 5 R. P. C.; *Proctor*, 4 R. P. C.; *Moore*, 1 R. P. C.).

(8) it does not, by the complete specification, sufficiently distinguish between what was useful and what was useless [or dangerous] therein (*Easterbrook*, 2 R. P. C.).

(9) the patentees, *A. B.* and *C. D.*, did not, in their complete specification, state the most beneficial method of practising their alleged invention with which, at the time of their lodging the said complete specification, they were acquainted (*Turner*, 1 Web. P. C.; *Coles*, 3 R. P. C.; *Bovill*, Dav. P. C. 361, Higg. Dig. 400).

(10) claim 5 [as amended] is too wide, and extends not only to the use of the mechanism described in the specification, but of any other suitable [ ], such as [ ], the action of which, in conjunction with [ ], was described by in a book entitled etc., etc., and was old and well known at the date of the said letters patent (*Templeton*, 10 D. 803; *Morton*, 1 M. 720; *Leadbetter*, 7 R. P. C.); extends to every method of [*distilling coal, of making tar from coal*], other methods of [founded on], being old and well known at the date of the said letters patent (*Nobel's*, 11 R. P. C. 527). (See *Neilson*, 4 D. 1200, 1203.)

(11) the claims of the said amended specification are too wide in respect that, by their terms, they are sufficient to cover the [manufacture, process, product], which was old and well known at the time of the said letters patent founded on. (See *Chadburn*, 12 R. P. C. at p. 132.)

(12) the claim, as amended, is too wide in respect that it is larger than the invention, and claims the [ ] as a whole, whereas the complainers' invention, if any such there be, is an improvement in a particular part or parts of [ ], the said [ ] being old and well known at the date of the said letters patent (*R.* v. *Else*, 1 Web. P. C.; *Harrison*, 3 R. (H. L.) 66; *Boulton*, 2 H. Bl. 489, 1 Carp. Pat. Ca.; *Perry*, 13 R. P. C.; see *Krebs*, (H. L.) 13 R. P. C., Higg. Dig. 454 *et seq.*).

29. The amended specification relative to the said letters patent founded on is insufficient in respect that—

(1) the alleged invention is not fully disclosed therein (*Dudgeon*, 11 M. 873), and the description contained in the said specification is not such as to enable a workman of ordinary (*Sykes*, 4 M. 351), competent (*Neilson*, 4 D. 1211) skill in the subject of the said letters patent, or any person, to practise the said invention so as to produce the effects set forth (*Prale*, 1 M. 451; *Sykes*, 4 M.) in the said specification, without further experiment, information, discovery, or invention, even with the aid of the drawings appended thereto (*Neilson*, 4 D. 1211 (per Ld. J.-Cl. Hope), 5 D. 101, 2 Bell's App.; *Smith*, 17 D. 672; *Dudgeon*, 11 M.; *Plimpton*, 3 Ch. D.; *Bailey*, 4 R. (H. L.) 179; *White*, 14 R. P. C.). [Experiments for best results, see 4 D. 1211; *Edison*, 6 R. P. C.; *Badische*, 14 R. P. C. 875; *Lane Fox*, 9 R. P. C. 248, 417. As to drawings, see *Stewart*, 11 R. 236; *Gillies*, 5 R. 337; *Morton*, 1 M. 718.]

(2) the said amended specification does not so describe and ascertain the nature of the said alleged invention, and in what manner the same is to be performed, that a workman of ordinary skill in the subject of the patent, or any person, could understand the same, or perform, carry into effect, practise, and obtain the benefit of the alleged invention therein professed to be described, without further experiment, information, discovery, or invention (*Neilson*, 4 D. 1211). ["Workman" must be a skilled chemist in some specifications, *Incandescent*, 13 R. P. C. 325.]

(3) the said amended specification does not so describe one of the three processes professed to be described thereby, namely, the process of [ ], referred to at page , lines to , of the said amended specification, or ascertain in what manner the same is to be performed, that a workman of ordinary skill in the subject of the patent, or any person, could understand the same, etc., *ut supra* (*United Horseshoe*, 2 R. P. C. 132).

(4) the said amended specification is not intelligible [*e.g.* by reason of the absence of drawings, 13 R. P. C. 365].

(5) the said amended specification does not so describe and ascertain the nature of the said alleged invention as to show the members of the public what they may

use without infringing the same (*Morton*, 1 M. 718, 35 Sc. Jur. 542; *Neilson*, (H.L.) 40 L. J. Ch. 317, 329; *Hill*, 1 Web. P. C. 229, 235).

(6) the said amended specification does not describe or claim a material part of the said invention, namely [ ], without which the same cannot be made, beneficially used, or worked (*Liardet*, 1 Web. P. C.; *Sturtz*, 1 Web. P. C.).

(7) if the [sixth] claim of the said amended specification be construed so as to cover the [ ] complained of, the said specification is insufficient, in respect that research and experiment would be necessary in order to ascertain the limits of the [proportions], other than those given in the said specification, which would be practically useful (*Maxim-Nordenfelt*, 14 R. P. C. 371, 671).

30. The provisional specification relative to the said letters patent founded on does not sufficiently state the nature of the said alleged invention (see *Foxwell*, 10 L. T. N. S.; *Penn*, L. R. 2 Ch.; *United Telephone*, 21 Ch. D.; *Newall*, 10 Jur. N. S.; *Stoner*, 4 Ch. D.; *Woodward*, 4 R. P. C.; *Siddell*, H. L., 7 R. P. C.; *Nuttall*, 8 R. P. C.; *Cook*, 13 L. J. Q. B.; *Lane Fox*, 9 R. P. C.).

31. The alleged invention, as set forth in the amended complete specification relative to the letters patent founded on [and particularly as claimed in the third claiming clause thereof] is essentially (*Prale*, 1 M. 451) different from and larger than, or not embraced in, that disclosed and its nature described in the provisional specification, and is not disclosed, indicated, or referred to in the provisional specification thereof, and is not a legitimate development (*Woodward*, 4 R. P. C.; *Moseley*, 4 R. P. C.; *Siddell*, 39 Ch. D. 92; *Brooks*, 14 R. P. C.) of anything disclosed in the said provisional specification. The final specification relative to the said letters patent founded on is disconform to the provisional specification, and claims an invention substantially different from (*Lucas*, 2 R. P. C.) and larger than, or not embraced in (*Watling*, 3 R. P. C.), that disclosed and its nature described in the provisional specification (*United Telephone Co.*, L. R. 21 Ch. D., *Lane Fox*, 9 R. P. C., and *Nuttall*, 8 R. P. C., the three successful English cases; *Hutchison*, 15 R.; *King Brown*, 17 R. 1266—"If this were all, the Court would have allowed an opportunity of disclaiming"; *Neilson*, 4 D. 1188; *Dubs*, 10 S. L. R. 334; *Dudgeon*, 11 M. 863, 4 R. (H. L.); *Bailey*, 4 R. (H. L.) 545; *Gillies*, 5 R. 337; *Magee*, 14 R. P. C.; *Prale*, 1 M. 450; *Lucas*, 2 R. P. C.; *Watling*, 3 R. P. C.; *Penn*, 2 Ch.).

32. [The alleged invention described in the complete specification as amended is a substantially different invention from that described in the provisional specification and in the complete specification as originally drawn and accepted.] (Formerly a good defence: *Gillies*, 5 R.; *Templeton*, 10 D.; *Dudgeon*, 4 R. (H. L.) (Ld. Blackburn); *Van Gelder*, 6 R. P. C.; but not now, *Moser*, (H. L.) 13 R. P. C. 31; see p. 222, *infra*.)

33. The alleged grant of the said Letters Patent No. of 18 to *A. B.* and *C. D.*, was contrary to law in respect (*e.g.*) that *A. B.* and *C. D.*, in whose favour the said letters patent were granted, were public officials, engaged, at the time of making the said invention, in making inquiries in the public service into the subject-matter of the said invention, and were under a duty of disclosing the said invention to the public (*Patterson*, L. R. 3 App. Ca. 1).

34. The said letters patent were obtained by fraud (Act 1883, s. 26 (3)), in respect that . . . . . .

35. The alleged grant of the said letters patent to the said *A. B.* and *C. D.* was mischievous to the State, by (1) raising prices of commodities at home; (2) by being in hurt of trade; (3) by being generally inconvenient, in respect that (Stat. of Monop. s. 6).

36. The alleged grant of the said letters patent to the said *A. B.* and *C. D.* was in derogation of a prior grant of letters patent, No. of , to *E. F.* and *G. H.* for the same or substantially the same invention (*Crane*, 12 L. J. C. P.). [See Act 1883, s. 26 (3).]

Letters patent for an invention the same, or substantially the same, with that described and claimed in the specification relative to the said letters patent founded on, were granted to the respondent on an application dated prior to the date of the said letters patent founded on, and the said letters patent are numbered of the year 18 , and dated the of 18 . (Act 1883, s. 26 (3).)

37. Assuming the said letters patent founded on by the complainers to be good and valid in all respects, the respondents have not infringed, or threatened to infringe, the

same. The respondents are [*distilling coal*] (1) according to a patent granted to *P. Q.* and *R. S.* on the of 18 , No. of the year 18 ; (2) by a method and means substantially similar to, the same as, they have used at their premises at for years past. The respondents deny that at the date of the commencement of this action they were infringing the complainers' patent, or that they have threatened, or that they intend, to do so. They admit that, some time previous to the action, they constructed, made, and sold certain [*coal retorts, tar*] which were similar to those described and claimed in the complainers' said letters patent, but it is explained that on being requested to desist from making such [*coal retorts, tar*], they discontinued the manufacture, and offered to pay royalties in respect of those which they had sold, and that they have made none since (*Fletcher*, 4 R. P. C.: important as affecting expenses).

38. The respondents have not made or used any [*coal retorts, tar*] in the manner described and claimed in the letters patent founded on, and no [*coal retorts, tar*] made by them have been or are infringements of the said letters patent with regard to the [construction] of the said [*coal retorts*], or in respect of the method by which the same were manufactured and used, or the said [*tar*] manufactured, or at all.

39. The respondents have made, used [*three*] [*retorts, tar*] of the kind described and claimed, but they have not made, used, vended, the same for profit, or to the pecuniary prejudice of the complainers, and do not intend to do so. They have made, used, the said [*retorts, tar*] merely for *bonâ fide* experimental purposes, and with a view of ascertaining whether such [*retorts, tar*] require, are capable of, improvement (for their own amusement, or as models (*Jones*, 1 W. P. C. 122)). They have not made more than [ ] of [*tar*] by the use of the said [*retorts*], and they have not sold, and do not intend to sell, any such [*tar*]. They have not received, and are not to receive, any money or pecuniary profit whatsoever by or through the making, using of such [*retorts, tar*], and the privileges and advantages granted by the letters patent founded on are not in any manner of way affected by the respondents having made, used, the said [ ] as aforesaid (*Frearson*, 9 Ch. D. 48; *Muntz*, 2 Web. P. C. 101 ; *U. Teleph. Co.*, 29 Ch. D. ; *Proctor*; 6 R. P. C. 107). The articles complained of are not saleable, or to the pecuniary prejudice of the respondents, in respect that . . . . (*Higgs*, 27 L. J. Q. B. ; *contra*, *Newall*, 10 Jur. N. S.).

40. At the date of the said letters patent founded on [*distilling tar*] was an old and well-known process. The complainers have described and claimed a particular method of effecting this process, which method the respondents have not used or exercised (*Dudgeon*, 4 R. (H. L.) 100 ; *Bovill*, 11 Exch. 718 ; *Seed*, 8 H. L. Ca. ; *Palmer*, 23 L. J. Exch. ; *Curtis*, L. R. 3 Ch. D. 136 *n.* ; *Proctor*, 36 Ch. D. See as to colourable variations in process, temperature, proportions : *Young*, 9 R. P. C. (H. L.) ; *Clippens*, 10 R. (H. L.) ; *Montgomerie*, 11 R. P. C.).

41. The patentees, the said *A. B.* and *C. D.*, have [*by their disclaimer* (*Dudgeon*, 4 R. (H. L.) ; *Seed*, 8 H. L. Ca. ; *Parkes*, 5 Ch. ; *Hocking*, H. L., 6 R. P. C.)] on the true construction of their specification (*Clydebridge*, H. L., 9 R. P. C.) so framed their claims (particularly claims and) as to limit the same (*Neilson*, 5 D. 86) to the specific and precise arrangement, combination, described and claimed in their specification. The respondents have not used, and do not intend to use, the said arrangement, combination (*Curtis*, L. R. 1 H. L., 35 J. Ch. ; *Seed*, 8 H. L. Ca. ; *Harrison*, 2 R. 869 ; *Dudgeon*, 4 R. (H. L.) ; *Mackie*, 2 R. P. C.; *Stewart*, 11 R., "a substantially different invention" ; *Preston Davies*, 11 R. P. C. 299, 574 ; *Pennycook*, 9 R., "in substance and reality a different thing" ; *Clippens*, 10 R. (H. L.) ; *Nobel*, 11 and 12 R. P. C. ; *Parkes*, 5 Ch. ; see Ld. Watson in *Clippens*, 10 R. (H. L.) 42).

42. The [*method*] used, etc., by the respondents is not the same, or substantially the same as that described and claimed by the complainers or their authors, but is a new and essentially different [*method, combination, etc.*], in respect that ; and the said [*method*] involves fresh invention, and the alleged invention claimed by the complainers has not been taken (*Russell*, 1 Web. P. C. 457 ; *Needham*, Higg. Dig. 192 ; *Curtis*, (H. L.) 35 L. J. Ch. ; *Dudgeon*, 4 R. (H. L.) ; *Nobel's*, 11 and 12 R. P. C. ; *Huddart*, 1 Web. P. C ; *Walton*, 1 Web. P. C. 585 ; *Pennycook*, 9 R. ; *Stewart*, 11 R. ; *White*, 14 R. P. C. ; *Clydebridge*, (H. L.) 9 R. P. C.). The [result reached] by the respondents is not the same as [that reached] by the complainers, in respect that [ ].

43. The alleged invention averred by the complainers to have been infringed does not come within the scope of the claims under the said letters patent founded on [*Harrison*,

2 R., 3 R. (H. L.); a subordinate invention not claimed while others are claimed, is disclaimed].

44. The acts complained of are in no way covered by the nature of the alleged invention, as professed to be described in the provisional specification relative to the said letters patent founded on (*Bailey*, 4 R. (H. L.) (Ld. Blackburn)).

45. The respondents have not in their [ ] used [ ], which are an essential or material part of the complainers' alleged invention, and are of the essence thereof (*Clippens*, 10 R. (H. L.); *Gwynne*, 13 R. 691; *United Horseshoe*, 14 R.; *Harrison*, 3 R. (H. L.) 55).

46. The respondents have used [ ] for a purpose, namely [ ], which is different from that set forth in the complainers' said specification, and which is accomplished by a different mode of action from that described and claimed therein (*Preston Davies* (Ld. Low), 11 R. P. C.; *Fletcher*, 4 R. P. C.; *Cannington*, L. R. 5 H. L.; *Edison* v. *Holland*, 5 R P. C.; *Morewood*, 3 C. L. R.).

47. The [ ] which the respondents use in conjunction with [ ] was not known, at the date of the said letters patent founded on, to be a mechanical, chemical, equivalent to the [ ] described and claimed in the specification relative to the said letters patent [*Unwin*, 5 H. L. Ca.; *Electric Telegraph Co.*, 10 C. B.; *Badische*, 2 R. P. C.).

48. The respondents admit that they offered to supply [ ] as averred, but it is explained that the complainers, in the specification relative to the said letters patent founded on, do not claim every kind of [ ], and the respondents do not intend, and never have intended, to supply [ ] such as would infringe the said letters patent (*Gwynne*, 3 R. P. C., 13 R.).

49. The acts complained of have all been done with the licence, consent, and agreement of the pursuers, in respect that . . . .

50. The respondents bought the [*machines*, *articles*] complained of from , who are licensees of the complainers, and that without notice of any restriction as to the area within which the said [*articles*] might be or might not be used (*Thomas*, 17 C. B. N. S. 183).

51. The [*articles*] complained of were bought in [*Germany*], in which country the complainers were, at the date of the acts complained of, the owners of the [*German*] patent numbered , and dated , for the same invention, and the said [*articles*] were so bought without notice of any restriction as to the area within which such [*articles*] might or might not be used, etc., or notice of any exclusive licence for any such area (*Betts*, 6 Ch. As to article bought in the United Kingdom, made abroad by foreign manufacturing licensee, see *Soc. Anon.*, 25 Ch. D.).

52. The respondents have not made, sold, or used the combination of parts, materials, described and claimed in the said specification. They have only sold certain component parts, materials, thereof, not prepared for being put together so as to form the complainers' said combination (*Townsend*, Higg. Dig. 165; *Sykes*, 12 Ch. D.).

53. The respondents are retail dealers, and bought and sold the [*articles*] complained of in the way of their trade. Immediately on ascertaining that the [*articles*] complained of, and bought for sale and sold by them, were infringements of the complainers' said letters patent, the respondents gave information to the complainers, and promised to sell no more of the said [*articles*] (*Betts*, 6 Ch.; *Nunn*, 34 Beav.).

54. The acts complained of all took place after the said letters patent had ceased by the expiry of their term of fourteen years, and before the same had been extended under sec. 25 of the Patents, etc., Act of 1883 (cf. *Russell*, 16 L. J. Exch.).

55. The acts complained of all took place before the publication of the specification of the said letters patent founded on; and since the date of the said publication, that is to say, the of 18 , the respondents have not infringed, and they do not intend to infringe, the said letters patent (*Smith*, 19 D. 695; Act 1883, *s.* 13).

56. The acts complained of were all done on a British vessel on the high seas [*narrate the circumstances*] (*Newall*, 10 Jur. N. S. 954).

57. The complainers' said alleged invention was used [*narrate the circumstances*] for the purposes of the navigation of a foreign vessel, namely, the of , within the jurisdiction of the Court, and was not used for or in connection with the manufacture or preparation of anything intended to be sold or exported from the United Kingdom or Isle of Man. The said [ ] was a vessel of a foreign State, namely, , of which the laws do not authorise the subjects of the said State, having patents or like privileges for the exclusive use of inventions within its territories, to prevent or interfere with the use of such inventions in British vessels while in the ports of the said State, or in the waters within the jurisdiction of its Courts, where such inventions are not so used for the manufacture or preparation of anything intended to be sold in or exported from the territories of the said State (Act 1883, s. 43).

58. The complainers' alleged invention was used [*narrate the circumstances*] in a foreign vessel, namely, the of , within the jurisdiction of the Court, and was not used [*etc., as in the preceding paragraph*] (Act 1883, s. 43).

Pleas in Law for Complainers.

1. The respondents having during the currency of the letters patent libelled on infringed the same, and still continuing and being about to infringe the same, the complainers are entitled to suspension and interdict as craved, with expenses.
2. In respect that the respondents have infringed the letters patents libelled on, and are, under the circumstances condescended on, barred from pleading invalidity of the said letters patent, the complainers are entitled to interdict as craved, with expenses.
3. The respondents ought to be interdicted as craved, in respect that they have threatened and have asserted a right to manufacture [ ], in contravention of the complainers' said letters patent (*Pennycook*, 9 R.).
4. The answers being irrelevant and unfounded in fact, the complainers are entitled to suspension and interdict as craved, with expenses.
5. The respondent has no title to maintain his answers as against the complainers; and, *separatim*, the respondent is barred by his own actings as condescended on from maintaining his answers (*Jackson*, 17 R. 282).
6. Under sec. 31 of the Patents, etc., Act, 1883, the complainers are entitled, having regard to the Certificate No. of process, to their full costs, charges, and expenses as between solicitor and client.

In respect whereof, etc.

(Signed) . . . . . *Complainers' Agent.*

Pleas in Law for Respondents.

1. No title to sue.
2. Petition incompetent as presented.
3. Petition incompetent as presented in virtue of the Patents, etc., Acts, 1883–88.
4. The petition is incompetent in virtue of the private Act of Parliament, and Vict. c. .
5. No title against this defender.
6. The action is barred by mora, taciturnity, and acquiescence.
7. The complainers' statements, so far as material, being irrelevant, wanting in specification, and insufficient to support the prayer of their note, the same should be refused, with expenses.
8. The respondents having a right to use the said invention under the circumstances condescended on, the note should be refused, with expenses.
9. The note ought to be refused, with expenses, because (*Harrison*, 2 R. 857; *Gill*, 14 R. P. C., 24 R.) the letters patent founded on are and have from the date thereof been null and void or invalid in respect of (1) the said *A. B.* and *C. D.* not having been the first and true inventors; (2) prior public general knowledge; (3) want of novelty or originality; (4) prior publication; (5) prior public use; (6) no manner of new manufacture; (7) no utility; (8) no improvement; (9) no subject-matter; (10) no invention; (11) being for a principle or theory only; (12) being *contra bonos mores*; (13) mere analogous use; (14) mere discovery; (15) mere direction; (16) not a sufficient invention; (17) no sufficient invention; (18) impossibility of performance; (19) specification vague and ambiguous; (20) false suggestions; (21) specification misleading; (22) specification not sufficiently distinguishing between new and old; (23) non-disclosure of the most beneficial method; (24) claim too wide; (25) insufficiency of specification;

(26) unintelligibility of specification; (27) disconformity between provisional and complete specification; (28) the alleged grant being contrary to law; (29) grant mischievous to the State; (30) prior grant; (31) grant obtained by fraud.

10. The note ought to be refused, with expenses, because the letters patent founded on had, at or prior to the commencement of this action, lapsed or become null and void or invalid through (1) expiry of their term; (2) non-payment of fees; (3) failure to supply for the public service; (4) abuse of the privileges granted.

11. If the complete specification and claims of the said letters founded on be large enough to cover the employment of [ ] for [ ], the said complete specification would claim an invention larger than and different from that disclosed in the provisional specification, and would be open to the objections of (1) want of novelty; (2) want of sufficient description of the manner in which the same is to be performed; (3) etc., and the said letters patent would be null and void or invalid (House of Lords judgment in *Bailey*, 5 R. (H. L.); *Hocking*, 6 R. P. C.; *Clydebridge*, (H. L.) 9 R. P. C. 470).

12. Assuming the letters patent libelled on to be in all respects valid, the note should be refused, with expenses, because the respondents have not infringed the same within the meaning of the patent law and the Patents, etc., Acts, 1883–88. (Cf. 5 D. 98.)

In respect whereof, etc.

(Signed) . . . . . *Respondents' Counsel.*

An action of interdict may be raised in the Sheriff Court with the required modifications (*Dubs*, 10 S. L. R.; *Bailey*, 4 R.; *Lifeboat*, 8 R. P. C.; *Cera*, 11 R. P. C.; *Rose's Co.*, 11 R. P. C.; *Gill*, 13 R. P. C.: in most of which cases there was also a conclusion for damages). In *Gill*, Ld. Young was of opinion that it was not competent to try the validity of a patent in the Sheriff Court; but the Second Division held (Ld. Young *diss.*) that it was a necessary consequence of the Sheriff's interdict jurisdiction that any competent defence should be pleadable (cf. *Harrison*, 2 R. 857) before the Sheriff. *Bailey* went to the House of Lords, and there is no suggestion in that case that there was anything wrong in the course there adopted. The peculiar phraseology of sec. 107 of the Act of 1883 seems to have been adopted with this in view. An English County Court judge cannot try a patent case, on the ground that a patent is a franchise (*R.* v. *Co. Ct. Judge of Halifax*, 8 R. P. C.), and the County Court Acts bar his jurisdiction. In *Rose's Patents*, 21 R., 11 R. P. C. (interdict and damages), the Sheriff-Substitute first decided on the question of infringement; his decision was appealed to and affirmed by the Sheriff, who remitted the case for proof on damages.

Usually, however, the action is raised in the usual way before a Lord Ordinary; and in the Bill Chamber interim interdict may be asked for, but is never granted unless the patent is free from all *primâ facie* objections, and the complainer makes a clear *primâ facie* case (*Brown*, 14 D. 826 and 828). It is a matter for judicial discretion; and if interim interdict be not granted, the Lord Ordinary on the Bills may order the defender to keep an account on full caution (*Neilson*, 4 D. 470; *Brown*, 14 D. 827; *Macnee*, 17 D. 838, 839), failing which caution, interim interdict may be granted (*Macnee*) on caution given by the complainers in common form. As to refusal in the Bill Chamber to sist third parties as respondents, see *Weir*, 11 R. P. C.; see also *Laing*, 5 R.

As to the procedure roll, it may be noted that in *Weir*, 11 R. P. C., where there was an action by Weir against Denny for interdict, and one by Worthington against Weir for reduction of Weir's patent, and the two processes had been conjoined, the interdict process was held over in the procedure roll until the reduction had been tried; and in *Jackson*, 17 R., where interdict was sought against a bankrupt for infringing a patent of his own which had passed into the hands of his trustee, and the respondent

challenged the validity of that patent, an asset of the bankrupt estate, the respondent was ordered to find caution for the expenses of the action. This is a question for the discretion of the Court.

In *Leggott*, 10 R. P. C., the complainer, by minute of restriction, restricted his ground of action to the second of two patents founded on, and the respondents put on several new pleas in law four days before the proof. In *Pickard*, 7 R. P. C., 17 R., the averment as to an ophthalmological journal supplied to Dr. Berry, on which the case came to turn, was added two days before the proof; the complainers then admitted the pincenez referred to therein were identical with their patent; and by consent the proof as to this publication was taken first, the respondent leading. In *Preston Davies*, 11 R. P. C., in the course of the proof the respondent stated he could not proceed further in the case unless he were allowed to amend his record by adding certain pleas; the case was adjourned, and counsel heard on a later day on the application to amend; and at that hearing the Lord Ordinary allowed the record to be amended, and appointed a diet for the adjourned proof, subject always to the condition of the respondent paying the complainers, before further procedure, the expenses occasioned by adjourning the proof. In *Pennycook*, 9 R., after evidence for the respondent was closed, the complainers asked for an adjournment in order to lead proof in replication as to the respondent's allegations of prior publication at a certain agricultural show; but since there was notice as to this point on the record, and the complainers had entered on that point in their evidence in chief, the motion was refused, on the ground that the complainers should have been prepared.

The earlier Scotch patent cases, for example *Neilson* v. *Houschill*, are complete studies in Scots jury law, for issues were not easy to frame, and the crop of exceptions was abundant; but this is now practically obsolete learning in patent cases, since by the Act of 1883, s. 107, there is not to be a jury in infringement cases unless the Court shall otherwise direct (cf. Ld. Cairns, at L. R. 16 Eq. 447). The provision, by secs. 28 and 107, for the assistance of the Court by an assessor specially qualified, has been a dead letter from the beginning in England; in Scotland assessors have sat in four cases: *United Horseshoe*, 2 R. P. C. (Ld. Kinnear and Prof. Fleeming Jenkin), suspension and interdict, 1884; *Mackie*, 2 R. P. C. (the same), suspension and interdict, 1885; *Gwynne*, 2 R. P. C. (Ld. M'Laren and Prof. Tait), interdict and damages, 1885; *Harvie*, 4 R. P. C. (Ld. Kinnear and Prof. Armstrong), breach of interdict, 1886; but there have been no instances since.

As to the evidence at a proof, note Ld. Watson in *Pickard*, 9 R. P. C., on the admissibility in Scotland of books regularly kept; and the doubt expressed by the Lord Chancellor (Halsbury) in *King Brown*, 9 R. P. C., as to whether the evidence of a patentee is admissible to explain what he meant by his specification. In that case Varley, the author of the anticipating specification, also produced a drawing of his own in a note-book, which drawing displayed the principle of his subsequent specification; and this was relied on throughout, though its admission was at first objected to. See *Young* in House of Lords, 9 R. P. C., as to experiments made by one party during a trial. See secs. 89 and 100 of the Act of 1883 as to certified copies or extracts from specifications, drawings, and amendments, and sec. 25 of the Act of 1888 as to Board of Trade Orders. The Museum of Science and Art, Edinburgh, seems, under sec. 100, to have taken the place of the Records of Chancery in Edinburgh under the early practice and secs. 18 and 29 of the Act of 1852, and 16 & 17 Vict. c. 115 (1853).

Specifications can be consulted there daily from 10 to 4 without payment; on pay days free admission is secured by signature in a book kept for the purpose. The Act seems to give the choice, for use in an action, of certified copies from the Patent Office, London (s. 89), or from the Edinburgh Museum (s. 100). It is, however, usual to admit at bar or by minute that the Patent Office printed copies of specifications are equivalent to the originals; but cases have occurred in which misprints were found in the printed copies: so care should be exercised. The former practice of the Patent Office was to print amended specifications, with the aid of italics and "erased type," in such a way as to show what the original wording of the specification had been; and the constant practice in the Court of Session has been to refer to this original wording, not merely for the sake of dealing with a plea of the scope of the patent having been extended or altered by the amendment (*King Brown*), but also for the purpose of aiding in the construction of the specification. Since *Moser*, 13 R. P. C. 31, 32, 33, 1896, in which the House of Lords ruled that this plea was not competent in view of sec. 18 (9) of the Act of 1883, and that the original wording could only be referred to for the purposes of construction, the Patent Office has issued amended specifications only in the form in which they stand after amendment. There seems to be some mistake in this, having in view what Ld. Watson said in that case, 13 R. P. C. p. 31, line 17; and nothing has occurred to render it incompetent or less useful to refer to the original wording for the purpose of construing the amended specification. As to the ruling in question, there seems some doubt whether it was not merely *obiter*, and not necessary for the decision in the case; and it is difficult to reconcile it with sec. 18 (8). See *Van Gelder's* case, 1890, 6 R. P. C., according to which, if the leave to amend was itself invalid, the original wording of the specification would stand; and 13 R. P. C. 440, 509, 595–597 and 668–670. Compare also sec. 39 of the Act of 1852. As to inspection, see *Russell*, 15 S. 1272, and sec. 30 of the Act of 1883. In *Neilson*, 6 D. 72, it was held that it was for the evidence of experts, not for the judge's opinion, whether the results were the same in two machines; but the Courts do not seem now to limit themselves to this view. The specification has to be construed impartially (*Harrison*, 3 R. (H. L.) 60; *Dudgeon*, 4 R. (H. L.)), the thing protected being that which is specified, though this may be coloured or disguised in the infringement (*Dudgeon*, 4 R. (H. L.) 94); and the words are to be read in their ordinary and popular sense, unless the usage of trade has given them a peculiar meaning (*Neilson*, 5 D. 113). A patent of which there has been a disclaimer may be narrowly construed (*Dudgeon*, 4 R. (H. L.)). Forms clearly inconsistent with the objects are necessarily excluded (*Neilson*, 6 D. 64) unless they are claimed. Perhaps the most important judicial interpretation of any single word is that of "near," in *Cera*, 11 R. P. C. (ships' lamps), as meaning near enough to effect the object as ascertained by practice, a term relative to the particular oil being dealt with.

The form of the judgment seems, from what was said by Ld. Rutherfurd Clark in *Montgomerie*, 11 R. P. C. at p. 635, to be a matter of considerable importance. He said during argument: "If we hold the patent bad by reason of the first claim being bad, that would not prevent you from amending; but if we held your patent bad without qualification, that would annul your patent, and you could not amend." The reference here is to the practice, when a claim has been found bad at law, of going to the Patent Office and getting that claim excised by a disclaimer under sec. 18 of the Act of 1883 and sec. 5 of the Act of 1888. This gives the patent, in

an amended form, a fresh lease of life, and practically often turns defeat into victory, by enabling the patentee to prevent any further infringement after the date of the amendment, if what remains after the disclaimer be sufficient for that purpose (see *Harrison*, 2 R. 857). It is submitted that even where the interlocutor simply sustains the respondents' plea in law that the patent is invalid, the terms of the opinions must be looked to in order to ascertain what parts of the patent have been held to be bad; and this is certainly the current practice. It has almost become current practice, in reference to important patents, to take them through a lawsuit, largely with the view of ascertaining any bad or doubtful claims, and then amending by disclaiming these (*United Horseshoe*, 6 R. P. C.); and amendment can be done even after an adverse judgment of the House of Lords (*Deeley*, 12 and 13 R. P. C.). The advantage then is that the patent is "purged" of its known defects.

The principal cases on the sections of the Act referring to amendment are the following:—On sec. 18, *Cropper*, 1 R. P. C.; *Allen*, 4 R. P. C.; *Bray*, 4 R. P. C.; *Hall*, 4 R. P. C.; *Van Gelder*, 6 R. P. C.; *Lang*, (H. L.) 7 R. P. C.; *Kelly*, 7 R. P. C.; *Andrew*, 9 R. P. C.; *Deeley*, 11 R. P. C.; *Moser*, (H. L.) 13 R. P. C.; *Armstrong's*, 13 and 14 R. P. C.: on sec. 19, *Singer*, 1 R. P. C.; *Codd*, 1 R. P. C.; *Haslam*, 5 R. P. C.; *Gaulard's Patent*, 5 R. P. C.; *Gaulard*, 5 R. P. C.; *re Hall*, 5 R. P. C.; *Meyer*, 7 R. P. C.; *Dellwik*, 13 R. P. C.; *Perkes*, 14 R. P. C.

In regard to the expenses of the action there is little to remark, because these follow the ordinary rules. In the 1835 Act, s. 6, a provision was introduced directing apportionment of the costs according to the part of the case proved at the trial, having regard to the "notice of objections" (s. 5, not applicable to Scotland, *supra*) and the "declarations," without regard to the general result of the trial. This section was not applied in Scotland, and the corresponding section (s. 43) in the 1852 Act was only applicable to the Courts in Westminster and Dublin. The corresponding section, 29 (6), of the Act of 1883 follows the same principle in reference to the "particulars of objections" which do not exist, apart from the record, in Scotland. It may be noted that there is in England at the present time a tendency to avoid the tedious and expensive taxation under the Act by a rough and ready apportionment of costs such as will approximately meet the justice of the case. In *Fletcher*, 4 R. P. C., expenses were given by Ld. M'Laren to the respondents where the few cases of admitted infringement were not really part of the issue for trial, and where on the cases really in dispute there was found to have been no infringement.

The pursuer, under sec. 31 of the Act of 1883, may, if successful, have a certificate (*Dick*, II. Div., 13 R. P. C.) that the validity of the patent came in question (not a "certificate of validity," as the newspaper advertisements call it), the effect of which certificate is that in any subsequent action for infringement the pursuer may get full solicitor and client expenses.

As to certificate of validity having come in question, see *Peroni*, 1 R. P. C.: *United Telephone* v. *Townshend*, 3 R. P. C.; *Haydock*, 4 R. P. C.; *Proctor*, 5 R. P. C.; *Spencer*, 6 R. P. C.; *U. Teleph. Co.* v. *Patterson*, 6 R. P. C.; *Automatic* v. *Hygienic*, 6 R. P. C.; *do.* v. *Combined*, 6 R. P. C.; *Delta*, 8 R. P. C.; *Boyd*, 11 R. P. C.; *Edison*, 11 R. P. C.; *Singer*, 11 R. P. C.; *Jardine*, 13 R. P. C.; *Pneumatic* v. *Chisholm*, 13 R. P. C.; *Incandescent*, 13 R. P. C. 579 (Court of Appeal not within the section, the references there being to 6 R. P. C. 45 and 12 R. P. C. 530). As to unsuccessful pursuer, see *Haslam*, 5 R. P. C. 144 and *Morris*, H. L., 12 R. P. C. 464, 465.

In the Action for Interdict and Damages the parties are called the pursuer and defendant (*Russell*, 15 S. 1270). So also in the action for Interdict and an Account of Profits. The measure of damages is the extent to which the infringing articles actually interfered with the sale of

the pursuers' goods (*United Horseshoe*, 15 R. (H. L.), without allowance for reductions of price due to the pursuers' own unreasonable lowering of the price, nor for any extra sales due to the defender's special exertions (*ib.*), but allowing for reductions into which the pursuer is forced by the infringer's selling more cheaply (*American Braided Wire*, 7 R. P. C. 152). The damages are not necessarily limited to what the pursuer would have accepted as royalties (5 D. 60). The measure of profits is the actual profit made through the use of the invention, as compared with what the defenders would otherwise probably have used under the circumstances (*Siddell*, 9 R. P. C.). The older practice was to conclude, in name of damages, for both the profits made by the infringer and any further damages suffered by the pursuer (*Neilson* v. *Houschill*, 4 D.; *Neilson* v. *Baird*, 6. D.; *Templeton*, 10 D.; in *Neilson* v. *Houschill*, the conclusions were for interdict, for account, reckoning, and payment of profits made, and for £2000 damages). This practice was not objected to in the House of Lords in the earlier cases; but in the *United Horseshoe*, 15 R. (H. L.), it was held by the House of Lords, following the English case of *Neilson* v. *Betts*, that the pursuer could not get both profits and damages, and must make his election between them. The English practice is to claim damages or, at the plaintiff's option, an account of profits: and to make the election at bar when the judgment has been pronounced on the question of infringement. It is submitted that it would still be competent to put both conclusions alternatively in the summons, as follows:—

Victoria, &c., . . . hereunto annexed: Therefore the defenders ought and should be interdicted, prohibited, and discharged, by decree of the Lords of our Council and Session, from infringing, etc.; and the defenders ought and should be decerned and ordained, by decree foresaid, to exhibit and produce a full and particular account of the whole gains and profits which they have made, or which during the pendency of this action they may make, by the [*manufacture or sale*] of any [*apparatus or machine constructed*] as aforesaid, in infringement of the said letters patent, and to make payment of the sum of £1000, or such other sum as may be found to be the amount of the said gains and profits: and in the event of the defenders failing to produce the account as aforesaid, they ought and should be decerned and ordained to make payment to the pursuer of the sum of £1000, which shall in that case be held to be the amount of the said gains and profits: or otherwise the defenders ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £1000 sterling, or such other sum as shall be found to be due to the pursuer, on account of loss and damages in the premises, reserving to the pursuer all further or other claims competent to him in the premises against the defenders: and the defender ought, etc. [*expenses*]. Our Will, etc. (*Gwynne*, 13 R. 684).

Condescendence.— In consequence of and by the said infringements the pursuer's business has been seriously interfered with and injured. The defenders have by the said infringements made large profits, and the pursuers have also thereby suffered serious loss. The sum sued for does not exceed reasonable compensation for the loss so caused to the pursuers, and as the defenders refuse to pay the same, or any sum, to the pursuers, the present action is necessary (*Hutchison*, 15 R. 644).

Pleas in Law for Pursuers.—1. The pursuer is in the circumstances entitled to interdict for the protection of his patent rights. 2. The defenders having infringed the said letters patent, No. of 18 and No. of 18 , to the loss, injury, and damage of the pursuer (*Russell*, 16 S. 1155), they are liable in reparation therefor to the pursuer. 3. The sum sued for on account of loss and damages being a reasonable amount of compensation in the circumstances, the pursuer is entitled to decree therefor as concluded for, with expenses, or otherwise the pursuer is entitled to recover profits as concluded for, with expenses. *In respect whereof, etc.*

Pleas in Law for Defenders.—1. No title to sue. 2. The pursuers' averments not being relevant or sufficient in specification of the particulars of the alleged infringement, the action should be dismissed, with expenses. 3. The material averments of the pursuers being unfounded in fact, the defenders should be assoilzied, with expenses. 4. The alleged letters patent being null and void or invalid in respect of [ ], the defenders should be assoilzied, with expenses. 5. Assuming the said letters patent founded on to

be valid, the defenders, not having infringed the same, should be assoilzied, with expenses. 6. Assuming the validity of the said letters patent as amended, the pursuers are not entitled to any damages for any use of the invention therein described and claimed prior to the of 18 , the date of the amendment of the said letters patent, in respect that the said letters patent were invalid prior to the said amendment, and also in virtue of the 18th section of the Patents, etc., Act, 1883. 7. The alleged infringements being all alleged to have been committed, having taken place, before the amendment of the said amended specification, and the original claim in the said specification not having been framed in good faith and with reasonable skill and knowledge, under sec. 20 of the Patents, etc., Act, of 1883 no damages can be given, and the defender should be assoilzied, with expenses. 8. The pursuers having suffered no damage in consequence of the defenders' actings, decree of absolvitor should be pronounced, with expenses. 9. In any view, the pursuers not having suffered loss to the extent condescended on, the defenders are not liable in damages as concluded for. 10. [Any pleas of extenuation or mitigation, etc., 5 D. 100.] 11. The defenders not having made any profit through the use of the said alleged invention, are not bound to produce an account of profits as concluded for. *In respect whereof, etc.*

The Action for Damages alone is very rare. An example is furnished by *United Horseshoe Nail Co.*, 15 R. (H. L.) 45, in which an action for damages (with the conclusion "decerned and ordained, by decree of the Lords of our Council and Session, to make payment to the pursuers of the sum of £10,000 sterling," and for expenses) was brought after judgment had been given for the company as complainers in an action of suspension and interdict against the same defenders, and was taken by consent before the Lord Ordinary without a jury; and *Hutchison*, 15 R. 644, in which the condescendence narrated profits to the defenders as well as loss and damage to the pursuers, but the summons concluded for damages and expenses, without any alternative conclusion for profits. In the latter case Ld. Young doubted whether a general averment of use and infringement was relevant to found an action for damages; and in the same case Ld. Kinnear, in order to save the expense of a proof, closed the record without allowing parties a proof of their averments, and decided the case on the construction of the specification alone; but the Second Division held that this was wrong procedure, "recalled the interlocutor, and remitted to the Lord Ordinary to proceed" in the usual way, either with a jury or by proof before answer before himself as he might see fit. Compare the decision in *Harrison*, 2 R. 857, that in a jury trial if the judge is satisfied on the true construction of the specification that the patent is bad in law, he ought to state his opinion to that effect to the jury and direct them to find a verdict for the defenders, provided the defenders ask him to do so.

It sometimes becomes necessary to bring an action for breach of interdict. In that case the procedure is by a Petition and Complaint (see Session Papers, *Harvie*, No. 16, 13 Nov. 1886) of Breach of Interdict, with the formal concurrence of the Lord Advocate (cf. *Gillespie*, 23 D.). After narrating the circumstances, the petition runs—

May it therefore please your Lordships to grant warrant for serving this petition and complaint, and the deliverance to follow hereon, on the said [*name the defender*], and to appoint him to lodge answers thereto, if he any have, within a short period after service; and thereafter on advising the petition and complaint, with or without answers, and after such procedure as may be necessary, to find that the said [ ] has been guilty of contempt of Court and breach of interdict, and in respect thereof to inflict upon him such punishment [by fine, or imprisonment, or otherwise] as to your Lordships shall seem proper, in order to deter him and others from committing the like offence in time coming; and further, to find the said [ ] (jointly and severally) liable in the expenses of this application, and of all proceedings to follow hereon; or to do further or otherwise in the premises as to your Lordships shall seem proper. *According to justice, etc.* (*Signed by Counsel.*)

Answers.—1. The averments of the petitioner are irrelevant and wanting in specification.

2. The acts founded on not being the acts of the defender, but of
3. The said [*valves, etc.*] not constituting a breach of the said (interim) interdict, the petition and complaint ought to be refused, with expenses. *In respect whereof, etc.*

(*Signed by Counsel.*)

So long as the patent has not been amended or altered, the procedure by way of petition and complaint, not a new suspension and interdict (3 R. 604), is the proper procedure where the unsuccessful respondent in a suspension and interdict (*Dudgeon*, 11 M.) is alleged to have been infringing the letters patent by a modification of the construction previously employed by him (*Dudgeon*, 3 R. 604, 974, 4 R. 256, 4 R. (H. L.) 88; *Harvie*, 14 R. 73, referring to *Dudgeon* in the House of Lords); and if the respondent has, in the opinion of the Court, a substantial question to try as to whether his new construction is really an infringement or not, the Court will not impose a heavy penalty (£5 and costs in *Harvie*, 14 R. 7, 4 R. P. C.) in the event of his being again unsuccessful. Where the alleged infringer has taken a partner, the partner may be brought into the breach of interdict proceedings as an aider and abetter in the breach (*Dudgeon*, 3 R. etc.; *Harvie, ubi supra*). In *Dudgeon* the Inner House remitted to the Lord Ordinary (A. S., 11 July 1828, s. 86) to try the question of breach of interdict before himself without a jury (on the ground that questions of contempt of Court were for the Court, not for a jury), reserving all questions of expenses; and in *Harvie* it again remitted in the same way to the Lord Ordinary, who sat with an assessor (Prof. Armstrong). Breach of interdict procedure is not proper where there has been, since the interdict, an amendment of the specification, in which case there must be a new action (*Dudgeon*, 4 R. (H. L.) 88, 90, 95, 99); and it is not competent in such procedure to try the question of validity of the patent (*Harvie*).

The Action of Reduction of a Patent was introduced by the 1852 Act, ss. 35 and 43, and seems to be competent in Scotland only in the Court of Session. The older English procedure was that, after an inquiry on the common law side of the Chancery Court, an order might be pronounced calling in ("revoking") the patent, that it might be cancelled by the Lord Chancellor, and the seals cut off by him, in virtue of his non-judicial jurisdiction in matters relating to the Great Seal. It is conceivable that a similar order might have been pronounced in Scotland, the Lord Chancellor being Lord High Chancellor of Great Britain; but no case arose. The first case under the 1852 Act was *Todd*, 21 D. 7, 31 Sc. Jur., in which it was laid down that the summons for reduction ought not to contain conclusions affecting private rights and interests only (also 23 D. 1364); and the next was *Gillespie*, 23 D. 1357, in which stress was laid upon the necessity of the Lord Advocate's concurrence being given upon just cause only, and not a formal concurrence through his clerk. The next case was under the 1883 Act, *King Brown*, 17 R. 1266, 19 R. (H. L.) 20, in which the action of reduction was brought by way of reply to threats of proceedings for infringement, and the patent was reduced; and this was followed by *Montgomerie* and *Worthington*, both in 11 R. P. C.

The action of reduction proceeds on a summons charging the defenders to compear and "bring with them, exhibit, and produce the said pretended letters patent" and relative documents (specified), "to be seen and considered by our said Lords, and to hear and see the same, with all that has followed or may follow thereon, reduced, retreated, rescinded, cassed, annulled, decerned, and declared, by decree of our said Lords, to have been from the beginning, to be now and in all time coming, null and void, and of no avail, force, strength, or effect in judgment, or outwith the same in time coming, and the pursuers reponed and restored thereagainst *in integrum* for the reasons . . . . hereunto annexed: Therefore, and for other reasons to be proponed at the hearing

thereof, the said pretended letters patent (etc.), with all that has followed or may follow on the same, ought and should be reduced, etc., and the pursuers reponed and restored thereagainst *in integrum*: And [expenses]." "[On just cause shown] I concur. [*Signed by the Lord Advocate.*]" [See *King Brown*, Session Papers, 5 April 1892, H. L. No. 3.]

All the grounds on which the validity of a patent may be challenged by way of defence in an action for infringement are available as grounds of attack in an action of reduction. No action for reduction can be taken against a patent assigned to and certified for secrecy by the Secretary of State (Act 1883, s. 44 (9)). A practice has recently grown up in England of suspending a decree of revocation for a certain period, in order to allow an opportunity for amendment by disclaimer (*Deeley*, (H. L.) 13 R. P. C. 581).

The provisions of the Act of 1883, with special reference to actions of reduction, are:—"109. (1) Proceedings in Scotland for revocation of a patent shall be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest, with his concurrence, which concurrence may be given on just cause shown only. (2) Service of all writs and summonses in that action shall be made according to the forms and practice existing at the commencement of this Act." (Cf. s. 26 (4).)

Of the Action to Restrain Threats of proceedings for infringement, which was introduced by sec. 32 of the Act of 1883, there has not yet been any case in Scotland. Under the previous law there was no wrong committed in threatening to take proceedings against all or any persons concerned in infringing a patent, which so long as it stood was *primâ facie* valid (cf. *Halsey*, 15 and 19 Ch. D., and *Wren*, L. R. 4 Q. B.); but under the section such threats can be restrained at the instance of any person aggrieved, unless the patentee proceeds with due diligence in an action against somebody for infringement (see *Sugg*, 2 R. P. C.; *Challender*, 4 R. P. C.; *Kurtz*, 5 R. P. C.). In the case of *King Brown*, 17 and 19 R., it at first appeared that the course followed would be to take proceedings to restrain threats; but instead of doing this and awaiting an action for infringement, the bolder course was taken of attacking the Brush Co.'s patent in an action of reduction. The form a threats action would assume would be that of an ordinary suspension and interdict to prohibit, discharge, and interdict the proceedings complained of. Damages may be concluded for if there is actual damage (cf. *Driffield*, 31 Ch. D. 638; *Kurtz*, 5 R. P. C. 177). In *Kurtz* it was held that the invalidity of the defendant's patent may be a ground for the plaintiff in a threats action.

In *Montgomerie*, 11 R. P. C. 221, the defender Paterson was alleged to have slandered Montgomerie's patent and his process in the trade journals and by circulars, and the summons against him concluded for £5000 damages for infringement and for Slander of Title. Ld. Kyllachy held in that case, that if there be express or implied malice the pursuer could have interdict, or at least such special damage as he might prove; but malice is not to be inferred from mere falsity, unless the person alleged to be slandering the patentee's title had no legitimate interest to speak in defence or furtherance of his own rights or fancied rights; the intention to injure must be shown (see *Gillespie*, 38 Sc. Jur. 381; 5 M. (H. L.) 106).

Actions against Licensees are usually actions on the licence, that is, *ex contractu*. It occasionally occurs, however, that a substantial question of infringement has to be tried against licensees, as in *Young*, 8 and 9 R. P. C. There the licensees had put up a modified form of the Young and Beilby retort, and refused to pay royalties on this form: the patentees sued them for royalties in an action of account, reckoning, and payment under their licence; the question was whether they had used the invention (see *Few*, 9 S. 733). If the licence be for an indefinite term, it can be repudiated at

any time (*Redges*, 10 R. P. C.); but during the continuance of the licence, even though the patent be or become void (*Siemens*, 9 R. P. C.; *Mills*, 10 R. P. C.), a licensee cannot challenge the validity of the patent, unless on very strong grounds of fraud (*Todd*, 31 Sc. Jur. 725); he is, however, entitled, when sued on the licence, to ascertain the ambit of the patent, and to show that, on the true construction of the specification, he is not acting within the prohibition of the letters patent (*Clark*, L. R. 2 App. Ca.; *Couchman*, 1 R. P. C.; *Young*, (H. L.) 9 R. P. C.; *Neilson*, 1 Bell's App. 219, a leading case on licences, in which the licence had been revoked, and an action of declarator raised, but not gone on with, to have it found that this revocation rendered the licence null and void. See also this case (1 Bell's App. 250) as to summary diligence against licensees.

As to the duty of a law agent when money is being lent on the security of a patent, see *Stewart*, 13 R. 1062. A patent is moveable property though it has a *tractum temporis* (*Adv.-G.* v. *Oswald*, 10 D. 969, legacy duty case), the destination being to executors, administrators, and assigns. As to partnership in a patent and declaration of trust, see *Laird*, 12 R.

As to letters patent for a theatre, see *Yuille*, 15 R.

Pater est quem nuptiæ demonstrant. — The maxim *Pater est quem nuptiæ demonstrant* has long been recognised in the law of Scotland, and a child born in lawful wedlock, or within ten months of the dissolution of marriage, is presumed to be legitimate (Stair, iii. 3. 42; Ersk. i. 6 49). "Birth is a fact that can be proved by witnesses, but conception is a fact that can never be proved. To suppose that a man claiming to be served heir to his ancestor must, before making out his legitimacy, stand trial for his mother's delinquencies; that until her character come out pure and immaculate, he is to be denied his service; or that under such circumstances a proof should be allowed of her whole conduct and gallantries in a licentious age—the consequences would be monstrous" (*Routledge*, 19 May 1812, F. C., per Ld. Pres. Blair). The rule laid down in the maxim is merely a *presumptio juris*, and may be displaced by evidence showing that the child could not be the issue of the husband. Thus, if it be proved that the husband was impotent, the wife's child will not be held to be legitimate (*Sandy*, 1823, 2 S. 453). The presumption will also be overcome if it be proved that the husband was absent from his wife during the whole of the period within which conception must have taken place. According to the former law in England, it was requisite that the husband should be absent *beyond the seas*, but that was never the law in Scotland; and from the more recent decisions it may be inferred that the presumption *pater est* may be overcome by any evidence which is sufficient to prove that sexual intercourse had not taken place between the spouses (*Morris*, 1837, 5 Cl. & Fin.; *Brodie*, 1872, 463, 11 M. 142). In a recent case, the Court held that the presumption was rebutted, though the husband and wife had resided in the same village at the time of the child's conception (*Steedman*, 1887, 14 R. 1066; see also *Tennant*, 1890, 17 R. 1205; *Coles*, 1895, 22 R. 716; *Webster*, 1855, 17 D. 494; *Gardner*, 1876, 3 R. 695, 4 R. (H. L.) 57). If it be proved that the husband has been absent for more than ten months (authorities differ as to whether these should be lunar or calendar months) before the birth of the child, or has been absent and returns to his wife within six lunar months of the birth of the child, the child is not held to be legitimate. Declarations of the spouses as to the legitimacy of the children are looked upon with great caution, though

general evidence as to the conduct of the parents is always admissible and important. In a declarator of legitimacy, direct evidence of the spouses will not be admitted to prove that there was no intercourse at the time of the child's conception, but statements made by the spouses in matters unconnected with the action are, like evidence of the spouses' conduct, admissible (*Tennant*, 1890, 17 R. 1205). The presumption *pater est* applies as to the legitimacy of a child born shortly after marriage if the husband knew that the woman was pregnant when he married her. In a recent case it was held that the evidence had not displaced the presumption, though the spouses both stated that there had been no ante-nuptial connection between them and the alleged father admitted that at a date prior to the date of conception he had had intercourse with the mother (*Kerrs*, 1890, 18 R. 365). The maxim has been held not to apply to a child who was born out of wedlock, but whose alleged father afterwards married the mother (*Innes*, 1835, 13 S. 1050).

[Fraser, *Parent and Child*, ch. i. See AFFILIATION; BASTARD; PRESUMPTIONS.

Paternity.—See AFFILIATION; PATER EST QUEM NUPTIÆ DEMONSTRANT.

Patria potestas, in Roman law, is the power which a Roman father had over his lawful children, as well as over his grandchildren, or other descendants, through sons. In a Roman family only one person, the *pater-familias*, was *sui juris*; all the other members of the family, *filii-familias* and *filiæ-familias*, were *alieni juris* (*q.v.*). The power of the *pater-familias* extended over those members of his family who were grown up, as well as over those of tender years, and in this respect the *patria potestas*, as developed at Rome, was, as observed in the *Institutes* (i. 9. 2.), a right peculiar to Roman citizens (*jus proprium civium Romanorum*).

The *patria potestas* was acquired naturally by the birth of children in a lawful Roman marriage (see MATRIMONIUM), and civilly by adoption (see ADOPTION) and legitimation (see LEGITIMATION). The children of a *non justum matrimonium* and *liberi naturales*, the offspring of *concubinatus*, were not in their father's *potestas*. Bastards, *spurii seu vulgo concepti*, were treated as if they had no father.

The effect of the *patria potestas*, as regards the person of children, was in early times to give the *pater-familias* absolute power. The father, as domestic judge, had the power of life and death over his children (*jus vitæ et necis*), and he could sell them as slaves. These powers were checked by the influence of the family council (*Liv.* 1. 26) and by the dread of a *nota censoria*, the mark of the censor's disapprobation of an abuse of his power. In the course of time the father's absolute powers were directly limited by the law. The XII. Tables contained a provision that a father who thrice sold his son into bondage, *in mancipio*, thereby forfeited his *patria potestas*; and, in later times, this mode of terminating the *potestas* was employed fictitiously in cases of adoption and emancipation. In imperial times the genuine handing over of a child *in mancipio* occurred only in cases of noxal surrender, *i.e.* where a child who had committed a delict was handed over to the injured party; and the noxal surrender of a son or daughter was finally abolished by Justinian (*Inst.* iv. 8. 7; *Dig.* 43. 29. 3. 4). Early in the empire the power of life and

death was taken from the father, so that he could not kill a son unless the latter had been tried before the *præfectus* or *præses* and convicted of a crime deserving death (*Dig.* 48. 8. 2). Constantine, in A.D. 318, declared the father who should kill his son to be guilty of murder (*Cod.* 9. 17). The father's power of chastisement was also brought within moderate limits (*Cod.* 8. 47. 3). In the latest law, a father could not even give his son or daughter to another by adoption without the child's consent (*Inst.* i. 12. 8). Still the general control which a Roman father was entitled to exercise over his son's actions, remained greater than that which is recognised in modern law, *e.g.* he could, if so disposed, forbid his son's marriage. A father who was deprived of his child by a third party, could recover him by a *vindicatio*, as he might any other property, and he could also obtain an interdict, *interdictum de liberis exhibendis*, against the party who was depriving him of his rights. In virtue of the *potestas*, the father might, by testament, appoint a tutor for his children, if, on his death, the children became *sui juris*.

The effect of the *patria potestas*, as regards the property of children, was in early times to give the *pater-familias* absolute property in everything acquired by the child. A *filius-familias*, though he was capable of acquiring, for instance, by contract, acquired solely for his father, and was indeed practically without proprietal capacity. The history of the development of the law, by which this rigour was relaxed and *filii-familias* were allowed to have property of their own, is traced under the head of *peculium* (see PECULIUM). Between *pater-familias* and *filius-familias* no civil obligation could exist; so that neither of them could have a right of action against the other. But a natural obligation could subsist between them (see OBLIGATION IN ROMAN LAW). Lawful children had a right to aliment from their parents, and, failing them, from their grandfather. The obligation was reciprocal, the children being bound to maintain their parents when in want (*Dig.* 25. 3; *Cod.* 5. 25).

It is noteworthy that in all matters pertaining to the *jus publicum*, a *filius-familias* laboured under no incapacities. He could vote in the *comitia*; he could fill any magistracy; he could attain the highest honours of the State or command an army in the field. Thus, too, he could act as *tutor*, for *tutela* was part of the *jus publicum* (*Dig.* 1. 6. 9). In the latest period of the law, when a son attained certain high civil or ecclesiastical offices, he ceased to be under the *patria potestas*, irrespective of the will of his father, but retained his rights of succession (*Inst.* i. 12. 4; *Nov.* 81).

The *patria potestas* was extinguished either *ipso jure* in certain circumstances or by a voluntary act of divestiture. The death of the *pater-familias* released from the *potestas* all his children, and also such of his grandchildren as were subject to his immediate *potestas*, *i.e.* whose father was dead or had been emancipated. The *potestas* also came to an end when either the father or son suffered *capitis deminutio maxima*, the loss of freedom, or *capitis deminutio media*, the loss of citizenship. In the case of a daughter, it ceased when she entered into a marriage involving *conventio in manum*, or became a vestal virgin. The *patria potestas* might, further, be terminated directly by a voluntary act of divestiture on the part of the father. The recognised method of accomplishing this was by *emancipatio* (as to the process and legal effects of *emancipatio*, see EMANCIPATION). In the time of Justinian, a child could not be emancipated against his will (*Nov.* 89, c. 11 pr.).

By adoption the *potestas* of the father might be transferred to another (see ADOPTION). Where a father was adrogated, he, together with the

children who had hitherto been in his power, passed into the power of his adoptive father (see ADROGATION).

As to the *patria potestas* in Scots law, see PARENT AND CHILD; FORISFAMILIATION; ALIMENT.

Patronage.—The right of patronage, the chief characteristic of which is the *jus præsentationis*, or right to present a duly qualified person to an ecclesiastical benefice, was recognised at an early period in the history of the Church. Originally the right was acquired by one who had founded a church, by building or endowing it, or giving the land upon which it was built. The right came afterwards to be claimed by persons of influence living in the neighbourhood of churches, although they had done nothing towards founding or endowing them. Prior to the Reformation the Pope claimed the right of patronage of all churches which had no private patrons, and after the Reformation this right of universal patronage was assumed by the Crown.

According to our law, patronage was in its origin a personal right or privilege, but was capable of being feudalised, the usual symbols of infeftment being a Bible or psalm-book and the keys of the church (Stair, ii. 8. 35; Ersk. i. 5. 15).

Besides the *jus præsentationis*, the right of a patron included a right to a seat in the church, and burial in the church or churchyard, and a right, regulated by various statutes, to administer or even appropriate the fruit of a benefice during a vacancy (Ersk. i. v. 13). The *jus præsentationis* has since the Reformation been the occasion of much dissension within the Church, and of conflict between the Church and the civil authorities. Numerous Acts of Parliament have been passed dealing with the matter, and the rights of the patron have been fully considered by the Courts in the important cases which led up to the disruption of the Church in 1843. See the Auchterarder case (*Earl of Kinnoull*, 1838, 16 S. 661, affd. 1839, Macl. & R. 220; 1841, 3 D. 778, affd. 1842, 1 Bell's App. 662; 1843, 15 S. J. 381), the Lethendy case (*Clark*, 1839, 1 D. 955), and the Strathbogie case (*Edwards*, 1840, 3 D. 283; 1843, 15 S. J. 375 and 423). The right was finally abolished by the Church Patronage Act, 1874 (37 & 38 Vict. c. 82), which vested the right of electing ministers to vacant churches or parishes in the congregations of such churches or parishes, and made provision for the payment of compensation to the patrons in respect of the operation of the Act, provided a petition therefor were presented to the Sheriff within six months of the passing of the Act. The Act also provides that if no appointment has been made by the congregation within six months of the occurrence of a vacancy, the right to appoint shall devolve upon the Presbytery (*Stewart*, 1878, 6 R. 178; *Cassie*, 1878, 6 R. 221).

[JUS DEVOLUTUM; see also Dunlop, *Parochial Law*, 185; Duncan, *Parochial Eccl. Law*, 76; Black, *Parochial Eccl. Law*, 138.]

Pawn.—See PLEDGE; PAWNBROKING.

Pawnbroking. — Pawnbroking is a species of pledge under statutory regulations. The law relating to this transaction was consolidated by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93). The term "pawnbroker" signifies every person who carries on the business of taking goods in pawn (see *Hunter*, 1883, 11 R. J. C. 14), and the provisions of the Act are extended to every person who keeps a shop for the purchase or sale of

goods on the understanding that they may be afterwards redeemed or repurchased on any terms (ss. 5 and 6). Except in the case of forfeitures or penalties by their own neglect, the Act applies to executors and administrators of deceased pawnbrokers (s. 7). Acts and deeds of his apprentices and servants are deemed those of the pawnbroker himself (s. 8), and the rights conferred on pawnbrokers transmit to their executors and assignees (s. 9). The Act does not apply to loans of sums above £10 (s. 10). It is a fraud to advance more than £10 on one article by dividing the sum into several tickets of £10 each (*Ross*, 1826, 5 S. 192). And in regard to loans of sums above 40s., but below £10, power is given to the pawnbroker, subject to certain specified conditions, to contract specially with the pawner, excluding the provisions of the Act (s. 24). A pawnbroker is guilty of an offence if he does not keep his books in the form of Sched. III. annexed to the Act (s. 12); or if he fails to exhibit his name, with the word "pawnbroker," over the outer door of his shop; he must also have tables of rates legible from each box in his shop (s. 13). Before the Act it was held that a secret partnership in a pawnbroking business was illegal and void (*Gordon*, 1845, 4 Bell's App. 254; *Fraser*, 1853, 1 Macq. 392).

A pawnbroker is bound to give pawn-tickets for pledges (s. 14), and can only take profit on a loan on a pledge at the rate specified in Sched. IV. annexed to the Act. He is bound, if required, at redemption to give a receipt for the amount of loan and profit (s. 15). All pledges continue redeemable for one year, with seven days of grace (s. 16) (see *Lundie*, 1862, 24 D. 620). Pledges for 10s. or under, if not redeemed in time, become the absolute property of the pawnbroker (s. 17). Pledges above 10s. are redeemable until sale (s. 18); which must be by public auction, at which the pawnbroker may bid (s. 19). At any time within three years after the auction at which such a pledge is sold the pawn-ticket holder may inspect the sale book and auction catalogue (s. 21); and if the pledge appear to have been sold for more than the amount of the loan and profit due at the time of sale, the pawnbroker shall pay the surplus to the ticket holder, deducting the expenses of sale. But if, within twelve months before or after that sale, the sale of another pledge or other pledges of the same person has resulted in a deficit, the pawnbroker may set off the deficit against the surplus, and pay the balance (s. 22). Omission of these duties is an offence on the part of the pawnbroker (s. 23). The pawnbroker may make a special contract excluding the Act in respect of a pledge on which he lends more than 40s., provided (1) he deliver a special contract pawn-ticket signed by himself, and (2) the pawner sign a duplicate thereof: neither principal nor duplicate being subject to stamp duty (s. 24). But this special contract pawn-ticket does not exclude the common-law right of a pawnbroker to recover the balance due to him after sale of the pledge for less than the amount of the debt (*Jones*, 1889, 24 Q. B. D. 269). The pawnbroker is bound to deliver the pledge on production of the pawn-ticket, the holder being presumed to be the person entitled to redeem (s. 25). This action, however, only governs the rights between pawnbroker and customer; it does not affect the rights of the true owner of an article pledged without his knowledge or consent (*Singer Manufacturing Co.*, 1879, 49 L. J. Ex. 224; cf. *Brown*, 1880, 7 R. 427). In the general case a pawnbroker is not bound to deliver the pledge unless the pawn-ticket is delivered to him (s. 26). In case of a pledge being destroyed (*Scoular*, 1862, 34 Jur. 302), or damaged by fire, the pawnbroker is liable for the value of the pledge, less the loan and profit, the value being the amount of loan and profit plus 25 per cent. on the amount of the loan (s. 27). The pawner is entitled to compensation

for depreciation of the value of his pledge if he can show that it was due to the pawnbroker's fault (s. 28). Protection of owners and of pawners not having tickets is secured by provisions that the pawnbroker shall deliver to such a person a declaration form, to be declared and signed before a justice of peace, which, on delivery within three days to the pawnbroker, entitles the applicant to the same rights as if he had produced the pawn-ticket, and indemnifies the pawnbroker for not delivering the pledge to any person within the same period (s. 29). A court of summary jurisdiction may order delivery to the owner of property unlawfully pawned, with or without payment to the pawnbroker of the amount of his loan (s. 30). A pawnbroker neglecting or refusing to deliver a pledge without reasonable excuse is guilty of an offence under the Act (s. 31). He is also prohibited from (1) taking an article in pawn from any person appearing to be under twelve years of age, or intoxicated; (2) purchasing or taking in pawn or exchange a pawn-ticket issued by another pawnbroker; (3) employing any servant or apprentice under sixteen to take pledges; (4) carrying on his business on a Sunday or day appointed for public fast, humiliation, or thanksgiving (it being lawful in Scotland to transact pawnbroking business on Good Friday or Christmas Day (s. 56); (5) purchasing any pledge in pawn with him except at public auction; (6) suffering any pledge in pawn with him to be redeemed with a view of his purchasing it; (7) making any contract with the owner or pawner of any article for the purchase, sale, or disposition thereof within the time of redemption; (8) selling or otherwise disposing of any article pawned, except as provided by the Act (s. 32). Unlawful pawning of goods not the property of the pawner renders the pawner liable on conviction to forfeiture of a sum not exceeding £5 plus the value of the pledge: the forfeit sum going to the injured party, or to the poor of the parish on his declining it (s. 33). If anyone (1) offers to pawn an article of which he cannot give a satisfactory account of his acquiring possession, or (2) gives false information regarding the property of the article, or his name and address, or that of the lawful owner of the article, or (3) attempts to redeem an article which he has no title to do, he is guilty of an offence under the Act. In such a case the person or the article, or both, may be given into custody by the pawnbroker, and the person shall be dealt with according to law. The justice may grant the pawnbroker a certificate of compensation, which has the same effect as an order of Court (s. 34). The question whether a pawnbroker has reasonable suspicion that an article has been clandestinely obtained is one for the judge (*Howard*, 1888, 20 Q. B. D. 558). A pawnbroker is prohibited from taking in pawn any linen or apparel or unfinished goods or materials intrusted to clean, mend, or finish, and on conviction is liable to forfeit a sum not exceeding double the loan, and to restore the pledge (s. 35). In such a case a search warrant may be obtained by the owner on satisfying the justice to the effect of an offence under sec. 35 having been committed (s. 36). Every pawnbroker must take out an annual excise licence (£7, 10s.) for each shop kept by him. If a person acts as a pawnbroker without having such a licence in force, he is liable to a fine of £50 (s. 37). A single offence is sufficient under this section to render an offender guilty (*Hunter*, 1883, 11 R. J. C. 14). The Court may direct that a licence shall cease to have effect on a pawnbroker's being convicted of fraud in his business (s. 38). Licences are not to be granted without a certificate under the Act, but it is not necessary for any person, being at the commencement of the Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors, to obtain such a certificate (s. 39). This exemption of a pawnbroker already licensed is not confined

to the business which was then been carried on by him, but is general; and therefore such a licensed pawnbroker, his executors, etc., can open a new business, on payment of the licence duty, without a certificate (*Ohlson's* and *Garland's* cases, [1891] 1 Q. B. 485). Certificates are granted by justices of the peace (s. 40) in the form of Sched. VI. annexed to the Act, and remain in force for one year (s. 41). Notice of application for certificates must be sent, twenty-one days before the application, to the inspector of the poor of the parish and superintendent of police; and within twenty-eight days before application a notice must be fixed for two Sundays at the church door (s. 42). It can only be refused on the ground of failure to produce evidence of good character, or that the place of business is in a neighbourhood frequented by thieves, or that the regulations with respect to notice have not been complied with (s. 43). Forgery of a certificate, or of use thereof, entails a fine not exceeding £20 or six months' imprisonment; and a forged certificate is void, and the user thereof is debarred from obtaining a certificate thereafter (s. 44).

Except where specified, a £10 fine is the maximum for conviction of an offence against the Act (s. 35). Penalties not directed to be otherwise applied may be applied, in discretion of the Court, (1) where the complainer is the aggrieved party, one half to him; (2) where he is not, only such part, if any, as the Court thinks fit (s. 46). Justices are given power of awarding amends for frivolous information, except in cases of offences relating to licences (s. 47). It is an offence for common informers to compound, delay, or withdraw information (s. 48). Pawnbrokers have power to give into custody persons offering counterfeit, altered, or forged pawn-tickets (s. 49). A pawnbroker is bound to produce business books and papers when required by the Court (s. 50). A pawnbroker guilty of an offence against the Act (not being an offence against the licensing provisions) does not lose his lien on or right to the pledge, or to loan and profit, nor is his contract thereby rendered void (s. 51). The Court for enforcing this statute is that of summary jurisdiction, viz. the Sheriff Court, Justice of Peace Court, or any magistrate to proceedings before whom the provisions of the Summary Procedure Act of 1864 may be applied (ss. 45, 52, 56). Right of appeal against a conviction, or the refusal of a certificate for a licence, is given to an aggrieved party to the next Circuit Court of Justiciary, or, if there are no Circuit Courts, to the High Court of Justiciary (ss. 52, 56). No order or conviction against which appeal is authorised shall be quashed for want of form (s. 53). A warrant of commitment on a conviction shall not be held void by defect therein if there is a valid conviction to maintain the warrant, and it is alleged therein that the party has been convicted (s. 54). Persons executing the Act are protected (s. 55). A pawnbroker is not "a mercantile agent" in the sense of the English Factors Act, 1889 (*Hastings*, [1893] 1 Q. B. 63). As to the alienability of a pawnbroker's interest in pawned goods, see *Rollaston*, 1887, 34 Ch. D. 495, and cases there cited.

Payment being a form of discharging obligations the general rules of contract law apply, and the time, mode, and conditions of payment are regulated by the terms of each particular agreement (see OBLIGATIONS). To extinguish an obligation to pay money, payment must be made by the true debtor, or by one acting on his behalf, or out of his funds, to the true creditor or his representative.

Although in certain cases payments made by a debtor in good faith to one not truly his creditor result in a discharge of the debt, yet it will be

found on examination that in all such cases there existed the element of actions or neglect on the part of the true creditor which misled the debtor into paying the wrong person, and so barred the creditor from seeking a second payment (see Bona Fides; cf. *Pattison*, 1886, 13 R. 550). In every case it is essential to a valid discharge that payment be made to the true creditor (*Alexander*, 1826, 5 S. 185; *Donaldson*, 1833, 11 S. 740; *Duncan*, 1851, 13 D. 518; *Falconer*, 1871, 9 M. 212).

The fact of payment must be proved by writing (which need not be either holograph or tested (*M'Laren*, 1869, 8 M. 106)), except in the case of ready-money transactions (Bell, *Prin.* 565; *Shaw*, 1877, 5 R. 245); and the maxim *Chirographum apud debitorem repertum præsumitur solutum* states the rule of evidence which regulates the presumption arising from possession of a writ discharging debt. "But although that maxim is of great weight, its effect may be taken off by evidence that the document came into the hands of the debtor in some other way and for some other purpose. On that point Mr. Erskine says (iii. 4. 5): 'But it may be elicited by positive evidence that the ground of debt came into the hands of the debtor otherwise than by the creditor's consent.' He does not indicate that the evidence is to be of a limited character, or that the only proof is writ or oath" (per Inglis, L. P., *Henry*, 1884, 11 R. 713). In this case it was averred that a receipt had come accidentally into the debtor's hands through the carelessness of a clerk who, calling for payment, had failed to find the debtor at home, and had left the receipt in his house on the understanding that the money would be sent. The creditor was allowed to prove this averment *prout de jure*. So too in *Webster*, 1819, 19 F. C. 612; *Edward*, 1823, 2 S. 341. On the other hand, it is not competent for a creditor, while admitting that he delivered a receipt to his debtor, to maintain that it does not represent the passing of money (*Anderson*, 1845, 7 D. 265).

A debt is presumed to have been paid where it falls due periodically, and three consecutive discharges are produced subsequent in date to the date when the instalment claimed fell due (Ersk. iii. 4. 10; Stair, i. 18. 2). Payment by a third party does not discharge the debtor, notwithstanding a presumption, *in dubio*, that such disbursements have been made out of the debtor's funds (per Ld. Gifford in *Welsh*, 1878, 5 R. 542; Ersk. iii. 4. 6). A receipt in the hands of a third party is an implied mandate to him to receive payment, "but if at the same time the creditor receives the advance from the third party, the mandate truly acquires in the hands of that third party the character of a mandate *in rem suam*, which the creditor is not entitled to recall, and which he is bound to confirm in so far as it is defective as an actual title to recover payment" (per Ld. Fullerton in *Wood*, 1848, 11 D. 254). This was a case where the law agent of a lender on heritable security had advanced to his client the interest on his loan as it fell due from term to term. He took receipts for the money in the name of the debtor, but retained possession. It was held that the payment did not discharge the debt, and that the agent was entitled to an assignation of the security to operate payment. With this case must be contrasted the earlier judgment of *Tod*, 1838, 1 D. 231. There a law agent, who acted as agent for both a debtor and his heritable creditor, paid to the creditor for a number of terms the interest due on his bond. The money was found by the law agent, who took from himself, as agent for the creditor, receipts which bore that "all claims are hereby discharged." These receipts were not delivered to the debtor personally, but cross entries against him were made in the law agent's books. The debtor becoming

bankrupt, was sequestrated, and the law agent proposed to obtain from the creditor an assignation of his heritable security to the extent of the interest advanced by him (the agent); but the Court held that the effect of the payment and the terms of the receipts, coupled with the fact that the agent acted for both parties, was to discharge the debt, leaving the agent to rank on the bankrupt's estate for advances made to him on his behalf.

From the statement of the law as quoted above in the words of Ld. Fullerton, it would appear to be a sound doctrine that a third party on making payment of a debt, is entitled to demand from the creditor all the means at his disposal of obtaining relief from the true debtor. There is no express decision on the point, but a body of opinion supports the proposition. In *Wood's* case (*supra*), Ld. Fullerton continued: "The supposition that the client could refuse to refund the advances, and force the agent into the chance of recovering them from the debtor, and at the same moment refuse to grant an assignation to enable the agent to recover them, seems utterly preposterous, and contrary to every principle both of law and fair dealing." Such assignation, however, can be only demanded subject to the equities, and if it will in no way prejudice the rights of the creditor (*Will*, 1867, 6 M. 9; per Inglis, L. P., in *Fraser*, 1875, 2 R. 595; and of *Mackintosh's Trs.*, 1898, 35 S. L. R. 451). So a vassal tendering payment of a feu-duty is not entitled to demand from his superior an assignation of his right, to enable him to recover the proportion of feu-duty applicable to a portion of the feu he had disposed (*Guthrie*, 1880, 8 R. 107).

It is the part of the debtor to search out his creditor on the appointed day, and tender him payment of the full amount of his debt, at his house or place of business. He has the opportunity of paying up to midnight on the day of the expiry of credit (*Startup*, 1844, 6 M. & G. 595), when he must tender the amount of his debt in cash, unless his creditor is willing to accept bank notes, bills, or cheques. Legal tenders are regulated by 33 & 34 Vict. c. 10, s. 4. Bronze may be tendered for debts up to one shilling; silver up to the sum of forty shillings; gold for any amount. But a tender of more than is due, coupled with a demand for change, is not a good tender (Benjamin on *Sale*, 721). A cheque is a conditional payment, conditional on the cheque being honoured. But a creditor who receives a cheque in payment and retains it, is not entitled to disregard it entirely and prosecute diligence. "Until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, or to sue the debtor as if he had given no security" (*Currie*, 1875, L. R. 10 Ex. 153). His duty is to present the cheque for payment, and, if it is honoured, he must arrest any diligence he may have instituted in respect of the debt (*Macdougall*, 1897, 21 R. 144).

A creditor is entitled to demand full payment of his debt when due (Ersk. iii. 4. 1), and is not bound to accept a payment to account. If he receive a payment to account, he must apply the sums received, in the first instance, to payment of arrears (Ersk. iii. 4. 2). Where the creditor is creditor in various debts due by the same debtor, or in an account current, and receives a payment to account, such payment falls to be appropriated among the debts in accordance with settled rules. These are nowhere better stated than by Ld. Balgray in the case of *Bannatyne's Rep.* (1825, 3 S. 593). "By the law of Scotland, where sundry debts are due by a debtor, and an indefinite payment is made, the creditor in general cases is entitled to apply such payment in the manner most favourable to himself; but where payment has been made by the debtor, and received by the creditor, on a general and mutual understanding that the same was applicable to a special account, the creditor cannot afterwards, on emerging

circumstances, alter the application of such payments." If neither party have made an appropriation, the law makes an appropriation, according to the order of the accounts or the debit items of the account (*Jackson*, 1870, 8 M. 408; *Cuthill*, 1894, 21 R. 549). The rule is well exemplified by *Scott's* case, 1884, 11 R. 407, where A. and B., who had become joint tenants of a colliery, entered into an arrangement for the definition of their respective rights. A. had originally been the owner of plant used to work the mine. This he sold to B., on condition that the property should not pass till the price (which was payable in instalments) had all been paid. There were provisions also for annual payments in respect of lordships, etc., to be made by B. to A. An account current was opened between the parties, which ran on till B. became sequestrated, when it showed a balance due by his estate to A. of £1062. This account was produced by A. and founded on in support of his claim in the sequestration. The earliest entries in the account were debt entries against B. for the price of the plant. The entries to his credit in sum exceeded the price of the plant, and there had been no appropriation. A., however, claimed a preference over the plant, on the ground that the property in it had never passed to B.; but the Court held that the rule applied, and that the law appropriated the payment according to the items in the account. It was too late for A. to attempt to make an appropriation after the claiming in the sequestration and producing the account (see also *Lang*, 1859, 22 D. 113; *Yates*, 1832, 10 S. 565; *Bremner*, 1837, 16 S. 213; *Pollock*, 1863, 2 M. 14).

Cash payments made by an insolvent to his creditor are effective if made within sixty days of bankruptcy, if not made fraudulently (*Thomas*, 1864, 3 M. 358; *Coutt's Trs.*, 1886, 16 R. 224); but where the creditor was aware that a petition for cessio had been presented, and notwithstanding received payment, the trustee in bankruptcy was found entitled to repetition (*Shaw's Trs.*, 1887, 15 R. 72; and so too in *Jones*, 1888, 15 R. 328, where payment was made to a conjunct and confident person).

Shares in a company must be paid for in cash, unless they are held in terms of a contract duly made in writing, and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares (30 & 31 Vict. c. 131, s. 25). This rule is interpreted strictly (*Coustonholm Paper Mills*, 1891, 18 R. 1076; *Furness & Co.*, 1893, 21 R. 239). But where a company had issued shares to a vendee in payment of rights purchased from him, but had failed to file a written agreement in terms of the section, the Court authorised a rectification of the register on being satisfied that the failure had been the result of accident, and that the rights of creditors were in no way affected (*Drew, Petitioner*, 1898, 35 S. L. R. 322). Money paid in error may be recovered (see ERROR).

For payment of price, see SALE; for presentment and payment of bills, see BILLS OF EXCHANGE.

Peculium, in Roman law, was a fund which a *pater-familias* intrusted to a *filius-familias*, or an owner to a slave, and of which, though *de jure* it continued to belong to the granter, the *filius-familias* or slave had the administration. Since a *peculium* enabled its possessor to obtain credit in contracting, the prætors made the granter of the *peculium* responsible to the extent of it for the contractual debts of the son or slave. This responsibility was enforced by the *actio de peculio*. When the *filius-familias* or slave, with the knowledge of the parent or owner, had embarked any part of his *peculium* in trade, his trade creditors were entitled to claim on

the trade assets *pari passu* with the parent or owner, in virtue of the *actio tributoria*. It was a special privilege conferred on public slaves that they were permitted to test on their *peculia* to the extent of one-half.

The importance of *peculium* in the history of Roman law arises mainly from the fact that it was by means of successive and gradual extensions of the *peculium* that *filii-familias*, in the later law, acquired the right to have property of their own, independently of their father. In the earlier law a *filius-familias* was incapable of holding property; all that he acquired passed to his *pater-familias* in virtue of the *patria potestas* (see PATRIA POTESTAS). It was not till the time of Augustus that this rule was relaxed and the incapacity of *filii-familias* to hold property was partially removed. The rule was first varied in the case of *filii-familias* who were soldiers. *Filii-familias militares* were empowered to acquire for themselves, and to treat as their own, whatever they got in military service. This separate estate was the *peculium castrense*, with respect to which the son had full power of disposal, either *inter vivos* or *mortis causa*, as if he were a person *sui juris* (*Inst.* ii. 12 pr.; *Dig.* 49. 17. 1; 14. 6. 2). If, however, the son died without having made any disposition of this estate, it passed on his death to his father, not as a *hereditas ab intestato*, but as a *peculium* (*Inst.* ii. 12 pr.). About three centuries later, the privilege of holding property of their own was extended by Constantine to *filii-familias* who discharged certain civil functions. Sons exercising the profession of an advocate, or holding certain civil or ecclesiastical offices, were entitled to keep their acquisitions as an independent estate. As this privilege was based on the analogy of the *peculium castrense*, the separate estate acquired in this way was designated *peculium quasi castrense*. Constantine also introduced another kind of *peculium*, termed the *peculium adventitium*. Originally this *peculium* consisted of property coming to the *filius-familias* from his mother (*Cod.* 6. 20. 1). Subsequently there were included under this head all property received from the mother's relatives (*bona materni generis*), and finally, under Justinian, everything coming to the son from any other source than from the father himself (*Inst.* 2. 9. 1). While the son had the ownership of the *peculium adventitium*, the father, as long as the *patria potestas* subsisted, had the usufruct of this *peculium*, *i.e.* a life-interest in its produce; and, if the son was emancipated, the father, under Justinian's legislation, was entitled to retain the usufruct of one-half of the *peculium* (*Inst.* 2. 9. 2). This was the furthest limit to which the recognition of the capacity of a *filius-familias* to hold property of his own was carried in Roman law; and, as has been observed by Sir Henry Maine, "Even this, the utmost relaxation of the Roman *patria potestas*, left the father's power far ampler and severer than any analogous institution of the modern world" (Maine, *Ancient Law*, p. 143). An estate received by a son from his father for the purposes of administration has been termed by the commentators *peculium profectitium*, to distinguish it from the above-mentioned *peculia* of the later law. The ownership of this *peculium profectitium* remained with the father.

[*Inst.* 2. 9; 2. 12; *Cod.* 6. 60; Stair, *Inst.* 1. 5. 11.]

In Scots law the term *peculium* is used by certain writers of authority, for example, by Professor Bell in his *Principles* (s. 1560), to denote a fund or provision appropriated to the wife, and exempted at common law from the *jus mariti*. Such a fund might be appropriated to the wife by custom, as in the case of the so-called "lady's gown," a present made to a wife on the sale of lands by the purchaser in view of her renunciation of the life-rent right she had in the lands purchased (*Lady Pitfirran*, 1709, Mor. 5799; *Mungl*, 1750, Mor. 5771). Similarly, any provision secured to a wife, and

not falling under the *jus mariti*, was spoken of as her *peculium* (Bell, *Prin.* s. 1560).

Pedlar.—By the Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 3, the term "pedlar" means any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot, and goes from town to town or to other men's houses carrying to sell, or exposing for sale, any goods, wares, or merchandise, or procuring orders for goods, wares, or merchandise immediately to be delivered, or selling or offering for sale his skill in handicraft. A lady occasionally selling her needlework for charitable purposes is not within the Act (*Gregg*, 1873, 42 L. J. M. C. 121). Sec. 4 makes it an offence to act as a pedlar without a certificate. A certificate (5s. fee) is only granted to one above seventeen years of age and of good character; it must be in the form prescribed by the Act; it remains in force one year from the date of issue, and is renewable; and it is not assignable.

By the Pedlars Act, 1881, a register of certificates is kept in each police district. The police are empowered to inspect a pedlar's pack. By the Hawkers Act, 1888 (51 & 52 Vict. c. 33), a hawker is defined as any person who travels with a horse or other beast bearing or drawing burden, and goes from place to place or to other men's houses carrying to sell, or exposing for sale, any goods, wares, or merchandise, or exposing samples or patterns thereof, to be afterwards delivered, and includes any person who travels by any means of locomotion to any place in which he does not usually reside or carry on business, and there sells or exposes for sale any goods, wares, or merchandise in or at any house, shop, room, booth, stall, or other place whatever, hired or used by him for that purpose. A licence (duty £2) must be taken out. It is granted only on a certificate, only on full payment, and expires on March 31st. It is not required by (*a*) any persons selling or seeking orders for goods, wares, or merchandise who are dealers therein, and who buy to sell again; (*b*) the real worker or maker of goods, or his children, apprentices, or servants residing with him, selling or seeking orders therefor; (*c*) any person selling fish, fruit, victuals, or coal; (*d*) a seller of goods in public market legally established (s. 3). The licence is not transferable. Every hawker must keep his name and the words "licensed hawker" visibly written on his packages, vehicles, and place of business, and on all hand-bills distributed by him. The law is codified by this Act, which repeals prior enactments. See PAWNBROKING; VAGRANT.

Peer; Peerage.—In its primary sense a peer means an equal. Commoners, *i.e.* subjects of lesser dignity than that of a baron, are all peers of each other in the sense being equals in Courts of Justice, etc. In the same way holders of the dignity of baron and upwards are all peers of each other. The term in its secondary sense applies to this latter class as peers of the realm. A peer of the realm is one of the titled nobility who holds in his own right the dignity of baron, or any dignity of higher rank of (1) England, (2) Scotland, (3) Ireland, (4) Great Britain, or (5) the United Kingdom of Great Britain and Ireland. The dignities of the peerage are Duke, Marquis, Earl, Viscount, Baron. (See articles under these titles.) Peerages are created by the sovereign at the pleasure of the sovereign, by (1) writ—the sovereign's summons to attend and sit in the House of Lords. It is said that two successive writs and attendance in two Parliaments are requisite to infer a hereditary barony by writ. A peerage by

patent is hereditary though it has not been used. Hereditary peerages descend to the heirs of the grantee according to the conditions of the grant. The presumption is for heirs male (*Kennedy*, 1762, 2 Pat. 55; *Glencairn*, 1797, 1 Macq. 444; *Herries*, 1858, 3 Macq. 588, 600).

A peerage vests in the heir without service. A member of the House of Commons vacates his seat there on becoming a member of the House of Lords, or on becoming a peer of Scotland (cases of *Queensberry*, 1857, *etc.*, cited in Erskine May, 29, note). A right to sit in Parliament is held to be conferred in a grant of a hereditary peerage; but the rights of the Scots and Irish peers to sit in the Parliaments of these countries have not been extended by the Acts of Union, without modification, to the Parliaments of the United Kingdoms. A hereditary peerage is extinguished by attainder, degradation by Parliament, or extinction of the heirs. It has been held that the holder of a Scots peerage might resign the dignity into the hands of the Crown (More's Stair, cclxiv. (2)). A dignity in the peerage of Scotland which may descend through the female line, goes to the eldest of heirs-portioners. A dignity of the United Kingdom, similarly descendible, falls into abeyance if it falls among heirs-portioners, and remains so till one only of the lines of descendants is left extant, or till the sovereign calls the title out of abeyance in favour of one of the heirs-portioners.

By 39 & 40 Vict. c. 59, s. 6, three Lords of Appeal were constituted, enjoying the rank of barons for life, and the privilege of sitting and voting in the House of Lords during the term of their tenure of their judicial office. The appointments to these offices are in the hands of the Crown.

Life peerages not created under the provisions of a statute do not now make the grantees Lords of Parliament (case of *Wensleydale*, 1856, reported by Erskine May, 12). Claims of right to hereditary peerages must be made to the sovereign, who refers the claim to the Attorney-General in the case of a peerage of the United Kingdom, and to the Lord Advocate in the case of a peerage of Scotland. On the recommendation of the law officers, the claim is referred to the House of Lords, whose practice is to appoint a Committee of Privileges to investigate it, and to report to the House.

The Scottish peerage consists exclusively of descendants and representatives of persons who held peerages in Scotland before the union of Scotland with England. No provision was made at the time of the Union for the subsequent creation of such peerages.

The Union Roll.—An authentic roll of the peerage of Scotland as it stood on 1st May 1707, was returned to the House of Lords by the Lord Clerk-Register, and added to the Roll of Peers by order of the House on 12th February 1708. To this roll several Scots peerages, since proved to exist, have been added. By the Treaty of Union, the peers of Scotland shall, from and after the Union, be peers of Great Britain, and have rank and precedency immediately after the peers of the like orders and degrees in England at the time of the Union, and before all peers of Great Britain of like orders and degrees created since the Union; and shall be tried as peers of Great Britain, and shall enjoy all privileges of peers, . . . except the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and particularly the right of sitting upon the trials of peers (Art. xxiii.). The peers of Scotland have the right of electing sixteen members from their own body to represent them as members of the House of Lords. In virtue of their election, these representative peers are members of the House of Lords during the term of the Parliament to serve in which they have been elected, and during its subsistence they have all the rights and privileges of Lords of Parliament, including the right to sit on

the trials of peers, whether they take place during the sittings or prorogation of Parliament.

A peer of Scotland may be created a peer of the United Kingdom. If, when so created, he is a Scottish representative peer, he does not by recent practice vacate his representative seat (case of *Lord Colville of Culross* in the Parliament of 1886–1892, rep. by Erskine May, p. 11; but cf. cases of *Queensberry* and *Abercorn*, 1787, 26 Parl. Hist. 597, 37 L. J. 594, cited by Erskine May, p. 11). A peer of Scotland is in no case eligible to sit in the House of Commons. The bankruptcy of a Scottish representative peer vacates his seat at the end of a year from the date of the bankruptcy, unless the bankruptcy is determined within that time.

The peers of Ireland, whether created before the union of that country with Great Britain, or since under the provisions of the Treaty of Union, have the privileges of peers of the United Kingdom, save the right of sitting in the House of Lords, and on the trials of peers. They have the right of being represented in the House of Lords by twenty-eight of their own number, elected by themselves for life. Those representative peers have all the rights and privileges of Lords of Parliament. The Bankruptcy Acts apply to them as they do to Scottish representative peers. A peer who is a peer of Ireland only, and is not a representative peer, is eligible by any constituency in the three kingdoms to sit in the House of Commons. While he is a member of the House of Commons, his privileges of peerage are in suspense (Act of Union, 1800, Art. iv.).

The peers, so far as concerns duties and rights and privileges, saving those of precedence and of sitting in the House of Lords (see articles on PRECEDENCE and LORDS, HOUSE OF) are equal among themselves, and with regard to these constitute a class by itself. Individually the peer is a hereditary councillor of the Crown; he has a right of personal audience of the sovereign; in civil causes he cannot be outlawed, and is free from arrest. He is entitled also to liberation, if imprisoned in such a cause, when he becomes a peer. He is not liable to be called on to serve on juries, nor on the *posse comitatus*. He may sit covered in Courts of justice.

The peer has no vote for a member of the House of Commons (*Earl of Beauchamp* and *Marquis of Salisbury*, 1872, L. R. 8 C. P. 245-255). The House of Commons holds the interference of peers in the election of members of the House of Commons to be unconstitutional and an infringement of the liberties of that House. By the Bankruptcy Acts of 1883, s. 32, and 1884, s. 5, an adjudged bankrupt is not summoned, and is disqualified from sitting and voting in the House of Lords or on any committee thereof, or being elected as a representative peer of Scotland or Ireland. The disqualification is removed by the recal or reduction of the sequestration or cessio. The Court certifies the fact of the bankruptcy to the Speaker of the House of Lords and the Clerk of the Crown. The disqualification owing to bankruptcy does not deprive the peer of his privileges of peerage, nor entitle him to be elected to, or to sit in, the House of Commons. By the Bankruptcy Disqualification Act, 1871, ss. 6, 7, 8, a disqualified person who sits or votes in the House of Lords, or attempts to sit or vote is guilty of a breach of privilege. By the Act of 1883, s. 124, if a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with as if he had not such privilege. For misdemeanours, and in cases of præmunire, it has been held that peers are to be tried, like commoners, by a jury (*R.* v. *Lord Vaux*, 1 Bulst. 197). Peers indicted in Scotland for crimes capital in Scotland, or for which in England a peer would be tried by his peers, are to be tried by their peers (6 Geo. IV. c. 66). During the sitting of Parliament they are tried by a special commission

of peers appointed under the Great Seal, and presided over by the Lord High Steward. When Parliament is not sitting, they are tried by the Court of the Lord High Steward, to which all the peers of the realm must be summoned (7 Will. III. c. 3). Lords of Parliament are liable to the same punishments as other subjects (4 & 5 Vict. c. 22).

When the presence of a peer is required to give evidence before the House of Lords, or a Committee of the Whole House, the Lord Chancellor has been ordered to write a letter to him desiring him to attend and submit to examination; but peers usually attend without this requisition (Erskine May, 400). Peers, when witnesses in any Court, are examined on oath (Erskine May, 404, 405). Peeresses, whether so by marriage or in their own right, have all the rights and privileges of peers, save those of sitting on trials, sitting in the House of Lords, and voting at peers' elections. A peeress who is a peeress by marriage only, ceases to be so if, after her husband's death, she marries a commoner (see Erskine May, 107. See Hume, ii. 46; Ersk. i. 3. 8; iv. 3. 25; Bell, *Prin.* ss. 2138 *et seq.*; Alison, *Prac.* 14; Goudy on *Bankruptcy*, 77, 350: Bell, *Dict. h.t.*; 34 & 35 Vict. c. 50, ss. 6–8, sections not repealed by English Bankruptcy Act).

For procedure of the House of Lords, and of Committees of Parliament, see Erskine May's *Parl. Prac.*

See articles ATTAINDER; DIGNITIES; FORFEITURE; IMPEACHMENT LORDS, HOUSE OF; PEERS, ELECTION OF; SUCCESSION; TREASON.

Peers, Election of Scottish Representative.—The peers of Scotland, when required to meet and elect members from their own body to represent them in the House of Lords (see art. PEERS), are summoned by royal proclamation made at the Cross of Edinburgh. If, during the subsistence of a Parliament, the number of their representatives falls below sixteen, the peers are similarly summoned to meet and complete the number. The elections take place in the Palace of Holyrood House. The returning officer of the peers is the Lord Clerk-Register of Scotland, and he presides at the elections. The proceedings are solemnly opened and closed with prayer, offered up by one of the Queen's Chaplains for Scotland. The voting is open, and by signed lists. The peers are called on in the order of their precedence on the Union Roll (see PEERS). Absent peers may vote by proxy. In order to prevent the assumption of peerages which have become dormant or extinct since they were entered on the Union Roll, it is provided (10 & 11 Vict. c. 52, s. 1) that no title standing on that roll, in respect of which no vote has been received and counted since the year 1800, shall be called over at an election of peers without an order of the House of Lords. That House, on disallowing a claim to a dormant title, may order that the title in question shall not be called over at any future election (s. 2). Protests by peers for precedence, or by persons claiming to be allowed to vote as peers, cannot be adjudicated upon by the Lord Clerk-Register, but can only be received by him and reported to the House of Lords. No peer is eligible to vote at an election, or to be elected, till he is twenty-one years of age. A peer of Scotland who is a peer of Ireland, or already a peer of Parliament, does not on that account lose his vote for representative peers. An adjudged bankrupt, till he is discharged with a certificate that his bankruptcy was by misfortune, not fault, or the adjudication is annulled, is disqualified for election as a representative peer (Bankruptcy Act, 1883, s. 32) The decision in controverted questions regarding elections lies with the House of Lords (Acts of Union, and 10 & 11 Vict. c. 52).

Penal and Liquidate—These words refer to a clause introduced into a contract for the purpose of settling the amount of damages payable in the event of a breach. The clause is variously expressed; but whatever the form of expression may be, there is always room for the question, whether the sum of damages mentioned is to be treated as penal or liquidate. If the construction of the clause establishes the former, then the party seeking damages can recover, within the limit mentioned, only such damages as he proves he has suffered (*Forrest*, 1869, 8 M. 187). If the sum is held to be liquidate, the measure of damage is taken to be the amount of the sum stated, and no inquiry is made as to the loss actually suffered (*Commercial Bank*, 1890, 18 R. 80). The theory upon which liquidate damages are awarded is that the parties have estimated the amount of loss which will be caused by a breach of contract, that part of the bargain between them is payment of the sum mentioned (*Commercial Bank, supra*), and that therefore the Court by its decree is maintaining the performance of the contract according to the intention of the parties (*Wallis*, 1882, 21 Ch. D. 243, 266). But this theory is not consistently carried out. Although damages are held to be liquidate, the Court will still inquire whether they are exorbitant and unconscionable (*Commercial Bank*, p. 84), and will not enforce a contract in which stipulation as to damages is for punishment of the party in breach, but only where it is for reimbursement for loss (*Robertson*, 1881, 8 R. 555, 562; *Forrest*, 1869, 8 M. 187, 190, note; *Craig*, 1863, 1 M. 1020). Subject to these exceptions, however, liquidate damages will be awarded as stated in the contract. In an action raised on breach of contract, the proper course for a pursuer is to conclude for the stipulated sum, when it will devolve on the defender to instruct modification (*Craig*, 1863, 1 M. 1020).

Whether Penal or Liquidate.—In determining whether a sum is penal or liquidate, the use of the expressions "penalty" or "liquidated damages" must be held, in view of the decisions, to be not only inconclusive but unimportant (*Forrest*, 1869, 8 M. 187, 199; *Magee*, 1874, L. R. 9 C. P. 107, 115; *Elphinstone*, 1886, 13 R. (H. L.) 98). Where a sum was described as a "penalty," it was held to be liquidated damages (*Elphinstone, supra*); and where the expression was "liquidated and ascertained damages, and not a penalty or a penal sum or in the nature thereof," the sum was held to be a penalty (*Kemble*, 1829, 6 Bing, 141). But where the language of the contract and the disclosed circumstances of the case show that the parties intend the sum to be liquidate, especially where there appears to be nothing exorbitant or unconscionable in the stipulation, the Court will hold it to be liquidate (Bell, *Com.* i. 699).

Certain rules have been laid down by the Court in this connection—

(1) Stipulations regarding penal rent in contracts of lease explain themselves, and the Court has generally no difficulty, without taking any evidence or receiving any information except what appears upon the face of the contract itself, whether the additional rent stipulated can be enforced as pactional or must be regarded as penal (*Forrest, supra*, 194). Thus where an agricultural tenant lays himself under a prohibition as to cropping, and contravenes it, he will be held liable in the payment stipulated for (*Miller*, 1826, 2 W. & S. 52). A more rigorous rule of construction is applied in the case of a party thus voluntarily doing what he had undertaken not to do, than in the case of a person merely failing to perform what he had undertaken to do (*Lawson*, 1834, 7 W. & S. 397; *Forrest*, at pp. 197, 202). (2) Where the damages caused by the breach cannot be accurately measured, the amount agreed on in the contract will be accepted by the Court (*Sainter*, 1849, 7

C. B. 716; *Atkyns*, 1850, 4 Ex. 783). For instance, where a retiring partner in a surgeon and apothecary business undertook not to practise within a certain radius, and, in the event of default, to pay £2000, "not in the nature of a penalty, but as ascertained liquidated damages," that amount was awarded (*Reynolds*, 1856, 6 El. & Bl. 528; *Galsworthy*, 1848, 1 Ex. 659; but see *Curtis*, 1831, 10 S. 72). (3) Where there is a condition for the forfeiture of a deposit in the event of a breach of a stipulation to pay a fixed sum of money, the forfeiture will be enforced and not treated as a penalty (*Wallis*, 1882, L. R. 21 Ch. D. 243). Where, in the course of negotiations for the purchase of a business, the intending purchaser deposited in bank the sum of £5000 as part payment of the purchase price of £35,000, under the stipulation that in the event of failure to pay the balance of the purchase money before a certain date, the deposit should be forfeited, it was held, upon failure to pay, that the sellers were entitled, without going into any proof of damage, to enforce the forfeiture (*Commercial Bank*, 1890, 18 R. 80). The same result follows from a clause of forfeiture, although the money may not have been actually deposited, but an equivalent, such as an I. O. U., given (*Hinton*, 1868, L. R. 3 C. P. 161). But forfeiture will not be ordered where there is no apparent damage, or where the party claiming forfeiture reserves his claim of damages (*Watson*, 1885, 13 R. 347). (4) Where payment is to be in sums proportioned to the extent of the breach or breaches of obligation, parties are assumed to have adjusted them with reference to the actual amount of damage, and they are not to be regarded as penalties (*Elphinstone*, 1886, 13 R. (H. L.) 98, 106; *Craig*, 1863, 1 M. 1020, 1022). Examples of this class of cases occur in building and mercantile contracts, where the amount of damage is estimated at a specified amount for each day or week of delay after the period for fulfilment (*Johnston*, 1861, 23 D. 646). But regard must be had to the terms of the stipulations with reference to which the damages are inserted. The Court refused to enforce a penalty where a piece of executorial work, undertaken to be done in a certain time, could not possibly be executed within it (*Robertson*, 1881, 8 R. 555). (5) Where a sum is mentioned generally as the amount payable on a breach of contract in a case where the contract contains several provisions of different importance, the sum is to be regarded as a penalty (*Magee*, 1874, L. R. 9 C. P. 107). A general clause of damage occurring at the end of a contract which contains a special remedy for some specific breach, is clearly penal (*Johnston*, *supra*, 653). But if there is only one damages clause, and the contract contains several provisions, all of primary importance, the presumption in favour of penalty is lost (see Mayne, p. 153). (6) If the sum stipulated is manifestly extortionate, or largely in excess of the damage likely to result from the breach, it is held to be a penalty. An example of this occurs where payment of a smaller sum is secured by a larger (*Wallis*, 1882, 21 Ch. D. 243, 256; *Astley*, 1801, 2 B. & P. 346; *Newman*, 1876, L. R. 4 Ch. D. 724). Whether the security is by way of stipulation or deposit, equity regards the security as a pledge for the debt, the object of which is fulfilled by payment of the amount of the debt (*Thompson*, 1869, L. R. 4 H. L. 1, 15).

Damages Limited by Penalty.—The sum exigible from the party in breach can in no event exceed the penalty (*Johnstone*, 19 January 1819, F. C.). A defender may found upon the penalty clause as restricting the amount of damages, and a pursuer is not entitled to ignore it, and to prove in an action on breach of contract that his loss was greater than the sum mentioned. The judgment in the case cited has been held as establishing that in articles of roup a stated penalty is the maximum of damages which can be recovered

for non-implement of an offer at a public sale (*Hyndman's Trs.*, 1895, 33 S. L. R. 359; Menzies, *Lectures*, 3rd ed., p. 890).

"*By and Attour Performance.*"—These words, or their equivalent, usually inserted in penal clauses, are ineffective, and ought to be omitted (Ersk. iii. 3. 86). A pursuer cannot both enforce implement of a contract and claim the penalty. But, on the other hand, a party cannot by tendering the penalty escape from his obligation to implement the provision to which the penalty is adjected (*Hyndman, supra*). A tenant prohibited from keeping a public-house without permission of the landlord, "otherways to pay £10 of additional rent," was held not entitled to contravene the prohibition on payment of the extra rent (*Gold*, 1870, 8 M. 1006).

[Bell, *Com.* i. 699–702; Ersk. iii. 3. 86; Mayne on *Damages.*]

Penal Servitude is, next to sentence of death, the most severe punishment recognised by law. It was introduced as a substitute for transportation, which had been found to spread the contagion of crime to other lands without having a deterrent effect upon criminals at home, and to be accompanied by many forms of revolting crime. Various partial experiments were made, dating from about 1840, but at 1st July 1857 transportation was finally abolished and penal servitude substituted (20 & 21 Vict. c. 3, s. 2). By the latter system the convict is made to work under strict and severe discipline, partly to expiate his wrong-doing, partly to repay a portion of the cost of his maintenance, and partly, through the humanising influence of hard work, to lead him to amend his ways and, if possible, convert him into an honest and law-abiding citizen. It is to be feared that the punitive effect of penal servitude is more marked than its reformative influence.

I. *Statutory Authority.*—The principal regulating statutes are the Penal Servitude Acts, 1853 to 1891, viz.: the Acts of 1853, 1857, 1864, and 1891 (16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47; and 54 & 55 Vict. c. 69). These are in this article cited by their dates. The statutory provisions applicable in respect of persons under sentence of transportation, and in particular the Transportation Act, 1824 (5 Geo. IV. c. 84), are extended to persons under sentence of penal servitude (Acts 1853, s. 7; 1857, s. 4).

II. *Sentence of Penal Servitude.*—This punishment can be awarded in Scotland by the High Court of Justiciary only. Any person who prior to 1st September 1853 might have been sentenced to a term of transportation, is liable to be sentenced to be kept in penal servitude for a term of the same duration; and where the Court might award one of two or more terms of transportation, it has the same discretion to award one of two or more terms of penal servitude (Act 1857, s. 2). Where the Court has under any enactment power to award a sentence of penal servitude, the sentence may be for any period *not less* than three years and not exceeding five years, or any greater period authorised by the enactment; and where it is empowered or required to award a sentence of penal servitude, it may award imprisonment for any term not exceeding two years, with or without hard labour (Act 1891, s. 1). The term of servitude varies from three years to life, and in each case the sentence begins with nine months of separate confinement. Whenever the royal prerogative of mercy is exercised by commuting a sentence of death into one of penal servitude for a term of years or for life, such intention of mercy has the same effect, and is signified and carried out in the same manner, as where the death sentence was formerly commuted upon condition of transportation beyond seas (Act 1853,

s. 5). A convict found at large before the expiry of his sentence without lawful authority, is liable to severe punishment (*Nellis*, 1861, 4 Irv. 50). The royal prerogative of mercy, as regards reducing or modifying sentences, is not affected by the Penal Servitude Acts (Act 1853, s. 13).

III. *Discipline.*—The rules for the maintenance of discipline and the management of convict prisons, contained in the Transportation Acts (especially that of 1824, 5 Geo. IV. c. 84), the Convict Prisons Acts, 1850 and 1853 (13 & 14 Vict. c. 39, and 16 & 17 Vict. c. 121), and orders, regulations, and instructions issued by the Home Secretary, are too numerous for insertion here. Every person sentenced to penal servitude may be confined during the specified term in a prison in any part of the United Kingdom, or of Her Majesty's dominions beyond the seas, as the Home Secretary or (as regards Scotland) the Secretary for Scotland may direct from time to time, and may be kept to hard labour and otherwise dealt with in all respects as a person sentenced to transportation (Act 1853, s. 6). Such person may during the term of his sentence be conveyed to any place beyond the seas duly appointed by the competent authority (Act 1857, s. 3). The Secretary for Scotland may empower two or more named justices of the peace, acting for the county in which a Scottish convict prison is situated, to order the infliction of corporal punishment on a convict for breach of prison discipline, and such justices have the powers of a director of convict prisons (Act 1864, s. 3). The principal convict prison in Scotland is situated at Peterhead (49 & 50 Vict. c. 49, s. 23).

IV. *Licences.*—Her Majesty, by order under the hand of the Home Secretary or the Secretary for Scotland, may grant to a convict licence to be at large in the United Kingdom and Channel Islands, or a specified part of these, during such portion of his term, and on such conditions, as to Her Majesty may seem fit (Act 1853, s. 9). So long as the licence is in force, the holder may remain at large (*ib.* s. 10). He is subject to regulations as to reporting himself to the police, and other matters, which will be more conveniently explained under PREVENTION OF CRIMES ACTS. The licence is in the form of Sched. A of the Act of 1864, as amended by the Act of 1891, s. 3 (3), or in a different form if the Secretary of State deems it expedient, but is in the latter case revocable at pleasure (Act 1864, ss. 4 and 10), and such altered conditions must be submitted to Parliament (34 & 35 Vict. c. 112, s. 4). A licence- holder who fails without reasonable excuse to produce his licence when required by a judge, magistrate, or constable, or who breaks any of the other conditions of his licence by an act not of itself punishable, is liable to three months' imprisonment with or without hard labour (Act 1864, s. 5; 34 & 35 Vict. c. 112, s. 4). Such offences may be prosecuted at the instance of the procurators-fiscal of the Sheriff, Justice of the Peace, or Burgh Courts (*ib.* s. 7). Remission of sentence by grant of licence is earned by industry accompanied by good conduct. The maximum remission obtainable is, for male convicts, *one-fourth* of the sentence, and for female convicts, *one-third*. The earning of marks and grant of remission extend to convicts undergoing the preliminary nine months of separate confinement, and to recommitted licence-holders serving *remanets* of former sentences. The cases of female licence-holders recommitted are specially considered when they have served one year of their *remanets*. Female convicts are also privileged in respect that they may be released to Refuges nine months before the ordinary time for release on licence. These rules do not apply to *life sentences*, which are specially submitted to the Home Secretary, or Secretary for Scotland, after twenty years and considered on the merits; but it by no means follows that a

licence will be granted even after the lapse of that period. Quarterly lists of convicts released on licence are issued from the Crown Office to the procurators-fiscal, who furnish copies to the police officers within their districts.

V. *Forfeiture and Revocation of Licences.*—The authority by whom a licence has been granted may revoke or alter it (Act 1853, s. 9). If a licence-holder is convicted on indictment of any offence, his licence is forthwith forfeited by virtue of the conviction (Act 1864, s. 4). It is the duty of the prosecutor in such a case, before moving for sentence, to inform the Court that the prisoner is a licence-holder, mentioning the date of his liberation on licence, and the *remanet* of his original term which he has still to serve. When a licence-holder is convicted on summary complaint, the Court must without delay forward to the Secretary for Scotland a certificate in the form of Sched. B of the 1864 Act, and the licence may be revoked (Act 1864, s. 8). In this case the prosecutor, if he is aware that the accused is a licence-holder, leads evidence of the fact, and applies to the presiding judge to issue the certificate. The Sheriff's procurator-fiscal, the clerk of the peace, or the chief magistrate of a burgh, must communicate to the Crown Agent the name of each licence-holder or person previously sentenced to penal servitude, whether released from such sentence or not, who is recommitted to prison by the Sheriff, justices of the peace, or burgh magistrates respectively, with particulars of the charge on which he has been recommitted, and of its disposal. This rule does not extend to convictions for drunkenness, except in the case of a licence-holder. These returns are reported by the Crown Agent to the Secretary for Scotland. If a licence is revoked by the Home Secretary, he signifies the revocation by his warrant to one of the metropolitan police magistrates, who issues a warrant for the apprehension of the convict, which may be executed in any part of the United Kingdom and Channel Islands; and the convict, on being brought before him or another magistrate of the same Court, is recommitted either to the prison from which he was released, or another convict prison, for the residue or *remanet* of his sentence (Acts 1853, s. 11; 1857, s. 5). When a licence is *forfeited* by conviction on indictment, or *revoked* in pursuance of a summary conviction, the holder, after undergoing the sentence following on such conviction, must serve the unexpired portion of his term of penal servitude, and for that purpose may be removed to a convict prison by the warrant of any justice of the peace for the county in which he is confined (Act 1864, s. 9). Such forfeiture or revocation is equivalent to a sentence of penal servitude; and if the sentence on conviction is also one of penal servitude, the *term of sentence* and the *unexpired term* are deemed to be one term of penal servitude, and a licence may be granted for part of it upon the same principles as for part of the original sentence (Act 1891, s. 3).

[Dewar, *Penal Servitude Acts*, 1895.]

Penalties (Statutory). — Penalty is defined under the Summary Procedure Act, 1864, as meaning "any sum of money which may under the authority of any Act of Parliament be recoverable from any person in respect of the contravention of any statutory requirement or prohibition; and also any sum which may under the provisions of any Act of Parliament be recoverable as a penalty or forfeiture,—whether such sum shall be payable to the party complaining, prosecuting, or suing for the same, or shall be payable in whole or in part to any other person, or be

applicable to any other use, and whether the amount thereof is fixed by such statutory provision, or is so fixed subject to a power to modify or mitigate, or is in the nature of a penalty not exceeding a certain sum to be awarded by the Court or judge who may take cognisance thereof." It has been doubted whether a fine imposed for non-compliance with an order of Court is properly a penalty. The weight of authority is in favour of the view that it is not (*Lee*, 1883, 11 R., J. C. 1, 5 Coup. 329, per Ld. Pres.; *Torrance*, 1892, 19 R., J. C. 85, 3 White, 254—cases under the Public Health Acts). Apart from the definition clause of the 1864 Act, it has been held that where a statute provides that a person doing malicious acts shall be liable to pay the damage done under pain of imprisonment, the sum awarded is not the less penal that it is not expressly termed a penalty (*Robertson*, 1869, 1 Coup. 348, per Ld. Jus.-Gen. Inglis, at p. 354).

General Considerations Affecting Penal Statutes.—Although statutes imposing penalties would probably now no longer be construed with the extreme rigour which was formerly deemed necessary, it is still a well settled rule that before an Act is held to impose a penalty upon the lieges it must, upon a strict construction of its terms, be plainly evident that it is intended so to do. Even under the older practice it was allowed that a statute merely imposing a pecuniary penalty might be read with less extreme stringency than where the rule of construction was invoked *in favorem vitæ*. The established rule now seems to be, that to warrant the imposition of a penalty there must be all the elements present—whether morally material or not—which are, in fact, made to constitute the offence as defined by statute (see Maxwell on *Interpretation of Statutes*). It has been said that, generally speaking, there must be *mens rea* (*Lee*, [1892] 2 Q. B. 337; *Downie*, 1893, 1 Adam, 80), but this is not a universal rule (see Broom, *Legal Maxims*, 6th ed., 301; *Watt*, 1873, 2 Coup. 482; *Pendreigh's Trs.*, 1871, 9 M., H. L., 49; 1875, 2 R. 769; *Thomas*, 1872, 11 M. 81; and cf. too the cases under the Factory Acts and Public Health Acts).

In several cases where a penalty was attached to one offence, the Courts have refused to extend it by implication to others in the same Act, even where the effect has been to leave the latter without punishment (*Pearson*, 3 H. & C. 921; *Elliot*, L. R. 7 Q. B. 429). On the other hand, if the Act fairly falls within the purview of the prohibition, it will be subject to penalty although the *modus* is new (*Guisbert*, 14 C. B., N. S. 306; *Taylor*, 4 Q. B. D. 228; *Parkins*, 7 Q. B. D. 13. See also *Underhill* (29 L. J., M. C. 65) and *Williams* (1 Ex. D. 277)). In short, all charges upon the subject must be imposed by clear and unambiguous language (Maxwell on the *Interpretation of Statutes*); and in the case of reasonable doubt, the construction most favourable to the subject is to be adopted (*in re Thorley*, [1891] 2 Ch. 613). It has been suggested that *all* statutes which impose costs fall to be strictly construed, on the ground that costs are in substance penalty, but this has been doubted (Maxwell, *loc. cit.* 406).

Where a penalty is imposed for doing or omitting to do an act, the act or omission is thereby prohibited and made void; for the statute would not inflict a penalty on what was lawful. Consequently, when the thing in respect of which the penalty is imposed is a contract, it is illegal and void (*in re Cork Ry. Co.*, L. R. 4 Ch. 748, per Ld. Hatherley; *in re Padstow Assurance Co.*, 20 Ch. D. 137). The imposition of a penalty, while implying prohibition, does not, however, *ex ipso* confer on anyone a civil right to restrain the act by interdict. Thus in *The Institute of Patent Agents* (1894, 21 R., H. L. 61), where a person designed himself as a

patent agent without being registered, and so was guilty of an offence against the Patents, etc., Act, 1888, it was held that no title had been conferred on duly registered agents to have him restrained by interdict from so offending.

Questions Affecting Penalties under the Summary Procedure Scotland Acts, 1864 and 1881.—(1) *Forum.*—In many cases the recovery of a penalty may be obtained by way of ordinary action in the civil Courts founded upon the facts (1864 Act, s. 27; *Lawson*, 1877, 3 Coup. 433); recovery in the Small Debt Court is not, however, competent (S. P. Act, 1864, s. 27). This facility for recovery by civil process is advantageous, as there may be cases in which summary procedure may be inexpedient (*Clelland*, 1887, 1 White, 359; *Gemmell*, 1887, 1 White, 437). The usual method of recovery is, however, by prosecution under the Summary Procedure (Scotland) Acts of 1864 and 1881. The complaint should set forth that it is brought under these Acts (*Nicoll*, 1887, 14 R. J. C. 47, 1 White, 416); if this be done, the sections need not, in general, be set forth (*M'Leod*, 1892, 20 R., J. C. 6, 3 White, 339; *M'Ewen*, 1894, 21 R., J. C. 14, 1 Ad. 314). It has been held that a corporation may be sued summarily for a statutory penalty; although it would be otherwise were imprisonment the only means of enforcement (*Glasgow City & District Ry. Co.*, 5 Coup. 420; *Meldrum's Trs.*, 11 R., J. C. 59; *Fletcher*, 1886, 1 White, 259). On the other hand, it seems that in the case of an unincorporated company a petition and complaint directed against the company and the individual partners *unnamed* is incompetent as against the company (*Miles*, 1830, 9 S. 18). Penalties for contraventions of the Sunday Trading Act (1661, c. 18) are not recoverable summarily (*Nicoll, supra*).

(2) *Title to Sue.*—Unless it otherwise appears from the statute, the title to sue for recovery of a penalty seems to be confined to the procurator-fiscal for the public interest (cf. *M'Intosh*, 1875, 2 R. 877). So in suing for penalty, a proprietor or tenant of premises adjoining a railway in course of construction has only the statutory right of a common informer for the public interest; and one-half of the penalty which he recovers goes to the poor (*Glasgow City & District Ry. Co.*, 1884 11 R., J. C. 59). The imposition of a penalty does not, however, deprive parties injured of any right to recover damages which may be otherwise competent to them (*Clyde*, 1885, 12 R. 1315). "The injured party has no right to the penalty: reparation is his right, which can be neither supplemented nor superseded by a penalty" (*M'Intosh, supra*). Penal interest under the 83rd section of the Bankruptcy Act, 1856, must be recovered by creditors as a debt of the estate; and will not be awarded under a report by the Accountant of Court (*Peacock's Tr.*, 1867, 6 M. 158).

(3) *Application of Penalty.*—This falls to be gathered from the enacting statute. The penalty may be either (1) payable to the party complaining, prosecuting, or suing; or (2) payable in whole or in part to some other person; or (3) applicable to some other use. This point requires to be kept in view in framing the complaint, and especially in framing the conviction. In regard to the latter, where the statute makes a complete and determinate disposal, it does not seem to be absolutely necessary to mention the application (*M'Callum & Scaley*, 1870, 9 M. 46, 1 Coup. 486; *R.* v. *Barrett*, Salk. 383). It is otherwise, however, where the matter is in the discretion of the Court: or where the description of the parties entitled requires to be explicated (*Dempsey*, 2 T. R. 96; *R.* v. *Seale*, 8 East, 568). Where no direction is given in the statute, any penalty inflicted falls to be applied in the same manner as do the fines and penalties in other proceedings before the Court

in which the prosecution is taken. Where the penalty has been appropriated, and no finding has been pronounced as to expenses, it is incompetent to retain the expenses out of the penalty (*Clyde Trs.*, 1865, 3 M. 736).

(4) *Specification of Penalty in Charge.*—It was formerly necessary, and is still highly expedient (notwithstanding the Criminal Procedure (Scotland) Act, 1887, ss. 9 and 71), to furnish a short statement of the penalty or forfeiture (Sum. Proced. Act, 1864, Sched. A, No. 2; Crim. Pro. Act, 1887, *loc. cit.*; *Blain*, 1892, 3 White, 221). If stated, the following particulars should be given: (*a*) the amount of the penalty; (*b*) the amount of any alternative punishment; and (*c*) any forfeiture (see *Maccwan*, 1894, 1 Adam, 314). If penalties are referred to in the charge, the reference must be correct, and should be brief (Brown on *Summary Procedure*, 79).

(5) *Jurisdiction in regard to Infliction, Restriction, and Mitigation of Penalties.*—The amount of the penalty may be (*a*) fixed absolutely by a statute; (*b*) fixed subject to a power in the judge to modify or mitigate; (*c*) of the nature of a penalty not exceeding a certain sum, at the discretion of the Court (Sum. Pro. Act, 1864, s. 2). Almost all penalties are now subject to modification at the discretion of the Court—the only exceptions being apparently (1) where the Act prescribing the penalty carries into effect a treaty, convention, or agreement with a foreign State, and such treaty, etc., stipulates for a fine of minimum amount, and (2) where the proceedings are taken under an Act relating to any of Her Majesty's regular or auxiliary forces (Summary Jurisdiction (Scotland) Act, 1881, s. 6). See, however, *Glasgow District Subway Co.*, 1892, 20 R., J. C. 28, 3 White, 390,—a case under the Lands Clauses Consolidation Act, 1845. By the 1881 Act, in every case where the special Act imposes a penalty in excess of that authorised by the Act of 1881, such penalty is (subject to the foregoing and one or two other exceptions) *ipso facto* restricted to the limits allowed by that Act. Where the special Act, however, imposes a less penalty than that of 1881, its own terms are adhered to. The restrictions of the Act of 1881 apply, and modification in accordance with its provisions is competent even when the prosecution is brought, not under the Summary Procedure Acts, but under a Local Police Act (*Linton*, 1887, 14 R. J. C. 46; 1 White, 410). Cf. also the Burgh Police (Scotland) Act, 1892, ss. 501–510, 516. Apart from power in the Court to modify, it is competent for *the complainer* to modify the penalty in making the charge, so as to bring himself within the benefit of the Summary Procedure Acts; and where the restriction is necessary for jurisdiction, it ought to be set forth in the complaint (*Blain*, 1892, 19 R., J. C. 96, 3 White, 221; *Hastie*, 1894, 22 R., J. C. 18, 1 Ad. 505).

The jurisdiction of Sheriffs, Justices, Police, and other Magistrates in regard to the imposition of penalties is now regulated by the following Acts, so far as unrepealed: 9 Geo. IV. c. 29, s. 19; 19 & 20 Vict. c. 48, s. 1; Summary Procedure Act, 1864, 27 & 28 Vict. c. 53; Summary Jurisdiction Act, 1881, 44 & 45 Vict. c. 33; The Burgh Police (Scotland) Act, 1892, 55 & 56 Vict. c. 55; Prisons (Scotland) Administration Act, 1860, 23 & 24 Vict. c. 105, s. 74; 25 Vict. c. 18, ss. 1 and 2; Industrial Schools Acts, 1866 and 1880 (29 & 30 Vict. c. 118, and 43 & 44 Vict. c. 15), and amending Acts; Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), and 56 & 57 Vict. c. 48, s. 1; and The First Offenders Act, 1887, 50 & 51 Vict. c. 25. The periods of imprisonment which may be awarded, failing payment of a penalty or expenses, are regulated by the Summary Jurisdiction Act of 1881, and are as follows:—

(*a*) Where the penalty, etc., does not exceed 10s., the period of imprisonment must not exceed seven days.
(*b*) Where it is over 10s. and under £1, imprisonment must not exceed fourteen days.
(*c*) Where over £1 but not over £5, imprisonment must not exceed one month.
(*d*) Where over £5 but not over £20, imprisonment must not exceed two months.
(*e*) Where over £20, imprisonment must not exceed three months.

Wherever recovery by poinding is competent under the Summary Procedure Act, a warrant of imprisonment for periods not exceeding those above stated is competent on default of recovery.

The provisions of sec. 6 of the Act of 1881 qualify all cases (*Gray*, 1889, 2 White, 290), except (*a*) where the alternative imprisonment provided by the substantive Act is less than that of the 1881 Act, in which case it seems a fair inference that the lower term must be taken; and (*b*) in revenue prosecutions, if the amount be over £50, imprisonment for six months is still competent.

A penalty may be recovered after the death of the person on whose complaint it is directed to be paid (*Martin*, 1867, 5 Irv. 357), the Crown being the proper creditor.

(6) Whether a penalty is joint or several depends largely upon the nature of the act prohibited and the language of the statute imposing it. Where the offence is one in which every participator is punishable in proportion to his part, a separate penalty may be inflicted on each. On the contrary, if the offence is in its nature single, or if it is the offence and not the offender that is chiefly within the view of the statute, only one penalty will be incurred,—for which, however, the parties will be jointly and severally liable. It has been suggested that this criterion is unsatisfactory, and that the question is more fittingly decided by the consideration whether the penalty is inflicted by way of compensation for a private wrong, or as a punishment (Maxwell on the *Interpretation of Statutes*, pp. 273–276).

Penalties under Particular Acts, and Miscellaneous Points as to Penalties.—Where by a Canal Act a penalty on every ton carried on a boat was imposed on parties failing to make a return, or making a false return, it was held, in a question regarding a false return, that the penalty was only payable on the difference between the true amount and the amount returned (*Monkland Canal Co.*, 1823, 2 S., N. E. 310).

Under the Tweed Fisheries Amendment Act, 1859, imposing a penalty *not exceeding* £10, and an additional penalty of 10s. for each salmon taken, it was held that the words "not exceeding" qualified the additional penalty also (*Johnston*, 1868, 6 M. 800).

The penalty in the shape of interest imposed by the Judicial Factors Act and by the Bankruptcy Act on factors or trustees improperly retaining funds in their own hands, ceases to run from the date of removal of the factor or trustee (*Johnstone*, 1826, 4 S., N. E. 487; *Wallace's Factory*, 1898, 25 R. 642).

The penalties exigible under the Winter Herding Acts are not available against a tenant who fails to remove at the stipulated term (*Thomson*, 13 May 1791, Hume, 780). An opinion was expressed in *Hazzard* (1873, 2 Coup. 383) that the penalties under secs. 27 and 48 of the Volunteer Act, 1863 (26 & 27 Vict. c. 65), fall to be imposed by the commanding officer, the Justice of Peace Court being resorted to merely to enforce recovery.

On a charge of a contravention of a statute, for which a penalty is

imposed, the judge must, unless specially authorised by statute to do otherwise, impose some penalty; he is not entitled to dismiss with an admonition (*Gardner*, 1865, 5 Irv. 13; but cf. the Burgh Police Act, 1892, s. 483, and *Downie, etc.*, 1893, 1 Adam, 80). A judge may not refuse to find a charge proven, merely because he thinks the statutory penalty too severe (*Refuge Assurance Co.*, 1889, 2 White, 373).

For an instance of penalty under Act of Sederunt, see *Lowe* (*Petr.*), 1872, 11 M. 17.

Pendente lite, nihil innovandum.—In Roman law property became *res litigiosa* as soon as it was the subject of *litis contestatio*. By an edict of Augustus, a pursuer who was not in possession of land was prohibited from alienating, as soon as it became litigious, provided the land was situated *in solo italico*. Originally a defender in possession does not seem to have been prohibited from selling the subject in dispute, it being held that the pursuer was not injured by such sale, inasmuch as the defender's failure to hand over the thing could always be compensated for by money damages. At a later period, however, when it was recognised that the pursuer had a right to the actual delivery of the specific thing, the alienation of the subject in dispute by the defender was regarded as an injury to the pursuer. Accordingly, in Justinian's time, not only every alienation by a pursuer of the subject of his claim was void, but also an alienation by a possessing defender in a *vindicatio*. If the purchaser had notice that the subject was a *res litigiosa*, he forfeited the purchase-money to the fisc, and the seller forfeited an equal sum. If the purchaser was without notice, he could recover from the seller the price he had paid, together with an additional third, and the seller was further liable to forfeit two-thirds of the price to the fisc (Gaius, *Inst.* iv. 117; *Cod.* 8. 37. 2; 8. 36. 5; *Nov.* 112. 1).

In Scotland the maxim, *Pendente lite nihil innovandum*, is recognised as a principle of common law. After an action or diligence has been begun, and the necessary steps have been taken to secure publication, the defender or debtor cannot defeat the action or diligence which has been instituted against him by alienating the property forming the subject of litigation. If the property in question is alienated, the rights of the pursuer of the action, or of the person using the diligence, are not prejudiced, for the purchaser is bound by any decree pronounced in the action, or takes the property subject to the diligence then in dependence (Bell, *Com.* ii. 144; *Marshall*, 1895, 22 R. 954; 23 R. (H. L.) 55). The manner in which land may be made litigious, and the point of time from which it is reckoned *in rebus litigiosis*, are now matters of express statutory provision (Titles to Land Consolidation (Scotland) Act, 1868, ss. 155, 159). This maxim does not strike at an act done or deed granted in fulfilment of a previous obligation. Thus a party who is substantially in right of a ground of action is entitled to found on a deed granted *pendente lite* to complete his formal title (*Donald*, 1866, 5 M. 146). It has long been settled that the maxim "applies only to things done by the debtor or defender in the action which tend to make the right of the creditor or pursuer worse, but cannot hinder the creditor or pursuer from making his right better, even in competition with another creditor or pursuer" (*Massey*, 1785, Mor. 8377). The effect of diligence in producing litigiosity is fully treated in Bell, *Com.* ii. 145. Erskine mentions as an instance of the application of the maxim, the rule that no diligence was effectual to create a new preference to the user of it, in competition with other creditors, after the institution of a process of ranking and sale

(Ersk. *Inst.* ii. 12. 65). As is pointed out, however, by Professor Bell (*Com.* ii. 147), this rule is properly referable to the principle that wherever the process can be regarded as a general measure for the behoof of all the creditors, it ought to supersede the diligence of individuals,—a principle which is fully recognised in the Bankruptcy Statutes.

See LITIGIOSITY.

Pension.—A pension is a gratuitous annual allowance of money from the public purse or from a private person, generally granted in consideration of past service. Any person who holds a pension from the Crown, either during pleasure or for a number of years, is incapable of being elected a member of the House of Commons; and any such person who, being elected, shall sit or vote in the House, is liable to a penalty of £20 for every day in which he shall so sit or vote (1 Geo. I. c. 2, s. 56).

Pensions granted by the Crown are not arrestable, because they are held to be alimentary, even when there is no express declaration to that effect. Provision is made by sec. 149 of the Bankruptcy Act, 1856, whereby, in the case of the bankruptcy of persons to whom pensions are paid by certain departments of Government, an order of Court may be obtained for payment of part of such pensions to the bankrupt's creditors. The section has been held not to apply to the case of a pension payable by the Lords Commissioners of the Treasury (*Latta,* 1857, 19 D. 1107), and an order will not in any case be granted where the pension does not exceed a *beneficium competentiæ* (*Scott's Tr.*, 1885, 12 R. 540; Goudy on *Bankruptcy,* 384).

Penuria testium.—"The spirit of the old Scotch law was to exclude the evidence of every person whose character, whose connection with the parties, or whose interest in the cause raised a doubt as to the trustworthiness of his evidence. It was then more difficult to discover who were admissible, than who were incompetent, witnesses" (Dickson, s. 1542). As examples of those thus excluded from bearing testimony may be cited: pupils, lunatics, bondsmen, women, adulterers, thieves, the perjured and the infamous, *socii criminis,* 'men sib in blood . . . clerks against laicks and laicks against clerks" (*ib.*). Owing to the difficulties arising from the numerous disqualifications, the Court resorted to the expedient of examining *ex nobili officio* persons incompetent at law as witnesses. This practice fell into disuse (Tait, *Evidence,* 341). It was succeeded, however, by a similar practice in cases where there was "a penury of unexceptionable witnesses" owing to the "occult or more private" nature of the facts (Ersk. iv. 2. 26; cf. Stair, iv. 43. 8). The witnesses were admitted *cum notâ*; and their testimony, while not entirely rejected, was regarded as of an inferior degree of credibility (*ib.*). The tendency of modern times has been to sweep away these exclusionary rules, and, accordingly, the question of *penuria testium* can but seldom arise. It is to be observed that the privilege obtains where the *penuria* is due to the nature of the case, and not to the actings of the parties (*Lindsay,* 1826, 4 S. 490, per Ld. J.-Cl. Boyle). It really "arises only where it is not possible that there should be any more evidence. A very well-known example of that is the celebrated case of *Christie* (17 November 1731, Maclaurin's *Crim. Cas.* 632; 2 Hume, *Com.* 400) in the last century, who was tried for murder, and whose defence was that he killed the deceased under provocation arising

from finding him in an act of adultery with his wife. No human being knew anything of that except himself and the deceased and the wife; and in these circumstances, the wife's evidence was admitted. . . . If the wife's evidence had not been admitted, the fact would never have been proved" (*Surtees*, 1872, 10 M. 866, per Ld. Pres. Inglis).

As to the effect of *penuria testium* in an application for a commission to take the evidence of persons aged, sick, or infirm, or intending to go abroad, see COMMISSION, PROOF BY (3).

See also WITNESS.

[Dickson, ss. 1615, 1636; Tait, *Evidence*, pp. 373 *et seq.*; Mackay, *Manual*, 366.]

Perambulation.—The old action upon a brieve of perambulation, which had for its purpose the determination of controverted marches, was regulated by the Act 1579, c. 79. The tenor of the brieve of perambulation, or precept directed to the Sheriff, is stated by Stair (*Inst.* iv. 3. 14). An action of this kind, in its purpose and effect, was closely akin to an action of molestation. The distinction between the two actions was, as stated by Erskine, that the action upon a brieve of perambulation was used where there was no dispute concerning the possession of the lands, and where the only question between the parties related to a point of right; whereas, in an action of molestation, the pursuer laid his plea on possession and secured the continuance of his possession of the lands, until the point of right was determined (Ersk. iv. 1. 48; Stair, iv. 27). Both actions are now in disuse, as their object can now be readily attained, in regard to the question of possession, by interdict, or, in regard to the question of right, by declarator.

[Stair, iv. 3. 14; iv. 27; Ersk. iv. 1. 48; Bankt. i. 281.] See FINIUM REGUNDORUM, ACTIO; MOLESTATION, ACTION OF.

Per capita; Per stirpes.—In the succession of classes of persons questions often arise as to whether each class is to take an equal share, or whether the division of the estate is to be among the individual members in equal shares. Where each individual succeeds to an estate in his own right, the succession is said to be *per capita*. When the estate or fund is to be divided, not among individuals as such, but between the different stocks or *stirpes*, the succession is *per stirpes*.

The Intestate Moveable Succession Act, 1855 (18 Vict. c. 23), which introduced the principle of representation in succession in moveables, provides (s. 1) "that where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing." Under this provision succession is *per stirpes*, but the provision only applies where but for the Act such issue would have been altogether excluded. Thus where nephews and nieces are the nearest surviving relatives, the estate of their intestate uncle will be divided among them *per capita* (*Turner*, 1869, 8 M. 222).

In testate succession, where a bequest is made to a class or classes, the tendency is to favour division *per capita* (*M'Courtie*, 1812, Hume, 270; *Rennie*, 1822, 2 S. 60; *Hogg*, 1887, 14 R. 887). The question is, however,

entirely one of the intention of the testator, as gathered from the words of bequest and the whole scope of the settlement. Where shares of residue, original or lapsed, are given in liferent and fee to persons named and their children respectively, the rule of construction is in favour of division *per stirpes* (*Home's Trs.*, 1884, 12 R. 314).

Perduellion.—See Treason.

Periculum.—See Risk.

Perjury. — Definition. — *Perjury is the judicial affirmation of falsehood upon oath.* The term *oath* includes an *affirmation* recognised as equivalent to an oath (Hume, i. 366; Alison, i. 465; Macdonald, 214).

(1) The Statement must be upon Oath, and in a Judicial Proceeding.—The institutional writers treat of perjury as an offence against *the course of justice.* It is apparently on this principle that the crime can only be committed in civil or criminal proceedings possessing a properly judicial character. A formal appeal to the Deity, or affirmation equivalent thereto, emitted before a judge competent to receive it and in due form, is essential to the crime (*M'Lachlan*, 1837, 1 Swin. 528; Bell, *Notes*, 94; see also *Barr*, 1839, 2 Swin. 282—held that the taking falsely the oath prescribed by the Reform Act, 1832, Sched. 1, although not perjury in respect of there being no appeal to the Deity, was an indictable offence at common law. This case contains an exhaustive examination of the principles applicable to the crime of perjury. See more especially the *Information for the Panel*, pp. 294–310). A technical informality in the trial in which the alleged perjury is committed, will not elide the charge (*Richardson*, 1872, 2 Coup. 321); but if a satisfactory guarantee for the accuracy of the oath itself is omitted, the results may be more serious (*Hastie*, 1863, 4 Irv. 389—Sheriff absent during part of examination of a witness in sequestration proceedings). Perjury may be committed in a reference to oath. Although Hume (i. 370) appears to treat the point as open, it seems settled that perjury cannot be committed in proceedings before an *Ecclesiastical Court* (Alison, i. 471; Macdonald, 215). Professor More (ii. 409) indicates an opinion that where *civil proceedings* are being investigated by an Ecclesiastical Court, a charge of perjury in respect of falsehood would lie. See also Erskine's *Principles* (Rankine), 632. Falsehood in *affidavits required by law*, more especially where forming part of judicial proceedings, have been prosecuted as perjury at common law The majority of statutes, however, prescribing such affidavits, make special provision for falsehood therein inferring the pains of perjury or special pains and penalties (Hume, i. 374; Bell, *Notes*, 95, 96; *Speirs*, 1836, *Hutchison and Carter*, 1831; Alison, i. 471).

(2) The Falsehood.—To infer perjury, the falsehood must be (*a*) *Explicit*—absolutely irreconcilable with truth. Mere omission is not sufficient. (*b*) *It must be made wilfully and corruptly in the knowledge of the truth.* If the untrue statements can be reasonably attributed to an erroneous view of the facts, or to defective recollection, the accused will be entitled to the benefit of this; but an oath of *non memini* or *nihil novi* will not protect a witness if the events were so recent or the circumstances such that he could not fail to be aware of them. As Hume (i. 375) points

out, there is no absolute distinction between *oaths of opinion or credulity* and other oaths, but that the difficulty lies in obtaining proof of the corrupt *animus* in such cases. It is only in very exceptional circumstances that such an oath could be made the foundation of a charge of perjury. A prosecution for perjury will not lie in respect of the breach of *promissory oaths*, such as those of allegiance, as this may be attributed rather to forgetfulness subsequent to the oath, than to falsehood at the time when it was emitted (Hume, i. 366, 368, 371, 375; Alison, i. 467, 475). (*c*) *It must be material to the issue.* This naturally follows from the principle of the crime being against the course of justice, as only falsehoods on material points are calculated to affect the interests involved. The possibility of innocent mistake on immaterial details is also a ground for the distinction between facts material and immaterial. To what facts these characteristics apply will be a question of circumstances in each case, but facts affecting the qualification, credit, and credibility of witnesses have been held material (Hume, i. 369; Alison, i. 469; Macdonald, 216; *David Brown*, 1843, 1 Broun, 525).

(3) Proof of Perjury.—(*a*) *Proof of the Tenor of the Oath.*—It is very desirable that where perjury is suspected the evidence of the witness should be formally reduced to writing, read over to and signed by him. In proceedings where a written deposition is essential, such deposition would be the only competent method of proving the oath; but in proceedings where a record of the evidence does not require to be kept, parole evidence is admissible. Where perjury is alleged to have been committed in proceedings in the inferior Court, the judge of that Court is a competent witness, and he may refer to notes of evidence made by him at the time (*Monaghan*, 1844, 2 Broun, 82 and 131). It rather appears that a judge of the Supreme Court is not a competent witness in similar circumstances (*Wilson*, 1834, Bell, *Notes*, 99. In *Monaghan*, *supra*, p. 136, the Court abstained from expressing an opinion on this point). (*b*) *The falsehood of the oath and the knowledge of that falsehood by the witness* may be proved *pro ut de jure*. Even although such evidence implies guilt of a crime in which an acquittal has been obtained (*Walker*, 1838, 2 Swin. 69, see p. 86).

In *Bauchop*, 1840, 2 Swin. 513, it was held competent to prove by parole the terms of an oath by the panel as a witness in the Small Debt Court three years previous to the trial, for the purpose of supporting a charge of perjury in respect of a deposition subsequently emitted by him. The prosecutor must be prepared to prove the true state of the facts: it is not sufficient to found on two contradictory oaths, and allege that one or other is false (*Bauchop*, *supra*; Hume, i. 372, 375–377; Alison, 476–482; Macdonald, 214).

(4) The Punishment of Perjury.—Hume (i. 378) gives instances of capital punishment following on convictions of perjury; and under the old Statutes 1540, c. 80; 1551, c. 19 and 22; 1555, c. 47, severe corporal pains, such as dismembering the hand or tongue and piercing the tongue, as well as banishment, escheat of moveables, etc., were authorised. For many years the punishment has been confined to penal servitude or imprisonment. It was for long the invariable practice to include in the sentence a declaration that the panel was to be "infamous and incapable of holding any public trust or office, or of passing upon any inquest or assize, or of giving evidence in any Court of justice in all time coming." The clause relating to giving evidence was omitted after the passing of the Evidence Act, 1852 (15 Vict. c. 27), as being inconsistent with the terms of that Act, which provided (s. 1) that no person adduced as a witness "shall be excluded from giving

evidence by reason of having been convicted of, or having suffered punishment for, crime" (see *Maxwell*, 1865, 5 Irv. 65); and opinions were expressed by the Lord Justice-Clerk (Moncreiff), in the case of *Marr*, 1881, 4 Coup. 407, in favour of the declaration of infamy being omitted in the majority of cases (see p. 417). The Court of Session has jurisdiction summarily to try perjury occurring in proceedings before that Court (Hume i. 379), but in modern practice the crime is dealt with in the criminal Courts. The Sheriff has jurisdiction in cases of perjury (*Marr, supra*). Indeed such cases are now generally tried in the Sheriff Court, and in exceptional circumstances have, with the authority of Crown counsel, been even tried summarily. Prior to the cases of *Marr, supra*, and *Roberts*, 1882, 5 Coup. 118, it appears to have been not uncommon in the Sheriff Court to add the declaration of infamy to sentences in perjury; but having regard to the opinions expressed in these cases, it appears settled that this declaration is incompetent in the Sheriff Court. See remarks in the latter case as to the effect on a charge of perjury of the evidence in the Sheriff Court not being dictated (Hume, i. 377; Alison, i. 482; Macdonald, 217.)

Modus in Libel.—". . . you being sworn as a witness in a civil cause, then proceeding in the Sheriff Court, deponed [*here set forth the statements said to be false*]; the truth, as you knew, being that [*here state the true facts*] . . . " (see Crim. Proc. Act, 1887, Sched. A; Macdonald, 400; *Bole*, 1883, 5 Coup. 350). It is competent to charge several panels in the same indictment with perjury where the crime relates to the same matter, and is alleged to have been committed to compass the same defeat of justice (*Marr, supra*).

Prevarication upon Oath.—This consists in the witness not uttering direct falsehoods, but attempting to mislead the Court by "*an artful tricking oath*," *inconsistent* and *contradictory* in itself. As a gross contempt of Court and of the sanctity of an oath, it may be immediately punished by the presiding judge (Hume, i. 380; Alison, i. 484). It is unnecessary in the High Court and in the Sheriff Court to set forth in the warrant of commitment the particulars of the prevarication (*MacLeod*, 1884, 5 Coup. 387. In this case the prevarication was in a civil action. Ld. Young entered a strong dissent to the judgment, and the case is one deserving careful perusal). In Police Courts, details of the prevarication are frequently matter of statutory requirement (*Blake*, 1890, 2 White, 477).

Subornation of Perjury consists in the inducing others to give false testimony (Hume, i. 381; Alison, i. 486; Macdonald, 217). It is immaterial by what means or inducement the false evidence is procured. The crime is only complete if the witness actually swears to the falsehood, but *attempt* is a relevant charge both at common law and under sec. 61 of the Criminal Procedure Act, 1887. The criminal attempt is committed as soon as the corrupt inducement has been offered to the witness.

Punishment.—The punishment is penal servitude or imprisonment; and if the crime has been completed, the sentence, in the High Court, may include a declaration of infamy.

Modus in Libel.—". . . you did suborn James Carruthers, scavenger, 12 Hercles Street, Edinburgh, to depone as a witness in the Sheriff Court of Edinburgh that [*here set forth the statements said to be false*], and he did [*time and place*] depone to that effect; the truth, as you knew, being" [*here state the true facts*] (Criminal Procedure Act, 1887, Sched. A).

Practices to procure False Evidence or to prejudice a Fair Trial.—Such practices, although they may not amount to subornation, are punishable. Hume (i. 383–385) and Alison (i. 488, 489) cite cases prosecuted under this category in respect of the destruction or suppression of evidence, soliciting parties to concur in false or malicious prosecution, and publications calculated to affect the mind of the public and prevent a fair trial.

Notes on Law of England.—The law of England seems to rest on very much the same principles as our own (Stephen, *Digest*, pp. 95–100; Russell on *Crimes*, vol. i. 293–403). The following cases may be consulted: *R.* v. *Hughes*, 1879, 4 Q. B. D. 614 (technical informality in proceedings in which perjury committed—conviction sustained); *R.* v. *Lloyd*, 1887, 19 Q. B. D. 213 (registrar absent during examination on oath in which alleged perjury committed—conviction quashed); *R.* v. *Baker*, [1895] 1 Q.B. 797 (materiality).

Permutation.—See Barter; Excambion.

Personal Bar or Exception.—See Bar (Personal).

Personal Rights.—Rights are distinguished as "personal" in several different senses and relations.

1. *As Distinct from Heritable* (see Heritable and Moveable).—From a conveyancing point of view there is a conspicuous failure to provide statutory facilities in regard to dealings with moveable or personal estate. The Transmission of Moveables Act, 1862, is quite insufficient; virtually it takes no cognisance of securities over such property, transactions which in point of fact represent an enormous annual aggregate. It is quite different in England.

2. *As Distinct from Transmissible.*—See Infeftment, vol. vi. p. 326; Open Charters.

3. *Under Unfeudalised Conveyance.*—See Disposition, vol. iv. p. 290.

4. *Under* 1874 *Act.*—See Disposition, vol. iv. p. 295.

5. *Jus crediti to Heritage* (see Disposition, vol. iv. p. 296; Jus crediti, vol. vii. p. 247).—A "personal" right under an unfeudalised conveyance of heritable property, and a "personal" right to such property under the 1874 Act, are of course heritable. But a *jus crediti* under a trust which consists of, or embraces, heritable property may or may not be heritable (see Heritable and Moveable). If, however, it is correctly described as a *jus crediti* to heritage, it must be heritable; but whether heritable or moveable as regards succession, it may be validly transmitted by a simple assignation intimated to the trustees. As pointed out, however, in the article on Disposition, recording in the register of sasines will, under certain circumstances, be equivalent to intimation. This especially is so when trustees hold particular heritage upon trust, say for A. in liferent and B. in fee, without any power of sale, so that the right of both A. and B. is to the liferent and the fee respectively of the specific property. This suggests that in any transaction with either A. or B. in regard to such property, there should be not only inquiries of the trustees as to prior intimations, but also a search in the register of sasines.

6. *In Conjunction with a Feudalised Fee.*—See Consolidation, vol. iii. p. 224, and Double Title, vol. iv. p. 352.

Personal Services—These were feudal obligations, express or customary, under which a vassal was bound to attend personally on his superior "hosting, hunting, watching, and warding." So far as of a military tendency, they were practically abolished by the Clan Act of 1715 (1 Geo. II. c. 54, s. 10; also 20 Geo. II. c. 43, and c. 50, s. 18). Other Personal Services, which are not military in their nature and which do not necessitate the assembling of the vassals together, still subsist. To this latter class belong obligations to up-keep a manor house; to maintain a boat and steersman; to supply peats, kain-fowl, and the like; to render agricultural services, such as a sheer-darg. Agricultural services, carriages, and similar prestations must be demanded within the year to which they refer, but arrears of services requiring the supply of certain articles of consumption may be demanded. "Carriages" and "services" may be commuted for a money payment under the provisions of the Conveyancing Act of 1874 (37 & 38 Vict. c. 94, ss. 20 and 21).

[*Young*, 1693, Mor. 13071; *D. of Argyle*, 1762, Mor. 14495; *Munro*, 1763, Mor. 14497; *Dallas*, 1699, Mor. 15006; *Hope*, 1872, 10 M. 347; Ersk. ii. 5. 2; More's Stair, ccvii; Kames, *Stat. Law*, *voce* "Service"; Bell, *Prin.* 691; Menzies, *Convey.* 521; Bell, *Convey.* 573, 633; Begg, *Convey.* 352.]

Per stirpes.—See PER CAPITA; PER STIRPES.

Pertinents.—See PARTS AND PERTINENTS.

Petition.—Petitions form one of the two great divisions of initiatory writs in the Court of Session, summonses being the other. While the summons, however, presupposes a contradictor,—some person guilty of a wrongful act, whether of omission or commission, for which the pursuer seeks a remedy,—the petition, as a rule, commences as an *ex parte* application, seeks no remedy against any specific person, but asks only that the petitioner be empowered to do, by or with the authority of the Court, some act which otherwise would be incompetent. The petition, further, does not run in name of the sovereign, nor does it pass the signet. Historically, the petition, or, as it was sometimes called, supplication, was in early times regarded as purely an equitable proceeding, suitable whenever the ordinary forms of action were inapplicable, or circumstances required a simple and summary form of procedure, and it was even sometimes employed as an economical substitute for action by way of summons (*Thomson*, 1677, Mor. 14965; *Hume*, 1712, Mor. 14967). Some traces of its origin still survive in the rule that procedure by petition is incompetent wherever any other form of action can be used. That equitable jurisdiction of the Court known as the *nobile officium* (*q.v.*) has always been, and still is, invoked by petition.

In form the petition is exceedingly simple. It consists of (1) the address, which, except in Bill Chamber petitions and petitions incidental to other processes, is always "Unto the Right Honourable the Lords of Council and Session"; (2) the name and designation of the petitioner, which must be accurately given (*Maccallum*, 1883, 11 R. 60); (3) a statement of the facts or statutes which it is conceived entitle the petitioner to the desired intervention of the Court; and (4) the prayer, which commonly asks (*a*) that the petition be intimated on the walls and in the Minute Book, and served on such persons as have, or may be supposed to have, an interest, and,

in some instances, advertised in the public prints; (*b*) that all persons desiring to oppose the prayer of the petition be ordered to lodge answers within a limited time, usually eight days; and (*c*) that, on consideration of the petition and answers, if any, and after any inquiry thought neccessary, the Court will make or recall the appointment (*e.g.* of judicial factor or curator *bonis*), or grant the power (*e.g.* to make up title to or sell property), or make such other order as may be desired. In petitions for appointment of factors or curators, and for sequestration or liquidation, if the circumstances so require, an interim appointment, pending the carrying through of the petition, is sometimes asked. The petition should be drawn or at least revised and, unless a Bill Chamber petition, must be signed by council (Note in 18 D. 33).

By the Distribution of Business Act, 1857 (20 & 21 Vict. c. 56, s. 4), the great bulk of petition work has been appropriated to the Junior Lord Ordinary, particularly: (1) Petitions under the various Entail Acts (see ENTAIL). (2) Petitions for the appointment, discharge, or recall of the appointment of all classes of judicial factors (*Rhind*, 1875, 2 R. 1002), factors *loco tutoris* or *absentis*, and curators *bonis*, or by such officials for special powers. (3) Petitions under the Pupils Protection Act, 1849 (12 & 13 Vict. c. 51). (4) Petitions relative to consigned money. (5) Petitions under the Railways, Lands, and Companies Clauses Acts, and (unless otherwise specially enacted) local and personal Acts. As the Junior Lord Ordinary is, in session, also Lord Ordinary on the Bills, all Bill Chamber petitions, which are almost exclusively connected with sequestrations, come before him in that capacity.

A second class of petitions can be brought before any of the Lords Ordinary whom the petitioner may choose. Those are: (1) Petitions under the Trusts Act, 1867 (which it must, however, be remembered only apply to gratuitous trustees, *Mackenzie*, 1872, 10 M. 749), including: (*a*) for power to sell, feu, borrow on security of, or excamb, any part of the trust estate; (*b*) for authority to make advances out of capital to minor descendants having vested interests; (*c*) for authority to apply funds, left for the purchase of heritage, to the payment of burdens on heritable estate destined to the same heir or heirs; (*d*) for the discharge of trustees resigning, or of the heirs of trustees who have died during the subsistence of the trust, where a discharge cannot otherwise be got; (*e*) by a sole trustee for the appointment of new trustees or a factor, and for leave to resign; (*f*) by anyone having an interest, for the appointment of new trustees, where new trustees cannot be assumed, or the sole trustee is insane or incapable of acting. (2) Petitions incidental to a depending process, as for recall of arrestments or inhibitions used on the dependence of an action, which must, of course, be brought before the Lord Ordinary before whom the principal process depends (1 & 2 Vict. c. 114, s. 20). During session the Inner House has concurrent jurisdiction in such petitions (*Hart*, 1864, 3 M. 336; *Latham*, 1866, 4 M. 1088), and in vacation the Lord Ordinary on the Bills may recall such diligence, even though the summons may not have been called (*Morrison*, 1847, 10 D. 146). (3) Petitions to fix the date of death of absent persons under the Presumption of Life Act, 1891. (4) Petitions by married women for protection orders under the Conjugal Rights Act, 1861, s. 1; and petitions by deserted wives, or those living by consent apart from their husbands, to execute deeds dealing with their own estate without their husbands' consent, in terms of the Married Women's Property Act, 1881, s. 5. (5) Petitions under the Court of Session Act, 1868, s. 91, for the restoration of property or the performance of statutory duties.

Election Petitions form a class entirely separate, the whole procedure in which is statutory and peculiar to these. They will be found treated of at length under the head of ELECTION PETITION.

Although brought before Outer House judges, all the foregoing classes of petitions, except those which may be called incidental to other processes,—viz. petitions for recall of diligence, for audit of agent's accounts, and for admission to the poor's roll, and notes to the Presidents of either Division,—are addressed to the Lords of Council and Session, and are printed and boxed to the Court. The jurisdiction exercised by the Lords Ordinary is really a delegated jurisdiction from the Inner House, and the causes remain in essence still Inner House causes. Thus, for example, they never fall asleep (*Wemyss*, 1860, 22 D. 556).

By statute (52 & 53 Vict. c. 54, s. 3) the processes in all petitions brought before the Junior Lord Ordinary are under the charge of the Bill Chamber Clerks, and they appear in the Bill Chamber Rolls. During vacation, when the Junior Lord Ordinary does not sit, the judge who for the time takes the Bill Chamber work, exercises, partly by statute and partly by long-continued custom, the greater part of his petition jurisdiction. Thus he can deal with all entail petitions (Entail Act, 1875, s. 12 (1)), appoint judicial factors, curators *bonis*, and factors *loco tutoris* (Distribution of Business Act, 1857, s. 10).

As has been noticed, all petitions were originally brought in the Inner House, and it follows that, unless where the jurisdiction has been delegated, they must still be brought there (*Campbell*, 1867, 10 M. 1052; *Paterson*, 1820, 17 R. 1059). It would be impossible to enumerate all the kinds of petitions that come before the Inner House, but the following are perhaps the most common: (1) Petitions under the Companies Acts for winding-up or supervision orders, or for special powers, such as to reduce capital. In vacation this power is exercised by the Lord Ordinary on the Bills (Companies Act, 1886, s. 5; *Niddrie Coal Co.*, 1892, 19 R. 820). (2) Petitions for custody of children (*Brand*, 1888, 15 R. 449; *M'Callum*, 1892, 20 R. 293); which may in vacation be brought before the Lord Ordinary on the Bills (*Edgar*, 1893, 21 R. 59). (3) Petitions in connection with House of Lords appeals, viz. for leave to appeal, for interim possession and execution, and to apply the House of Lords' judgment. (4) Petitions for the opinion of the Court on questions of law remitted from other British or Colonial Courts. (5) Petitions for the exercise by the Court of its *nobile officium* (*q.v.*). These include petitions for appointments of public officials *ad interim* in cases of urgency (which may be made in vacation by the Lord Ordinary on the Bills—*Logan*, 1890, 17 R. 757); for recall of diligence, whether on the dependence or not (see ARRESTMENT; INHIBITION); as to cases unprovided for under a statute (*White*, 1893, 20 R. 600); relative to trusts, and not falling under the Trusts Act, 1867 (*Websters*, 1887, 14 R. 501); and to settle or alter schemes, etc., in charitable trusts (*Glasgow Royal Infirmary*, 1887, 14 R. 680).

The principal steps of procedure are practically the same in all petitions—any variations consisting merely of such additional steps as may be necessary to adapt it to the particular purpose. With the exceptions already noted, all are printed and boxed (see BOXING), and are lodged in process in the same way as summonses or other initiatory writs. On being so lodged, they appear in the rolls of the next sederunt day, viz. the Single Bills if an Inner House petition, and the Motion Roll if in the Outer House. All subsequent steps must be enrolled in the usual way, and also the first step where the petition is not boxed. When it appears

in the roll, counsel moves for intimation and service, and, if asked for, advertisement; and also an order on anyone desiring to oppose, to lodge answers, all in terms of the prayer of the petition. The Court may order such further service or notice as it sees fit. As in other cases, a certified copy of the interlocutor is the warrant for service; copies of the petition and order, with schedule of intimation annexed, are then served on each of the persons on whom service has been ordered, and also, if ordered, a notice of the dependence of the petition inserted in the newspapers. A copy of the petition and order is also put up on the walls of the Parliament House lobby. On the expiry of the *inducice*, which are usually eight days, the execution of service, and also a certificate that the petition has been intimated and advertised, and that the *inducice* have expired, are lodged in process.

If there is to be opposition, answers, which will be in the same form as the petition, *i.e.* printed and boxed or written, as the case may be, must be lodged. The case is then enrolled by the petitioner, and proceeds in much the same way as an opposed petitory action, save that the pleadings are not put into the form of a closed record, nor adjusted. The cause may be sent to proof if necessary.

If no answers are lodged, the certificate of intimation should state this, and the petition will then be enrolled either for decree or for further procedure. In most cases the next step is a remit to some skilled person to report on the circumstances of the case, and the propriety of granting the prayer. Thus in entail petitions a remit is made to a man of business, and sometimes also to a man of skill, to report, for the information of the Court, on the propriety of the proposed proceedings; in certain petitions as to companies, to a man of business; and in petitions by factors, etc., for discharge or for special powers, to the Accountant of Court. If the report be adverse or raise doubts, the case may, with or without objections being lodged, be sent to the roll for hearing; if favourable, it will be enrolled for decree. In the latter case the reporter usually appends to his report the draft of a proposed interlocutor. In cases of difficulty the Lord Ordinary may report to the Inner House for direction.

The decision of a Lord Ordinary may be reclaimed against in the usual way. The time for reclaiming varies in different cases. Thus petitions before the Junior Lord Ordinary or the Lord Ordinary on the Bills in vacation, and those under the Trusts Acts, must be reclaimed against within eight days (*Mellab*, 1871, 10 M. 248; *Haig*, 1878, 2 R. 701); incidental petitions, within ten days; and sequestration petitions, within fourteen days.

The procedure in special forms of petitions will be found under the different heads (Entail; Judicial Factor; Presumption of Life; Joint Stock Company; Arrestment; Inhibition; etc.).

[Shand, *Practice*, ii. 968; Mackay, *Manual*, 522 *et seq.*; *Jurid. Styles*, iii. 395, 474 *et seq.*]

Petition and Complaint is the process by which the Court of Session exercises its criminal or *quasi*-criminal jurisdiction (*Bell*, 1848, 10 D. 1413; *Bell*, 1862, 1 M. 85). In Erskine's time (i. 3. 21) the Court of Session had jurisdiction, by statute, in such crimes as forgery (1555, c. 47), deforcement (1581, c. 118), fraudulent bankruptcy (1696, c. 5), and wrongous imprisonment (1701, c. 6); and at common law, when the crime was necessarily connected with a civil action depending before it. Such proceedings have now for long been in desuetude. It still, however,

exercises a criminal jurisdiction (1) over inferior judges (20 Geo. II. c. 43, s. 29; *McAulay*, 1830, 9 S. 48; *Harvey*, 1837, 16 S. 249); (2) over its own officials (1 & 2 Vict. c. 118, s. 30), including Clerks of Court (*Ld. Advocate*, 1837, 15 S. 1184), judicial factors, law agents (*Loudon*, 1822, 1 S. 247), and trustees in bankruptcy (*Baillie*, 1844, 6 D. 1376); (3) in breach of interdict (*McNeil*, 1866, 4 M. 608). In all these cases the only competent mode of proceeding is by petition and complaint. As this is really a criminal procedure, the acts charged must be detailed with the same precision as in an indictment, and, except in proceedings under the Act of Sederunt 6 March 1783, the concurrence of the Lord Advocate must be obtained before the case is brought into Court (*Syme*, 1765, Mor. 14979; *Lord Advocate, supra*; *Harvey, supra*; *Paterson*, 1872, 11 M. 76). It can only be brought in the Inner House (*Syme, supra*; *McNeil, supra*). The procedure is regulated by A. S. 11 July 1828, ss. 83 *et seq.*, and is very similar to that in other Inner House petitions, the criminal *inducice* of fifteen days being, however, allowed. After answers are lodged, a remit is made to the Junior Lord Ordinary, who hears parties, and, if necessary, takes proof (*Dudgeon*, 1876, 3 R. 974). He then reports to the Division, who decide the case, and who may fine or imprison the respondent (*M'Leod's Trs.*, 1883, 10 R. 792; *Mackenzie*, 1889, 16 R. 1127).

There are two other classes of causes which, although not exactly criminal, usually proceed by way of petition and complaint. The one is petitions by the Board of Supervision, now the Local Government Board, to enforce the provisions of the Poor Law and Public Health Acts (8 & 9 Vict. c. 83, s. 87; *Board of Supervision*, 1850, 12 D. 628; 30 & 31 Vict. c. 101, s. 97; *Board of Supervision*, 1893, 20 R. 434). The other is petitions under the Law Agents Act, 1873, s. 22, against a law agent for misconduct (*Society of Law Agents*, 1886, 14 R. 161).

[Shand, *Practice*, ii. 1012, 1035 *et seq.*; Mackay, *Manual*, 587 *et seq.*; Beveridge, *Forms*, i. 206.]

Petitory Actions "are so called not because something is sought to be awarded by the judge (for in that sense all actions are petitory), but because some demand is made upon the defender in consequence either of a right of property or credit in the pursuer" (Ersk. iv. 1. 47). As opposed to possessory actions, they are founded not on possession of, but on right to, the subject of dispute. They include actions for payment, furthcoming, damages, implement, poinding, decree *ad factum præstandum*, and, generally, all actions for the enforcement of contracts or *quasi*-contracts. The Sheriff Court has concurrent jurisdiction with the Court of Session in such actions.

Petroleum.—The storage and carriage of petroleum is regulated by the Petroleum Acts of 1871 (34 & 35 Vict. c. 105) and of 1879 (42 & 43 Vict. c. 47). Petroleum to which these Acts apply includes any rock oil, Rangoon oil, Burmah oil, oil made from petroleum, coal, schist, shale, peat, or other bituminous substance and their products giving off an inflammable vapour at a temperature of less than 73° Fahr., when tested in the manner set forth in the Acts (s. 3 of 1871 Act and 2 of 1879 Act). The owner or master of any ship carrying petroleum must, on entering a harbour, give notice to the harbour authority of the nature of his cargo; otherwise he incurs a penalty not exceeding £500 (s. 5 of 1871 Act). When any ship or cargo is moored or landed in contravention of the bye-laws in force

in any harbour, the owner or master of the ship, or the owner of the cargo, incurs a penalty not exceeding £50 for each day during which the contravention continues, and the harbour authorities may remove the ship or cargo at the expense of the owner (s. 4 of 1871 Act). Provision is made for the labelling of vessels containing petroleum (s. 6 of 1871 Act). Petroleum is not to be kept without a licence granted by the Local Authority appointed under the Act, viz: in burghs, the Town Council or Police Commissioners; in harbours, the Harbour Trustees; in other places, two or more Justices of the Peace for the county (ss. 7 and 8 of 1871 Act). The decision of the Local Authority may be appealed from to the Secretary for Scotland (s. 10 of 1871 Act). Petroleum kept in contravention of the Acts is to be forfeited, and the occupier of the place in which it is kept is liable to a penalty not exceeding £20 for each day during which the petroleum is kept (s. 7 of 1871 Act). Penalties imposed on those contravening the Acts are recovered at the instance of the procurator-fiscal or any officer authorised by the Harbour Authority or the special Local Authority under the Act. Penalties to the amount of £50 may be recovered before the Court of summary jurisdiction appointed by the Act, viz. two or more Justices of the Peace sitting in their Court, or one of the following magistrates sitting in Court alone or with others: (1) the Sheriff or his Substitute; (2) the Provost or other Magistrate of a Royal Burgh; or (3) some other officer or officers for the time being empowered by law to do alone or with others any act authorised to be done by more than one Justice of the Peace. Such penalties may be enforced, in default of payment, by three months' imprisonment. Penalties exceeding £50 are recovered and enforced in the same manner as any penalty due to Her Majesty under any Act of Parliament (s. 15 of 1871 Act).

The hawking of petroleum, as defined by the Acts of 1871 and 1879, is regulated by the Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), and penalties are imposed on persons contravening its provisions.

On 3 March 1896, a Select Committee of the House of Commons was appointed to inquire and report on the sufficiency of the law relating to the keeping, selling, using, and conveying of petroleum and other inflammable liquids, and the precautions to be adopted for the prevention of accidents with petroleum lamps. This Committee was reappointed in 1897 and 1898. On 24 June 1898 the Committee decided, by a majority of eight to seven, to recommend the raising of the flash-point from 73° to 100° Fahr.

Pew.—See Seats in Churches.

Pharmacy Acts; Pharmaceutical Society.—The Acts regulating the qualifications of pharmaceutical chemists are: 1852, 15 & 16 Vict. c. 56; The Pharmacy Act, 1868, 31 & 32 Vict. c. 121; The Pharmacy Act, 1868, Amendment Act, 1869, 32 & 33 Vict. c. 117. See also Poisons. An unqualified person who dispenses drugs which cause death is guilty of culpable homicide. In the case of *Wheatley* (1853, 1 Irv. 225) the panel was charged that "being a student in attendance on the medical classes of the Andersonian University of Glasgow, and not being authorised or in use to practise or prescribe as a physician, and having" been permitted for some months to frequent a certain chemist's shop with a view to acquiring a practical knowledge of drugs and the making up of prescriptions, "but not being employed or intrusted by the said D. C. to

dispense drugs," he gave a person a dose containing tincture of aconite and tincture of belladonna, from the effects of which he died. The panel pleaded guilty, and was sentenced to fourteen days' imprisonment. Instead of following the acknowledged medical books in this country, he had taken a French book of *Materia Medica*, where, it appears, medicine is used of a different strength.

Pharmacopœia, British.—By the Medical Act, 1858, 21 & 22 Vict. c. 90, s. 54, the General Council of Medical Education and Registration of the United Kingdom were directed to cause to be published under their direction a book containing a list of medicines and compounds, and the manner of preparing them, together with the true weights and measures by which they are to be prepared and mixed, and containing such other matter and things relating thereto as the council should think fit, to be called the *British Pharmacopœia*. Power was given to the council to alter, amend, and republish the Pharmacopœia as often as they deem necessary. The council have the exclusive right of publishing, printing, and selling the Pharmacopœia, the price being fixed by the Treasury (25 & 26 Vict. c. 91, s. 2). So printed, it is to be admitted in evidence (s. 3).

Pictures.—See Paintings and Pictures.

Pictures (Obscene).—See Obscene Works.

Pigeons.—In the eye of the law pigeons may be divided into three kinds: (1) wild pigeons, (2) dovecot pigeons, and (3) enclosed pigeons. The last are domestic animals in the same way as poultry, and the subject of private property, and the taking of them is theft at common law. The first kind—wild pigeons—are in the ordinary category of animals *feræ naturæ* and are *res nullius*. The only question of legal interest that has been raised in regard to them is whether they are vermin within the meaning of the Gun Licence Act, 1870 (33 & 34 Vict. c. 57, s. 7 (4)). That Act exempts from the gun licence the occupier of any lands using a gun "for the purpose only of scaring birds or of killing vermin on such lands." On this question reference may be made to Irvine, *Game Laws*, p. 246; *Journal of Jurisprudence*, vol. xxvi. (1882) p. 47; and to the recent case in regard to rabbits (*Young*, 8 March 1898). It seems doubtful whether, upon a sound construction of the statute, any species of birds can be held to be vermin, so as to entitle the non-licence-holder to kill and not merely to scare them.

The greater part of the law in regard to pigeons, however, is concerned with the second kind mentioned above, viz. dovecot pigeons, *i.e.* pigeons which have their headquarters in a dovecot, but are free to go and come. Such pigeons, according to old Scottish law, following the Roman law (*Dig.* 41. 1. 5), are, like bees, wild animals, and not private property (Irvine, 23; but see per Ld. Balgray in *Easton*, 1832, 10 S. 542, 5 Deas & And. 258). At a very early period, however, protection was given to them by statute. Thus by the Act 1474, c. 60, the taking of pigeons from dovecots was declared to be punishable as theft; whilst by the Act 1567, c. 16, ratified by 1597, c. 270, the shooting of pigeons was prohibited under stringent

penalties. These latter statutes, however, which prohibited also the shooting of many other animals, were probably directed mainly against what was deemed an unsportsmanly manner of taking game; and, accordingly, Bankton affirms (ii. 3. 167) that he knows of no law against the shooting of doves found at large; but this has been disapproved (*Murray*, 1797, Mor. 7628; and per Ld. Balgray in *Easton*, 1832, 10 S. 542, 5 Deas & And. 258). Kames, however, appears to agree with Bankton, so far at all events as the protection of crops is concerned. "Good neighbourhood requires that I should endeavour to chase away my neighbour's pigeons, without doing them any harm. But if, by the number of pigeon-houses round me, or by the voracity of the pigeons, this cannot be effectually done, the law of nature entitles me to proceed to blood. It is in vain to talk of damages, which in this case cannot be ascertained with any certainty. There is no statute against rabbit-warrens, though very ready to infest neighbouring grounds. It appears to me clear that I may lawfully kill my neighbour's rabbits if I find them burrowing in my ground. The case of pigeons is in this respect perfectly similar" (Kames, *Select Decisions*, p. 14; Mor. App. "Dovecot," No. 1). But this reasoning was not accepted in the case of *Easton*, *supra*.

Another Act (1617, c. 19) requires that for one dovecot the owner must have ten chalders of land within two miles. A heritor is, however, entitled to build one dovecot for every ten chalders of land (*Brodie*, 1752, Mor. 3602). This Act is still in observance; and an eminent judge, not very long since deceased, once startled an intrant to the Faculty of Advocates by propounding, as the first question in the Scots Law branch of the examination, the inquiry, "Wha may hae doos?" A person without the necessary qualification must build up his pigeon-holes, but he need not pull down his dovecot, which may be used for other purposes, or may convalesce as a dovecot through his acquisition of lands (*Durie*, 1682, Mor. 3601). The purchaser of lands and a dovecot, not being ruinous at the time of purchase, from a qualified person, may keep it though not himself qualified by the possession of ten chalders of land, but he may not increase the number of holes in it (*Kinloch*, 1731, Mor. 3601).

Acts were from time to time passed from 1424, c. 33, downwards, enacting severe penalties against the destroyers of dovecots. A list of these Acts will be found in Irvine, p. 26; but probably nowadays such a case, if the pigeons were not taken, would be treated as one of malicious mischief; and if a child were implicated in such a point of dittay he would probably be in greater danger of six strokes with the birch rod, under modern statute, than of being "leschet, scurgit, and dung, according to his falt," under the Act 1503, c. 69.

[Rankine, *Landownership*, 134; Irvine, *Game Laws*, chap. iii., where the authorities on this curious branch of the law are collected].

Pignus; Pignorate rights.—In Roman law, a thing forming a security for debt was properly termed *pignus*, when the possession of the thing was given to the secured creditor; and *hypotheca*, when the possession of the thing was not with the secured creditor (*Dig.* 13. 7. 9. 2). The law relating to *pignus* and *hypotheca* was in all essentials the same.

Anything could be the object of pledge which could be an object of sale (*Dig.* 20. 3). If a thing were pledged, its increase or accessories were pledged (*Dig.* 13. 7. 18).

In the ordinary case, pledge was the result of a contract between the parties, and nothing more was required to establish the validity of the security than proof of this agreement between the parties. A pignorate right might also be constituted by testament, *e.g.* where an annuity was bequeathed on the security of certain lands, or by judicial decree, *e.g.* where damage was threatened by the dilapidated state of a neighbour's property *causâ damni infecti*. There were also certain well-recognised tacit hypothecs which existed *ipso jure* (*Dig.* 20. 2). These might be "general," *e.g.* that in favour of the fisc over the whole estates of persons indebted to it; or "special," *e.g.* that in favour of a landlord over the *inventa et illata* of the tenant of his house.

A debtor who gave a pledge remained owner of the thing pledged. Accordingly, the debtor, as owner, might continue to use the subject of security, and enjoy its fruits, if he had not parted with possession. As the creditor, even if he were in possession, could not at law use the subject of pledge, it was usual for the parties to make an agreement that the creditor should have the use or profit of the thing instead of interest. See ANTICHRESIS.

The creditor had the *jus retinendi*, *i.e.* the right to keep possession of the security subject until his debt was fully satisfied. He might also sub-impignorate a *pignus* in his hands (*Dig.* 20. 1. 13. 2). Finally, in case of the debtor's default, he could sell the thing and satisfy his debt out of the proceeds (*jus distrahendi*). In case of a sale, however, the creditor must observe certain preliminary forms. He must give private notice (*denuntiatio*) of the sale to the debtor, and two years must elapse after this notice before the sale could legally take place. In the sale the creditor was presumed to act as the debtor's agent, and, if he *mala fide* sold the thing below its true value, he was liable in damages. If any surplus remained over (*hyperocha*) after satisfying the secured debt, it went to the debtor. If the price got did not suffice to meet the creditor's claim, he still had a personal action against the debtor for the balance due. At one period it was common for the creditor and debtor to enter into an agreement that, if the debt was not paid within a definite time, the security subject should become the property of the creditor on the expiry of that time; but such agreements were declared by Constantine to be illegal, on grounds of public policy.

Certain hypothecs had a preference (*privilegium*) in case of a competition, *e.g.* that in favour of the fisc in respect of its claim, or that in favour of a wife in respect of her *dos*. Among unprivileged creditors, the general rule was that he whose pledge was prior in time had a preference. *Potior est in pignore qui prius credidit pecuniam et accepit hypothecam* (*Dig.* 20. 4. 11). The most notable exception to this general rule was in the case of so-called "public" hypothecs. Hypothecs proved by means of a writing which was publicly registered, or which was attested by three reputable witnesses, were preferred to those constituted merely by private agreement, though the latter were prior in date.

The creditor had an *actio pignoraticia* or *hypothecaria*, whereby he could make his rights in the subject of security effectual.

A pignorate right was extinguished by the extinction of the debt secured, or by the destruction of the subject of security (*Dig.* 20. 6. 8 pr.). If the subject of security was changed, so that it was no longer the same thing, as if a creditor held as a security certain timber, which later was used in building a ship, the creditor's right ceased (*Dig.* 13. 7. 18. 3).

[*Dig.* 20. 1 *et seq.*; 13. 7; *Cod.* 8. 14–35; 4. 24. The relation of the Roman law as to pignorate rights to the Scots law is treated by Stair, i. 10.

12; 1. 13. 11 *et seq.*; ii. 10. 1 *et seq.*; and by Erskine, *Inst.* iii. 1. 33 *et seq.*] See PLEDGE; HYPOTHEC; SECURITY, RIGHTS IN.

Pilot.—"The name of pilot or steersman is applied either to a particular officer, serving on board a ship during the course of a voyage, and having the charge of the helm and of the ship's route; or to a person taken on board at a particular place for the purpose of conducting a ship through a river road or channel, or from or into a port" (Abbott, *Merchant Shipping*, 148). In Scotland and England it is to a person acting in the latter capacity that the term is usually applied. The Merchant Shipping Act, 1894 (s. 742), defines a pilot as "any person not belonging to a ship who has the conduct thereof." The master of a ship, though competent to manage the ordinary course of a voyage, cannot be supposed so familiar with the peculiar dangers and difficulties of narrow firths and rivers, and the entry into ports and harbours, as to be able to conduct these parts of the voyage in safety (Bell, *Com.* i. 551). Pilots with local knowledge are therefore necessary, and bodies of persons with the requisite skill, licensed for the performance of such duties, have been established in all maritime countries. In some places and with certain ships it is *compulsory* upon the master to take a pilot; in other instances pilots are provided, but (so far as statute law is concerned) the employing of them is optional. In Scotland compulsory pilotage depends entirely upon statute (see *infra*). The only body in Scotland entitled by ancient charters to license and superintend pilots is the Trinity House of Leith. All other authorities are created by statute. By the M. S. A., 1854 (ss. 331, 353), re-enacted M. S. A., 1894 (ss. 573, 574, 603), existing pilotage authorities and rules as to compulsory pilotage in force at the date of the Act were continued.

The M. S. Acts, 1854 to 1889 (re-enacted M. S. A., 1894, ss. 575 to 580), gave powers to the Board of Trade by Provisional Order (requiring the confirmation of Parliament) to constitute new pilotage authorities, to alter the limits of those existing, and to regulate compulsory pilotage. Accordingly, to ascertain what rules are in force as to pilotage in a particular district, reference must be made to local Acts of Parliament.

The following is a list of pilotage authorities in Scotland as given in the annual return by the Board of Trade to Parliament for 1897:—

Arbroath	C.	Inverness	F.
Aberdeen	F.	Irvine	C.
Ayr	C.	Kirkcaldy	F.
Bo'ness	F.	Trinity House of Leith	F.
Buckie (Cluny)	C.	Harbour and Docks of Leith	F.
Burghead	C.	Leven and Methil	F.
Burntisland	F.	Lossiemouth	C.
Charlestown	F.	Montrose	F.
Dingwall		Nairn	F.
Dundee	F.	Peterhead	C.
Eyemouth	F.	Rosehearty	C.
Fraserburgh	F.C.	Sandhaven	C.
Glasgow	C.	Stonehaven	F.C.
Grangemouth	F.	Wick	C.
Greenock	F.		

(C. means pilotage *compulsory*; F. *free*.)

Pilotage authorities are empowered to make bye-laws for the regulation of matters under their control (M. S. A., 1894, s. 582). Such bye-laws require confirmation by Order in Council (ss. 583, 584). A list of the Orders in Council confirming pilotage bye-laws in force in 1893 is contained in the "Index to Statutory Rules and Orders, 1893," p. 494, and those issued since are given in the *Law Reports Digest, sub voce* "Ship—Pilotage." The statutory rules relative to pilots are contained in Part X. of the M. S. A., 1894 (ss. 572–633). Provision is therein made for the licensing of pilots (ss. 586–590) and the payment of pilotage dues (ss. 591–595). Regulations are made for pilot boats and pilot signals (ss. 611–615). The Act contains a list of offences, and provides penalties (ss. 606–610) which may be imposed by the pilotage authority. If a pilot is aggrieved by the decision of a pilotage authority, he may appeal to the Sheriff, who shall hear the appeal with an assessor of "nautical and pilotage experience" (s. 610). Procedure in such appeals is regulated by A. S., 13 March 1890 (kept in force by sec. 745). A master or mate of a ship may obtain from a pilotage authority a certificate entitling him to pilot the ship of which he is master or mate, or another ship belonging to the same owner (ss. 599–602). The statute recognises a distinction between "qualified" and "unqualified" pilots, and authorises the employment of unqualified pilots in certain circumstances (s. 596). A ship *passing through* a pilotage district does not require a pilot (s. 605). Compulsory pilotage does not apply to Her Majesty's ships (s. 741).

It is the duty of the shipmaster at common law, apart from statutory obligation, to secure the services of a pilot wherever these are necessary (Bell, *Com.* i. 552) and obtainable (*Philips*, 1831, 2 Barn. & Adol. 380). *Entering* a harbour or narrow sea, this obligation appears to be discharged if the master use due diligence to obtain a pilot, although he fail (*Philips, supra*). Where a duly qualified pilot cannot be had, the aid of persons locally acquainted with the navigation, if obtainable, must be taken (Bell, *Com.* i. 552; *Thomson*, 1826, 4 S. 670, N. E. 677). The principle of the rule which requires a pilot does not seem to apply to the case of a port or river to which the ship belongs, and with the navigation of which the master is familiar (Bell, *Com.* i. 552, 553; as to England, see M. S. A., 1894, s. 625). Every vessel carrying passengers between places in the British Islands must have a pilot, unless the master or mate holds a pilot's certificate (M. S. A., 1894, s. 604; *The Warsaw*, [1898] P. 127).

Licensed pilots are bound to give their services when required (Bell, *Com.* i. 551; *General Palmer*, 1828, 2 Hag. 176; M. S. A., 1894, s. 606). They are not entitled to remuneration as for salvage services unless in special circumstances (*The Æolus*, 1873, L. R. 4 A. & E. 29, and cases there cited). But if a vessel is in distress a pilot is not bound to go on board to render ordinary pilotage services; he is entitled, if he takes charge of a vessel in distress, to salvage remuneration (*The Frederick*, 1838, 1 Wm. Rob. 16; *The Anders Knape*, 1879, L. R. 4 P. D. 213; *Akerbloom*, 1881, L. R. 7 Q. B. D. 129). This applies with greater force to persons who are not licensed pilots, but who voluntarily offer their services to a vessel in distress (*The Roschaugh*, 1854, 1 Spink, 267).

Where pilotage is compulsory, when a pilot is on board a ship he takes entire charge of the navigation of the ship (*The Lochlibo*, 1850, 3 Wm. Rob. 310; rev. 1851, 7 Moo. P. C. C. 427; *The Ocean Wave*, 1870, L. R. 3 P. C. 205; *The City of Cambridge*, 1874, L. R. 5 P. C. 451; *Burrell*, 1891, 18 R. 1048), including control of the tug when the vessel is under tow (*The Ocean Wave, supra*; but see *The Borussia*, 1856, Swab. 94; *The Sinquasi*, 1880,

5 P. D. 241; and *The Mary*, 1879, L. R. 5 P. D. 14). The owners, master, and crew are not, however, entirely relieved from responsibility because of the pilot being in charge. The owner is still "responsible for the sufficiency of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty" (per Baron Parke in *The Christiana*, 1850, 7 Moo. P. C. C. 160, 171; *The Massachusetts*, 1842, 1 Wm. Rob. 371). He is bound to disclose to the pilot any defect in the ship (*The Meteor*, 1875, Irish Rep. 9 Eq. 567). The master and crew must perform their ordinary duties properly, *e.g.* a good look-out must be kept (*The Diana*, 1840, 1 Wm. Rob. 131; affd. 1842, 4 Moo. P. C. C. 11; *The Iona*, 1867, L. R. 1 P. C. 426; *The Schwan*, [1892] P. 419, 442), the anchor must be attended to in a proper and seamanlike manner (*The Rigborgs Minde*, 1883, L. R. 8 P. D. 132). The exact position of the master with a compulsory pilot on board his ship is difficult to define (see Marsden, *Collisions*, 276 *et seq.*). He seems to be bound to attend to his ordinary duty of taking care of the ship and giving necessary orders for all matters that do not depend upon local knowledge (*The Diana*, 1840, 1 Wm. Rob. 131, opinion of Dr. Lushington, 136). His power and responsibility are in such matters concurrent with those of the pilot (*The Christiana*, 1850, 7 Moo. P. C. C. 160, 172). In *The Christiana* both the pilot and the master were held to blame for a collision caused by a vessel driving when she had come to anchor in the Downs in bad weather, a proper and seamanlike precaution to prevent her driving not having been taken. In another case the master was held responsible for not veering cable and setting sail when doing these things might have prevented a collision (*The Annapolis* and *The Golden Light*, 1862, 5 L. T. N. S. 692). It is the duty of the master to see that proper lights are exhibited (*The Ripon*, 1885, L. R. 10 P. D. 65). But the master must not interfere with the pilot in matters within the pilot's province. "If we encourage such interfering we should have a double authority on board, a *divisum imperium*, the parent of all confusion, from which many accidents and much mischief would most surely ensue" (per Dr. Lushington in *The Peerless*, 1 Lush. 30, at p. 32; see also *The Lochlibo*, 1850, 3 Wm. Rob. 310; rev. (on the facts) 1851, 7 Moo. P. C. C. 427; *The Argo*, 1859, Swa. Ad. 462; *Burrell*, 1891, 18 R. 1048, opinion of Ld. Kinnear, p. 1057). But the master would be bound to interfere if the pilot were incapable of taking charge of the ship (per Dr. Lushington in *The Duke of Manchester*, 1846, 2 Wm. Rob. 470, at p. 480), or was proceeding to do something clearly wrong (*The Ripon*, 1885, L. R. 10 P. D. 65), or plainly involving danger (*The Belgic*, 1875, L. R. 2 P. D. 57, opinion of Sir Robert Phillimore, at p. 59; *The Oakfield*, 1886, L. R. 11 P. D. 34; see also *The Girolamo*, 1834, 3 Hag. 169; and *The North American*, 1865, 2 Mar. Law Cas. O. S. 319). The master is entitled to make a *suggestion* to the pilot. A suggestion does not amount to interference (*The Oakfield, supra*). The master and the other officers of a ship are bound to act on their own responsibility in a sudden emergency when there is no time to wait for the pilot's orders (*The Massachusetts*, 1842, 1 Wm. Rob. 371; *The City of Cambridge*, 1874, L. R. 5 P. C. 452).

If it is difficult to define the relative positions of master and pilot when pilotage is compulsory, it is much more troublesome in the case where, although not compulsory, it is the duty of the master to take a pilot. The law as laid down by text writers and in the decisions of the Courts both in England and Scotland apparently gives the supreme command in all cases to the pilot. A different view of the pilot's position is taken by various maritime authorities. The Elder Brethren of the Trinity House

have expressed the opinion that even where pilotage is compulsory the master "is bound to keep a vigilant eye on the navigation of the vessel, and, where exceptional circumstances exist, not only to urge upon the pilot to use every precaution, but to insist upon such being taken" (see Marsden, *Collisions*, pp. 276 *et seq.*). This also is the rule in the Royal Navy (*ib.*).

A pilot is personally responsible for his own misconduct or negligence (Balfour, *Practicks*, 618, Sea Lawis, c. xvii.; *Stort*, 1792, Peake, 107). The licensing or pilotage authority is not responsible for his acts (*Ogilvie*, 22 May 1821, F. C.; 1 S. 24; *Shaw, Savill, & Albion Co.*, 1890, L. R. 15 App. Ca. 429); but where Harbour Trustees, although a pilotage authority under the M. S. A., 1854, employed unlicensed persons to pilot vessels into their harbour, they were held responsible for the fault of one of these (*Holman*, 1877, 4 R. 406). How far this would apply to licensed pilots directly in the employment of such an authority is not clear (opinion of Ld. Shand in *Holman*, at p. 410; *Parker*, 5 S. L. T. No. 479, 6 S. L. T. No. 108).

Both at common law and by statute a pilot employed by compulsion of law is not the servant of the shipowner, and the shipowner is not responsible for his acts (*The Maria*, 1839, 1 Wm. Rob. 95; *Clyde Navigation Trustees*, 1875, 2 R. 842; affd. 1876, 3 R. (H. L.) 44, L. R. 1 App. Ca. 790; M. S. A., 1894, s. 633). Accordingly, for any damage caused through the fault of the pilot, the shipowner is not liable. It has been held by the Judicial Committee of the Privy Council that this principle applies to the case of a pilot compulsorily employed in the waters of a foreign country, even where the law of that country expressly makes the shipowner liable for his fault (*The Halley*, 1868, L. R. 2 P. C. 193). Sir R. Phillimore held that the shipowner's freedom from liability did not extend to a case of damage done by a tug acting under the orders of a pilot on board the tow (*The Mary*, 1879, L. R. 5 P. D. 14)—a decision which seems somewhat doubtful. To free the shipowner from liability the fault must be *entirely* that of the pilot. If there be any fault on the part of the crew contributing to the loss, the shipowner is responsible for the whole damage (*The Diana*, 1840, 1 Wm. Rob. 131; *Clyde Navigation Trustees*, 1875, 2 R. 842; affd. 1876, 3 R. (H. L.) 44; *The Schwan*, [1892] P. 419). The *onus* is upon the shipowner advancing the defence of compulsory pilotage to prove that it was through the fault of the pilot that damage was caused. He does *not* require to prove that there was no fault on the part of the crew (*Clyde Navigation Trustees, supra*). He must show that it was compulsory upon the ship to have a pilot *at the time* (*The Cachapoal*, 1881, L. R. 7 P. D. 217; see also *The Killarney*, 1861, Lush. 202). In a case of collision where both vessels are to blame, but one of them is in charge of a pilot by compulsion of law, the natural result would be that the other vessel should pay all the damage; the rule of the English Court of Admiralty, however, is that the vessel under compulsory pilotage recovers only *half* the amount of her damage from the other vessel (*The Hector*, 1883, L. R. 8 P. D. 218).

In some foreign waters, although pilotage is compulsory the pilot is declared to be only the adviser of the master, and does not conduct the navigation of the vessel. In such a case the shipowner continues responsible for wrong done by the ship (*The Guy Mannering*, 1882, L. R. 7 P. D. 52, 132; *The Agnes Otto*, 1887, L. R. 12 P. D. 56).

In compulsory pilotage the principle that the pilot is not the servant of the shipowner has this consequence, that if the pilot sustains injury through the fault of the crew of the vessel the shipowner is liable to him in damages (*Smith*, 1875, L. R. 10 Q. B. 125).

[Abbott, *Merchant Ships*, ch. v.; Maude and Pollock, *Merchant Shipping*, ch. v.; Marsden, *Collisions*, ch. x.; Temperley, *Merchant Shipping Act*, 1894, Part X.]

Piracy is a crime by the law of nations, and the Court of Justiciary has jurisdiction to try the offence, wheresoever, or by whomsoever, it has been committed.

The crime of piracy is committed: (1) Where hostilities are carried on at sea without a commission from any State.

(2) Where the powers conferred by a commission are grossly and wilfully exceeded.

(3) Where the ship, or goods or persons on board, are masterfully and illegally seized, either by strangers from without or by the crew on board.

If the master of a ship in distress forcibly takes necessaries from another ship, either paying for them or promising to do so, this is not piracy.

By the Act 8 Geo. I. c. 24, commanders of ships or others trading with pirates shall be adjudged guilty of piracy; and persons belonging to any vessel who forcibly board any merchant ship and throw goods overboard, shall be punished as pirates. These are cases of "constructive piracy."

Punishment.—Formerly the penalty was death; but this would not now be imposed unless murder had been committed (50 & 51 Vict. c. 35, s. 61).

[Hume, i. 481; Alison, i. 638; Macdonald, 56; Anderson, *Crim. Law*, 42.]

Plagium is the theft of a child under puberty. It is immaterial whether the child is legitimate or illegitimate, whether it is an orphan in the custody of guardians or one of a family living with parents. The crime of *Plagium* is committed whether the child accompanies its abductor of its own free will or is enticed or forced away from its legal guardians (*Wade*, 1844, 2 Broun, 288; *Miller*, 1861, 4 Irv. 74; *Cairney*, 1897, 2 Adam, 471). It is a crime to "detain and secrete" a child known to have been stolen. Such a charge is equivalent to a charge of reset (*Cairney*, *supra*).

Plagium is an aggravated theft in its own nature. A previous conviction of an ordinary theft is an aggravation of *Plagium* (*Rosmond*, 1855, 2 Irv. 234).

[Hume, i. 84; Alison, i. 280; Macdonald, 24, 46, 50; Anderson, *Crim. Law*, 100.]

Planting and Enclosing of Lands.—(*A*) PLANTING.—For the encouragement, and, indeed, enforcement of the plantation of lands, a large number of Acts, commencing so far back as 1424, were passed by the Scots Parliament; and the series was continued by the British Parliament down to 1773, the last being 13 Geo. III. c. 33. These are all obsolete or repealed. As regards entailed estates, the policy of these Acts has been perpetuated in the Montgomery Act, 1770 (10 Geo. III. c. 51), and the Entail Amendment Act, 1875 (38 & 39 Vict. c. 61). By sec. 9 of the former Act, among the "Montgomery Improvements," which it is declared highly beneficial to the public to encourage proprietors to lay out money upon, there is included "enclosing, planting, or draining"; and heirs of entail in possession are accordingly permitted to lay out money thereupon, and charge the same under the Act. By the later Act it is provided by sec. 3 that "improvements" (for the charging of which the Act makes

amended provision) "shall include . . . (3) the enclosing of land and the straightening of fences and re-division of land; and . . . (6) the trenching of land, the clearing of land, or the planting of land."

So far as the provisions of the older Acts were directed to the punishing of damage to plantations, their object is now sufficiently attained by the common law of malicious mischief (see *M'Kay*, 1882, 20 S. L. R. 23, where thirty days' imprisonment was awarded for malicious injury to trees). For enumeration of the older Acts, and cases under them, see Rankine, *Landownership*, p. 129, note 43, and p. 536; also cases in Morrison, as there cited; and Bell's *Dictionary*, *s.v.* "Planting."

(*B*) ENCLOSING.—(1) *Enclosing at Common Law.*—At common law there was no obligation upon a proprietor to co-operate with his neighbour in erecting suitable fences between their lands. Even the negative obligation of abstaining from trespass, and preventing the trespass of one's cattle, seems to have been confined—at least as regards the latter—to cases where it was necessary for the protection of artificial crops in "haining time while the corns are upon the ground" (Stair, ii. 3. 67; and see *ib.* in regard to forests). In the case of waste land, and even in that of cultivated lands at other times of the year, it lay with the owner to protect himself by turning off his neighbour's cattle without hurt. The Act 1686, c. 11, required cattle to be herded the whole year, . . . "so as they may not eat or destroy their neighbour's ground, woods, hedges, or planting." For detailed treatment of this statute, which is still in observance (*M'Arthur*, 1873, 1 R. 248), see *sub voce* WINTER HERDING.

(2) *Enclosing under Act* 1661, *c.* 41.—This Act provides that "where enclosures 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 dyke which parteth their inheritance." . . . "All Lords, Sheriffs, and Bailies of regalities, Stewarts of Stewartries, and Justices of Peace, Bailies of Burghs, and other Judges whatsoever," are charged with the enforcement of the Act—a clause under which it has been held that applications under the Act may competently come before the Court of Session (*Pollock*, *infra*). The statute provides that the enclosing is to be done "upon the equal charges of the liferenter and heritor." It has, however, it is understood, come to be the practice to charge the estate with the expense (Rankine, *Landownership*, p. 537). "Burgh and incorporate acres" are excluded from the Act; and it has been held that its tenor shows that it was meant to apply to landward estates only (*Penman*, 1739, Mor. 10481). It seems also inapplicable except where mutual (not necessarily equal) advantages would accrue to the proprietors (*Earl Peterborough*, 1784, Mor. 10497; *Sinclair*, 1872, 11 M. 137). So, too, where the march is a stream of sufficient size to exclude trespass in ordinary seasons, an application under the Act probably would not be granted (Rankine, *loc. cit.*). In the case of a smaller stream, the Act has been applied, the fence being erected either entirely on the petitioner's side of the water, or, in the objector's option, partly within and partly without the water. Whichever method is chosen, the petitioner is entitled to have suitable access for watering (*Earl Crawford*, 1669, Mor. 10475; *Pollock*, 1869, 7 M. 815). The Court has not power to straighten the marches in an application under this Act, but ought to do as little as circumstances permit to alter the possession. As regards the style of fence, it will take expert opinion as to what is most suitable in the whole circumstances. In some early cases difficulty arose as to the application of the Act where a portion of the boundary between the lands was not of a nature suitable for the erection of a fence, and yet

such at the same time as to impose no sufficient obstacle to trespass. This difficulty, and probably also a keen sense of the public advantage of making provision for the straightening of crooked marches, led the Scots estates to legislate further on the matter (cf. *E. Crawford*, *supra*).

(3) *Enclosing and straightening Marches under the Act* 1669, *c.* 17.—This statute recites the foregoing section of the Act of 1661, and narrates "the inconveniency and difficulty the execution of that part of the said Act may meet with in lands marching together where the marches are crooked and unequal, or where any part of the bordering ground is unfit or incapable of bearing a dyke or receiving a ditch, or hinders the completing of the enclosure in an equal line"; and it proceeds to enact that "wheresoever any person intends to enclose by a dike or ditch upon the march betwixt his lands and the lands belonging to other heritors contiguous therewith, it shall be lessoin to him to require the next Sheriffs or Bailiffs of regalities, Stewarts of Stewartries, Justices of the Peace, or other Judges Ordinary to visit the marches alongst which the said dike or ditch is to be drawn, who are hereby authorised, when the said marches are uneven or otherways incapable of ditch or dike, to adjudge such parts of the one or the other heritor's ground as occasion the inconveniency betwixt them from the one heritor in favour of the other, so as may be least to the prejudice of either party; and the dike or ditch to be made in all times thereafter the common march betwixt them; and the parts so adjudged *respective* from the one to the other being estimate to the just avail and compensed *pro tanto*, to decern what remains incompensed of the price to the party to whom the same is wanting; and it is hereby declared that the parts thus adjudged, *hinc inde*, shall remain and abide with the lands or tennandries to which they are *respective* adjudged as parts and pendicles thereof in all time coming."

It is to be observed that the primary object of this Act is—like that of the earlier one—the convenient enclosing of land, neither statute making any provision for the determination of a disputed boundary. It must be noted, however, that while the effect of the two Acts is thus similar, the procedure under them is radically different. Under the Act 1669, the only competent Court of first instance is the Judge Ordinary, and it is imperative for him to visit the ground. Thus in the case of *The Lord Advocate* (1872, 11 M. 137), it was held that procedure by remit to a man of skill, even though accompanied by a general knowledge of the ground on the part both of the Sheriff-Substitute and of the Sheriff, utterly vitiated the application, and that the defect was not cured by the fact that neither of the parties at the time objected to the course.

As with the Act of 1661, so with that of 1669, it is essential, in order that the provisions may be enforced, that there be reasonable mutuality of advantage, reasonable necessity for a fence and for straightening the march, and reasonable proportion between the expenditure involved and the value of the lands. (Cf. as to this *Earl of Cassilis*, 28 Feb. 1809, F. C., with *Lord Advocate*, cited *supra*.)

In the course of rectifying the boundaries, a transference of land very considerable as compared with the whole area involved is competent. It is, moreover, not a sufficient objection that the march is not actually *straightened*, provided the line selected be in point of fact that which convenience dictates (*Earl of Kintore*, 1886, 13 R. 997, per Ld. J. C. Moncreiff). As regards title, a tenant may object although the landlord is agreeable (*Pew*, 1754, Mor. 10484; Rankine, *Landownership*, 540). Entail is no bar to proceedings under the Act; but if there be a surplus, it behoves to be tailzied or employed upon the land (*Ramsay*, 1702, Mor. 10477; *Earl Kintore*, *supra*).

(4) *March Fences originating otherwise than by Statute.*—It is a mistake to suppose that the origin of a march fence must necessarily be traceable to one or other of the statutes just cited. In the case of *Strang* (1864, 2 M. 1015, and 4 M. (H. L.) 5), it was observed by Ld. Cowan (p. 1024), that "without applying to the Sheriff, heritors may agree and contract with each other to erect a fence upon their properties at the mutual expense. Further, it may be that, without express agreement to a contract, a marchwall or other fence by which adjoining properties are *de facto* divided, has from time immemorial been held and recognised and treated as if it had been originally 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 the several properties." It is not conclusive against this that the march fence is proved to have originally belonged to one estate, or to have been erected by one who was at the time proprietor of both the lands (*Lockhart*, 1758, Mor. 10488; *Strang, supra*); nor that the fence is not strictly along the original boundary, but on one side of it (*ib.*).

At the same time, it does not follow that whatever is *de facto* a division fence is therefore also a march fence (per Inglis, L. J.-Cl., in *Strang, supra*, at p. 1039). It remains to consider:—

(5) *The Ownership and Upkeep of March Fences.*—However originating, once it is established that a fence is a march fence, it appears to be the common property of the conterminous landowners,—differing, however, from other common property in that it is not liable to partition at the will of either of the owners—its nature being "to be and remain undivided." (As to the theory of this mutual ownership, *vide* Rankine, p. 542.)

Arising out of the common ownership or common interest, there rests upon the proprietors a common obligation to maintain the march fence when erected; and further, the Act of 1661 has been read as authorising not merely the original erecting and repair, but even the reconstruction of fences where necessary (*Paterson*, 1880, 7 R. 958). Neither party is, however, entitled to do the repairs at his own hand and then claim half the expense. He must, as in the case of construction, apply to the Judge Ordinary (Rankine, *loc. cit.*).

A long-continued course of common contribution to the repair of a fence is in general the most satisfactory evidence of an implied contract making it mutual. It does not, however, *per se* establish a conclusive presumption for such mutuality. (See the whole subject fully discussed in *Strang* (*supra*)—a case in which the fence was held not to be mutual.) On the other hand, although there are no Scotch cases directly in point, there seems no reason to doubt that in the case of a mutual fence the burden of repair may by the means appropriate to a real burden be thrown upon one party; and were this done, it would seem from various English cases that the proprietor liable to repair would, on failure to do so, be liable for injuries sustained by cattle lawfully on the adjacent lands, though not for those injured while trespassing (see Rankine, 544, 545, and cases cited).

(6) *Fences in Special Localities.*—(*a*) *Railways.*—The obligation of railway companies in regard to fencing is regulated, so far as exceptional, by the Railway Clauses Consolidation (Scotland) Act, 8 & 9 Vict. c. 33. By sec. 16 it is made lawful for the company to construct *inter alia* fences. By the 60th section the company is bound to make and maintain certain "accommodation works," amongst which are posts, rails, hedges, ditches, mounds, or other fences for separating the lands taken from the adjoining lands. (For full treatment of this subject see Deas on *Railways*, pp. 407, etc., and Rankine, p. 546.)

(*b*) *Public Roads.*—The owners of land adjoining on roads are not under any obligation to erect fences, nor are the authorities, except at dangerous parts (Roads and Bridges Act, 1878, incorporating sec. 94 of Act of 1832). Owners of hedgerows are, however, bound to keep them trimmed (*ib.* ss. 88, 89).

(*c*) *Pits, Quarries, Shafts,* etc.—Where the ownership of the surface and the minerals has become separated, and the surface of the land is opened in connection with the mineral workings, in a question with the surface owners, it lies upon the mineral owners, as the party giving rise to the changes, to take all reasonable precautions to avert risk (*Williams,* 32 L. J. Q. B. 237; *Hawken,* 56 L. J. Q. B. 284). The statutory duty of mine owners in this respect is governed by the Metalliferous Mines Act, 1872, 35 & 36 Vict. c. 77, ss. 13 and 23 (6), and the Coal Mines Regulation Act, 1887, 50 & 51 Vict. c. 58, ss. 37 and 49 (18).

For a statement of the liabilities incurred by such owners, and by other parties failing properly to fence their lands in questions with their neighbours, and especially in questions with members of the public, see Rankine, pp. 547–551, and Glegg on *Reparation.* See REPARATION.

As regards special kinds of fences, there is generally little difficulty in tracing the history of ordinary *paling and wire fences,* so that their ownership can be easily ascertained. It appears that a *sunk fence* would not be a proper march fence in the sense of the statute, being useful only to the lower proprietor, and so there would be no contribution exigible for its repair from the upper proprietor, who would not benefit by it.

Trees in the actual line of the march follow the fence, as regards ownership (*Wilson,* 1844, 7 D. 113, per Ld. Mackenzie, 115). Trees, however, growing to the side of the boundary belong to him in whose land they grow, but his neighbour is entitled to require them to be so pruned that the branches shall not extend across the march (*Halkerston,* 1781, Mor. 10495). In other respects they probably follow the rules of the civil law, for which see *Landownership,* 552, 553.

A *ditch* may be either a single ditch with a bank or a double ditch with a bank between. Where the boundary appears from the titles, it is decisive. (See BOUNDARIES.)

If the titles are silent, the presumption, in the absence of contrary evidence, is that both ditch and bank belong to the party on whose land the bank is (*Girran,* 1829, 8 Sh. 173; *Thomson,* 1829, 7 Sh. 730).

[See in connection with the foregoing, MUTUAL GABLE; COMMON PROPERTY; COMMON INTEREST.]

Plea in Bar of Trial.—See BAR OF TRIAL (PLEA IN).

Plea of Panel.—In a criminal prosecution, after preliminary objections, pleas in bar, or objections to the relevancy, if any, have been disposed of, the accused must plead either "Guilty" or "Not Guilty" to the charge, unless the prosecutor consents to accept a minor plea. In Sheriff Court cases where the second diet is in another sheriffdom, a plea of guilty, if tendered at the first diet, must be signed by the panel if he can write, and also by the Sheriff (Crim. Proc. (Scotland) Act, 1887, s. 28). In High Court cases, at the first diet before the Sheriff, the panel, where no preliminary plea is stated, is called on to plead, and his plea is engrossed by

the Clerk of Court in the Books of Court, or in a record kept for the purpose, and a certificate of the plea must be indorsed on the record copy of the indictment in the form given in Sched. I. to the Act of 1887. A plea of guilty to all or any part of the charge must be signed by the panel if he can write, and also by the Sheriff (Crim. Proc. Act, 1887, ss. 29, 31; *H.M. Advocate* v. *Galloway*, 1894, 1 Adam, 375, 1 S. L. T. 604; *H.M. Advocate* v. *M'Donald*, 1896, 3 S. L. T. 317). A plea of guilty remitted to the High Court under sec. 31 of the Act, cannot be withdrawn (*H.M. Advocate* v. *Lyon*, 1888, 1 White, 539, 15 R. (J. C.) 66, 25 S. L. R. 211), unless the Crown withdraw the libel (*H.M. Advocate* v. *Black*, 1894, 1 Adam, 312, 31 S. L. R. 250).

See Criminal Procedure, (Summary); Bar of Trial.

Pleading.—The presentation of a litigant's case to the Court which has to decide it, is what is usually meant by *pleading*. The term includes both the written statement of the litigant's case as submitted to the Court, and the oral argument by which it is supported in debate. The purpose of the pleadings is to put clearly and shortly before the opposite party and the Court what the party pleading claims. In so far as the carrying out of this purpose has been made the subject of definite rule in practice, it has been treated in various articles throughout this work, *e.g.* Actions (Ordinary Procedure in); Condescendence; Pleas in Law; Defences; etc. For the rest, the subject does not fall within the scope of this work. The true purpose of pleading being as above stated, the ordinary rules of statement to be followed—*e.g.* to state the subject in controversy and the contentions of parties clearly, exhaustively, and yet tersely, without ambiguity or superfluity—will occur to everyone. Reference, however, may be made to a useful article on the subject by C. S. Dickson, Esq., Q.C., Solicitor-General for Scotland, which will be found in the *Juridical Review*, vol. ix. p. 14.

Pleas in Law.—In the Judicature Act, 1825 (by which they were introduced into our practice), *pleas in law* are thus described: "A short and concise note . . . . of the pleas-in-law on which the action or defence is to be maintained; and in such notes the matter of law . . . . shall be set forth in distinct and separate propositions, without argument, but accompanied by a reference to the authorities relied on" (6 Geo. IV. c. 120, s. 9). This provision of the Judicature Act has been repealed (Statute Law Revision Act, 1873, 36 & 37 Vict. c. 91); but the form of pleas in law continues as under the former practice (Mackay, *Manual*, 195). It is no longer the practice to give a reference to the authorities relied on. In the former practice, under the Judicature Act, the note of pleas in law was handed in separately previous to the final adjustment of record. Now the note of pleas in law for the pursuer is, along with the condescendence, annexed to the summons; while the pleas in law for the defender are appended to the defences when the defences are lodged.

Pleas in law ought to be short and concise; and without argument (*Fraser*, 4 S. 699, note; Shand, *Practice*, i. 331; Mackay, *Manual*, 195). Pleas in law ought to be specific. "A plea-in-law ought to be a distinct legal proposition, applicable to the facts of the case (Ld. J.-C. Inglis in *Young*, 1860, 23 D. 36). The Court will not sustain "a loose and unmeaning statement" (*ib.*). The plea which the Court refused to sustain in that

case was: "In the circumstances above set forth, the pursuers are entitled to decree in terms of the conclusions of the libel, with expenses." But while pleas in law ought to be specific, it is the almost invariable practice to add one or more general pleas,—as, *e.g.* (for the pursuer), that "the pursuer is entitled to decree in terms of the conclusions, with expenses"; and (for the defender), that "In the circumstances of the case, the defender is entitled to be assoilzied (or to have the action dismissed), with expenses." "It is not usual or perhaps safe to dispense with such plea" (Mackay, *Manual*, 195); but there ought always to be specific pleas in addition.

In present practice the addition of new pleas and the amendment of pleas are subject to the general rules as to the amendment of records in defended actions. These are laid down in sec. 29 of the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 29). The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper (see, *e.g.*, *Thomson*, 1861, 23 D. 679; *Lennox*, 1865, 32 Sc. Jur. 202). See Amendment of Record.

In Sheriff Court procedure, similarly, notes of pleas in law for the parties are annexed to the petition and defences respectively. The defender must state all his pleas in law, both dilatory and peremptory, at once (Dove Wilson, 105 *et seq.*, 144). See Amendment of Record (Sheriff Court Proceedings).

See Actions (Ordinary Procedure in); Defences; Amendment of Record.

Pleas of the Crown.—See Crown, Pleas of.

Pledge.—The word "pledge" is defined in the Factors Act, 1889 (52 & 53 Vict. c. 45, s. 1, extended to Scotland by 53 & 54 Vict. c. 40), as including, for the purposes of that Act, "any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability." This may perhaps be regarded as the ordinary sense in which the word is used; but in order that it may correctly represent the legal connotation of pledge in the law of Scotland, apart from the Factors Act, two qualifications are necessary. In the first place, a contract pledging a subject is indeed an essential part of a pledge, but does not of itself constitute a pledge, for which purpose it is necessary that the subject of the contract should be placed in the possession of the pledgee. In the second place, securities over goods may take the form of an absolute transfer of property, subject to an obligation to reconvey, instead of a pledge. From these remarks it may be seen that a pledge is constituted when, in pursuance of a contract to give a security over a moveable subject, that subject is placed in the possession of the party in whose favour the security is to be constituted, or in that of an independent agent for him, while the right of property in the subject remains, as before, in the party granting the security. It is known as a real contract, because the essential character of the pledgee's security, in a question with third parties, consists in his possession of the subject, and not in his contractual relations with the pledgor.

Pledge distinguished from other Securities.—A pledge is distinguished

from a hypothec in respect that the right of the pledgee must be completed by, and depends on, possession, whereas a hypothec is a security over a subject in the possession of another. The distinction between a pledge and a lien is more delicate. In the ordinary case, where a lien is inferred by law from the possession of a subject, the distinction—that a pledge is the result of an express contract, a lien the result of an implication of law—is clear. Where, however, a lien is expressly constituted, the result would appear to be that the goods in question are pledged, although the distinction has been established that if goods are sent to an artificer, in the ordinary course of business, to have some operation performed upon them, and under a contract whereby they are subjected to a lien for a balance due on previous operations, the bankruptcy of the sender within sixty days of the sending of the goods does not render the lien reducible under the Act 1696, c. 5, as a security for prior debts; whereas an express pledge of goods would in such circumstances be reducible (*Anderson's Tr.*, 1871, 9 M. 718). Again, a pledge is distinguishable from a security over moveables constituted by transferring the property of the subjects to the creditor, subject to an obligation on his part, express or implied, to retransfer on his debt being paid. The distinction is clear in principle, as the creditor in the one case has only a right of possession, in the other a right of property, in the goods. It is recognised in England, where it is held that a pledgee cannot foreclose (*Carter*, 1877, 4 Ch. D. 605), whereas a mortgagee of railway stock—in which case the holder of the security must become the registered owner—is entitled to foreclosure (*General Credit Co.*, 1883, 22 Ch. D. 549). But the application of this principle may be difficult in particular cases. In *Hamilton* (1856, 19 D. 152) a bank, which had discounted bills for a customer, took in security delivery-orders for certain cases of brandy which were lying in the customer's name in a bonded warehouse. These orders were intimated to the warehouse-keeper, and the brandy was transferred to the name of the bank in the warehouse books. This security came before the Courts on a question whether the bank could claim a preferential right over the brandy, after the bills for which the security had been granted were retired, for a general balance due by the customer on his bankruptcy. In the Outer House the case was taken as one of pledge, but in the Inner House it was pointed out that the result of the transaction was not a pledge of the brandy, but an absolute transfer of it to the bank, subject to an obligation to retransfer, even although it was clear, and indeed admitted, that the intention of the parties was to constitute a pledge. This case, though questioned by Ld. M'Laren (Notes to Bell, *Com.* ii. 21), has been more than once recognised as good law (*Mackinnon*, 1868, 6 M. 974; *Robertson & Baxter*, 1897, 24 R. 758). The result is that it is impossible to constitute a pledge of goods situated in a warehouse or store by means of the transfer of a delivery-order, as such a transfer, until intimated to the warehouse-keeper, is not a good security (*Robertson & Baxter, cit. supra*), and when intimated to the warehouse-keeper, results in a transfer of the property in the goods. This rule, however, does not apply to the case where a bill of lading is transferred or indorsed in security. The bill of lading is recognised as a symbol of the goods, and its transfer results in a transfer of the property in the goods, if such was the intention of the parties, or in a transfer merely of the possession, if the intention was to constitute a pledge (*Sanders*, 1883, 11 Q. B. D. 327; *Sewell*, 1884, 10 App. Ca. 74; *North-Western Bank*, 1894, 21 R. 513; rev. 22 R. (H. L.) 1).

Constitution of Pledge.—The constitution of a pledge must be completed

by the delivery of the subject to the pledgee, or to an agent for him (Ersk. iii. 1. 33 ; Bell, *Prin.* s. 1363). As long as the security rests upon mere contract,—is, in fact, merely an agreement to pledge,—the creditor, though entitled to enforce the contract in a question with the debtor, has no real right over the subject, and thus cannot vindicate it from a third party to whom it may have been transferred, or assert a preference over it in a question with the general creditors of his debtor (*Robertson & Baxter*, 1897, 24 R. 758). But where an advance is made in reliance on a pledge to be immediately given, the pledge is regarded as given at the date on which it is arranged, even although an interval elapses before it is completed by possession, so that it cannot be reduced, under the Act 1696, c. 5, as a security for prior debts given within sixty days of bankruptcy (*Cowdenbeath Coal Co.*, 1895, 22 R. 682). The necessity of actual delivery has been illustrated in a number of cases in which a merchant or shopkeeper has attempted to pledge his goods or stock-in-trade by going through a form of delivery, and reserving to himself the right to release from the security any article required in the course of his business, by paying for it at the price fixed in the stock-list (*Stiven*, 1871, 9 M. 423 ; *Rhind's Tr.*, 1891, 18 R. 623 ; *Paterson's Tr.*, 29 S. L. R. 87); in none of which cases was it held that a pledge had been successfully completed. Delivery may, however, be effected by transferring to the pledgee the key of the premises in which goods are situated, provided that he is thereby vested with the control of the goods (*Maxwell & Co.*, 1830, 8 S. 618 ; rev. 1831, 5 W. & S. 269 ; *Pattison's Tr.*, 1893, 20 R. 806, per Ld. Trayner, p. 813 ; *Hillier*, 1888, 39 Ch. D. 669); or by setting the goods apart, even in the premises of the pledgor, provided some means are adopted to subject them to the control of the pledgee (*Liquidator of West Lothian Oil Co.*, 1892, 20 R. 64). A pledge may be completed by delivery of the goods to a carrier for the pledgee, or to a ship chartered by him (Bell, *Com.* i. 183), unless the bill of lading is taken so as to place them at the disposal of the pledgor. And where goods are in course of transit, the bill of lading is recognised as their symbol, and when indorsed and transferred with the intention to pledge the goods, places them in the possession of the pledgee, and completes the pledge (*North-Western Bank*, 1894, 21 R. 513 ; rev. 22 R. (H. L.) 1).

Subjects of Pledge.—The term "pledge" is most properly applied to a security of which the subject is a corporeal moveable. But debts which are identified with the instrument, as in the case of bills or negotiable instruments, may be pledged (Bell, *Prin.* s. 205). The term would seem to be misused when applied to an assignation in security of subjects which pass by written title, such as a policy of insurance, or an obligation of guarantee, and which cannot be assigned in security by the mere transfer of the document in which the obligation is embodied (*Strachan*, 1835, 13 S. 954 ; *Scottish Provident Institution*, 1888, 16 R. 112 ; *Robertson*, 1891, 18 R. 1225). Similarly, shares in a company cannot be pledged, because in order to complete the right of a creditor over them he must become a partner in the company by having his name placed on the register, and, on doing so, he becomes the owner and not the pledgee of the shares (*Morrison*, 1876, 3 R. 406 ; and see BLANK TRANSFER). It may be stated as a general rule that any corporeal moveable subject may be pledged. But to this rule there are exceptions. Thus while there is no ground for doubting that if a ship were placed in the actual possession of a creditor, it would be effectually pledged to him (*Watson*, 1879, 6 R. 1247), yet such a form of security would in practice be very inconvenient, and securities

over ships are usually constituted by a written mortgage and without actual possession (see SHIP). And the title deeds of an estate in land cannot be pledged, as it is held not only that such a pledge would give the pledgee no right over the estate, but that it would not prevent the owner of the estate from recovering them as accessories of his right (*Christie*, 1862, 24 D. 1182; *Robertson*, 1891, 18 R. 1225). To this there is an exception in the fact that a law agent may exercise a lien or right of retention for his professional account over papers or title deeds placed in his hands in the course of his employment (Bell, *Prin.* s. 1442); but this is an exceptional right, based probably on professional usage, and does not enable the agent to use the title deeds as a pledge for advances of money made to the client, even although such advances are expressly made on that security (*Christie*, 1862, 24 D. 1182). Again, moveable subjects may be placed in such a position that to pledge them would be impossible, or would defeat the object of the pledgor. Thus if a man wishes to borrow money on the furniture in his house, or the moveable machinery in his mill, the contract of pledge is not suited to his purpose. For a pledge, as has been already seen, must be completed by possession, and to place such subjects in the possession of the pledgee would be to deprive the pledgor of their use, a result which, in such circumstances, it would be desired to avoid. The expedients which have been devised to constitute a right in security over subjects so circumstanced have been of various characters, and will be dealt with under the head of SECURITIES OVER MOVEABLES.

Certain forms of pledge are regulated by statute. Of these, the pledging of goods for duty in bonded warehouses will be dealt with under the head of WAREHOUSING, while the well-known form of pledge under the pawnbroking system has been already treated in the article on PAWNBROKING.

Rights of Pledgee.—The general right of a pledgee is to retain the subject until his debt is paid; his obligations, to preserve the pledge with due care, and to restore it on payment. He is bound to account for any profits resulting from the pledge, and is not entitled to make use of it, unless its maintenance occasions expense, as in the case of a domestic animal (Opinion of Ld. Holt in *Coggs*, 1703, 1 Sm. *L. C.*, 10th ed., p. 167). The property in the subject, and therefore the risk, remains with the pledgor (Bell, *Prin.* s. 206), but the pledgee is bound to keep the subject with reasonable care, and will be liable in damages if it is lost or injured through his negligence or that of his servants (*Coggs, supra*; *Dominion Bank*, 1889, 16 R. 1081; *Coupé Co.*, 1891, 2 Q. B. 413). If the subject is accidentally lost, the pledgee, unless he is a pawnbroker, can still exact payment of the debt for which the pledge was given (*Syred*, 1858, El. B. & E. 469). These rules, however, only apply when the pledgee is legitimately in possession of the pledge. If he retain it after payment of the debt is made or tendered, and a demand for the return of the pledge made, he will be absolutely answerable in damage for loss or injury to it, whether arising from his own negligence or not (*Yungmann*, 1892, 67 L. T. 642). In Scotland a pledgee has no power to sell the subject without express authority, even if the time fixed for repayment has expired, but he may apply to the Sheriff for a warrant to sell (Bell, *Prin.* s. 207).

These rights are of course subject to alteration by express contract of parties, by which the rights of a pledgee may be enlarged or limited. It would appear that an "immediate and absolute power of sale" is not inconsistent with the character of a pledge (*North-Western Bank*, 1894, 21 R. 513; rev. 22 R. (H. L.) 1). But an agreement whereby failure to pay the

debt at a fixed date is declared to infer forfeiture of the pledgor's right of redemption, is not, apart from pawnbroking transactions, a term of the contract which a Court of law will enforce (*Thomson*, 1844, 6 D. 1106; *Smith*, 1874, 6 R. 794; *Salt*, [1892] App. Ca. 1). These cases do not relate to a pledge of moveable subjects, but the principle on which they were decided, that a clause of forfeiture in a right in security is oppressive and outwith the power of a creditor, is clearly applicable.

Retention for other Debts.—It has never been finally decided whether a pledgee is entitled, without an express contract to that effect, to retain a pledge for debts other than that for which it was granted, in a question with the general creditors of the pledgor; but the authorities, so far as they exist, tend to prove that a pledge secures only the debt for which it was given (*Hamilton*, 1856, 19 D. 152; *Rintoul & Co.*, 1862, 1 M. 137; *Alston's Tr.*, 1893, 20 R. 887). In the last of these cases, where the question did not arise in the Inner House, the Lord Ordinary (Low) drew a distinction in this respect between a security involving a transfer of the property in a subject and a pledge. The former security would, and the latter would not, entitle the security-holder to retain for a general balance. And in a case relating to an assignation of an insurance policy, it has been held that an assignation made expressly in security of a particular debt could not be extended to cover other debts (*National Bank*, 1858, 21 D. 79). It must be observed, however, that the case might be different if the pledgee were in a position to prove that he made the subsequent advance in reliance on the security of the subject which he held in pledge. In English law, if it is proved that the pledgee agreed to make, and the pledgor to receive, further advances on the security of the subject pledged, these further advances will be secured (Turner on *Pawn*, 2nd ed., p. 85).

Maintenance of Possession.—The right of a pledgee depends upon his retaining the possession of the subject, or the control of it, if it is held for him by an agent. If he suffer it to revert to the possession of the pledgor *de plano*, his preference over the article pledged, in a question with other creditors, is lost (Ersk. iii. 1. 33; Bell, *Com.* ii. 22; *Tod & Son*, 1883, 10 R. 1009). But a pledgee may constitute the pledgor his agent, and place the subject in his possession in that capacity, without losing his right over it (*North-Western Bank*, 1894, 21 R. 513; rev. 22 R. (H. L.) 1). In that case, goods in course of transit were pledged to a bank, by delivery of the bills of lading, together with a letter of hypothecation. On the arrival of the ship the bank returned the bills of lading to the pledgors, with instructions to receive and sell the cargo. Part of the price was arrested in the hands of the purchaser by a creditor of the pledgors. It was held that the bank had a right preferable to the arrestment, on the ground that the goods remained pledged to them, although they had parted with the control by returning the bills of lading to the pledgors, because the latter took them under a contract which made them the agents for the bank. It appears from the opinions expressed in the House of Lords, that the same result would be arrived at if the case were that corporeal moveables had been actually delivered to a pledgee on a contract of pledge, and returned to the pledgor on a contract of agency.

Title of Pledgor.—Goods may be pledged by the owner, or by a person authorised by him. Where goods are pledged by an agent, the question of his authority to pledge, as between himself and his principal, must of course be decided by the terms of the contract between them. But the validity of the pledge may depend on other considerations. If the subject

pledged consists of money, bank-notes, bills of exchange, or negotiable securities, the pledgee will obtain a good title, whether the pledgor had the right to pledge or not, if he has taken the subjects in pledge without knowledge, or means of knowledge, of any defect in the pledgor's right (*National Bank*, 1895, 22 R. 740; *London Joint Stock Bank*, [1892] App. Ca. 201; *Bentinck*, [1893] 2 Ch. 120). And the pledgee, at least if the pledge is taken in the ordinary course of business, is not bound to scrutinise the pledgor's title. Thus where negotiable securities are pledged by a broker with a bank, the bank is in general entitled to assume that if they do not belong to the broker, they belong to clients who have given him authority to pledge them (*National Bank*, 1895, 22 R. 740; *Thomson* (*Dunlop's Tr.*), 1891, 18 R. 751; affd. 1893, 20 R. (H. L.) 59). In the case of pledge of corporeal moveables, no such independent title results from the fact of transfer to a *bonâ fide* pledgee. But it has been provided by statute that a pledge by parties in certain defined positions shall be valid in the hands of the pledgee, if he takes in good faith and without notice of any defect in his author's title, even although, as between himself and a third party, the pledgor had no right to pledge the goods. The cases provided for are: (*a*) Pledge by a mercantile agent in possession, with the consent of the owner, of goods, or of documents of title (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2). (*b*) Pledge by a person who, having sold goods, is in possession of them, or of the documents of title (Factors Act, 1889, s. 8; Sale of Goods Act, 1893, s. 25). (*c*) Pledge by a person who has bought, or agreed to buy, goods, and has obtained, with the consent of the seller, possession of the goods, or of the documents of title (Factors Act, 1889, s. 9; Sale of Goods Act, 1893, s. 25). In cases of pledge of corporeal moveables in circumstances to which these statutory provisions do not apply, it may be stated broadly that the title of the pledgee is no higher than that of the pledgor, and that he cannot maintain a right to the goods if the pledge was made without authority (*Martincz & Gomez*, 1890, 17 R. 332; *Mitchell* 1894, 21 R. 600; *Mitchell's Trs.*, 1894, 21 R. 586; *Cundy*, 1878, 3 App. Ca. 459). Thus where a party obtains goods on a contract of hire-purchase, by which the passing of the property in the goods is suspended, and pledges them before he has paid the instalments on which they become his property, the pledgee cannot maintain his right against the true owner, unless he can bring the case within sec. 9 of the Factors Act, 1889, by proving that the pledgor had bought, or agreed to buy, the goods (*Murdoch*, 1889, 16 R. 396; *Helby*, [1895] App. Ca. 471). Again, in *Mitchell* (1894, 21 R. 600), A. subjected certain copper rollers, which did not belong to him, and which he had no authority to pledge, to a lien in favour of B., which practically resulted in the rollers being pledged for a debt due by him to B. It was held, in a question with the owner of the rollers, that B. had no right to retain them. In certain exceptional cases, however, the pledgee may be able to maintain that the true owner is barred or estopped from asserting his right, because his conduct in the matter has been such as to mislead the pledgee into the belief that the pledgor had a right to the goods, or authority to pledge them. An example of such a case will be found in the case of *Pochin & Co* (1889, 7 M. 622), which was affirmed in the House of Lords on the ground that the case was governed by the Factors Act (*Vickers*, 1871, 9 M. (H. L.) 65). And a pledge by a party who has obtained authority to pledge, but has obtained it by fraud, will be good, because contracts obtained by fraud are valid until they are rescinded, and therefore cannot be rescinded to the prejudice of rights and interests obtained by third parties in good faith (*Brown*, 1880, 7 R. 427; *Kingsford*, 1856, 11 Ex. 577; *Moyce*, 1879,

4 Q. B. D. 32; *Henderson & Co.*, [1895] 1 Q. B. 521; *Mitchell*, 1894, 21 R. 600, per Ld. Kinnear, p. 613).

Sub-pledge.—A pledgee may sub-pledge the goods, but cannot confer on the sub-pledgee a right to retain them, in a question with the original pledgor, for more than the amount of the original pledge (Bell, *Prin.* s. 206; *Donald*, 1866, L. R. 1 Q. B. 585). If the subject is injured owing to the sub-pledge, the pledgor, on tendering payment of the debt, may recover damages from the pledgee (*Halliday*, 1868, L. R. 3 Ex. 299).

Pledge of Bill of Lading.—There are certain specialties in the contract of pledge when completed through the medium of a bill of lading. The bill of lading is regarded as a symbol of the goods, and its indorsement, with the intention of pledging them, places the goods in the possession of the indorsee, as it will likewise pass the property, if indorsed in pursuance of a contract of sale (*Saunders*, 1883, 11 Q. B. D. 327; *Sewell*, 1884, 10 App. Ca. 74; *North-Western Bank*, 1894, 21 R. 513; rev. 22 R. (H. L.) 1). It continues in force as a living instrument, and as a means whereby the property and possession of the goods may be transferred, even although they have been landed on a sufferance wharf under a stop for freight, but not if the transit be entirely completed, and the goods placed in the hands of a warehouseman (*Barber*, 1870, L. R. 4 H. L. 317). Where, as is usual, a bill of lading is drawn and signed in triplicate, the indorsee of that copy first lawfully indorsed acquires a completed right to the goods, without taking actual possession, and may recover them from a party to whom a second copy has been indorsed, even although that party has actually obtained delivery (*Barber, supra*; *Piric*, 1871, 9 M. 523). A pledgee of a bill of lading does not, however, incur liability for freight merely by taking an indorsed bill of lading, but he does incur such a liability if he takes actual possession of the goods (*Sewell*, 1884, 10 App. Ca. 74).

Where a bill of lading is indorsed by a party who has purchased the goods but has not paid the price, questions have several times been raised as to the effect of this indorsement on the right of the seller to stop the goods *in transitu*. The rules on this subject, first established in the celebrated case of *Lickbarrow* (1793, 1 Sm. *L. C.*, 10th ed., 674), have been codified by the Sale of Goods Act, 1893, in the following terms (s. 47):—"Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated; and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee." Thus an unpaid seller of goods, where the bill of lading has been indorsed in security, may stop *in transitu*, and will thereby acquire a secondary right to the goods, which, though postponed to that of the indorsee, will be preferred to any other right derived from the purchaser (*Kemp*, 1882, 7 App. Ca. 573). And in such circumstances the indorser of the bill of lading is bound to exhaust all other securities he may hold over the estate of the purchaser, and can only realise the goods under the bill of lading in the last resort (*Alston*, L. R. 4 Ch. 168). The seller may reduce the indorsement of the bill of lading, if he can prove that it was fraudulent on the part both of indorser and indorsee (*Adamson, Howie, & Co.*); or if it is indorsed in security of a prior debt and within sixty days of the bankruptcy of the indorser (*Stoppel*, 1850, 13 D. 61).

[Bell, *Prin.* s. 203–208, 1363–1384; Bell, *Com.* (M'L. ed.) ii. 19; Gloag and Irvine, *Rights in Security*, chs. vii. viii.; Robbins on *Mortgages*, vol. ii. ch. lxiii.]

Plough Goods.—By the Roman law (*Cod.* viii. tit. 17 (*quæ res pign. obl.*), ss. 7, 8) the instruments of husbandry could not be taken in execution of a private debt, in case the public interest in the cultivation of the soil should suffer. This law was to a partial extent adopted in Scotland by the Act 1503, c. 98: "Item, it is statute and ordained, that in time to cum, na maner of Schireffe nor Officiar poynd nor distreinzie the oxen, horse, nor uther gudes perteining to the pleuch and that labouris the ground, the time of the labouring of the samin, quhair ony uther gudes or lande ar to be apprised or poynded, according to the common law." Now it is competent to poind plough goods although the debtor have lands which might be apprised, provided no moveables can be found, or not sufficient moveables, to satisfy the rent of the lands and the debt (*Turner*, Mor. 10523; *Goodsir*, Mor. 10520; *Lord Advocate*, 20 Feb. 1811, F. C. App. No. 1). By the time of labouring mentioned in the Act is meant the time when the debtor himself is actually tilling the ground; so that as soon as he has finished ploughing, his plough goods may be poinded without previous search for other moveables, although the rest of the district be later or earlier than himself (*Watson*, Mor. 10510; *Arnot*, Mor. 10527). The poinding of plough goods in contravention of this Act, where there are other moveables of the debtor sufficient to pay the debt exposed to view, infers a SPUILZIE (*q.v.*), which gives the debtor right to recover violent profits; but where the moveables were concealed, and the officer to blame only for not making a sufficient search, the debtor is entitled to restitution only (*Lawson*, Mor. 10524). Resisting the officer in an attempt to poind plough goods, without previous search for other moveables, is not relevant to infer deforcement (*Lord Advocate*, 20 Feb. 1811, F. C. App.; 1 Hume on *Crimes*, 392).

By the Act 1587, c. 83, whoever is convicted of destroying ploughs and plough gear in time of tilling, or breaking mills or disabling oxen or horses in time of leading corn (*i.e.* harvest), shall be put to death as a thief.

[See Ersk. iii. 6. 22; Stair, i. 9. 29, and iv. 30. 5; Hunter on *Landlord and Tenant*, ii. 609; Mackenzie's *Observations on Scots Acts*, p. 123.] See POINDING.

Ploughgate of Land.—Ploughgate of land was an ancient measure of arable land for two purposes: first, for rental; secondly, for qualification for hunting and hawking.

A ploughgate or carrucate of land was the extent cultivable by a single plough in the course of a year. It contained viii. oxgang (Balf. *Prac.*, *voce* "Brieve of Division," c. 98, p. 441). The oxgang or bovate, however, contained from eight to fourteen Scots acres. Usually, however, the number was thirteen, so that a ploughgate may be taken as containing 104 acres (Innes, *Sc. Leg. Antiq.* 242). The davach, another Scotch measure, contained four ploughgates. The ploughgate was rentalled in the old extent (*i.e.* in the time of the Alexanders) at three marks, or forty shillings. A proprietor of a ploughgate held of the Crown had a vote for a member of Parliament (Innes, 274).

Under the Act of 1621, c. 31, a fine of £100 Scots was a penalty fixed on a landowner for hunting and hawking by anyone who had not a plough-gate of land. This Act is still in force (*Trotter*, 8 July 1809, F. C.; *Kelly*, 1780, Mor. 4995), the Acts of 1600, c. 23, and 1685, c. 20, both being in desuetude. The fine exigible is divided between the Crown and the informant (Irvine on *Game Laws, passim*; Rankine, *Landownership*, 136–200).

See EXTENT.

Pluris petitio.—In the Roman law of actions *pluris petitio* had in early times the effect of making the plaintiff fail entirely in his suit, and as the *litis contestatio* operated novation, and so extinguished the original ground of action, he completely lost his claim. *Pluris petitio* might be in respect to the thing, to the time, to the place, or to the circumstances. Under imperial legislation the stringency of the older rules was abated, and penalties were substituted for entire failure in the action.

The rules of the civil law in this matter have not received acceptance in Scotland. It is quite common for a party to conclude for more than he is entitled to, in which case "it is for the Court to say how much he is to get" (per Ld. Benholme in *M'Taggart*, 1867, 5 M. 534, at 549). This is quite common in petitory actions: and in *M'Taggart*, where a declarator of a right to gather sea-wrack within a certain boundary was concluded for, the Court affirmed the right to gather within a certain line less extensive than that advanced by the pursuer,—repelling the objection as to the competence of affirming any other boundary than that specified in the summons.

Even in an action of adjudication a conclusion for more than the sum due does not vitiate the process, if the decree be taken only for what is due (*Maxwell & Riddell*, 1743, Mor. 110). In *M'Neill* (1794, Mor. 122) and *M'Kinnell* (1797, Mor. 312) the Court set aside the proceedings where a decree of adjudication was taken for a sum greatly in excess of that due; and the same rule would probably apply where a decree for an excessive amount comes into competition with other creditors' claims (Mackay, *Manual*, 190 (*a*)). In actions of count and reckoning it is usual to conclude for a certain sum, or alternatively such other sum as shall appear to be due; and where this is done, decree is competent for such sum as in the result is actually found to be due, whether greater or less in amount than that specified.

But, in general, no larger sum than is asked for can be decerned for in the decree. Nor is it competent to increase the amount by way of amendment of the summons under 31 & 32 Vict. c. 100, s. 29, even to the limited extent of adding interest from the date of raising the action (*Shotts Iron Company*, 8 M. 383).

Poaching.—Reference is made to the following articles:—CLOSE TIME; DEER; FISHINGS; GAME LAWS; GUN LICENCE; GROUND GAME ACT; HARES; LICENCE (GAME); PIGEONS; RABBITS; SPRING GUNS.

The ancient Scottish statutes against poaching are referred to in the article upon GAME LAWS. The interest which the Scottish Parliament evinced in matters pertaining to sport was maintained to the last, and one of the last proceedings of that body in 1707 was to pass an Act against poaching. This Act subjected common fowlers, hunting without a subscribed warrant from the landowner, to a penalty of £20 Scots, besides forfeiture of their dogs, guns, and nets, and prohibited all persons from coming within

any heritor's ground, without his leave, with setting dogs and nets for killing fowls.

This Act, though not repealed and said to be in force (Rankine, *Landownership*, 138), is obsolete, and has been superseded by more modern legislation. There are three important Acts dealing with the matter: The Night Poaching Act, 1828; The Day Trespass Act, 1832; The Poaching Prevention Act, 1862. These Acts will now be noticed in their order. In regard to the first it is necessary to point out that it is differentiated from the two latter by the far greater stringency of its provisions. Night poaching is regarded by the Legislature not merely as a trespass and an infringement of private right, but as an offence which, by reason of its tendency to lead to serious violence and outrage, falls to be very severely dealt with (see Bell, *Notes to Hume*, 118; *Swanston*, 1 Swin. 54; *Reid*, 1 Swin. 202).

Night Poaching.

This offence is dealt with by the Act 9 Geo. IV. c. 69, known as The Night Poaching Act, as amended by 7 & 8 Vict. c. 29.

The leading statute provides that if any person shall by night unlawfully take or destroy *any game or rabbits* in any land, whether open or enclosed, or shall by night unlawfully enter or be on any land, whether open or enclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying *game*, such offender shall for the first offence be imprisoned for a period not exceeding three months with hard labour, and thereafter shall find caution, himself in £10 and two sureties in £5 each, or one in £10, for not so offending again for the space of one year next following, or on failure to find caution, shall be further imprisoned with hard labour for six months, unless caution be sooner found. For a second offence the respective periods and amounts are all doubled. For a third offence the sentence may be penal servitude up to seven years, or imprisonment with hard labour up to two years. Under this section it has been held that—

(1) The offence may be committed by the agricultural tenant of the lands (*Smith*, 1856, 2 Irv. 402).

(2) The onus of proving permission lies on the accused (*Wood*, D. & B. C. C. 1).

(3) Where the offence charged is entering or being upon land for the purpose, etc., the charge is not made good if it appears that the ground was waste ground between the hedges bounding a public road (*Harris*, 12 L. T. 303); but in regard to roads, see *infra* as to the Amending Act, 7 & 8 Vict. c. 29.

(4) The names of the fields in a complaint is mere surplusage (*Henderson*, 1878, 4 Coup. 120, 6 R. J. C. 1).

(5) The alternative offence may be proved by showing that accused was in company with one having a net or other instrument for the purpose stated (*Granger*, 1863, 4 Irv. 432).

(6) A complaint is bad which charges "or rabbits" where the offence is entering on land, the expression in the section under this branch being simply "game" (*Mitchell*, 1863, 4 Irv. 257).

(7) The section does not describe the different offences, but one offence which may be committed in two different ways (*Duncan*, 1864, 4 Irv. 474, overruling *Jones*, 1853, 1 Irv. 334, 337).

By sec. 2 it is provided that the owner of land, or his servant, or any assistant, may apprehend a person caught night poaching. If the poacher

resists, and offers violence with any offensive weapon, he is liable to penal servitude for seven, or imprisonment with hard labour for two, years. It has been held that large stones, though not taken to the ground, are offensive weapons (*Grice*, 7 C. & P. 803; *M'Nab*, 1845, 2 Broun, 416; *Mitchell*, 1887, 1 White, 321). As to other weapons, see *Palmer*, 1 Moody & R. 70; *Fry*, 2 Moody & R. 42; *Turner*, 3 Cox, 304; *Merry*, 2 Cox, 240.

Sec. 9 deals with the most serious form of night poaching, viz. by armed bands. It provides that if any persons to the number of three or more together shall by night unlawfully enter or be on any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, firearm, bludgeon, or any other offensive weapon, each and every such person shall be liable to penal servitude for a period not exceeding fourteen years, or to imprisonment with hard labour for a period not exceeding three years. Under this section it has been held that—

(1) Stones are offensive weapons (see cases cited *supra*).

(2) Being on the land is a question of circumstances for the jury (*Worker*, 1 M. & C. C. R. 165; *Capewell*, 5 C. & P. 549; *Higgs*, 10 Cox, 527).

(3) It is not sufficient that the accused were apprehended on a public road, not having been seen on the land, though shots were heard from neighbouring coverts (*Meadham*, 2 C. & K. 633).

(4) It is enough if any one or more be armed, provided the others knew of the fact (*Granger*, 1863, 4 Irv. 432; *Limerick*, 1844, 2 Broun, 1; *Smith*, Russ. & R. 368; *Southern*, Russ. & R. 444. See also *Goodfellow*, 1 Den. C. C. 81).

(5) A conviction is good though accused laid down their guns and stole away on being disturbed (*Nash*, Russ. & R. 386).

(6) If a common design of poaching be proved, it is enough to convict all concerned, though one only entered the land (*Passey*, 7 C. & P. 282; *Lockett*, 7 C. & P. 300. See also *Whittaker*, 1 Den. C. C. 310; *Nickless*, 8 C. & P. 757; and *Jones*, 2 Cox, 185).

The punishment of all offences punishable summarily under the Act, viz. first and second offences of entering or being on land for the purpose of taking game at night, and first or second offence of taking game at night, must be commenced within six calendar months after the commission of the offence; and the prosecution of offences punishable on indictment, within twelve calendar months (s. 4).

For the purposes of the Act, night commences one hour after sunset and ends one hour before sunrise (s. 12).

According to the definition of this Act, the word "game" includes hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

Jurisdiction.—In virtue of 40 & 41 Vict. c. 28, s. 10, the exclusive jurisdiction to try all offences punishable summarily is in the Sheriff of the county. First and second offences under sec. 1 must be tried summarily. The Sheriff may not try them with a jury (*Caird*, Arkley, 413). Under the Act a third offence, or any other offence where a sentence of penal servitude might be pronounced, could be tried only by the High Court of Justiciary, but under the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35, s. 56), trial by sheriff and jury is now competent. Prosecutions are instituted on the oath of a credible witness (s. 3). It is doubtful whether private persons may prosecute. In any event, they need to have the concurrence of the procurator-fiscal, and to set forth an interest (*Graham*, 1844, 2 Broun, 85; *Herbert*, 1855, 2 Irv. 346).

Roads.—The amending Act 7 & 8 Vict. c. 29 makes the punishments and forfeiture imposed by sec. 1 of the leading Act on persons destroying

game or rabbits by night in any open or enclosed land, to apply to persons destroying game or rabbits by night on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any public road, highway, or path. The like power of apprehension is given as if the offender were found upon the land.

Under this provision it has been held that—

(1) The amending Act applies only to the case of persons actually destroying game, not to the other offences under the leading Act; and accordingly a libel charging persons, under sec. 9, with being out armed, to the number of more than three, on certain lands or on a road, is irrelevant, but the defect can be cured by deleting the reference to the road (*Burns*, 4 Irv. 437).

(2) A charge of unlawfully *entering a public* road and then and there killing, etc., is bad because the word "unlawfully" is misplaced (*Mains*, 1860, 3 Irv. 533).

(3) Although, as was pointed out *supra*, sec. 1 of the leading Act creates only one offence, which may be committed in two ways, it was found that when the amending Act was prayed in aid, a general verdict of guilty on a charge of killing on the road, or being on the lands for the purpose, etc., was bad, as being cumulative (*ib.*).

Day Poaching.

This offence is dealt with by the Day Trespass Act of 1832 (2 & 3 Will. IV. c. 68. The corresponding English statute is 1 & 2 Will. IV. c. 32, ss. 30 *et seq.*).

Sec. 1 provides that if any person shall commit any trespass by entering or being in the daytime upon any land without leave of the proprietor in search or pursuit of game (not defined), or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies (rabbits), such person shall on summary conviction be fined a sum not exceeding two pounds, together with the expenses of the prosecution. If the offence be committed by five persons together, or by a person or persons with the face disguised, the penalty may be as much as £5, with expenses. The oath of one credible witness is sufficient for a conviction.

Under this section it has been held that—

(1) There may be constructive trespass, as by remaining on the road but acting in concert with others who enter the land, or by sending dogs on to the land (*Stoddart*, 1880, 7 R. J. C. 11, 4 Coup. 334; *Wood*, 1890, 17 R. J. C. 55, 2 White, 497, overruling *Colquhoun*, 1876, 4 R. J. C. 3, 3 Coup. 342).

(2) The Act does not apply to an agricultural tenant (*Smellie*, 1844, 2 Broun, 194; *Kinnoull*, 3 Irv. 501). As to the tenant's friends, see *Porter*, 1858, 3 Irv. 57; *Black*, 1875, 3 R. J. C. 18, 3 Coup. 209; *M'Adam*, 1876, 3 Coup. 223, 4 R. J. C. 20; *Niven*, 1888, 1 White, 578, 15 R. J. C. 42.

(3) The Act applies to the tenant's servant (*Selkirk*, 1850, J. Shaw, 463; *Raper*, 1860, 3 Irv. 329). As to the case of a servant authorised by the tenant, see *Calder*, 1878, 4 Coup. 131, 6 R. J. C. 3; *Jack*, 1887, 14 R. J. C. 20, 1 White, 350.

(4) The Act also applies to the case of a person employed for hire to kill rabbits which are reserved to the landlord by the lease, and where the employment is not in terms of the Ground Game Act, 1880 (*Richardson*, 1897, 2 Adam, 243, 24 R. J. C. 32).

(5) One who has a written permission to kill rabbits, only contravenes the section by killing game (*Maxwell*, 1889, 2 White, 176, 16 R. J. C. 48).

(6) The proprietor's name must appear on the conviction (per Ld. Ardmillan in *M'Kenzie*, 1859, 3 Irv. 459).

(7) Trespass for the purpose of taking dead game not *unico contextu* with the killing is not within the Act (*Macdonald*, 1879, 4 Coup. 205, 6 R. J. C. 14). As to cases of game killed or wounded on the march between two properties, see the discussion in Rankine on *Landownership*, p. 142, and the cases there cited.

(8) A written complaint is necessary, and may be subscribed by a law agent as prosecutor for the complainer, who may be represented by a law agent at the trial (*M'Kenzie*, 1859, 3 Irv. 459; *Stewart*, 1881, 4 Coup. 455, 8 R. J. C. 33).

(9) The mere allegation of a right based upon alleged title, but not supported by *primâ facie* evidence, will not bar a prosecution (*Scott*, 1887, 1 White, 298, 14 R. J. C. 45).

Daytime commences one hour before sunrise, and terminates one hour after sunset (s. 3).

Sec. 2 provides that the trespasser may be required by the person having right to the game, or the occupier of the lands, or the servant of either of them, or by any other person authorised by either of them, to leave the land, and also to give his name and address. If he refuses to give his name and address, or gives an illusory address, or remains upon or persists in returning to the land, he may be apprehended by the person making the demand, and brought before the Sheriff, provided he is not detained more than twelve hours before this is done. In this case he is liable to a penalty not exceeding five pounds, with expenses. The prosecution is at the instance of the owner or occupier of the lands, and the concurrence of the procurator-fiscal is not required (*Russell*, 1845, 2 Broun, 572).

The Act does not apply to the pursuit with hounds or greyhounds of deer, hares, or foxes, if started on other land on which the hunters were entitled to hunt (s. 4).

The person having right to game, or the occupier or anybody in the employment of either of them, may demand possession of the game taken, and if it is refused, may take it by force, for the use of the person entitled to the game upon the lands (s. 5).

If the trespasser obstructs or assaults any person in the execution of his duty under the Act, he is liable on summary conviction in an additional penalty of five pounds, with the option of imprisonment for a period not exceeding three months (s. 6).

The fines and penalties are payable to the kirk session of the parish where the offence was committed, for behoof of the poor (s. 7).

The Sheriff may adjudge the fine to be paid immediately, or he may allow time for payment; and in either case he may sentence the trespasser to imprisonment for a period not exceeding two months in default of payment (s. 8).

Every prosecution must be commenced within three months of the commission of the offence (s. 11). The Act directs that prosecution shall be instituted on the oath of credulity of a credible witness (*ib.*). Opinions fluctuated as to whether this procedure is permissible or directory, but the latter opinion ultimately prevailed (see cases in Rankine on *Landowncrship*, 775). Objection to the formality of the oath, it was held, came too late after the accused had pleaded to the complaint (*Munro*, 1889, 17 R. J. C. 14, 2 White, 409). The portion of sec. 11 requiring the oath was repealed by the Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67, s. 1), and it

seems to have been assumed in a recent case that this repeal was effective (*M'Donald*, 17 Dec. 1897).

The provisions of the Act do not affect ordinary civil remedies by way of action or interdict; but any person at whose instance, or with whose concurrence or assent, proceedings have been taken, is barred from raising any action at law in respect of the same trespass (s. 16).

All actions and prosecutions in respect of anything done under the Act by those charged with its execution must be commenced within six months of the act committed, and one calendar month's notice must be given to the defender before the commencement of any such action (s. 17).

Poaching Prevention Act.

This Act (25 & 26 Vict. c. 114) was meant to meet the case of men being found upon the public highway returning from a night of depredation laden with their spoil. It provides (s. 2) that any police constable may search in any highway, street, or public place for any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or nets or engines used for killing or taking game, and also to stop and search any cart or conveyance in regard to which he shall have the like suspicion; and should any game or instrument be found, the constable may seize and detain the same. The constable shall then summons the person so searched before the Sheriff, and should the Sheriff be satisfied that the accused has obtained the game by poaching, or used the instruments for that purpose, or been accessory thereto, he may be fined in any amount not exceeding five pounds, and shall forfeit the game or instruments, and the Sheriff shall direct the same to be sold or destroyed, and the proceeds of sale and penalties to be paid to the treasurer of the county or borough. Should no conviction follow, the game or instruments are to be returned to the person from whom they were taken.

Under this section it has been found that—

(1) The constable may not apprehend (*Spencer*, 3 F. & F. 857).

(2) It is enough that the game or instruments are openly seen in accused's possession on the highway; but if they are not so seen, and a suspected person is followed off the highway and searched, the case does not appear to be within the Act (*Hall*, 33 L. J. M. C. 1; *Clarke*, L. R. 4 C. P. 638; *Turner*, L. R. 10 C. P. 587; *Lloyd*, 14 Q. B. D. 725).

(3) It is no objection that the policeman does not merely suspect, but actually knows, accused has been poaching (*Hall*, 53 J. P. 310).

(4) Proof of having been seen on land poaching is not required. It is for the judge to say whether the only reasonable inference in the circumstances of the particular case is that the accused has been poaching (*M'Kenzie*, 1890, 18 R. J. C. 1, 2 White, 534; *Jameson*, 1893, 1 Adam, 91; *Scatterty*, 3 Feb. 1898; *Browne*, 32 L. J. M. C. 106; *Evans*, 33 L. J. M. C. 50; see *Jenkin*, 7 Q. B. 478; cf. *Gillan*, 1877, 3 Coup. 551). The *onus* will be heavy in the case of a common carrier (see *Lawley*, 51 J. P. 502; *Young*, 1891, 28 S. L. R. 332; but see *Young*, 1891, 18 R. J. C. 20, 2 White, 581).

For the purposes of this Act, game includes hares, pheasants, partridges; eggs of pheasants and partridges; woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse or black or moor game.

Sec. 3 provides that the procedure in prosecutions is to be the same as that under the Day Trespass Act (2 & 3 Will. IV. c. 68, s. 11). Accord-

ingly, there is an oath of credulity (*Trainer*, 1863, 4 Irv. 264; *Logan*, 1863, 4 Irv. 453). The repeal of the clause requiring the oath of credulity in the case of a prosecution under the Day Trespass Act, referred to above, has not affected this requirement in the case of a poaching prevention prosecution (*M'Donald*, 17 Dec. 1897). It has been found that there must be a fresh oath of credulity under the Poaching Prevention Act where the first oath was to facts which would have made the complaint one under the Day Trespass Act (*Morris*, 1867, 5 Irv. 529). The procurator-fiscal or the police may prosecute (*Anderson*, 1868, 1 Coup. 18, 6 M. 560). There is no provision for private prosecution.

[Irvine, *Game Laws*; Oke, *Game Laws*; Warry, *Game Laws*; Rankine on *Landownership*.]

Poinding is the diligence by which a creditor can make the goods of his debtor available for the payment of his debt; in other words, by which a decree for payment of money is made effectual. The diligence has been known to our law from the earliest times; it is described in *Quoniam Attachimenta*, c. 49, and the changes in our law since that time have left this diligence but little altered (Ersk. iii. 6. 20). The older writers constantly use "distress" as an equivalent term; but that seems to be incorrect, since a poinding was reduced as it proceeded on an act which only authorised "distress" (*Lord Advocate*, 20 Feb. 1811, 16 F. C. App. No. 1).

Poinding is of two kinds, real and personal. Real poinding is applicable only to *debita fundi*, and is treated of in the succeeding article on POINDING OF THE GROUND (*q.v.*). We shall here deal with personal poinding, which is the diligence appropriate to the ordinary case in which the debtor is personally liable.

Prior to 1838 poindings proceeded either on letters of horning, etc., issued from the Signet of the Session, or on the decrees of inferior Courts, the extracts of which contained a precept of poinding. The Personal Diligence Act, 1838 (1 & 2 Vict. c. 114), without repealing the former practice, introduced provisions which have ever since regulated the execution of this diligence. Sec. 1 provides that every extract of a decree of the Court of Session, Teind Court, or Court of Justiciary, or of a decree proceeding upon any deed, bond, or decree-arbitral, or upon the protest of a bill or note recorded in the Books of Council and Session, or of the Court of Justiciary, shall contain a warrant to charge the debtor to make payment within the days of charge, under pain of poinding, and to arrest and poind, and for that purpose to open shut and lockfast places. Sec. 9 contains similar provisions for the Sheriff Courts. The first step is to charge the debtor (Act 1669, c. 4). A charge, however, is not necessary in poindings by the Crown of the effects of deceased debtors under the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56, s. 36). On the expiry of the days of charge without payment, the officer may proceed to poind; but if he shall be required to do so, he shall conjoin in the poinding any creditor of the debtor who shall produce to him a warrant to poind (1 & 2 Vict. c. 114, s. 23). The officer shall then proceed to the place where the goods are, with two valuators, who should be put on oath, and are bound to use their best care and skill in valuing (per Ld. Craighill in *Le Conte*, 8 R. 175), and shall there make an inventory of the effects, entering also the price at which the valuators appraise each article. Each article must be valued separately. If a slump sum is stated, the proceedings are inept (*McKnight*, 13 S. 342; *Le Conte, supra*). The pointed effects shall be left with the person in whose

possession they were when poinded; and the officer shall also leave with such person a schedule specifying the effects, the person at whose instance they were poinded, and the value (s. 24). Within eight days the officer shall report the execution to the Sheriff, stating full particulars, which execution shall be signed by the valuators as witnesses (s. 25). If necessary, the Sheriff shall then give orders for the safe custody of the poinded effects, or for their immediate disposal if perishable; if not so disposed of, the Sheriff shall grant warrant of sale by public roup, at such time and place, with such public notice, and at the sight of such judge of the roup as the Sheriff shall think fit, provided that the sale shall not take place sooner than eight days, nor later than twenty days, after such public notice, in computing which time either the day of publication or the day of sale should be included (*M'Neill*, 3 D. 554); the Sheriff shall order a copy of the warrant of sale to be served on the debtor and the possessor of the poinded effects at least six days before the date of the sale (s. 26). The posting by a sheriff-officer of a registered letter in terms of the Citation Amendment (Scotland) Act, 1882 (45 & 46 Vict. c. 77, s. 3), is a competent mode of intimation to a debtor resident out of the jurisdiction of the Sheriff who granted the order (*Lochhead*, 11 R. 201). The poinded effects shall be offered for sale at upset prices not less than the appraised value thereof; if not sold, the judge of the roup shall deliver such part of the effects as, at the appraised value, shall satisfy the debt and expenses, to the poinding creditor, "subject to the claims of other creditors to be ranked as by law competent" (s. 27); and the judge of the roup shall report to the Sheriff within eight days. If the effects be sold, the judge of the roup shall, within eight days, lodge with the sheriff-clerk the roup rolls and an account of the sum arising from, and of the expenses of, the sale; and the Sheriff may order the sum, or so much thereof as may be necessary to satisfy the debt, interest, and expenses, to be paid over to the poinding creditor, "subject to the claims of other creditors to be ranked as by law competent"; and the report, when lodged, shall be patent to all concerned on payment of a fee of one shilling (s. 28). The poinder or any other creditor may be a purchaser at the sale (s. 29). Any person unlawfully intromitting with the poinded effects shall be liable, on summary complaint to the Sheriff, to be imprisoned till he restore the effects, or pay double the appraised value (s. 30). The complaint to the Sheriff under this section is a civil process, and does not require the concurrence of the procurator-fiscal (*Wilson*, 24 R. 254). Nothing in the Act shall affect any hypothec known in law (s. 31). Where the goods poinded are subject to no hypothec, and where the poinding is not cut down or equalised by notour bankruptcy or sequestration occurring within sixty days, a preference in favour of the poinding creditor may be created by the use of this diligence. But the preference will be lost by delay in following up the diligence (*Henderson*, 23 R. 659). But see later in this article, under the sub-heading *Competing Diligences*.

Sec. 20 of the Small Debts Act, 1837 (1 Vict. c. 41), provided a slightly more summary process of sale in the case of debts under £12 sterling. Not sooner than forty-eight hours after the effects have been poinded in the manner above described, the officer may carry the poinded effects to the cross, or most public place of the nearest town or village, and there sell them by public roup between the hours of eleven a.m. and three p.m. on previous notice of at least two hours by the crier, but reserving to the Sheriff power to appoint a different hour or place, or a longer or different kind of notice. The procedure in other respects is practically the

same as that already described. This section was incorporated with the Debts Recovery (Scotland) Act, 1867 (30 & 31 Vict. c. 96, s. 16).

"In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party" (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 40)). Sec. 3 of the Mercantile Law Amendment Act (Scotland), 1856 (19 & 20 Vict. c. 60), contained a similar provision, with this qualification, now omitted, that such attachment must be made "at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller." Secs. 1 to 5 inclusive of the Mercantile Law Amendment Act (Scotland), 1856, were repealed by sec. 60 of the Sale of Goods Act, 1893. Any creditor may competently poind goods of his debtor which are in his (the creditor's) own possession (*Lochhead*, 11 R. 201).

Subjects which may be poinded.—The general rule is that all moveables, corporeally valuable and capable of being sold by the Sheriff's warrant (Bell, *Prin.* s. 2289), belonging to the debtor, or of which he is the reputed owner (*Anderson*, 11 D. 270; *Muirhead*, 1 Stuart, 511; *Fyfe*, 4 D. 255; *Macdougall*, 2 D. 500), wherever situated, may be poinded for payment of his debts. When the feudal system was in its prime, the goods of a tenant might be poinded for his landlord's debts. By the Act 1469, c. 36, such poindings were limited to the amount of the rent due to the landlord by the tenant. But even this has been discontinued, and the landlord's creditor can only attach the rent by arrestment in common form in the tenant's hands. "The Court will prevent any attachment of the debtor's wearing clothes, or of such of his working tools as are necessary for the exercise of his calling: Bankt. iv. 40. 1; *Reid*, Mor. 1392; *Pringle*, Mor. 1393" (Ersk. iv. 3. 27, note). But not the furniture of his house, though alleged to be necessary to enable him to carry on his profession (*Gassiot*, 12 Nov. 1814, F. C.). See Beneficium Competentiæ. Following, to a partial extent, the Roman Law, it was made incompetent to poind instruments of husbandry in time of tillage when other goods could be found (1509, c. 98). See Plough Goods. The creditor of an individual cannot poind effects belonging to a firm of which the debtor is a partner (*Dawson*, 4 S. 39); or effects which belong to the debtor jointly with another (*Fleming*, 7 S. 92); or effects of which the debtor is only liferenter (*Scott*, 15 S. 916). Goods which have been poinded and bought back by or given to the debtor cannot be poinded a second time for the same debt (*Fiddes*, Bell's Oct. Cas. 355; *Dick*, 2 Stuart, 13). Growing corns may be poinded, for they are truly moveable (Ersk. iii. 6. 22); but they must have reached such a state of maturity as will enable the valuators to fix the quantity and price with reasonable accuracy (*Ballantine*, Mor. 10526). Thus crops newly brairded cannot be poinded (*Elders*, 11 S. 902). Straw or fodder which, by the terms of his lease, the tenant is bound to consume on the ground, cannot be poinded (*idem*); nor, in general, any subject which *ex contractu* or otherwise has lost the character of a moveable. A question whether bank notes could be poinded was argued, but not decided, in *Alexander* (4 S. 439, N. E. 445). The sole argument against poinding them seems to have been that poinding of bank notes had never been recognised in the law of Scotland, by which, presumably, is meant that the practice had been not to poind them, since there is no decision on the point. But as there is no other diligence by which bank notes could be attached, this argument appears a slender foundation for such consequences, and it is thought that

no Court would hold bank notes exempt. All doubt in Crown cases has been removed by the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56, s. 32), which provides that the Crown may "cause poind the whole moveable effects without exception of such Crown debtor, including bank notes, money, bonds, bills, etc." By general admission, which seems to have no foundation either in principle or authority (2 Bell's *Com.*, 7th ed., p. 60), ships and goods on shipboard cannot be poinded (Bankt. iv. 41. 9), arrestment being the appropriate diligence. But by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 693), which re-enacts sec. 523 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), repealed by the first-mentioned Act, "where any Court, justice of the peace or other magistrate, has power to make an order directing payment to be made of any seaman's wages, fines or other sums of money, then if the party so directed to pay the same is the master or owner of a ship, and the same is not paid at the time and in the manner prescribed in the order, the Court, justice of the peace or magistrate, who made the order may, in addition to any other powers they may have for the purpose of compelling payment, direct the amount remaining unpaid to be levied by distress or poinding and sale of the ship, her tackle, furniture, and apparel." In *Mackenzie & Co.* (7 M. 27) it was observed that arrestment, and not poinding, is the proper diligence to attach furniture which had been placed by the debtor in the hands of auctioneers for sale, they acting under a well-defined contract, and being liable to account. Where goods belonging to another have been poinded under the belief, reasonably induced by the actings of the parties, that they belonged to the debtor, the poinding has in some cases been sustained (*Anderson*, 11 D. 270; *Muirhead*, 1 Stuart, 511; *Fyfe*, 4 D. 255; *Macdougall*, 2 D. 500; *Johnstone*, Hume, 448). But see REPUTED OWNERSHIP.

Competency.—It was held by the House of Lords that it was incompetent to poind, within the Palace of Holyrood, the effects of a subject resident there (*E. of Strathmore*, 2 W. & S. 1). The omission of a statutory requisite from a warrant or execution invalidates the whole proceedings. Thus the omission to fix a date or place of sale in a warrant to sell poinded goods (*Kewly*, 5 D. 860; *M'Vicar*, 19 D. 948; *M'Kinnon*, 4 M. 852), and the failure to state in an execution of poinding the amount of the debt for which the diligence was used (*Sangster*, 20 D. 355), were held illegal. But in a poinding on a small debt decree (1 Vict. c. 41, s. 20) it is not necessary to insert in the schedule the name of the creditor at whose instance the diligence is used (*Crombie*, 23 D. 333). Where a statute imposes penalties, and expressly mentions imprisonment as the means of compelling payment, it is incompetent to grant a warrant to recover the penalty by poinding, and the insertion of such a warrant will invalidate the whole decree (*Moffat*, 23 R. (Just.) 18). It is incompetent to sist a decree in absence, in a small debt action, after the debtor has been charged on a decree, and the charge has been followed by a poinding (per Ld. Kincairney in *Gow & Sons*, 1 Adam, 534; *Rowan*, 4 Irv. 377). By the Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60, s. 1), it was provided that goods sold but not delivered should not be attachable by the diligence of the creditors of the seller. It was held that this section did not apply to the case of a transaction in which, notwithstanding an alleged sale, the seller continued in the possession and use of the subject—a mare (*Sim*, 24 D. 1033). The section has now been repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 60). A creditor of a notour bankrupt operated payment of his debt by arrestment and furthcoming, but was subsequently obliged,

under sec. 12 of the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), to make over to another creditor of the bankrupt part of the sum he had recovered. It was held competent for the first creditor to get further payment of his debt by poinding (*Gallacher*, 13 S. L. R. 496). But it is not competent to anticipate such claims; so where a creditor of a tenant poinded his debtor's goods to an amount sufficient to pay not only the debt and expenses, but also the debtor's rent, for which the landlord, by his hypothec, had a prior claim on the goods, the creditor was held liable to his debtor in damages (*M'Kinnon*, 4 M. 852). But it was subsequently held that there was no such clear or authoritative law or practice as to render the creditor's law agent liable in relief on the ground either of gross ignorance or want of skill (*Hamilton*, 7 M. 173).

Competing Diligences.—In the ordinary case, diligences rank in order of priority. There are certain statutory exceptions to this, which will be noticed immediately, and there is also some question whether a poinding does not rank before an arrestment of prior date, not yet followed up by an action of furthcoming. Erskine (*Inst.* iii. 6. 21) says: "A debtor's goods may be poinded by one creditor, though they have been arrested before by another; for arrestment being but an imperfect diligence, leaves the right of the subject still in the debtor." This is in apparent conflict with a previous passage (iii. 6. 11), which says: "Arrestment, being a step of diligence, renders the subject litigious so soon as used, before it be perfected by furthcoming . . . and therefore . . . it cannot be excluded either by the posterior voluntary deeds of the debtor, or by the legal diligence of creditors, unless the user of the begun diligence has been in *mora*, or become negligent in prosecuting it." This last-quoted passage is supported by Stair (*Inst.* iii. 1. 42). These passages were discussed by the Court in *M'Donald* (3 D. 1128). The first Ld. Moncreiff said: "Does not the passage first quoted [*N.* His lordship was understood to refer to Erskine iii. 6. 11] mean that the creditor competing with the arrestment must have been a creditor at the time of the arrestment? And, further, that the common debtor has not interfered with the creation of the debt on which the creditor's diligence proceeds? . . . Mr. Erskine was not unaware of the doctrine, which had been delivered by him in another place [iii. 6. 21], that a poinding will defeat an arrestment; but this assumes that there was no voluntary deed of the debtor. I do not think it inconsistent with the other passage." The other judges concurred, and the law may be taken to be as there stated. In the case of *Tullis* (18 June 1817, 19 F. C. 358) it was decided that a poinding is not completed, nor the property transferred, until after the sale has taken place, and the note been lodged with the Clerk; and till a personal poinding has been so completed, a poinding of the ground by a heritable creditor, though later in date, is preferable to it. This decision was questioned by Prof. Bell (2 Bell, *Com.*, 7th ed., 61); but, as Ld. Kinnear pointed out in *Henderson* (23 R. 659, at p. 666), "that decision proceeded on the construction of regulations which are not identical with those of the statute now in force, although they are very similar to them"; the case of *Tullis* must therefore be used with caution. By undue delay in following up a poinding by a sale, a creditor may lose his right to a preferential ranking in the event of the debtor taking out *cessio* (*Henderson*, 23 R. 659; cf. *Scoullar*, 3 S. 77, N. E. 50).

By the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79, s. 108), sequestration is equivalent to an arrestment in execution and decree of furthcoming, and to an executed or completed poinding; and no arrestment or poinding of the funds or effects of the bankrupt, executed on or

after the sixtieth day prior to sequestration, shall be effectual. Sec. 12 of the same Act provides that all arrestments and poindings used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* (see BANKRUPTCY and SEQUESTRATION). In computing the sixty days, either the day of bankruptcy or the day of poinding must be excluded, and the principle "*dies inceptus pro completo habetur*" applies (*Scott*, 2 D. 206). Provisions of a similar character are made for the case of companies registered under the Companies Acts, 1862 to 1890. The Companies Act, 1886 (49 Vict. c. 23, s. 3), provides that "in the winding up, by or subject to the supervision of the Court, of any company under the Companies Acts, 1862 to 1886, whose registered office is in Scotland, . . . the following provisions shall have effect:—

"(1) Such winding up shall, in the case of a winding up by the Court, as at the commencement thereof, and in the case of a winding up subject to the supervision of the Court, as at the date of the presentation of the petition, on which a supervision order is afterwards pronounced, be equivalent to an arrestment in execution and decree of furthcoming, and to an executed or completed poinding; and no arrestment or poinding of the funds or effects of the company executed on or after the sixtieth day prior to the commencement of the winding up by the Court, or to the presentation of the petition on which a supervision order is made, as the case may be, shall be effectual. . . . Provided that any arrester or poinder, ... who shall be thus deprived of the benefit of his diligence, shall have preference out of such funds or effects for the expense *bonâ fide* incurred by him in such diligence." The Companies Act, 1862 (25 & 26 Vict. c. 89, s. 163), enacts that "where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents." It was held in the case of *Allan* (20 R. 36) that a personal poinding was an "execution" in the sense of this enactment; that a poinding for county council rates executed after the commencement of the winding up of a company was therefore ineffectual; and that sec. 87 of the Companies Act, 1862, which provides that "when an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose," does not limit the effect of either of the above-quoted sections by giving the Court power to authorise an execution or distress. This last point has been differently decided in England (*in re Exhall Mining Co.*, 4 De G., J. & S. 377; *in re Lancashire Cotton Spinning Co.*, 1887, L. R. 35 Ch. D. 656).

A *cessio* has not the effect of a sequestration in equalising diligence. "A *cessio* has not the effect of a universal diligence in favour of the trustee in the *cessio*, and there is nothing in that appointment that can prevent a poinding creditor from going on with his diligence. It is possible that the effect of notour bankruptcy may be that other creditors will come in and share in the sale of the poinded effects. But that takes place apart from the process of *cessio*, and the trustee has nothing to do with the sale" (per Ld. Pres. Inglis in *Simpson*, 16 R. 131).

Miscellaneous.—A poinding must be carried out in daylight, though the rule as to carrying out between sunrise and sunset is not strictly enforced (*Douglas*, Mor. 3739). The creditor who causes a

poinding to be executed will be personally liable in damages for any irregularity or illegality in the carrying of it out (*Le Conte*, 8 R. 175; *Beattie*, 8 D. 930).

Poinding of Stray Cattle.—By the Act of 1686, c. 11, "anent winter herding," all possessors of land are enjoined to herd their beasts so as to prevent them from straying on their neighbour's land, under a penalty, if they shall contravene, of half a merk for each beast they shall have going on their neighbour's ground, over and above the damage done; "and it shall be lawful to the heritor or possessor of the ground to detain the said beasts until he be paid of the said half merk for ilk beast found upon his ground, and of his expenses in keeping the same." This detention of stray cattle is called poinding; but it requires no special warrant, and differs completely from the diligence above described. The Act applies to ground of every description and under every kind of pasture, crop, or forest. All that is necessary is that the animals should be actually caught in the act of trespassing (*M'Arthur* v. *Jones*, 6 R. 41). They may then be retained until the penalty and expenses are tendered by the owner of the cattle (*M'Arthur* v. *Miller*, 1 R. 248). If the owner fails to claim the cattle within a reasonable time, the poinder may apply to the Sheriff for warrant to sell the cattle for the benefit of all concerned. At common law the right of poinding was confined to the case of cattle straying amongst artificial crops "in haining time" (Stair, i. 9. 24, and ii. 3. 67; Ersk. iii. 6. 28). At common law, and presumably under the statute also, the poinder of the cattle was bound to supply them with sufficient fodder. (See Rankine on *Landownership*, chap. 32, and cases there cited.)

Poinding of the Ground is the action or diligence by which the superior or any creditor in a debt constituting a real burden or lien upon lands can attach the moveables on the ground in payment of his debt. The proceedings commence by raising an action of poinding of the ground, the conclusions of the summons being: "It ought and should be decerned and ordained, by decree of the Lords of our Council and Session, that our letters be directed, at the instance of the pursuer against the defenders, to messengers-at-arms our sheriffs in that part, charging them, conjunctly and severally, to pass and in our name and authority search for, seek, fence, arrest, apprise, compel, poind, and distrain all and sundry the said defender's readiest moveable goods, gear, effects, corns, cattle, horse, sheep, inside plenishing, and other moveable goods of every denomination poindable or distrainable, being, or that shall happen to be, within or upon the grounds of the said lands and others, but in so far as relates to the said tenants, to the amount of the rent only which may be due and payable by them respectively at the time, and make payment thereof to the pursuer to the amount of the principal sum of £ sterling liquidate penalty and interest of the said principal sum from the said term of , and in time coming during the not redemption, the terms of payment thereof being always first come and bygone, and to see the pursuer satisfied of and paid the same" (*Jurid. Styles*, 3d ed., vol. iii. p. 203). When decree has been given, letters of poinding the ground are issued as a matter of course, and the officers proceed to poind as described in the preceding article, but without any charge or other preliminary notice. The extract of the Sheriff's decree of poinding of the ground is sufficient warrant to poind, without letters under the signet or a separate precept from the Sheriff (*Kennedy*, 14 D. 513). The jurisdictions of the Sheriff and the Court of Session are concurrent, so

the actions may be raised in either Court. (See Lees, *Sheriff Court Styles*, 3rd ed., p. 298.)

"A poinding of the ground is a proceeding merely for the purpose of giving effect to a creditor's security, and it is analogous to those other remedies open to heritable creditors, such as adjudication, or sale, or maills and duties. These are all diligences open to a heritable creditor to give effect to his preference, which has already been secured to him. . . . The security which a heritable creditor holds over moveables is of exactly the same nature, and has the same effect, as that which he holds over the *fundus* itself. In extent, of course, it varies with the amount of moveables on the ground, but his right to them is secured by his infeftment, not by his action of poinding of the ground. A heritable creditor, therefore, in raising his action is not seeking to obtain a preference, but to give effect to a preference which is already his, but it is a preference which ranks with the preferences of other heritable creditors, according to the priority of the dates of the creditors' titles," *i.e.* of their infeftments (per Ld. Pres. Inglis, *Athole Hydropathie Co., in liquidation*, 13 R. 818).

Parties entitled to raise the Action.—The action is competent to a superior for his feu-duties; but after he has sold the superiority and been divested by the infeftment of the purchaser, he may not use this action for the recovery of arrears (*Scottish Heritages Co Ltd.*, 12 R. 550). Whether the casualties of superiority, being of uncertain amount and exigible at uncertain dates, could be made *debita fundi*, and so recoverable by poinding of the ground, was discussed in *Morrison's Trs.* (5 R. 800). Ld. Rutherfurd Clark, Ordinary, decided that a composition was incapable of being made a real burden, and therefore could not found an action of poinding of the ground, but his judgment was reversed in the Inner House by a bare majority. As the case stands, therefore, it is an authority in favour of such casualties being recoverable by poinding of the ground; but considering Ld. Rutherfurd Clark's eminence as a conveyancing lawyer, and the fact that the four judges taking part in the decision were equally divided in opinion, the decision cannot be accepted as final. The action is also competent to an annual renter for arrears of his interest, and to the creditor in a heritable bond, and in general to all creditors under *debita fundi* (Ersk. iv. 1. 11). Infeftment in the subjects is the title requisite; but an assignee or executor of a creditor duly infeft, may sue though he be not himself infeft (*Waugh*, Mor. 5453; *Tweedie*, 14 S. 337; *Jeffray*, 21 D. 492). The only apparent exception to the rule requiring infeftment as the foundation of poinding the ground, is the case of a disposition of land burdened with a particular debt in favour of a third party (*Andrews*, 12 D. 344). "It must be observed, however, that in the case of such a debt the infeftment of the disponee is the infeftment also of the creditor whose debt is declared in the disposition to be a burden on it; and such creditor is in a situation to assert a real right in the lands against the disponee and all deriving right from him, to the effect of recovering his debt" (per Ld. Lee in *Scottish Heritages Co. Ltd.*, 12 R. at p. 556).

A proprietor or a heritable creditor in possession on a proprietary title cannot sue an action of poinding of the ground, because there is a natural impropriety in poinding the lands of the poinder (Ersk. iv. 1. 11). For this reason a proprietor cannot poind the ground though it be let to another; and a creditor with an *ex facie* absolute disposition, whether qualified by a back letter or not, and whether the back letter be recorded in the Register of Sasines or not, cannot poind the ground (*Scottish Heritable Security Co. Ltd.*, 3 R. 333; *Garthland*, Mor. 10545; see also *Scottish Union and National*

Insurance Co., 13 R. 928). But creditors on a bond and disposition in security are not barred from poinding the ground though they have entered into possession by an action of maills and duties (*Henderson*, 2 R. 272). It is not competent for two creditors holding different securities over the same subjects to be conjoined in the same action of poinding of the ground; but where decree in absence was granted in such an action, followed up by diligence at the instance of one of the parties, the Court (*dub.* Ld. Rutherfurd Clark) held, in an action for interdict, that the debtor's objections came too late (*Douglas*, 12 R. 10). The creditor under a bond and assignation of a ninety-nine years' lease, duly recorded in the Register of Sasines in terms of the Registration of Leases (Scotland) Act, 1857 (20 & 21 Vict. c. 26, s. 4), is not entitled to warrant for poinding of the ground (*Luke*, 23 R. 634). The creditor in a contract of ground-annual may poind the ground (*Bell's Trs.*, 23 R. 650). But a wadsetter may not poind the ground, as he has full possession (*Henderson*, 2 R. 272, per Ld. Pres. Inglis, at 276).

Parties who must be called as Defenders.—The action being for the recovery of a debt due by the ground, the parties to be called as defenders are all those interested in the ground. These are of three classes: (1) the proprietor; (2) the tenants and possessors; and (3) the heritable creditors other than the pursuer. Each of these must be called in his proper character (*Scottish Heritages Co. Ltd.*, 12 R. 550; *Brown*, 22 D. 273). Anyone having an interest may compear, though not called as a defender, and state defences, or put forward a preferable claim to the pursuer (Stair, iv. 23. 20; 2 Bell's *Com.*, 5th ed., p. 58). "Where lands are wadset, it is the wadsetter, who is the proprietor, that must be cited, and not the reverser; but the superior need not be called" (Ersk. iv. 1. 12). It is not competent for the proprietor to oppose decree in absence passing against the tenants (*Buchan*, 7 S. 296). If a proprietor has died, his apparent heir may be called as defender without previously charging him to enter (*Oliphant*, Mor. 2171). The defences to an action of poinding of the ground are either objections to the pursuer's title (concerning which, see *ante*, *Parties entitled to raise the Action*); or pleas founded on a preferable title in a competition (see *post*, *Competing Diligences*).

Effect of a Poinding, and Subjects Poindable.—The effect of a properly executed decree of poinding of the ground is to attach all the moveables belonging to the proprietor or his tenants (*Thomson*, 9 R. 430; *Collet*, Mor. 10550) which happen to be upon the ground at the date of the serving or execution of the summons (*Urquhart*, 10 R. 991); and also to give the user of it a right to the rents, though not to assume the natural possession of the lands. The service of the summons of poinding of the ground has not, however, the effect of interpelling the tenants from paying to the landlord the rents thereafter becoming due by them (*Royal Bank*, 6 M. 995). In an earlier case, however, in which the summons specially set forth the clause of assignation of rents in the bond and disposition in security under which the poinding proceeded, the service of the summons was held to be sufficient intimation of the assignation (*Lang*, 16 D. 908).

For the general description of the subjects which may be attached by a poinding of the ground, see the preceding article on POINDING. Goods belonging to a tenant are poindable only to the extent of the rent which he is due (Act 1469, c. 36). Goods which belong to a stranger, though they happen to be on the ground at the time of the execution of the poinding, are not attachable (*Thomson*, 9 R. 430; *Brown*, 22 D. 273; *Collet*, Mor. 10550); but if moveables belonging to a third party happen to be on

the ground, the mere fact that they have erroneously been included in the poinding will not entitle their owner to obtain damages from the poinding creditor (*Nelmes & Co.*, 10 R. 890). Goods removed from the premises before service of the summons of poinding cannot be attached by that diligence, whether the removal was rightful or wrongous (*Urquhart*, 10 R. 991). It is otherwise if the summons has been served (*Lyons*, 8 R. 24).

Competing Diligences.—Where the competition is between poindings of the ground by different creditors, the order of preference is (first) poinding of the ground by the superior; next, poindings by heritable creditors, to be ranked in the order of their infeftments; if the infeftments are of even date, the process having the first citation will be preferred. The creditor in a contract of ground-annual is of course "a heritable creditor" for all intents and purposes. By the Taxes Management Act, 1880 (43 & 44 Vict. c. 19, s. 88), the duties and land tax are made preferable to every claim except that of the landlord for rent. By the Poor Law Act, 1845 (8 & 9 Vict. c. 83, s. 88), all the powers, etc., for recovering land taxes, etc., are to be held applicable to assessments imposed for the relief of the poor. It has been held that under these provisions a collector of poor-rates has a preference over a heritable creditor who had obtained decree in an action of poinding of the ground (*North British Property Investment Co. Ltd.*, 15 R. 885).

By the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79, s. 102), it is enacted that the act and warrant of confirmation in favour of a trustee in a sequestration shall *inter alia* have the same effect as if a poinding of the ground had been executed at the date of sequestration, subject always to such preferable securities as existed at the date of sequestration, and are not null and reducible. By sec. 118 it was enacted that "no poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration . . . shall be available in any question with the trustee; provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee shall be prevented from executing a poinding of the ground . . . after the sequestration; but such poinding shall, 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." This section was repealed by the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94, s. 55), and re-enacted by the Conveyancing (Scotland) Act, 1874, Amendment Act, 1879 (42 & 43 Vict. c. 40, s. 3). The restriction was held not to apply to heritable creditors of the bankrupt's ancestor, because the section of the Bankruptcy Act, 1856, which vests the heritable estate of the bankrupt in the trustee in the sequestration (s. 102) expressly reserves the rights of the creditors of the ancestor (*Millar's Trs.*, 13 R. 543). Where the proprietor of land in Scotland was made bankrupt in England, the English trustee could take no benefit of the limitation in this action in competition with a Scotch heritable creditor who poinded the ground (*Scottish Union and National Insurance Co.*, 13 R. 928). But both these decisions have been overturned by subsequent legislation. The Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887 (50 & 51 Vict. c. 69, s. 2), provides: "Notwithstanding anything contained in the Bankruptcy (Scotland) Act, 1856, the provisions of sec. 3 of the Conveyancing (Scotland) Act (1874) Amendment Act, 1879, shall be applicable to all poindings of the ground by which moveables forming part of or belonging to a bankrupt estate, whether administered in Scotland or furth thereof, are sought to be attached or affected, and that whether the debts or securities in respect of which such

poindings of the ground shall be brought shall have been constituted or granted by the bankrupt, or by any ancestor or predecessor of the bankrupt, or by any other person." The creditor in a contract of ground-annual is entitled to the benefit of this section, the annual payments being truly interest on a debt, the amount of which is to be ascertained by capitalising the annual payment in the ordinary way (*Bell's Trs.*, 23 R. 650). The effect of the temporary repeal of the 118th section was to revive the heritable creditor's right at common law to attach all the moveables on the ground without any restriction (*Royal Bank*, 4 R. 985; *Dick's Trs.*, 6 R. 586).

In order to secure a preferential right to the moveables in a sequestration, it is necessary for the heritable creditor to execute a poinding of the ground (*Hay*, 3 S. 223, N. E. 157; affd. 2 W. & S. 71). But such execution will make his preference effectual for both principal and interest (*Bell*, 10 S. 100; *Kinnears*, 11 S. 46; *Campbell's Trs.*, 13 S. 237; *Barstow*, 18 D. 846). For questions arising out of sequestration, see *infra*, SEQUESTRATION.

Joint-stock companies registered under the Companies Acts, 1862 to 1890, are not subject to the ordinary provisions of the Bankruptcy Acts, but special provision is made by the Companies Acts with the view of making the results the same. The Companies Act, 1886 (49 Vict. c. 23, s. 3), provides: "In the winding up by or subject to the supervision of the Court of any company under the Companies Acts, 1862 to 1886, whose registered office is in Scotland, the following provisions shall have effect: (4) No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the respective dates aforesaid [*i.e.* in the case of a winding up by the Court, the date of the commencement thereof, and in the case of a winding up subject to the supervision of the Court, the date of the presentation of the petition on which a supervision order is afterwards pronounced] shall be available in any question with the liquidator: Provided that no creditor who holds a security over the heritable estate preferable to the right of the liquidator shall be prevented from executing a poinding of the ground after the respective dates aforesaid, but such poinding shall, in competition with the liquidator, 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." A poinding of the ground is not an "attachment, sequestration, distress, or execution" within the meaning of sec. 163 of the Companies Act, 1862 (25 & 26 Vict. c. 89). (*Athole Hydropathic Co. Ltd., in liquidation*, 13 R. 818.)

A poinding of the ground by a heritable creditor, executed subsequent to a personal poinding of the same effects, but before the latter had been completed by sale and report thereof, was preferred in a competition (*Tullis*, 18 June 1817, 19 F. C. 358. See remarks on this case *supra*, POINDING).

Miscellaneous.—Poinding of the ground in security of current interest is competent, but payment cannot be demanded till the stipulated term arrives (*Stewart*, 8 R. 270; *Lady Ednam*, Mor. 8128; *Douglas of Morton*, Mor. 1282 and 8130).

Where a creditor has a security over two estates, over one of which there is a postponed bond, the prior creditor must claim repayment, in the first instance, from the otherwise unburdened estate, or he must assign his security to the postponed creditor (Bell, *Com.*, 7th ed., ii. 418). This principle applies where a heritable creditor has executed a poinding of the ground, and the two estates consist of the subjects in the bond and the moveables attached by the poinding of the ground (*Nicol's Tr.*, 16 R. 416; *Littlejohn*, 18 D. 207; *Goldie*, 12 S. 498).

On poinding of the ground, see generally, Stair, bk. iv. tit. 2. 3; tit. 47, s. 16; Bankt. i. 648; Ersk. bk. ii. tit. 8, ss. 32 and 33; bk. iv. tit. 1, ss. 11–13; Bell, *Com.* ii. 56; Bell, *Prin.* ss. 699, 2285; Mackay, *Manual of Practice*, chap. 74; Dove Wilson, *Sheriff Court Practice*, 470.

Poison.—The sale of poisons is regulated by statute.

Arsenic.—By the Arsenic Act, 14 Viet. c. 13, the seller of arsenic, or colourless, poisonous preparations of arsenic, is required (s. 1) to enter all the particulars of the sale in statutory schedule form in a book to be kept by him.

Arsenic is not to be sold (s. 2) to any person who is unknown to the seller, unless in the presence of a third person who knows both, and who is required to subscribe as a witness to the sale. Nor is arsenic to be sold to any person under full age.

Arsenic must, before sale, be mixed with soot or indigo (s. 3) in certain proportions; but if it is required not for use in agriculture, but for some other purpose for which the colouring would render it unfit, it may be sold uncoloured in quantities of not less than ten pounds.

The penalty for contravention of the Act (s. 4) is a fine not exceeding £20.

The Act does not apply (s. 5) to the sale of arsenic when it forms part of the ingredients of a prescription by a legally qualified medical man, or to the sale of arsenic by wholesale to retail dealers upon orders in writing in the ordinary course of wholesale dealing.

Sale of Poison.—Under the Pharmacy Act of 1832 (31 & 32 Vict. c. 121), all persons selling poison, or keeping open shop for the purpose (s. 1), require, under a penalty of £5 (s. 15), to be registered as chemists and druggists or pharmaceutical chemists, unless they be qualified medical practitioners. This provision does not apply to legally qualified medical practitioners or to veterinary surgeons, so as to prevent them dispensing medicines for animals under their care (32 & 33 Vict. c. 117, s. 1). The partners of a company carrying on business as chemists and druggists, who do not personally dispense poisons, and who are not registered or qualified for registration, cannot be prosecuted as offenders, as the Act does not apply to corporations, but to the persons who actually dispense (*Gray*, 1887, 1 White, 445, 14 R. J. C. 60); but a person who dispenses or compounds poisons, not having the statutory qualification, commits an offence though he be but a servant or assistant (*Tomlinson*, 1895, 1 Adam, 393, 21 R. J. C. 46).

The poisons to which this part of the statute applies are (Schedule, Part I.): Arsenic and its preparations, prussic acid, cyanides of potassium and all metallic cyanides, strychnine and all poisonous vegetable alkaloids and their salts, aconite and its preparations, emetic tartar, corrosive sublimate, cantharides, savin and its oil, ergot of rye and its preparations; Part II.: Oxalic acid, chloroform, belladonna and its preparations, essential oil of almonds, unless deprived of its prussic acid, opium and all preparations of opium or of poppies.

Sec. 17 declares it to be an offence, punishable with a fine of £5, with £10 for a second offence,—

(1) To sell any poison mentioned in the Schedule above narrated, whether wholesale or retail, without having the name of the article, the word poison, and the seller's name and address on the box, bottle, or wrapper.

(2) To sell any poison mentioned in Part I. of the Schedule *supra*, unless

the purchaser be known to the seller, or a third party who knows both, and must subscribe as a witness, be present.

(3) To sell any such last-mentioned poison without entering the particulars thereof in statutory schedule form in a book to be kept by the seller.

These provisions do not apply to poisons sold for export by wholesale dealers, nor to the sale of poisons by wholesale to retail dealers in the ordinary course of business, or to any medicine supplied by a legally qualified apothecary to his patient, or to any article when forming part of the ingredients of any medicine dispensed by a registered chemist, provided that such medicine is labelled with the name and address of the seller, and the ingredients, with the name of the purchaser thereof, are entered in a book to be kept for the purpose. A sale by a servant or apprentice is deemed to be a sale by the master of that servant or apprentice on whose behalf it is made.

Poisoned Grain.—By the Poisoned Grain Prohibition Act, 1863 (26 & 27 Vict. c. 113), the sale of poisoned grain seed or meal is prohibited under a penalty of £10 (s. 1). A like penalty is imposed upon any person sowing or laying down any such poisoned grain in any exposed place (s. 3). There is an exception in favour of the sale or use of any solution or infusion, or any material or ingredient, for dressing, protecting, or preparing any grain or seed for *bonâ fide* use in agriculture only, or the sowing of such last-mentioned grain or seed so prepared (s. 4).

Poisoned Flesh.—By the Poisoned Flesh Prohibition Act, 1864 (27 & 28 Vict. c. 115), the penalty is extended to the exposure of poisoned flesh or meat, unless it be done in a dwelling-house, or garden or covered drain adjoining, or in any rick or stack, for the purpose of destroying rats, mice, or other vermin.

Poisoning.—The administration of poison to any of Her Majesty's subjects with intent to murder, disable, or do some other grievous bodily harm, is a capital offence under 10 Geo. IV. c. 38, ss. 1 and 2. Under a later statute (23 Vict. c. 8) the administration of poison to any person with intent to do grievous bodily harm is declared a felony, punishable by penal servitude for a period not exceeding ten years (s. 1). The administration of poison or other destructive or noxious thing with intent merely to injure, or aggrieve, or annoy, is declared to be a misdemeanour, punishable by imprisonment for a period not exceeding three years (s. 2).

Police.—The term "police," in its broadest acceptation, is generally understood to apply to everything which may be comprehended under the preservation and maintenance of order within the United Kingdom. From the fact that the paving, watching, lighting, and cleansing of burghs has long been supervised by Police Commissioners in Scotland, the term "police" has in popular language been applied to these matters. In the more restricted and probably proper sense, it is applied to the preservation of the peace and the regulation and maintenance of order within the counties and burghs; while in popular parlance it is used to designate the members of the police force. Though Edinburgh, Glasgow, Leith, and several of the larger towns had local Acts providing for watching, lighting, and cleansing, it was not until 1833 that any general Police Act applicable to Scotland was passed. At that time the Act 3 & 4 Will. IV. c. 46, commonly known as Sir William Rae's Act, was passed, intituled an Act to enable burghs in Scotland to establish a general system of police, and which proceeds on the

preamble that "it is expedient that provision should be made to enable the royal burghs and burghs of regality and of barony in Scotland to establish such a system of police, and to adopt such powers of paving, lighting, cleansing, watching, supplying with water, and improving such burghs respectively as may be necessary and expedient, and consistent with the powers, authorities, provisions, and regulations granted and prescribed by this Act." This Act was amended by 10 & 11 Vict. c. 39, intituled "An Act to amend an Act to enable burghs in Scotland to establish a general system of police," and another Act provided for the appointment and election of magistrates and councillors for certain burghs and towns in Scotland. These two Acts were repealed by the 13th and 14th Vict. c. 33, except as regards such burghs as had then adopted in whole or in part the powers and provisions of 3 & 4 Will. IV. c. 46. This Act (13 & 14 Vict. c. 33), generally known as Lord Rutherfurd's Act, is intituled "An Act to make more effectual provision for regulating the police of towns and less populous places in Scotland, for paving, draining, cleansing, lighting, and improving the same." These Acts were repealed and consolidated by the General Police and Improvement (Scotland) Act, 1862 (25 & 26 Vict. c. 101), commonly known as the Lindsay Act. After being amended in several respects by some five different statutes, which need not now be particularly specified, this Act was in turn also repealed by the Burgh Police (Scotland) Act, 1892, except in so far as incorporated by references in local Acts. This Act has already been amended in certain particulars by 56 & 57 Vict. c. 25, and 57 & 58 Vict. c. 18. The Burgh Police Act applies to every existing burgh in Scotland except Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock, which have special private Acts of their own. These burghs may, however, adopt the Act in whole or in part in the manner prescribed by sec. 15 of the Act.

This Act is divided into six parts or branches. The first or general part deals with definitions, the application of the Act, boundaries, adoption of the Act, and some miscellaneous provisions. Part II. provides for the constitution of police burghs, election of Commissioners, police and municipal administration, provisional orders, meetings of Commissioners, powers and duties of Commissioners, minutes and accounts, appointment of clerk, treasurer and auditor, surveyor, inspector, and medical officer of health. Part III. deals with the police force, including chief constables, constables, and special constables. Part IV. provides for the lighting, cleaning, paving, and maintaining streets, private streets, foot-pavements, cleaning streets and numbering the houses, laying out new streets, improvement of streets, obstructions and line of streets, plans of new buildings and regulations, ventilation, precautions during the construction or repair of buildings and streets, and in regard to old and ruinous tenements, the Dean of Guild Court, surveys and plans, public sewers, drainage of houses, soil-pipes and water-closets, supply of water, hackney carriages, omnibuses, and porters, markets, slaughter-houses, public docks, fire establishments, public bathing, etc., special orders, bye-laws to be made by virtue of the Act, execution of works by the Commissioners and by owners or occupiers, form and service of notices and appeal. Part V. treats of rating and borrowing powers, including the assessment for general purposes, general improvement assessment, foot-pavement assessment, sewer assessments, private improvement expenses, mode of collecting special rates, incidence of assessment, and the borrowing of money for the general purposes of the Act. Part VI. deals with offences and penalties, theatres and places of public resort, disorderly houses and gambling houses, suppression of vagrants, articles found or

stolen or fraudulently obtained, prevention of fraud, brokers and pawnbrokers, and jurisdiction and recovery of penalties.

The enumeration of the matters embraced under these heads shows the scope of this Act, and as an analysis of its provisions is foreign to the nature of a work like the present, reference must be made to the Act itself.

As already stated, five of the larger burghs are exempted from the operation of that Act in consequence of there being private Acts operative therein providing for the same matters. In Edinburgh, the watching, lighting, cleansing, etc., are administered by the Magistrates and Town Council of the city, under and in virtue of the Edinburgh Municipal and Police Act, 1879, 42 & 43 Vict. c. 132, which was amended by the Edinburgh Municipal and Police Extension Act, 1882, 45 & 46 Vict. c. 161. These Acts were amended by the Edinburgh Municipal and Police Extension Act, 1890, 53 Vict. c. 4; the Edinburgh Municipal and Police Amendment Act, 1891, 54 & 55 Vict. c. 136; the Edinburgh Improvement and Municipal and Police (Amendment) Act, 1893, 56 & 57 Vict. c. 154; the Edinburgh Extension Act, 1896, 59 & 60 Vict. c. 203; the Edinburgh Corporation Act, 1897, 60 Vict. c. 32.

Special statutes affecting the sewage in connection with Edinburgh are: The Edinburgh and Extension Sewage Act, 1885, 48 & 49 Vict. c. 179; the Edinburgh Improvement Act, 1887, 50 Vict. c. 6; and as regards lighting: The Electric Lighting Orders Confirmation, No. 6, Act, 1891, 54 & 55 Vict. c. 73, and the Edinburgh Corporation Act of 1897 already mentioned. The other Acts relating to Edinburgh which have a bearing more or less upon police matters are: The Edinburgh Roads Act, 1882, 45 & 46 Vict. c. 72; the Edinburgh Improvement Scheme Provisional Order Confirmation Act, 1893, 56 & 57 Vict. c. 113; the Edinburgh Corporation Tramways Act, 1893, 56 & 57 Vict. c. 78; the Edinburgh North Bridge Improvement Act, 1894, 57 & 58 Vict. c. 151; the Edinburgh Corporation Stock Act, 1894, 57 & 58 Vict. c. 56; and the Edinburgh Improvement and Tramways Act, 1896, 59 & 60 Vict. c. 224. (See secs. 3 to 17.)

In Glasgow, the watching, lighting, paving, and cleansing matters are administered by the corporation of the city. Prior to 1895 the members of the corporation formed a separate body of Police Commissioners, but by an Act passed in that year the separate commission was abolished and police matters made a department of the Town Council. The statutes regulating the police matters, that is, watching, lighting, cleansing, etc., within the city are, with reference to lighting, the Glasgow Police Act, 1866; as regards watching, that Act with the Further Powers Act of 1892 and the Corporation and Police Act of 1895; and regarding cleansing, the Glasgow Police Act, 1866, and the Glasgow Police (Amendment) Act, 1896, with the various Acts therein incorporated.

In Aberdeen, the watching, lighting, cleansing, etc., are administered by the Town Council of the city, there being no separate Police Commission. The leading statute regulating these affairs is the Aberdeen Police and Waterworks Act, 1862, which has been amended by the Aberdeen Provisional (Sewerage) Order, 1866; the Aberdeen Police and Waterworks Amendment Act, 1867; the Aberdeen Municipality Extension Act, 1871; the Aberdeen Corporation Act, 1881; the Aberdeen Extension and Improvement Act, 1883; the Aberdeen County and Burgh Roads Act, 1883; the Aberdeen Improvement Confirmation Act, 1884; the Aberdeen Corporation Water Act, 1885; the Aberdeen Corporation Act, 1891; the Aberdeen Corporation (Gas and Water) Act, 1893; and the Aberdeen Improvement Scheme Provisional Order Confirmation Act, 1896.

The Aberdeen Harbour Act of 1895 provides for the establishment of harbour police, but authorises the Commissioners to agree with the Town Council for watching the harbour, a power of which the Commissioners have availed themselves by entering into an arrangement with the Town Council to repay that body the expense incurred in doing so.

The statutes regulating the watching, lighting, cleansing, etc., within the burgh of Dundee are the Dundee Police and Improvement Consolidation Act, 1882, subject to a recent resolution of the Town Council adopting certain sections of the Burgh Police Act of 1892, and repealing certain old sections now superseded by that adoption. These statutes are administered by the Magistrates and Town Council as such under an Act passed in 1894, intituled "The Dundee Corporation Act, 1894." By that Act the Police Commissioners as a separate body ceased to exist, and all their estates, rights, properties, and authorities were transferred to the Town Council.

The Town Council takes charge of the watching of the harbour of Dundee, but the lighting and cleansing of the harbour and docks are attended to by the "Harbour Trustees" themselves.

In Greenock, police matters are regulated by the Greenock Police Act, 1877. The Police Commissioners consist of the same persons as the Town Council, but they have separate minutes as a Town Council and as a Board of Police, and likewise separate officials. The Police Commissioners attend to the watching and lighting of the harbour and docks of Greenock, but the cleansing of the docks is attended to by the Harbour Trust.

In Leith, where the Burgh Police Act is in operation, the Harbour Commissioners attend to the paving, lighting, and cleansing of the docks,—the watching being undertaken by the Town Council under an arrangement with the Dock Commissioners.

With regard to the preservation of the peace and maintenance of order in the counties, a tax, known as Rogue Money, was formerly assessed on the valued rent of lands and premises by the freeholders in the counties, from the proceeds of which the expenses of what is now known as police were defrayed. The constables were appointed by the Justices of the Peace at their quarter sessions. Thereafter, by the Act 2 & 3 Will. IV. c. 65, the collection and application of the rogue money was transferred from the freeholders to the Commissioners of Supply, and by 2 & 3 Vict. c. 65, the Commissioners of Supply were authorised to levy an additional assessment with the rogue money for the maintenance of a constabulary or police force in the counties. By 20 & 21 Vict. c. 72, intituled "An Act to render more effectual the police in counties and burghs in Scotland," the powers and duties of the Commissioners of Supply as contained in the foresaid Acts were consolidated and extended, and this forms now the leading statute regulating the police force in counties in Scotland. It was amended by the Act passed in the following session, 1858, 21 & 22 Vict. c. 65, to the effect of making provision for the appointment of additional constables to keep the peace on public works in any of the counties. In all the counties of Scotland, including burghs situated therein, which do not maintain a separate police force, the police or constabulary are appointed under and in virtue of the Police (Scotland) Act, 1857.

By the Local Government (Scotland) Act, 1889, the powers and duties of Commissioners of Supply (with certain exceptions), including the provision and regulation of the police force, were transferred to the County Council. The County Police Expenses Act is, 38 & 39 Vict. c. 48, extended and amended by 39 & 40 Vict. c. 64, and 40 & 41 Vict. c. 58, 1877. The Secretary for Scotland makes and issues rules for the appointment and

regulation of the whole police force in Scotland. The Police (Scotland) Act, 1890, 53 & 54 Vict. c. 67, provides pensions for members of the force, as well as other gratuities and provisions for widows.

In burghs the police force is maintained and regulated by the Burgh Police (Scotland) Act, 1892, except in the case of the five burghs exempted from the operation of that Act, and in these latter burghs the local Acts generally make provision for the maintenance of the police force.

Only certain burghs are entitled to maintain a police force, viz. (1) which had at the census of 1891 a population of 7000 or more, and at the passing of the Act of 1892 maintained a separate force; (2) had a population, according to the same census, of not less than 20,000; and (3) which at any time after the passing of that Act may be found by the Sheriff to have a population of 20,000. The Police Act of 1890, as to the pensions, gratuities, etc., applies in burghs also. The Act 50 & 51 Vict. c. 9 removes the disabilities of police to vote at parliamentary elections.

The police in Scotland have very onerous duties, as well as extensive powers and responsibilities. In addition to the duties enforced in the counties by the special statutes applicable thereto, and in the burghs by the Burgh Police Act and certain local Acts, they are expected to execute, or assist in the execution and administration of, the following among other general Acts:—

ACTS OF PARLIAMENT DIRECTLY OR INDIRECTLY AFFECTING THE DUTIES OF THE POLICE.

Subject.	Act.	Year.
Army Act	44 & 45 Vict. c. 58	1881
Attempt to Commit Crime	50 & 51 Vict. c. 35	1887
Bakehouses	46 & 47 Vict. c. 53	1883
Ballot Act	35 & 36 Vict. c. 33	1872
Bankruptcy, Fraud, and Disabilities Act	47 & 48 Vict. c. 16	1884
Barbed Wire Act	56 & 57 Vict. c. 32	1893
Betting Houses	16 & 17 Vict. c. 119	1853
Do.	37 Vict. c. 15	1874
Betting and Loans (Infants) Act	55 Vict. c. 4	1892
Bread Act	6 & 7 Will. iv. c. 37	1836
Burgh Police (Scotland) Act	55 & 56 Vict. c. 55	1892
Cattle Sheds in Burghs Act	29 Vict. c. 17	1866
Children, Dangerous Performances	42 & 43 Vict. c. 34	1879
Chimney Sweepers	3 & 4 Vict. c. 85	1840
Do.	27 & 28 Vict. c. 37	1864
Civil Imprisonment Act	45 & 46 Vict. c. 42	1882
Coining	24 & 25 Vict. c. 99	1861
Concealment of Pregnancy	49 Geo. iii. c. 14	1809
Conspiracy and Protection of Property	38 & 39 Vict. c. 86	1875
Contagious Diseases (Animals) Act	41 & 42 Vict. c. 74	1878
Do.	47 & 48 Vict. c. 13	1884
Do.	47 & 48 Vict. c. 47	1884
Do.	49 & 50 Vict. c. 32	1886
Do.	53 & 54 Vict. c. 14	1890
Corrupt Practices Act	46 & 47 Vict. c. 51	1883
Do.	52 & 53 Vict. c. 69	1889
Criminal Law Amendment Act	48 & 49 Vict. c. 69	1885
Criminal Procedure (Scotland) Act	50 & 51 Vict. c. 65	1887
Cruelty to Animals	13 & 14 Vict. c. 92	1850
Debtors (Scotland) Act	43 & 44 Vict. c. 34	1880
Dog Licences Act	30 Vict. c. 5	1867
Do.	41 Vict. c. 15	1878
Drilling, Unlawful	60 Geo. iii.	1819
Do.	1 Geo. iv. c. 1	1820

Subject.	Act.	Year.
Education Act	35 & 36 Vict. c. 62	1872
Explosives Act	38 Vict. c. 17	1875
Explosive Substances Act	46 Vict. c. 3	1883
Extradition Act	33 & 34 Vict. c. 52	1870
Factory and Workshop Act	41 & 42 Vict. c. 16	1878
Do.	46 & 47 Vict. c. 53	1883
Do.	52 & 53 Vict. c. 62	1889
Do.	54 & 55 Vict. c. 75	1891
Family Desertion	8 & 9 Vict. c. 83	1845
First Offenders Act	50 & 51 Vict. c. 25	1887
Fisheries (Salmon) Act	9 Geo. IV. c. 39	1828
Do. Do.	7 & 8 Vict. c. 95	1844
Do. Do.	25 & 26 Vict. c. 97	1862
Do. Do.	31 & 32 Vict. c. 123	1868
Do. Fresh Water Trout	8 & 9 Vict. c. 26	1845
Do. Do.	23 & 24 Vict. c. 45	1860
Food and Drugs Act	38 & 39 Vict. c. 63	1875
Do.	42 & 43 Vict. c. 30	1879
Friendly Societies	38 & 39 Vict. c. 60	1875
Do.	50 & 51 Vict. c. 56	1887
Do.	52 & 53 Vict. c. 22	1889
Do.	43 & 44 Vict. c. 14	1880
Do.	56 Vict. c. 12	1893
Fugitive Offenders	44 & 45 Vict. c. 69	1881
Game Licences	1 & 2 Will. IV. c. 32	1831
Do.	2 & 3 Vict. c. 35	1839
Do.	23 & 24 Vict. c. 90	1860
Do.	46 Vict. c. 10	1883
Gun Licences	33 & 34 Vict. c. 57	1870
Habitual Drunkards Act	42 & 43 Vict. c. 19	1879
Hawkers Act	51 & 52 Vict. c. 33	1888
Horse-slaughtering	13 & 14 Vict. c. 92	1850
Horse Flesh, Sale of	52 Vict. c. 11	1889
Indecent Advertisements	52 & 53 Vict. c. 18	1889
Industrial Schools	29 & 30 Vict. c. 118	1866
Infant Life Protection	60 & 61 Vict. c. 57	1897
Infectious Diseases Notification	52 & 53 Vict. c. 72	1889
Insects, Destructive	40 & 41 Vict. c. 68	1877
Intimidation of Workmen	38 & 39 Vict. c. 86	1875
Lands Valuation Act	17 & 18 Vict. c. 91	1854
Local Government Act	52 & 53 Vict. c. 50	1889
Locomotives on Roads	28 & 29 Vict. c. 83	1865
Do.	41 & 42 Vict. c. 58	1878
Lotteries	42 Geo. III. c. 119	1802
Do.	4 Geo. IV. c. 60	1823
Lunatics	25 & 26 Vict. c. 54	1862
Mad Dogs	34 & 35 Vict. c. 58	1871
Margarine	50 & 51 Vict. c. 29	1887
Married Women, Separate Estate	40 & 41 Vict. c. 29	1877
Do.	44 & 45 Vict. c. 21	1881
Merchant Shipping	17 & 18 Vict. c. 104	1854
Do.	18 & 19 Vict. c. 91	1855
Do.	25 & 26 Vict. c. 63	1862
Do.	30 & 31 Vict. c. 124	1867
Do.	43 & 44 Vict. c. 16	1880
Methylated Spirits	52 & 53 Vict. c. 42	1889
Militia Act	45 & 46 Vict. c. 49	1882
Mines Regulations	50 & 51 Vict. c. 58	1887
Murder, Attempts to	10 Geo. IV. c. 38	1829
Mutiny	37 Geo. III. c. 70	1797
Do.	57 Geo. III. c. 7	1817
Naval Discipline Act	29 & 30 Vict. c. 109	1866
Do.	47 & 48 Vict. c. 39	1884
Official Secrets	52 & 53 Vict. c. 52	1889
Pawnbrokers	35 & 36 Vict. c. 93	1872

Subject.	Act.	Year.
Payment of Wages	46 & 47 Vict. c. 31	1883
Pedlars	34 & 35 Vict. c. 96	1871
Do.	44 & 45 Vict. c. 45	1881
Do.	54 & 55 Vict. c. 69	1891
Penal Servitude	27 & 28 Vict. c. 47	1864
Petroleum	34 & 35 Vict. c. 105	1871
Do.	42 & 43 Vict. c. 47	1879
Do.	44 & 45 Vict. c. 67	1881
Pharmacy Act	31 & 32 Vict. c. 121	1868
Poaching Day	2 & 3 Will. iv. c. 68	1832
Do. Close Time	13 Geo. iii. c. 54	1773
Do. Do. Hares	55 Vict. c. 8	1892
Do. Ground Game	43 & 44 Vict. c. 47	1880
Do. Night	9 Geo. iv. c. 69	1828
Do. Do.	7 & 8 Vict. c. 29	1844
Do. Prevention	25 & 26 Vict. c. 114	1862
Poisoned Substances	26 & 27 Vict. c. 113	1863
Do.	27 & 28 Vict. c. 115	1864
Police Supervision	34 & 35 Vict. c. 112	1871
Police (Scotland) Act	20 & 21 Vict. c. 72	1857
Do.	21 & 22 Vict. c. 65	1858
Do.	53 & 54 Vict. c. 67	1890
Police Disabilities Removal	50 & 51 Vict. c. 9	1887
Do.	56 Vict. c. 6	1893
Post Office Offences	1 Vict. c. 36	1837
Post Office Protection	47 & 48 Vict. c. 76	1884
Pregnancy, Concealment of	49 Geo. iii. c. 14	1809
Prevention of Crimes Act	34 & 35 Vict. c. 112	1871
Do.	42 & 43 Vict. c. 55	1879
Do.	48 & 49 Vict. c. 75	1885
Prevention of Cruelty to Children	52 & 53 Vict. c. 44	1889
Do.	56 Vict. c. 15	1893
Prevention of Gaming Act	32 & 33 Vict. c. 87	1869
Prison Act	40 & 41 Vict. c. 53	1877
Do.	31 Vict. c. 24	1868
Promissory Oaths	31 & 32 Vict. c. 72	1868
Public Bodies, Corrupt Practices	52 & 53 Vict. c. 69	1889
Public Health Act	30 & 31 Vict. c. 101	1867
Do.	34 & 35 Vict. c. 38	1871
Do.	45 Vict. c. 11	1882
Public Houses Act	9 Geo. iv. c. 58	1828
Do.	16 & 17 Vict. c. 67	1853
Do.	25 & 26 Vict. c. 35	1862
Do.	39 & 40 Vict. c. 26	1876
Do.	40 Vict. c. 3	1877
Do. (Passenger Vessels)	45 & 46 Vict. c. 66	1882
Railway Act	8 & 9 Vict. c. 33	1845
Do.	52 & 53 Vict. c. 57	1889
Do. (Cheap Trains)	46 & 47 Vict. c. 34	1883
Reformatory Schools	29 & 30 Vict. c. 117	1866
Do.	56 & 57 Vict. c. 48	1893
Registration of Births, Deaths, etc.	17 & 18 Vict. c. 80	1854
Do. Do.	18 Vict. c. 29	1855
Do. Do.	23 & 24 Vict. c. 85	1860
Riot Act	1 Geo. i. Stat. 2, c. 5	1714
Roads and Bridges	41 & 42 Vict. c. 51	1878
Rogues and Vagabonds	5 Geo. iv. c. 83	1824
Shop Hours Act	55 & 56 Vict. c. 62	1892
Tramways	33 & 34 Vict. c. 78	1870
Treason Felony	11 Vict. c. 12	1848
Trespass Act	28 & 29 Vict. c. 56	1865
Truck Act	1 & 2 Will. iv. c. 37	1831
Do.	50 & 51 Vict. c. 46	1887
Vaccination	26 & 27 Vict. c. 108	1863
Vagrancy (Scots Act)	c. 8	1617

Subject.	Act.	Year.
Vagrancy (Scots Act)	c. 38	1661
Volunteer Act	26 & 27 Vict. c. 65	1863
Do.	44 & 45 Vict. c. 57	1881
Weights and Measures	41 & 42 Vict. c. 49	1878
Do.	52 & 53 Vict. c. 21	1889
Do.	56 & 57 Vict. c. 19	1893
Wild Birds	43 & 44 Vict. c. 35	1880
Do.	44 & 45 Vict. c. 51	1881

See Campbell Irons, *Burgh Police Act.*

Police Court.—Though the magistrates of royal burghs and burghs of barony have for a very long period exercised jurisdiction in matters of police in the Courts held by them, the Police Court proper as it is now known is really of statutory creation, and regulated both in its constitution and administration by statutory authority. The Burgh Court and Bailie Court are quite separate and distinct from the Police Court, and though, by the Burgh Police (Scotland) Act, 1892, the magistrates of police have a like jurisdiction within the burgh as any magistrates of a royal burgh or any Dean of Guild of a royal burgh have by the law of Scotland, that jurisdiction can only be exercised and administered in the appropriate respective Courts.

Constitution of Court.—As already stated, the constitution of the Court is regulated by statute. Sec. 454 of the Burgh Police (Scotland) Act, 1892, empowers the magistrates of police of a burgh, or any one or more of them, to act in the Police Court, and take cognisance of the crimes and offences appropriated to that Court. The general practice in the burghs throughout Scotland is for one magistrate to sit in the Police Court, the duty being taken by the magistrates in rotation. The 455th section of the Act also authorises the Commissioners to resolve that a stipendiary magistrate be appointed to officiate in the Police Court,—the appointment being made by the Secretary for Scotland. The stipendiary magistrate has the same jurisdiction, powers, and authorities as the other magistrates of the burgh acting in the Police Court. By the Act 60 & 61 Vict. c. 48, any stipendiary magistrate has, in addition to the jurisdiction conferred by any Act then in force, the summary jurisdiction exercised by, or which may be conferred on, any Sheriff, or Justice of the Peace, or Justices of the Peace, together with all the powers auxiliary to such jurisdiction. None of the burghs in Scotland have availed themselves of the power regarding a stipendiary magistrate. In Glasgow, where a stipendiary magistrate held office for a time, since the death of the last holder of the office no new appointment has been made. The 454th section of the Burgh Police Act further provides that the Sheriff shall have power to sit and act in the Police Court, with consent of the magistrates, on any special occasion or under any continuing arrangement. This provision has not been taken advantage of, either, in any of the burghs. It may be taken as a general statement of the practice, that only the magistrates of police act in the Police Court in Scotland.

Burgh Prosecutor.—The Commissioners of Police are directed to appoint a burgh prosecutor, who within the burgh has all the powers and privileges of a procurator-fiscal. Where he is bound to devote his whole time to the duties of his office, he is not removable nor liable to have his salary diminished, unless with the approbation of the chief magistrate of the burgh and the Sheriff, or, in case of their differing in opinion, by the Secretary for Scotland. Where there is more than one Police Court in a

burgh, deputes may be appointed, and in the absence of the burgh prosecutor an interim prosecutor may be appointed.

The burgh prosecutor or party prosecuting for the public interest, by complaint under the Burgh Police Act, is not liable to pay, or be found liable by any Court in, a greater sum than £5 as damages in respect of any proceedings taken, or anything done on such complaint, or any judgment following thereon, unless it be averred and proved that the proceeding was done maliciously and without probable cause. The party suing is not entitled to decree against the prosecutor for any damages, or repetition of penalty or costs, if the prosecutor prove at the trial that the accused was guilty of the offence in respect of which he had been convicted, apprehended, or suffered, and that he had undergone no greater or other punishment than was assigned by law to the offence. Any prosecutor thus sued may at any time put an end to the action, in so far as not founded on acts done maliciously and without probable cause, by tendering payment of £5 as damages, with the amount of the penalty, if recovered, and the expenses of such action to the date of the tender. Where the prosecutor proceeds in regular course, he is entitled to have the protection of it being put on the pursuer to prove malice and want of probable cause (*Mains*, 1861, 23 D. 1258), even though the complaint be not relevant (*Rae*, 1875, 2 R. 669; *Craig*, 1876, 3 R. 441; *Urquhart*, 1886, 14 R. 18); but where he acts on a warrant which is *ultra vires*, he is liable without any such allegation (*Bell*, 1865, 3 M. 1026; see *Nelson*, 1866, 4 M. 328. See also *Murray*, 1872, 11 M. 147; *O'Connell*, 1885, 1 S. L. R. 153).

Clerk of Police Court.—By sec. 460 of the Burgh Police Act, the Commissioners are directed to appoint a proper person to be Clerk of the Police Court, who may be the same person as the Clerk to the Commissioners, and, subject to the approval of the Commissioners, he may appoint a depute or deputes. The Clerk to the Commissioners has no right to appointment *ad vitam aut culpam* (*Hamilton*, 1871, 9 M. 826), and it is *ultra vires* of the Commissioners to make an appointment on such terms (*Wright*, 1876, Campbell Irons, *Police Law*, p. 108). The Twopenny Acts do not apply to actions against the Clerk of Court (*McKellor*, 1841, 4 D. 287).

Jurisdiction.—The Police Court is established for the purpose of taking cognisance of the minor crimes, offences, and breaches of the peace, as well as of certain contraventions of statute specifically appropriated to the Police Court, but has no jurisdiction to try any of the crimes denominated pleas of the Crown, namely, murder, robbery, rape, and wilful fire-raising, nor with the crimes of stouthrief, of theft by house-breaking, or of house-breaking with intent to steal, or by opening lockfast places, or certain other crimes which will be found specifically mentioned in the Burgh Police (Scotland) Act.

The jurisdiction of the Police Court, though limited to what is termed the minor offences, is very wide and extensive, and embraces the trial of offences against a very large number of statutes, such as the Public Houses Acts, Weights and Measures Acts, Industrial and Reformatory Schools Acts, and others. To give even a synopsis of these would be foreign to the nature of a work like the present, but a table of statutes which the police are called on to administer, or assist in administering, is appended to the article Police, and in the majority of offences against these the Police Court has jurisdiction. There are of course a number of exceptions, but keeping in view that it is only the minor crimes and offences which can be tried in the Police Court, the exceptions can almost be gathered from the titles of the Acts. These Acts themselves must, however, be referred to as

the criterion of whether or not the Police Court has jurisdiction to try the offences against the provisions thereof. See as to concurrent jurisdiction in the inferior Courts, *Cameron*, 1894, 21 R. (J. C.) 31, where it was held that the Burgh Police Act does not deprive the Sheriff of a county of jurisdiction to try persons for offences committed within a burgh in the county. In this case there was no Police Court in the burgh.

Boundaries of Jurisdiction.—In proceedings for the trial of offences under the jurisdiction conferred by the Police Act, where two or more Courts have concurrent jurisdiction the offence may be tried by any one of such Courts: (1) Where the offence is committed in or on board any ship or boat in a harbour, arm of the sea, or other water (tidal or other) which runs between or forms the boundary of the jurisdiction of two or more Courts. (2) Where the offence is committed on or within 500 yards of the boundary of the jurisdiction of two or more Courts, or is begun within the jurisdiction of one Court and completed within the jurisdiction of another Court. (3) Where the offence is committed on a person or in respect of any property in or upon a cart or carriage employed in a journey, or on board any vessel employed in a navigable river, lake, canal, or inland navigation, the person accused may be tried by any Court through whose jurisdiction the cart or carriage or vessel passed in the course of the journey or voyage during which the offence was committed. Where the side, bank, centre, or other part of the highway, road, lake, canal, or inland navigation along which the cart or carriage or vessel passed in the course of such journey or voyage is the boundary of the jurisdiction of two or more Courts, a person may be tried for such offence by any one of such Courts (see Merchant Shipping Act, 1854, and Amending Acts). (4) Any offence which is authorised by the 457th section of the Police Act to be tried by any Court may be dealt with, heard, tried, determined, adjudged, and punished as if the offence had been wholly committed within the jurisdiction of such Court.

Procedure.—The procedure in the Police Courts in Scotland is regulated partly by the provisions of the Burgh Police (Scotland) Act, 1892, and partly by the Summary Procedure Act, 1864 (27 & 28 Vict. c. 55), as amended by the Summary Jurisdiction Act, 1881 (44 & 45 Vict. c. 33), as well as the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35). The object of the 1864 Act was to make provision for uniformity of process in summary criminal prosecutions and prosecutions for penalties in the inferior Courts in Scotland, and sec. 3 of that statute defines its application. Doubts having been entertained as to whether that section included and applied to prosecutions under the 23rd and 24th sections of the Salmon Fisheries (Scotland) Act, 1868 (31 & 32 Vict. c. 123), the Summary Jurisdiction Act of 1881 was passed, enacting that the former Act did apply to such prosecutions. It was also provided by the latter Act that the Summary Jurisdiction Acts should apply to prosecutions under the Tweed Fisheries Acts, but it was left to the option of the prosecutor to use either the forms provided by the Summary Jurisdiction Acts or the Tweed Fisheries Acts. Further provisions were also introduced into the 1881 Act as to the regulation of expenses, power to mitigate penalties, application of the Acts to Government prosecutors, imprisonment for non-payment of penalties, the execution of warrants of poinding and sale, and general procedure.

The Criminal Procedure Act, 1887, proceeds on the preamble that it is expedient to simplify and amend the criminal law of Scotland and its procedure, and it effects this in many ways. In general practice, in the Police Court the Burgh Police Act of 1892 and the Criminal Procedure Act are there founded on and referred to.

The proceedings under these Acts must begin with a formal complaint in writing, or partly written and printed. Though written pleadings be expressly dispensed with in the statute founded on, this does not apply to the initiatory proceeding, which must always be a written or printed record (*Law*, 1846, Ark. 109; *Welsh*, 1850, J. Shaw, 345).

A person may be tried and punished for contempt of Court during a proceeding without a formal written complaint, but it is better even in that case to proceed "in a formal and careful manner" by way of written complaint (*M'Glinchy*, 1889, 2 W. 358, and 17 R. (J. C.) 3).

The form appropriate to the nature of the offence charged, *i.e.* whether it be a common law offence or the contravention of a statute, should be used. An error as to this may lead to the conviction being set aside (*Kemp*, 29 Oct. 1889, 2 W. 323). It should bear on its face generally, by way of heading, the Acts upon which it proceeds, as: "Under the Burgh Police (Scotland) Act, 1892, and the Criminal Procedure (Scotland) Act, 1887" (*Murray*, 1872, 11 M. 147); and though a slight error in this recital is not necessarily fatal (*Armstrong*, 1892, 20 R. (J. C.) 21 and 3 W. 373), great care should be exercised to ensure accuracy.

The complaint should be addressed to the magistrates in the character and for the territory in which they exercise jurisdiction, and should set forth that it is at the instance of A. B., as procurator-fiscal of Court, or prosecutor for the public interest for the Burgh of . Failure to designate the prosecutor correctly may be fatal (*Lockhart*, 1868, 40 Sc. Jur. 393), though it has been held not a fatal objection that a person was not designed as procurator-fiscal (*M'Vie*, 1856, 2 Irv. 429). No prosecutor should run risks of this nature, but should be as accurate as possible in every detail; and where the statute founded on requires the name of the prosecutor to be stated, this must be done, otherwise the conviction will be quashed (*Burns*, 1897, 24 R. (J. C.) 58).

The complainer must sign the complaint, and the place where and the date when he does so should appear on the complaint (*Crawford*, 1838, 2 Swin. 200).

The complaint next sets forth the name and designation of the respondent accurately (Hume, ii. 157, 158, and cases of *Stobie*, *Berry*, and *Duncan* cited there), but the accused may be indicted by the name he gives at examination or in finding bail (Macdonald, p. 290, and cases there cited). A married woman should be indicted by her husband's name, but if known at the place where she lives by her maiden name, that will suffice (Macdonald, p. 291, and cases cited there).

The complaint then proceeds to set forth the charge. This must be done in words which amount either to an offence at common law or by statute, failing which the proceedings are *ab initio* null (*Buist*, 1865, 5 Irv. 210; *Nelson*, 1884, 12 R. (J. C.) 15). If the complaint does not specify the section or sections of the Acts constituting the offence charged, unless the statute is so brief as to render this unnecessary, the conviction will be quashed (*Buchanan*, 1896, 23 R. (J. C.) 86); or if it refers to a wrong section of a statute (*Hopton*, 1858, 3 Irv. 51), or fails in sufficient specification or statement of particulars as required, the conviction will be set aside (*Clelland*, 1887, 1 W. 359; *Thomson*, 1865, 5 M. 45; *Abbot*, 1882, 4 Coup. 614). If the complaint embraces or charges more than what the statute defines as an offence, the charge is bad and the conviction will be set aside (*Foley*, 1893, 3 W. 476).

The complaint must next set forth as accurately as possible the date or time at which the offence is alleged to be committed. In some cases, such

as those under the Public Houses Acts, this must be done very specifically, even to the hour. It is dangerous, and may be fatal, to add words of style such as "or about that time" in such complaints (*Paterson*, 1894, 1 Adam, 366). On the other hand, in cases not requiring such strict specification, and where the complainer cannot give this, some latitude is allowed, as "between 1st October 1886 and 15th January 1888" (*H.M. Advocate*, 1888, 1 White, 593), or, where the date is actually unknown, "on a date subsequent to to the complainer unknown," or "on a date to the complainer unknown." Where the offence is a continuous one, some date should be fixed on and libelled to be within the statutory period for raising prosecutions (*Lauder*, 1889, 2 M. 348).

The complaint must also aver a *locus* or place at which the offence was committed. In the first place, this is necessary to give the Court jurisdiction in the case; and if this be not shown on the face of the charge, it is fatal, and cannot be added by way of amendment (*Macintosh*, 1886, 1 White, 218; *Lauder*, 1887, 1 White, 327). In the second place, the accused is entitled to proper notice of the *locus* averred, that he may meet the charge, and hence this cannot be added by way of amendment (*Stevenson*, 1879, 4 Coup. 196). If the complainer is unaware of the *locus*, he may aver it "at a place within the burgh (or county) of ——— to the complainer unknown" (*Gracie*, 1884, 11 R. (J. C.) 22).

When the place is averred, however, it must be accurate; an untrue or erroneous *locus* is fatal (*Maxwell*, 1860, 3 Irv. 592; *Arthur*, 1876, 3 Coup. 300; *Macdonald*, 1894); but a trivial error, such as that a statute was contravened "at" licensed premises, instead of "within," has been disregarded (*Muir*, 1888, 2 White, 97).

Modus or Manner of Committing Offences.—As a general rule, the prosecutor must set forth specific facts which he is to prove, and which amount to the crime or offence charged, giving the act alleged, the persons affected, if any, and the nature of the offence. In some cases it has been held sufficient to do this in the words of the statute only (*Paton*, 1880, 7 R. (J. C.) 11; *Milton*, 1882, 10 R. (J. C.) 20; *Duff*, 1892, 20 R. (J. C.) 33, and opinion of Ld. Shand quoted in latter case), but generally some specification of the facts as to how, when, and where the offence was committed must be given (*Abbot*, 1882, 9 R. (J. C.) 26; *Carlin*, 1896, 23 R. (J. C.) 43). The facts averred must amount to the crime or offence charged, and, if proved, justify the conviction, or it will be set aside (*Fairfoul*, 1895, 23 R. (J. C.) 6; *Simpson*, 1896, 23 R. (J. C.) 22; *Bonnar*, 1896, 23 R. (J. C.) 39).

In contraventions of statutory enactments it is not necessary to quote the Act of Parliament, but it should be referred to, and an allegation made that the act alleged is contrary to statute, and the statute should be mentioned by its short title or other sufficient description. The section founded on should also be referred to, particularly if it contains the penalty or punishment to follow on a conviction (*Hastings*, 1889, 2 White, 325; *White*, 1891, 18 R. (J. C.) 56). "I think that the case of *Hastings* laid down a sound and valuable rule, and that prosecutors in the inferior Courts ought to understand that if they desire to state a complaint charging a statutory offence, they must set forth the statute and the section said to have been contravened, as well as to specify the facts said to form the contravention" (per Ld. Trayner in *White*; see also *Buchanan*, 1896, 23 R. (J. C.) 86).

Prayer.—The complaint then proceeds with what is known as the prayer. It comprehends (*a*) a crave for warrant to apprehend or cite as may be lawful, (*b*) for conviction, (*c*) punishment prescribed, and (*d*) for any special order or warrant authorised. Great care must be taken that the

appropriate warrant is asked and obtained. There is in the Police Act power to constables to apprehend or cite without a warrant, and the propriety as to which of these powers should be used is always a question of circumstances. Where the accused is a well-known, law-abiding citizen, it is not right to apprehend, and a warrant to cite should be obtained.

Both in common law crimes and statutory offences there are practically four courses open: cite or apprehend without warrant, or cite or apprehend upon a warrant. The question as to which method of citation be adopted is greatly one of discretion in the circumstances, but in both it is necessary to state the nature of the charge. It has been laid down that "even if it be not necessary to apply to a magistrate for a warrant to cite or apprehend a person accused of a crime, still a charge duly made and signed by the prosecutor must be in existence when the accused is apprehended or cited" (per Ld. J.-Cl. Macdonald in *Stewart*, 1894, 22 R. (J. C.) 11). So a serious difference between the charge and the copy served is fatal (*Stewart, supra*); but if the omission is trivial, and does not mislead accused or involve a different offence or greater penalty (*Chalmers*, 1871, 2 Coup. 164; *Armstrong*, 1892, 20 R. (J. C.) 21), it is not fatal; but an error in the day of compearance may be, especially if the accused be tried in absence (*Waddell*, 1857, 2 Irv. 611).

It is a more difficult question as to whether an accused should be apprehended or cited. The general rule laid down in a number of cases is that where the accused is a well-known, law-abiding citizen, it is not right to apprehend, and a warrant to cite should be obtained. Although it is not necessary on apprehending an accused to hand him a copy of the complaint (*Chapman*, 1850, J. Shaw, 466; *Bisset*, 1855, 2 Irv. 68), it is oppressive to apprehend an accused that has a residence, and is well known to the authorities, without first serving him with a copy of the complaint, except where he is taken "red-handed or in *flagrante delicto*" (*Carlin*, 1896, 23 R. (J. C.) 43).

The prayer then proceeds to make the crave for punishment. In common law crimes the usual crave is to adjudge the accused to suffer the "pains of law." This is quite sufficient in offences against the common law.

In a complaint relating to a statutory offence, the crave should be for the penalties provided by the Act, but these must be set forth either in the crave or in the complaint (*Jackson*, 1897, 24 R. (J. C.) 38). If the crave be for "the pains of law" in a complaint which does not specify what the statutory punishment is, that is a fatal objection to the conviction; but if the statutory penalties have been set forth in the complaint, either specifically or by reference to the statute, that is sufficient (*M'Leod*, 1892, 3 W. 339). It has been held that although more is craved than the statute authorises, that is not a fatal objection, if the actual sentence be in accordance with the Act (*Chisholm*, 1871, 2 C. 49). Where the statute authorises any further order, this should be prayed for and awarded, otherwise conviction may be set aside (*McCallum*, 1896, 24 R. (J. C.) p. 15).

Trial.—This must take place in open Court to which the public have access, and not in any private place (*Finnie*, 1850, J. Shaw, 368), and everything done in a legal manner. No illegality can be remedied by the consent of the accused (*Duncan*, 1853, 1 Irv. 208). The complaint is read over, and the accused asked whether he is guilty or not guilty. The plea must either be the one or the other; and if there be any equivocation, a plea of not guilty must be recorded (*Logan*, 1853, 1 Irv. 329; *Bone*, 1855, 2 Irv. 279; *Gray*, 1858, 3 Irv. 29; *Hopton*, 1858, 3 Irv. 51).

If the accused ask an adjournment, he is entitled to have it unless where he has been served with a copy of the complaint forty-eight hours before

the trial; and it is the duty of the judge where this has not been done, or if the accused be a child, an illiterate person, or be charged with a serious offence, to inform him of his right to an adjournment of forty-eight hours and to get a copy of the complaint (*Pyper*, 1885, 12 R. (J. C.) 47; *Gardiner*, 1890, 17 R. (J. C.) 44). If the accused be an adult of ordinary intelligence, or be charged and plead guilty to a trivial offence, or there be not some special circumstances, the fact of the judge not informing an accused of his right to an adjournment will not be sufficient to set aside conviction (*Boyce*, 1891, 19 R. (J. C.) 13).

If an accused ask an adjournment on account of the absence of his agent, and, being refused, plead guilty, the Court may allow that plea to be withdrawn on an agent appearing before sentence, and proceed with the hearing of the complaint (*Williams*, 1878, 6 R. (J. C.) 12); but if the motion be refused, and the accused pleads not guilty, he is held to have acquiesced in the trial proceeding (*Anderson*, 1868), 1 Coup. 4.

Any objections to the competency or relevancy should be stated when the complaint is read over after the accused is required to plead for the first time, but before the plea is recorded (*Hendry*, 1889, 2 White, 380). If the complaint be irrelevant under the special statute founded on, the Court has no jurisdiction to try it, and it will be set aside (*Crosbie*, 1866, 4 M. 803). If accused pleads guilty, this is recorded, and signed by him; but if he cannot write, it is signed by the clerk and authenticated by the judge. The plea must be authenticated either by the signature of the accused, the judge, or the clerk. If the accused plead guilty, sentence is pronounced; but if not, the trial may proceed or be adjourned.

The complainer may abandon the complaint and serve a new one; but the abandonment must be made before proof is entered upon, and should be formally made (*Gallacher*, 1886, 13 R. (J. C.) 56). The accused ought also to be allowed to leave the court-room before being cited or apprehended on the new complaint, which must proceed in all respects as regular as a fresh complaint, which it is (*Gallacher*, *supra*).

An accused ought not to be placed on trial if under seven years of age (*Grant*, 1889, 16 R. (J. C.) 87), or if insane or incapable of pleading, nor can he be tried twice for the same offence (*Dorward*, 1890, 1 Coup. 392).

An amendment may be made at any stage before judgment if (*a*) of a competent character, and (*b*) with consent of the Court, but not after the case is closed and the judge about to give judgment (*Henderson*, 1878, 6 R. (J. C.) 1). For examples of competent amendments, such as alterations of time, place, or mode of offence, by way of insertion of words, see *Jackson*, 1867, 5 Irv. 409; *Mathieson*, 1885, 12 R. (J. C.) 40, or deletion, *James*, 1880, 7 R. (J. C.) 9; *Armstrong*, 1892, 20 R. (J. C.) 21, provided the alterations are not material, such as altering nature of offence or causing injustice. If alteration material, such as insertion of omitted locus (*Stevenson*, 1879, 6 R. (J. C.) 33; *Mathieson*, 1885, 12 R. (J. C.) 40; *Macintosh*, 1886, 13 R. (J. C.) 96), or deletion of words rendering charge bad (*Mitchell*, 1863, 4 Irv. 257), such cannot be allowed. The amendment should be made on the complaint, but may be made before judgment is pronounced (*Owens*, 1869, 1 Coup. 217).

Conviction.—The judge must either find accused guilty (1) of the offence charged or some less offence embraced therein, or (2) acquit. There must be an express finding in words (*Muirhead*, 1890, 2 White, 473), and the judge must articulately state the conviction upon which he proceeds to sentence (*Sharp*, 1892, 19 R. (J. C.) 47); but though more than one are accused, one only may be convicted (*Fitzsimmons*, 1861, 23 D. 1301, 33 Jur. 655). The conviction must clearly bear the crime or offence of which the

accused is found guilty (*Graham*, 1888, 2 White, 96; *Foley*, 1893, 3 White, 476), especially when cumulative or alternative charges are libelled (*Mains*, 1860, 3 Irv. 533; *Duncan*, 1888, 2 White, 104; *Shaw*, 1886, 1 White, 270; *Charleson*, 1881, 8 R. (J. C.) 34; *Murray*, 1883, 10 R. (J. C.) 42; *Bell*, 1883, 10 R. (J. C.) 78; *Farquharson*, 1894, 21 R. (J. C.) 52).

Sentence.—This must be precise and within the judge's power, as after-alteration is not allowed. Vitiations, such as writing the period of imprisonment on an erasure (*Rogers*, 1847, 1 Ark. 393), writing the word "three" over "two" (*Clarkson*, 1871, 2 Coup. 125), discrepancy between date of conviction and extract warrant of imprisonment, are fatal (*Riddell*, 1881, 4 Coup. 397); but trivial slips, such as that words "to the obstruction or annoyance of the tenants or passengers" were added (*M'Giveran*, 1894, 21 R. (J. C.) 69), changing "him" to "her" (*Henry*, 1846, Ark. 105), the word "shillings" omitted as regards some respondents, though penalty correct as regards others (*Gallie*, 1883, 11 R. (J. C.) 13), will not be regarded as essential.

The punishment likewise must be definite and according to the prescribed character. Where a penalty is prescribed, it is of course incompetent to award imprisonment without the alternative of the penalty; but if payment of a penalty within a prescribed period be fixed by the statute, immediate imprisonment is illegal (*MacDonald*, 1864, 2 M. 407; *Rhodes*, 1870, 1 Coup. 469; *Ritchie*, 1884, 11 R. (J. C.) 20). If, on the other hand, the special statute libelled is silent as to recovery of penalties, and does not exclude imprisonment, immediate imprisonment, failing payment of penalty, may be awarded under Summary Jurisdiction Acts (*Murray*, 1872, 2 Coup. 284). Where the statute provides execution by poinding and arrestment, and instant imprisonment in default of recovery of penalty is awarded, this is invalid without setting forth that it is inexpedient to follow first course (*Simpson*, 1892, 19 R. (J. C.) 66). Where an accused is convicted of more than one statutory offence including separate penalties, these should be separately imposed in the conviction (*Tomlinson*, 1894, 21 R. (J. C.) 46); although where a *cumulo* penalty was imposed in a conviction for two offences, this was sustained (*Prentice*, 1883, 5 Coup. 210). So also if there be a power to decree a special order, and it be exceeded or deviated essentially from (*Robertson*, 1883, 5 Coup. 664), or not fully awarded in terms of the Act, the sentence is bad and conviction will be quashed (*MacCallum*, 1896, 24 R. (J. C.) 15).

The Police Court in the city of Edinburgh is regulated by the Edinburgh Municipal and Police Act, 1879 (42 & 43 Vict. c. 132), which defines the jurisdiction of the judge of police in that Court, and makes other provisions affecting the Police Court. The procedure in the Police Court of Edinburgh is regulated by the Edinburgh Municipal and Police Act, 1879, as amended by the Edinburgh Municipal and Police Amendment Act, 1891, ss. 73, 74. By the Edinburgh Municipal and Police Act, 1879, the expression "the judge of police" means and includes the magistrates of Edinburgh and the Sheriff and his substitutes, or any of them, sitting in the Police Court. In Edinburgh the Sheriff-Substitutes sit in the Police Court as judges of police in a certain rotation along with the judges of police, the magistrates under the statutes.

In Glasgow the constitution and procedure in the Police Courts are regulated by the Glasgow Police Act of 1866, and under that Act the magistrates sit in the Court as judges. Under the City of Glasgow Act, 1891 the number of magistrates was increased to the present number (14), and those members of the council who at any time during their membership acted as magistrates, now act under the 1891 Act as police judges.

The appointment of stipendiary magistrates for the city is regulated by the Glasgow Corporation Police Act of 1895, and by the Act recently passed (60 & 61 Vict. c. 48). Meantime there is no stipendiary magistrate; but when there was one, he did not try all the police cases, but only those in the Central and St. Rollox Districts, that is, in two out of eight Police Courts.

The Glasgow police take charge of the harbour and river. They form one of the divisions of the police of the city, called the Marine Division, and they act mainly under the provisions of the Clyde Navigation (Consolidated) Act, 1858.

The prosecutor in the Police Courts of the city does not prosecute for the offences within the harbour and river. There are separate prosecutors therefor, the one being the superintendent of the district, and the other the clerk to the police department of the corporation.

In Dundee, sec. 26 of the Dundee Police and Improvement (Consolidation) Act of 1882 constitutes the magistrates as the Police Court of Dundee, and the interpretation of magistrates by sec. 2 of that Act provides that "magistrate and magistrates shall mean the magistrates having police jurisdiction within the burgh, or any one of them, and shall include the provost and bailies of the royal burgh of Dundee, or any one of them, sitting or acting as police magistrates of the burgh; and magistrates shall also mean any two or more police magistrates sitting or acting as aforesaid." The Sheriff does not sit as a judge.

Part 36 of the Act of 1882, subject to and with the addition of the adopted clauses of the Burgh Police Act of 1892, regulates the procedure in the Police Court.

The trustees of the harbour and docks pay to the Town Council an annual allowance in full of the council's claims for trying the harbour cases in the Police Court, and the use of cells or lock-up houses for prisoners.

In Aberdeen the constitution of the City Police Court is regulated by the Aberdeen Police and Waterworks Act, 1862. The magistrates sit as judges, but under the Act the Sheriff and his substitutes may also sit. This power, however, is very rarely exercised.

The Act also contains provisions for regulating the procedure in the City Police Court, but this is now practically regulated by the Summary Jurisdiction and Criminal Procedure Acts.

The Aberdeen Harbour Act, 1895, provides for the establishment of harbour police, but at the same time authorises the Harbour Commissioners to agree with the Town Council for the watching of the harbour being carried out by the Town Council, instead of by the Commissioners themselves. An arrangement to this effect has been made: the expense incurred by the Town Council being repaid to them by the Harbour Commissioners.

In the counties, what are termed police offences are tried by the Sheriff. "The Sheriff hath also cognisance of all crimes which offend against the common police of the country" (Ersk. bk. i. tit. iv. 7); and indeed he has a concurrent or cumulative jurisdiction with justices of the peace, magistrates, and inferior magistrates. In burghs, therefore, when there is no Police Court the offences fall to be tried before the Sheriff (*Cameron*, 1894, 21 R. (J. C.) 31). He has an inherent jurisdiction at common law in all manner of offences, whether at common law or created by statute, provided the maximum punishment involved does not exceed that which the Sheriff is entitled to impose (per Ld. J.-Cl. Macdonald).

Review of Police Sentences.—No order, judgment, record of conviction, or other proceeding whatsoever, concerning any prosecution instituted

before the magistrates, can be quashed for want of form; and no warrant of imprisonment, and no extract of judgment, can be held void by reason of any defect of form therein, provided it be inferred therefrom that it is founded or has proceeded on a conviction or judgment, and there be a valid conviction or judgment to sustain the same. All judgments and sentences pronounced by the magistrate are final and conclusive, and not subject to suspension, or appeal, or any other form of review or stay of execution, unless on the ground of corruption, malice, or oppression on the part of the magistrate, or of such deviations in point of form from the statutory enactments as the Court of review shall think took place wilfully, or of incompetency, including defect of jurisdiction, of the magistrate. If suspension, appeal, or review, or stay of execution be brought or applied for, it must be presented before the next sitting of the High Court of Justiciary within the circuit, or, where there is no circuit, before the High Court of Justiciary at Edinburgh, in the manner and by and under the rules, limitations, conditions, and restrictions which shall from time to time be prescribed by the said High Court of Justiciary; provided that prosecutions under the Burgh Police (Scotland) Act, 1892, are, however, subject to the provisions of the Summary Prosecutions Appeals (Scotland) Act, 1875, and any Act amending the same. Where by that Act, also, jurisdiction is given to the magistrates to try any offence created by a statute which expressly provides an appeal, such appeal is competent.

It will be observed that review of sentences in the Police Court is excluded except upon the grounds stated, viz: (1) corruption, malice, or oppression on the part of the judge, and (2) such deviations in point of form from the statutory enactments as the Court of review shall think took place wilfully, or of incompetency, including defect of jurisdiction, of the magistrate.

With regard to the corruption, malice, or oppression necessary to ground an appeal, actual bribery, personal malice, or intentional oppression are not requisite. It is sufficient if the judge do anything so grossly unjustifiable, unfair, or oppressive as amounts in the eye of the law to these grounds (*Philip*, 1868, 1 Coup. 87). Thus putting a person on trial who had attended to be precognosced (*Ritchie*, 1848, J. Shaw, 142); apprehending a respectable person on a charge of theft without warrant, bringing him up for trial, asking if he has witnesses, when he mentioned five, proceeding to try and convict him an hour later when only two of his witnesses could come, and not informing him of his right to adjournment (*Pyper*, 1885, 12 R. (J. C.) 47); apprehending a law-abiding citizen, and bringing him before a magistrate for a police offence without serving a copy of complaint (*Carlin*, 1896, 23 R. (J. C.) 50); serving a complaint at common law upon a person who had appeared to answer a statutory charge, and that without any citation or warrant for apprehension, as required by statute (*Gallacher*, 1886, 13 R. (J. C.) 56); refusing an adjournment to a person who was brought up on a warrant of apprehension for breach of peace, and who, as he was not informed of his right to an adjournment, did not ask for this till after the witnesses for the prosecution had been examined, and was then refused (*Gardiner*, 1890, 17 R. (J. C.) 44). See also as to not granting adjournment: *Pyper*, *supra*; *Grant*, 1889, 2 White, 261; *Boyce*, 1891, 3 White, 73; *M'Arthur*, 1896, 23 R. (J. C.) 81, and the latter cases as to what will be considered nimious and oppressive.

Deviations from Statutory Form, Incompetency, and Defect of Jurisdiction. —Though there be three grounds of suspension here, they are practically reduced to two, as there are hardly ever any "wilful" deviations from

statutory form, and such as there may be will generally come under the head of incompetency or defect of jurisdiction. Where the proceedings are fundamentally null, radically defective, or the deviation or irregularity gross, the conviction will be set aside; as where a prosecutor deserts a complaint *pro loco et tempore*, obtains thereon a warrant to recite, serves on the accused, who fails to appear, but is apprehended, tried, and convicted (*Collins*, 1887, 15 R. (J. C.) 7); where a person appeared and pled that she was cited on an *inducice* of three instead of six days, but was convicted (*Laird*, 1895, 23 R. (J. C.) 14); where a professed copy of a complaint was served on an accused, while no complaint was in existence (*Stewart*, 1894, 22 R. (J. C.) 9); where a service copy of complaint did not contain alternative prayer for punishment in complaint convicted on (*Stewart, supra*); where there was no written record of an adjournment allowed (*Craig*, 1897, 24 R. (J. C.) 88); where a diet was adjourned, but the interlocutor appointing the adjourned diet was not signed (*McLean*, 1895, 22 R. (J. C.) 39); where a conviction, from its terms, might have proceeded on facts not inferring a contravention of the statute libelled (*Walker*, 1885, 12 R. (J. C.) 32); where a complaint was irrelevant (*Hastie*, 1894, 22 R. (J. C.) 18); where a complaint did not specify the sections of the Acts constituting the offence charged (*Buchanan*, 1896, 23 R. (J. C.) 86); where the alleged time of a statutory contravention was defective (*MacDonald*, 1894, 21 R. (J. C.) 38); where the complaint prayed for statutory penalties which it did not define (*Jackson*, 1897, 24 R. (J. C.) 38); where neither the complaint nor the conviction showed the facts upon which the conviction was rested (*Carlin*, 1896, 23 R. (J. C). 43); where, from the terms of the complaint and conviction, it was impossible to say that the offence might not have been committed beyond statutory limitation (*Farquharson*, 1894, 21 R. (J. C.) 52); where the complaint charged alternative charges, prayed for conviction of aforesaid contravention, and conviction bore to be of contravention charged (*Aitchison*, 1897, 24 R. (J.C.) 44).

But where the grounds of suspension averred do not amount to a deviation in point of form appearing on the face of the proceedings, incompetency of a like character, or oppression, or miscarriage of justice, an appeal on such cannot prevail. Thus where the words "and Criminal Procedure (Scotland) Act, 1887," were added to the complaint, that although the complaint bore the prosecutor's name, the service copy did not, but which was added at the trial (*Armstrong*, 1892, 20 R. (J. C.) 21); that a complaint did not disclose the fact that the term of imprisonment, failing payment of a penalty, might be modified (*McEwen*, 1894, 21 R. (J. C.) 14; see also *McLeod*, 1892, 20 R. (J. C.) 6, where an accused was charged with moving cattle contrary to sections of statute, Foot-and-Mouth Disease Order and Regulations of local authority); complaint defective from want of specification (*Sharp*, 1892, 20 R. (J. C.) 12); where an accused complained that he had not been apprehended and brought into Court in terms of warrant, but received notice that warrant would not be executed if he appeared in Court on date specified, which he did, and was convicted (*Spowart*, 1895, 22 R. (J. C.) 30); that an accused was arrested without a legal warrant, but was in custody on a legal warrant (*McHattie*, 1892, 19 R. (J. C.) 95); where a verbal alteration, not affecting the substance, has been made on the conviction after the accused left the bar (*M'Giveran*, 1894, 21 R. (J. C.) 69); where a fine was imposed, but no conviction written out, as there was nothing to suspend (*Jupp*, 1863, 4 Irv. 355, 35 Jur. 320); where a plea of not guilty was not authenticated in terms of Summary Procedure Act (*Mackay*, 1882, 10 R. (J. C.) 10 5 Coup. 132)—were held insufficient grounds of suspension.

In like manner, the Court will not, as a general rule, suspend proceedings upon grounds which require an examination of documents other than the complaint and what appears thereon, or inquire beyond the record, unless based on very strong relevant averments of oppression. Thus that a magistrate, in giving sentence, had proceeded upon a written report by the prosecutor not appearing on record (*Larkin*, 1874, 3 Coup. 64; *Glass*, 1882, 5 Coup. 160); that two police constables had communicated to other two the substance of their evidence during a trial (*Campbell*, 1884, 11 R. (J. C.) 61; where a notice of complaint did not specify offence charged, but accused appeared and pled guilty, and was convicted, but alleged cognition, not understanding complaint, and other explanations (*Spowart*, 1895, 22 R. (J. C.) 30)—were held insufficient grounds of review. Nor will the Court conduct an investigation into the merits of a case, or of the evidence adduced, even though sought to be reviewed as a question of fact (*O'Donnell*, 1864, 3 M. 6; *M'Lean*, 1866, 5 Irv. 275; *Watson*, 1878, 4 Coup. 67). The judgment of the magistrates is final on the facts. If complainer wishes to raise legal question, whether facts proved warrant conviction, should ask a case, and *suspension* refused, although if facts set forth by complainer had been found as the facts in a stated case, conviction could not have been upheld, as not constituting contravention (*Rattray*, 1891, 19 R. (J. C.) 23). Nor will the Court interfere on the ground that the sentence was oppressive, by being too severe, so long as it is within the magistrates' powers (*Mackay*, 1882, 10 R. (J. C.) 10; *Rodgers*, 1892, 19 R. (J. C.) 40), though the question whether the Court may suspend a sentence of an inferior judge on the ground of undue severity was expressly reserved.

Defect of Jurisdiction.—Though this ground is frequently combined with incompetency, it is a distinct and relevant ground of suspension. Thus where the Court declines to exercise its jurisdiction (*Muckersie*, 1874, 2 R. (J. C.) 12). So, in like manner, if the Court exceeds its jurisdiction, the conviction is bad; and it is held to be an excess of jurisdiction when the Court convicts on a charge which is not relevant either under the statute libelled or at common law (*Marr*, 1878, 5 R. (J. C.) 38; *Wemyss*, 1881, 8 R. (J. C.) 25; *Stirling*, 1883, 10 R. (J. C.) 59; *Hastie*, 1894, 22 R. (J. C.) 18).

In very special circumstances, and on strong averments of illegality and oppression, as that after an accused's bail had been fulfilled he was tried at a late hour on the same evening, on the same complaint, in the absence of his agent, refused an adjournment, and his witnesses excluded, the Court remitted to the Sheriff to report on the procedure (*Wright*, 1873, 1 R. (J. C.) 1), and on his report sustained the conviction; but this is a very unusual course, and will not be resorted to unless in very exceptional circumstances (*Spowart*, 1895, 22 R. (J. C.) 30).

Though review, either by way of suspension, or appeal, or any other form, may be expressly excluded by statute, this does not protect a bad conviction from being reviewed and set aside, as has been illustrated by the cases already quoted (see also *Hastie*, 1894, 22 R. (J. C.), 18; *Craig*, 1897, 24 R. (J. C.) 88).

It will further be observed that the method of review by appeal on a case stated, under the Summary Prosecutions Appeals (Scotland) Act, is expressly reserved. In many cases, where it is desirable to get a review of the question as to whether the facts proved would amount either to an offence at common law or a contravention of the statute libelled, a case under this Act is the proper and more satisfactory method of doing this (*Rattray*, 1891, 19 R. (J. C.) 23).

[Macdonald, *Crim. Law*; Brown, *Sum. Juris.*; Irons, *Police Act.*]

Police, Military.—There is, in connection with the army, corps of military mounted police and corps of military foot police, which form the organised body employed within the army for police purposes. The corps usually consist of steady, intelligent soldiers, who at home act under the orders of the commanding officer, and abroad under his orders or the orders of a provost-marshal appointed by the commanding officer. They arrest and detain for trial all persons, subject to military law, committing offences. They also generally attend to sanitary arrangements. In all military matters the police of an army possess summary powers somewhat similar to constables in the civil police force.

[See Army Act, 1881; Clode, *Military Forces of the Crown.*]

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

Pollution of Rivers.—See Rivers.

Poor; Poor Law—This term denotes the law which is applicable to the relief or maintenance of the "legal poor."

There is no statutory definition of the "legal poor," but under this description are included all poor persons of seventy years, if unable to gain a livelihood by their work; and all (even foreigners) possessed of a settlement in any parish, who by infancy, mental disease or corporeal weakness, disability or permanent disease, are unable to earn their subsistence by labour, and who have no separate means of subsistence (1661, c. 38; 1672, c. 18; Bell's *Prin.* s. 2191).

History.—The earliest statutes dealing with this subject were passed in the year 1424, when the Scots Parliament promulgated the Act 1424, c. 7, which placed vagrants and beggars under secure restrictions, and the Act 1424, c. 25, which prohibited from begging disorderly persons who were fitted for work, and gave permission, under certain regulations, to the impotent poor, who were to wear a badge, to continue begging. The next Act, 1503, c. 70, enacted that "cruicked folke, seik folke, impotent folke, and weak folke" were alone to be entitled to beg; and the immediately succeeding Act on the subject—1535, c. 22—enacted that "na beggars be thorled to beg in ane parochin, that ar borne in ane uther." These Acts, while chiefly directed against the able-bodied poor, yet admitted the right of the legal poor to get relief, and paved the way for the Act which was passed in the reign of James VI.,—1579, c. 74,—and which is the foundation of the present poor-law system in Scotland, just as the Act passed in the reign of Elizabeth was the basis of the English poor-law system. Like the former Acts, the Act of 1579 primarily dealt with the able-bodied poor, who are thus defined: "And that it may be knawen quhat maner of persones ar meaned to be idle and strang beggares and vagabounds, and worthy of the punischment before specified, It is declared that all idle persones, ganging about in ony countrie of this realme, using subtel, crafty, and unlauchful playes, as jugalarie, fast-and-lous, and sik uthers; the idle peopil calling themselves Aegyptians, or any uther that feinzies them to have knawledge of charming, prophecie, or uthers abused sciences, quhairby they perswade the peopil that they can tell their weirds, deathes, and fortunes, and sik uther phantastical imaginations; and all persones being haill and starke in

bodie, and abill to worke, alledging them to have bene herried or burnt in sum far pairt of the realme, or alledging them to be banished for slauchter and uthers wicked deides; and uthers nouther havand land nor maisters, nor using ony lauchful merchandise, craft, or occupation quhairby they may win their livings; and can give na reckoning how they lauchfullie get their living; and all minstrellis, sangsters, and tale-tellers, not avowed in special service be sum of the lords of Parliament, or great Burrowes, or be the head Burrowes, and cities for their commoun minstrellis; all commoun labourers, being personnes abill in bodie, living idle, and fleeing labour, all counterfaicters of licenses to beg, or using the same, knowing them to be counterfaicted; all vagabound schollers of the Universities of Saint Andrewes, Glasgow, and Abirdene not licensed be the Rector and Deane of Facultie of the Universitie, to aske almes; all Schipmen and Mariners alledging themselves to be schip-broken, without they have sufficient testimonialles, sall be taken, adjudged, esteemed and punished as strang beggarres and vagaboundes." Having enacted in the earlier part of the Act severe penalties and punishments upon "vagabonds and idle beggars" as defined in the section above quoted, the Act proceeds to make provision for the relief of the "pure, aged, and impotent people," and for the first time in Scotland institutes a system of compulsory assessment. The magistrates of the burghs, and justices in rural parishes, are authorised to "taxe and stent the haill inhabitantes within the Parochin, according to the estimation of their substance without exception of persones to sik oulkie charge and contribution, as sall be thoct expedient and sufficient to susteine the saidis pure people, and the names of the inhabitants stented, togidder with their taxation, to be likewise registrate." Several ratifying Acts followed, viz.: 1661, c. 38, which instructed certain officials called overseers to "call for the collections at the said parishes, or other sums appointed for the maintenance of the poor thereof," and to distribute them among the poor according to their several necessities; 1663, c. 16, which empowered the landowners in landward parishes to assess themselves for the maintenance of such of the poor as cannot fully maintain themselves, and to demand relief of one-half of the sum assessed from their respective tenants, according to their holding; and 1672, c. 18, which charged the ministers and elders of each parish with the duty of making up lists of the necessitous poor. By a proclamation of William and Mary, dated 11th August 1692, the heritors, ministers, and elders are required to meet at the parish church, and make up lists of the poor, to calculate the cost of their maintenance, to lay on an assessment, one-half upon the heritors and one-half on the householders, and to collect the same as often as necessary. This proclamation was ratified and approved of by the proclamations of William and Mary, dated 29th August 1693, and 31st July 1694, and of King William III., dated 3rd March 1698, and confirmed by the Statutes 1695, c. 43; 1696, c. 29; and 1698, c. 21. All these Acts and Proclamations keep up the distinction between the "idle and vagabond" poor and the impotent poor, and also provide for assessment to meet the expense of the maintenance (see Lamond's *Scottish Poor Laws*).

Having thus briefly referred to the early statutes and provisions dealing with this subject, we come to the system of poor law as now existing.

The management and relief of the poor are regulated by the Poor Law Acts 1845 to 1886, which comprise—

The Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83).

The Poor Law (Scotland) Act, 1856 (19 & 20 Vict. c. 117).

The Poor Law (Scotland) (No. 1) Act, 1861 (24 Vict. c. 18).

The Poor Law (Scotland) (No. 2) Act, 1861 (24 & 25 Vict. c. 37).
The Poor Removal Act, 1862 (25 & 26 Vict. c. 113).
The Poor Law Loans and Relief (Scotland) Act, 1886 (49 & 50 Vict. c. 51); and also by the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58).

The subject may conveniently be treated under the following headings:—

I. Administration of the Poor Law.
- (*a*) General.
- (*b*) Local Government Board as Supervisors of Parish Councils.
- (*c*) Parish Councils as Managers of the Poor.
- (*d*) Officers of the Parish Council—
  - (1) Inspector of Poor.
  - (2) Collector of Poor Rates.
  - (3) Clerk of Parish Council.
  - (4) Medical Officer.

II. Funds Applicable to the Relief of the Poor.
- (*a*) Church-Door Collections. (*b*) Mortifications. (*c*) Assessment.

III. Relief.
- (*a*) Persons Entitled to Relief.
- (*b*) Form of Relief—
  - (1) Outdoor Relief.
  - (2) Indoor Relief.
  - (3) Boarding-out of Pauper Children.
- (*c*) Miscellaneous.

IV. Recourse—
- (*a*) Against Relatives. (*b*) Against other Parishes.

V. Removal of Paupers—
- (*a*) To Parish of Settlement. (*b*) To England and Ireland.

VI. Pauper Lunatics.

[*Note.*—The law of settlement will be dealt with under Settlement.]

I. Administration of the Poor Law.

(*a*) General.—Prior to the passing of the Poor Law (Scotland) Act, 1845, the raising and administering of the funds necessary for the relief of the legal poor were, (1) in the case of burghal parishes (*i.e.* parishes which are wholly situated within a royal burgh), in the hands of the heritors and kirk-session; (2) in the case of landward parishes (*i.e.* parishes forming a rural district), in the hands of the provost and magistrates; and (3) in mixed parishes (*i.e.* parishes partly burghal and partly landward), in the joint hands of the kirk-session, heritors, and the magistrates of the burgh sitting as heritors. The Poor Law (Scotland) Act, 1845, in the case where an assessment required to be levied for the relief of the poor, changed the constitution of the body to which was intrusted the management and relief of the poor. It established a board of management called the Parochial Board (*q.v.*), which consisted, in rural parishes, of owners and occupiers of lands and heritages of more than £20 a year of annual value, and of members elected by the kirk-session and the ratepayers; in burghal parishes, of members elected by owners and occupants, with four persons named by the

magistrates, and four by the kirk-session; and in mixed parishes, by the heritors and elected members, together with the provost and magistrates of any burgh in the parish (8 & 9 Vict. c. 83, s. 22). These Boards ceased to exist on 15 May 1895 (57 & 58 Vict. c. 58, s. 21), their powers, duties, and liabilities being transferred to parish councils as established by that Act. Sec. 2 of the Act of 1845 also established a Board, entitled "The Board of Supervision for the Relief of the Poor in Scotland" (*q.v.*), to whom were intrusted *inter alia* the general superintendence of the relief of the poor. This Board ceased to exist in September 1894 (57 & 58 Vict. c. 58, s. 3), its powers and duties being transferred to the newly-created Local Government Board for Scotland (*q.v.*).

(*b*) Local Government Board as Supervisors of Parish Councils in Administering Poor Relief.—To the Local Government Board for Scotland are intrusted the powers and duties formerly exercised by the Board of Supervision under the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83). The Board is authorised to inquire into the management of the poor in every parish or burgh, and for that purpose to order returns, to require the attendance of witnesses, to administer oaths, and to examine on oath any persons they may think fit to call before them, and to call for books and other documents (s. 9). The Board may authorise special inquiries to be made, either by one of their own number, or by a commissioner not being a member of the Board (ss. 10, 11); and they may allow expenses of witnesses (s. 12). Any member of the Board, or any clerk or officer of the Board duly authorised by a writing, signed by two at least of the members of the Board, may attend the meetings of any parish council, and take part in the discussions, but has no vote (s. 15). The Board have power to combine parishes for poor-law purposes (s. 16), and to dissolve such combinations (24 Vict. c. 18); but looking to the wide powers of altering, extending, and uniting parishes which are now vested in the Secretary for Scotland (52 & 53 Vict. c. 50, s. 51, and 57 & 58 Vict. s. 46), these powers may be considered as practically superseded. The Board are empowered to present a summary petition to the Court of Session, or, during vacation, to the Lord Ordinary on the Bills, against any parish council who refuse or neglect to comply with the Board's instructions (8 & 9 Vict. c. 83, s. 87). The Court has given a wide interpretation to this section. *E.g.*, a parochial board appointed two inspectors over one parish. The Board of Supervision objected, on the ground that the duties of inspector, being statutory, could not be divided. They called on the parochial board to rescind their resolution, but they refused. The Board of Supervision applied to the Court, craving for a declaration that the appointment of the additional inspector was illegal, and for interdict against the parochial board and the said inspector. The Court granted the application (*Glasgow* case, 1850, 12 D. 627). It was held to be an obstruction, in the sense of the section, where a parochial board persisted in retaining a medical man in office after he had been validly dismissed by the Board of Supervision (*Dull* case, 1855, 17 D. 827); and where a parochial board resolved to reduce the salary of the inspector of poor, the Court, on the application of the Board of Supervision, ordained the parochial board to rescind the resolution. A decision by the Board is not subject to review by the Court on the merits (*Clark*, 1873, 1 R. 261; *Old Monkland* case, 1880, 7 R. 469). The Board have certain powers and duties with regard to the erection and management of poor-houses (see *infra*). The Board have power to appoint two general superintendents to assist in the execution of the Poor Law Act (19 & 20 Vict. c. 17). (As to the constitution and other powers and

duties of the Local Government Board, see LOCAL GOVERNMENT BOARD FOR SCOTLAND.)

(*c*) PARISH COUNCILS AS MANAGERS OF THE POOR.—Parish councils, as coming in the place of the old parochial boards, are intrusted with the management of the poor, and are empowered to impose the assessment necessary for the relief of the poor. The Act which regulates their powers and duties is the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83). They are empowered to fix certain days and places on and at which general meetings of the councils shall be held, with power of adjournment; but they are taken bound to hold at least two general meetings in every year—one on the first Tuesday of February, or as soon thereafter as may be, and the other on the first Tuesday of August, or as soon thereafter as may be, at which meetings the roll of paupers of the parish is revised and adjusted, and allowances to such paupers fixed (s. 30). They are vested with the power of assessment for the relief of the poor (s. 33), and the manner of such assessment (s. 34). They may also, with the concurrence of the Local Government Board, where one half of any assessment is imposed on the owners, and the other half on the tenants or occupants of lands and heritages, classify the lands and fix the assessments according to the purposes for which the lands are used (s. 36). They must yearly or half-yearly fix the amount of assessment for the year or half-year, and make up, or cause to be made up, a roll of the ratepayers, with the respective amount of assessment payable by them (s. 40). They have power to exempt from payment of the assessment, or any part thereof, any persons or class of persons, on the ground of inability to pay. A parish council may sue or be sued under the name of the parish council of the parish (57 & 58 Vict. c. 58, s. 32). The council is cited either by delivery of a copy of the summons to the chairman at a meeting of the council, or by citation of each member (Mackay, *Manual*, 203). (For constitution and other powers and duties of parish councils, see PARISH COUNCIL. For election, see PARISH COUNCIL ELECTION.)

(*d*) OFFICERS OF THE PARISH COUNCIL.—(1) *Inspector of Poor.—Appointment.*—The inspector of poor, the chief executive officer, is appointed by the parish council, who fix the amount of his remuneration, and report to the Local Government Board his name and address, and the amount of his remuneration (8 & 9 Vict. c. 83, s. 32). While the parish council have the power of appointment, they have no power of dismissal (*Clark*, 1873, 1 R. 261, per Ld. Shand, 263; *Old Monkland* case, 1880, 7 R. 469). Sec. 56 provides that if any inspector of poor shall fail, or neglect, or refuse to perform the duties of his office, or shall, in the opinion of the Local Government Board, be unfit or incompetent to discharge the duties of his office, then the Board may suspend or dismiss him. While there has been no direct decision upon the point, it is thought that an inspector of poor holds his office *ad vitam aut culpam* (*Old Monkland* case, *supra cit.*, per Ld. Pres. Inglis, 476; *Seaton*, 1896, 23 R. 763), but the amount of *culpa* necessary to deprive an inspector of his office is a matter for the Local Government Board, the Court only interfering where the Board have been actuated by malice, or have failed to apply their minds to the question. It is illegal for a parish council to appoint two inspectors, one to take charge of the outdoor labour, and the other the indoor; the remedy, where the whole work is too heavy for one inspector, being either to appoint assistant-inspectors, or to divide the parish into districts, with an inspector for each (*Glasgow* case, *supra cit.*). The parish council in populous and extensive parishes are empowered to appoint and pay assistant-inspectors, for whose

conduct and accuracy the inspector shall be responsible to the Local Government Board (s. 55). Such assistant-inspectors, unlike the inspectors, are, in the absence of express agreement, dismissable by the parish council at any time on reasonable notice, there being nothing in the nature of the duties they have to discharge which presumes a yearly hiring. The Board of Supervision have from time to time issued certain rules and orders as to the persons eligible to be appointed inspectors, from which it would appear that neither a woman nor a minor is eligible for appointment. The following would be held to be ineligible for appointment as inspector—an acting member of the parish council, the parish medical officer, the public vaccinator, the procurator-fiscal, the justice of peace clerk, a sheriff officer, a bailie or magistrate of a burgh, a member of a school board, or school board officer (*Clark, supra cit.*). The term "school board officer" does not include the schoolmaster, who is eligible for appointment, and in many of the smaller parishes holds the office of inspector along with that of schoolmaster.

By sec. 50 of the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), the officers of the parochial board were transferred to the parish council, but subject to the *proviso* that they should hold their offices by the same tenure and upon the same terms and conditions as if that Act had not been passed (s. 51 (1)). The parish council are given power to distribute the business to be performed by existing officers, and may combine their duties as they may think expedient, provided that if an inspector of poor holding office at the passing of the Act feels himself aggrieved by such distribution, he may appeal to the Local Government, whose decision shall be final (s. 51 (2)). Where two parishes are united, both inspectors continue in office (*Seaton, supra cit.*). An inspector is not entitled to a pension, nor is he at liberty to resign his office by merely intimating his resignation to the parish council, and he is not freed from the duties and responsibilities of his office until his resignation has been tendered to the Local Government Board, and accepted by them.

Powers and Duties. — The inspector in each parish is to have the custody and be responsible for all books, writings, accounts, and other documents relating to the management of the poor. It is his duty to inquire into and make himself acquainted with the particular circumstances of the case of each individual poor person receiving relief from the poor funds, and to keep a register of all such persons and of the sums paid to them; also of all persons who have applied for and been refused relief, and the grounds of refusal. He must visit and inspect personally, at least twice in the year, or oftener if required by the parish council or Local Government Board, at their place of residence, all the poor persons belonging to the parish in the receipt of parochial relief, provided they be resident within five miles of the parish. He must also report to the parish council and to the Local Government Board upon all matters connected with the management of the poor, in conformity with the instructions which he may receive from the parish council and Local Government Board respectively; and perform such other duties as they may respectively direct (8 & 9 Vict. c. 83, s. 55). The parish council, as stated above, in populous places may appoint assistant-inspectors, to whom the inspector may delegate the duties of inspecting and visiting the poor. The Board of Supervision have from time to time issued rules dealing with the powers and duties of an inspector, and as these are applicable to the inspector, as the officer of the parish council, we give a summary of

the chief of these:—The inspector must attend all meetings of the parish council, and make an accurate minute of the proceedings at every meeting, and enter it in a book, and submit the same so entered to the succeeding meeting, to be confirmed by the council, and authenticated by the signature of the chairman as a true record of the proceedings of the council. He must attend, if required, meetings of committees of the council, and keep an accurate minute of the proceedings thereof in the same manner as is directed in regard to meetings of the council. He shall conduct the correspondence in regard to the relief of the poor according to such instructions as he may receive. He shall keep all the accounts, and preserve and be responsible for all books, writings, letters, vouchers, and other documents relating to the business of the parish council, and produce the same when required to the Local Government Board, or to any person duly authorised by that Board to receive and inspect the same. He shall make such investigations as to all questions or matters connected with the administration of the poor law as the Local Government Board may require, and prepare and transmit to the Board all returns relative thereto. He shall from time to time prepare such reports as to the state and management of the poor within the parish as may be required by the parish council. In every case in which application may be made to the inspector for relief (whether the applicant has a settlement in the parish or not), it shall be the duty of the inspector to make immediate inquiry into the circumstances of the case, by visiting, either personally or by an assistant-inspector duly appointed by the parish council, the home of the applicant if situated within his parish, and by making all necessary inquiries into the state of health, the ability to work, and the means of support of the applicant, and to report the result of such inquiries to the parish council at their next meeting. In addition to the two annual visits required by the statute, the inspector must from time to time visit at their dwellings, either personally or by an assistant-inspector duly appointed, paupers recently admitted on the roll, especially those with whose habits and character he may not previously have been well acquainted, and likewise all such paupers as he may have reason to suspect of deception or of misapplying the relief given by the parish. It is the duty of the inspector, and of each assistant-inspector, to insert in a book kept for that purpose the dates of his visits to the dwelling of each pauper, and any observations he may think it material to make on the conduct and condition of the pauper. He should report to the parish council at its next meeting all cases of misapplication by the pauper of the relief given by the parish, and should make it known to all the paupers that he is required so to do. He shall return an answer to every application for relief within twenty-four hours of the time of its being made. If, on such inquiry as he shall be able to make within the time, he shall be satisfied that the applicant is in a state of destitution and a fit object for parochial relief, he shall make such an alimentary allowance as in the circumstances shall be reasonable, until the next meeting of the parish council, when he shall make a full report thereupon. But if, on such inquiry, he shall be satisfied that the applicant is not a fit object for relief, he shall refuse the application, and report the refusal, with his grounds for refusing it, to the parish council at their next meeting; or if he shall be unable within the twenty-four hours to satisfy himself as to the true circumstances of the case, he may delay making a final answer for any period which may appear to him necessary for completing his inquiries, but in that case he shall give such temporary relief, either in food or money, as may seem necessary,

until his final answer is made to the applicant. He must also provide for and relieve lunatics, fatuous persons, orphans, foundlings, and generally all destitute persons within the parish in case of sudden or urgent necessity, whether such persons have a settlement in the parish or not. Whenever any poor person who shall become chargeable on the parish shall be insane or fatuous, the inspector must forthwith report the same to the parish council. In all cases of sickness or accident befalling persons entitled to parochial relief, and requiring immediate medical or surgical assistance, the inspector must upon his own responsibility take measures for procuring without delay such medical aid as can be obtained, in conformity with the provisions which may have been made and the instructions which he shall have received from the parish council. In every case of sickness of any person in the receipt of parochial relief, the inspector must, as soon as may be, and from time to time afterwards, visit the home of such sick person, and supply him with such articles as may seem necessary, until the case shall have been reported at the next meeting of the parish council. If an inspector shall have relieved a poor person found destitute, and belonging to another parish, it is the duty of such inspector, immediately on discovering to what parish such poor person belongs, to send a notice in writing, with a statement of the circumstances, to the inspector of that parish. In all cases where a poor person is removeable from one parish to another in Scotland, if the poor person himself is, or alleges that he or any member of his family is, from sickness or infirmity, incapable of being removed, the inspector shall not remove him without having previously obtained a medical certificate stating that such poor person and his family may be removed to the parish to which he belongs without prejudice to his or their health; and when a poor person who has become chargeable on a parish is to be removed to England, Ireland, or the Isle of Man, the inspector shall, in every case before removal, obtain a certificate on soul and conscience by a regular medical practitioner setting forth that the health of such person, and that of his family (if he have any), is such as to admit of his being removed. The inspector must keep full and regular accounts of all moneys received and disbursed by him for the relief of the poor. He is subject primarily to the directions of the parish council, both in regard to the business brought or to be brought before the council, and in regard to the conduct of actions at law. He is the servant, not the master, of the parish council.

As we have already seen, a parish council may sue and be sued in their corporate name (57 & 58 Vict. c. 58, s. 32). Prior to the Local Government Act, 1894, a parish sued and was sued in name of the inspector of poor (8 & 9 Vict. c. 83, s. 57), and as this section of the Act has not been repealed, it is still competent for a parish council to sue and be sued in name of the inspector. But it is to be noted that although an action may be raised by the inspector, it must be under the authority and with the consent of the parish council, as the inspector "is the mere hand of the parochial board, and can take no decisive step on his own authority" (*Crawford*, 1860, 22 D. 1064, per Ld. Benholme, 1068). The inspector in a parish where religious instruction requires to be provided in Gaelic should be able to speak that language with paupers and applicants for relief. No inspector is entitled to absent himself from his parish without the permission of the parish council previously obtained, or without having provided to their satisfaction for the performance of his duties during his absence. He is not in general entitled to travelling expenses when

visiting any pauper chargeable to the parish and residing within five miles of it, when required by the parish council, or when obtaining any information respecting a pauper which can be procured by such a visit, unless such charge has been provided for in his original agreement; but in all other cases, when travelling in connection with cases of disputed settlement, he is entitled to charge his travelling expenses. By sec. 112 of the Lunacy (Scotland) Act, 1857 (20 & 21 Vict. c. 71), every inspector shall within seven days notify to the chairman of the parish council, and to the Board of Lunacy, the name and residence of any pauper lunatic ascertained to be within the parish, and the steps that may have been taken in reference to the care and custody of such lunatic; and whenever any pauper lunatic has been removed from an asylum or house by minute of the parish council, the inspector shall within fourteen days intimate to the Board of Lunacy the date of removal, the situation of the house to which he has been removed, the name of the occupier thereof, and the amount and nature of the parochial allowances made to such pauper lunatic (see *Pauper Lunatics, infra*, VI.).

(2) *Collector of Poor Rates—Appointment.*—The collector is appointed by the parish council, who fix his remuneration. They are empowered, if they see fit, to appoint the inspector to the office of collector, and to fix the additional remuneration to be given to him for exercising the office of collector (8 & 9 Vict. c. 83, s. 38). The collector, unlike the inspector, is liable to be dismissed by the parish council without the consent or approval of the Local Government Board. He does not require to be reappointed annually, but does not hold his office *ad vitam aut culpam* (*Shaw*, 1862, 24 D. 609). A minor is not eligible for the office of collector; and by sec. 11 of the Registration Amendment Act, 1885 (48 & 49 Vict. c. 15), it is not lawful for assessors under the Registration Acts to hold the office of collector.

Powers and Duties.—The collector's duty is to collect the poor-rate. After the parish council have fixed the amount of assessment for the year or half-year, and made up a book containing a roll of the persons liable for such assessment, the collector shall intimate to each ratepayer the amount of the assessment payable by him, and the time when it is payable (8 & 9 Vict. c. 83, s. 40). As the failure to pay the poor-rate debars an occupier from the privilege of voting for a member of Parliament, the collector must, on or before the first day of June, send a notice to every occupier who has not paid the poor-rate by the 15th of May in any year a notice setting forth that if payment of the poor-rate in arrear is not made, the occupier will be incapable of being entered on the next Register of Voters for the county or burgh (Representation of the People (Scotland) Act, 31 & 32 Vict. c. 48, s. 18). He must also, on or before the first day of July, deliver or send to the assessor for the burgh or county, as the case may be, a list of all occupiers who have been, during the twelve months preceding the last day of July in each year, exempted from payment of poor-rates on the ground of inability to pay, or who have failed to pay on or before the twentieth day of June all poor-rates that have become payable by them up to the preceding fifteenth day of May, or who have been in the receipt of parochial relief within the twelve calendar months next preceding the last day of July in such year (*ib.* s. 19 (2)). The collector, not the inspector, is the proper person to take proceedings for the recovery of arrears of poor-rate (*Leys*, 1851, 13 D. 630; *Neill*, 1864, 2 M. 1081).

(3) *Clerk of Parish Council.—Appointment.*—By sec. 19 (2) of the Local

Government Act, 1894, the parish council are authorised to appoint a clerk, but failing such appointment the inspector shall act as clerk of the parish council. In the event of the council appointing a clerk, he shall be paid such reasonable salary as the council may think proper, and shall hold office during their pleasure. An inspector acting as clerk is not entitled to any additional salary for his work as clerk. A member of the parish council is not entitled to act as clerk, even though his services as such are gratuitous.

Powers and Duties.—The powers and duties of the clerk of the parish council are contained in the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58). The clerk shall, one week before the time fixed for the nomination of candidates for the election of parish councillors, prepare a list of parish electors who have failed to make payment of the parish rate within one year from the demand thereof, and transmit a copy of it to the returning officer, in order that the latter may disallow the vote of any elector who is unable to produce a receipt for the payment of the rate within the said period of one year (s. 10). It is the duty of the clerk to summon the statutory meeting of the parish council (s. 17 (2)), which must be held in each year within ten days after the first Tuesday in December (s. 19 (6)). The clerk must also transmit annually, between 15th May and 1st August, the accounts of the parish council to the auditor appointed by the Local Government Board (s. 36 (4)).

(4) *Medical Officer.*—Parish councils are empowered to appoint properly qualified medical men to give regular attendance at the poorhouses under their control, and to fix the remuneration for their services, but he can only be dismissed or suspended by the Local Government Board (8 & 9 Vict. c. 83, s. 66). Parish councils are also empowered to provide medical attendance to the poor outside the poorhouse (*ib.* s. 69), which they usually do by appointing a medical man at a fixed salary to attend to the poor of the parish. The tenure of office of the latter officer is different from the former, as he is liable to be dismissed by the parish council without the approval or consent of the Local Government Board (*Dull*, 1855, 17 D. 827).

II. Funds Applicable to the Relief of the Poor.

The funds applicable to the relief of the poor are twofold: (1) Those arising from voluntary contributions at the church-door, mortifications, etc.; and (2) a sum levied by assessment in supplement of those funds (Bell, *Prin.* s. 1135).

(*a*) Church-Door Collections, etc.—By proclamation of the Privy Council of 29th August 1693 one-half of the collections at the parish church doors were ordained to be paid over by the kirk-session to the heritors, as the body to whom was then intrusted the relief of the legal poor. The other half of the collection remained in the hands of the kirk-session, who applied it in relieving the general poor, and for some necessary church expenses. By sec. 54 of the Poor Law Act of 1845, it is ordained that in all parishes which have agreed to an assessment being levied for the relief of the poor, all the money arising from the ordinary church collections shall "belong to and be at the disposal of the kirk-session of each parish"; but it is provided that nothing in the section is to be held to authorise the kirk-session "to apply the proceeds of such church collections to purposes other than those to which the same are now in whole or in part legally applicable." The heritors are still to be entitled to examine the accounts of the kirk-session, and inquire into the manner in which the funds have been applied. The kirk-session must also, through their session-clerk or other

officer appointed by them, report to the Local Government Board as to the application of the moneys arising from church collections. It is thought that the kirk-session, under this section, are the sole judges of who are proper recipients of relief from this fund, and that they are not bound to expend half of the sum received from church-door collections on the legal poor. "The Court must not be understood as suggesting any doubt as to the power of the kirk-sessions to dispense the funds in their own hands, according to rules and guided by considerations which are quite inapplicable to the proper parish funds, and their administrators. The church collections may be employed by the kirk-sessions so as to afford assistance to persons who are in no true sense proper objects of parochial relief, including able-bodied persons destitute from want of employment" (Ld. J.-Cl. Inglis in *Petrie*, 1859, 21 D. 614). The Local Government Board have expressed the opinion that church-door collections continue to belong to and to be at the disposal of the kirk-session, and the parish council are not entitled to claim any part of them, or to demand a voice in their application. Collections in churches, other than parish churches, belong to the congregation thereof (see note to sec. 54 of the Poor Law Act, 1845, in Graham's *Manual of Poor Law and Parish Council Acts* (1897), p. 180).

(*b*) MORTIFICATIONS.—Sec. 52 of the Poor Law Act, 1845, provides that where any property, either heritable or moveable, was vested in the heritors and kirk-session of any parish, or the magistrates and town council of any burgh, or trustees on their behalf, for the benefit of the poor, it should thereafter be received and administered by the parochial board, whose place is now taken by the parish council. It is only property left for the benefit of the legal poor to which the parish council have right; and if it is clear from the terms of the grant that the gift or bequest was for behoof of the poor generally, then the parish council have no right to receive and administer such property (*Liddle*, 1854, 16 D. 1075; *Hardie*, 1855, 18 D. 37). A consideration of the way in which the fund has been administered hitherto will assist in deciding whether it is one to which the parish council are entitled. *E.g.*, where since 1726 land had been held by the heritors and kirk-session jointly "for the use and behoof of the poor of the parish," it was held to be transferred (*Kinglassie* case, 1867, 5 M. 869). The words "poor of the parish" in the documents creating the trust do not necessarily mean the same as in the Poor Law Act of 1845. The true meaning of the words in the particular writing must be ascertained by inquiry into the origin of the fund, its investment, its administration, and its distribution (*Aberdour* case, 1869, 8 M. 176, per Ld. Ardmillan, p. 184; see also *Pencaitland* case, 1893, 21 R. 214; Graham's *Manual*, p. 178).

(*c*) ASSESSMENT.—The 33rd section of the Poor Law Act, 1845, gave the parochial board power to resolve that the funds requisite for the relief of the poor should be raised by assessment. According to the third annual report of the Local Government Board (1896–97), there were at that date (January 1898) 877 parishes in Scotland, of which 861 were assessed and 16 were unassessed. One-half of the total assessment is payable by the owners *as a class*, and one-half by the tenants or occupiers *as a class* (s. 34; *Galloway*, 1875, 2 R. 650). The assessment should run from Whitsunday to Whitsunday. There is no exemption from assessment except in the case of those who are unable to pay, and the parish council must satisfy themselves in each case of the inability to pay. They are not entitled to exempt a *class* on the ground that, in their opinion, persons who inhabit houses under a certain rental are unable to pay. An appeal must be taken

by every person desiring exemption, and on this appeal the parish council, after due inquiry, adjudicate. The assessment is not imposed on the gross rental, but on the annual value, *i.e.* the net rental, certain deductions having first been made. These deductions are made with the object of ascertaining the assessable rental; and on the assessable rental both occupiers and owners are rated. In the case of owners there is always a uniform rate. In the case of tenants and occupiers the parish council may, if they see fit, adopt a classification of rates (s. 36). Assessment for the relief of the poor was originally established on the equitable principle that everyone should contribute in proportion to his income, and that principle has never been abandoned. A farmer who paid £100 a year for his farm could not be supposed to have an income equal to that of a man who paid a rent of £100 a year for his dwelling-house; and if the principle that everyone should be required to contribute in proportion to his income was not to be lost sight of, it was obviously necessary that facilities should be afforded for imposing different rates with reference to the different amounts of means represented by the different kinds of occupancies. Accordingly, in the Act of 1845 it was provided (s. 36) that it should be lawful to distinguish lands and heritages into two or more separate classes, according to the purposes for which such lands are used and occupied, and to fix such rate of assessment upon the tenants and occupants of each class respectively as may seem just and equitable. It was thus made lawful to vary the rate with reference to the presumed income of the different classes of occupants (Circular of Board of Supervision, 10th December 1868).

The Local Government Board recommend the parish council, in adopting a classification, (1) to make it exhaustive, comprehending all classes of property in the parish (*N. B. Rwy. Co.*, 1887, 14 R. 478); (2) to fix the different rates *not according to rental*, but according to the purposes for which the properties are used; and (3) not to make the classification unnecessarily complicated. It is in the interest of the ratepayers and for the convenience of the officials that it should be made as simple as is practicable, and that subdivision of similar subjects should be avoided. The two main classes are in most instances (*a*) dwelling-houses, (*b*) lands used for agricultural or pastoral purposes; and the rate on agricultural or pastoral subjects ought not to exceed one-third or one-fourth of the rate on dwelling-houses (Circular of Local Government Board, 30th October 1895). The whole assessment may be levied from the tenant or occupant, who shall be entitled to recover one-half thereof from the owner, or to retain the same out of his rent (s. 43). In the case of tenants under £4 rental, it is competent to levy the whole assessment from the owner.

The parish council yearly or half-yearly fix the amount of the assessment to be imposed, and make up the roll of ratepayers (s. 40). Where a canal or railway passes through more than one parish, the proportion of the annual value thereof on which the assessment shall be made for each parish shall be according to the number of miles which the canal or railway traverses in each parish (s. 45). A canal or railway company is assessable both as owner and occupier (*Edin. and Glas. Rwy. Co.*, 1853, 15 D. 537; affd. H. L. 1855, 2 Macq. 331). Tramway companies are assessable both as owners and occupiers (*Craig*, 1 R. 947); and occupiers are not liable to be assessed for the same lands in more than one parish (s. 46). Clergymen are not liable to assessment in respect of their manses and glebes (*Forbes*, 1850, 13 D. 341; affd. 1852, 1 Macq. 106). The Rating Exemptions Act, 1874 (37 & 38 Vict. c. 20), enacts that no church, chapel, meeting-house, or premises exclusively appropriated to public religious

worship, and no ground exclusively appropriated as burial-ground, shall be liable to assessment. Sunday and ragged schools may, in the option of the parish council, be exempted from assessment for poor-rate (32 & 33 Vict. c. 40). Lands or houses occupied by the Crown, or by the servants of the Crown for exclusively public purposes, are not liable to be rated. This principle exempts from rates not only royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. On the same grounds, police Courts, county Courts, and even county buildings have been held exempt (*Jones*, 1864, xi. Clark's H. L. Reports, 443, per Ld. Cranworth). Militia and volunteer stores and depôts are exempt (17 & 18 Vict. c. 106, s. 36; 26 & 27 Vict. c. 65, s. 26); and so also are societies "instituted for the purposes of science, literature, or the fine arts exclusively," provided they obtain a certificate from the Lord Advocate to that effect (6 & 7 Vict. c. 38). Charitable institutions, however, are not exempt (*Greig*, 1866, 4 M. 675); nor are universities (*Greig*, 1868, 6 M. (H. L.) 97; *Kirkwood*, 1872, 10 M. 1000), nor docks and harbours (*Clyde Navigation Trs.*, 1860, 22 D. 606, and 1863, 1 M. 974; affd. 3 M. (H. L.) 100; *Leith Docks Commissioners*, 1864, 2 M. 1234; affd. 1866, 4 M. 14). The parish council may enforce payment either by ordinary petitory action (*M'Tavish*, 1876, 3 R. 412) or by summary warrant (8 & 9 Vict. c. 83, s. 88). In the case of bankruptcy or insolvency, poor-rates are preferable to all other debts of a private nature due by the parties assessed (*ib.*), even to that of a heritable creditor who has obtained decree in an action of poinding of the ground (*N. B. Property Invest. Co.*, 1888, 15 R. 885). Poor-rates are not subject to triennial prescription (*Munro*, 1857, 20 D. 72).

III. Relief.

(*a*) Persons entitled to Relief.—There is no definition in the Poor Law Act either of the word "pauper" or of the word "poor," but by a long series of judgments it has been determined that the following persons are entitled to relief:—(1) The aged poor, if unable to gain a livelihood by their work; (2) all persons who, by mental or corporeal weakness, disability, or permanent disease, are unable to earn their subsistence by labour, and who have no separate means of subsistence; (3) widows or deserted wives burdened with infant children; (4) orphan children under fourteen years of age. The law of Scotland, differing from the law of England, refuses a right of relief to the able-bodied poor. Ld. J.-Cl. Inglis thus defines the able-bodied poor: "A man may be able-bodied though not so strong as some other men are. The expression 'able-bodied' is a comparative term. What the statute means by an able-bodied man is a man not labouring under any disability (bodily or mental) to work so as to earn his subsistence" (*Jack*, 1860, 23 D. 173). An able-bodied man being bound to support his children, is not entitled to relief for his pupil children, even although, being out of employment, he is unable to support them (*Thomson*, 1849, 11 D. 719; affd. (H. L.) 1 Macq. 155). An able-bodied woman deserted by her husband, and burdened with young children, is entitled to relief for herself and her children. In such cases the question which arises is not whether the applicant is able-bodied to the effect of supporting herself, but whether she is able-bodied to the effect of supporting both herself and family (*Hay*, 1851, 13 D. 1223, per Ld. Robertson). A lad of sixteen out of work, and whose mother (his only surviving parent) was a pauper, was found entitled to relief (*Beattie*, 1880, 7 R. 907). A man, though able-bodied, is entitled to relief for his lunatic wife or child, and relief so given does not pauperise him (*Palmer*, 1871, 10 M. 185;

Milne, 1879, 7 R. 317; *Farquharson*, 1894, 21 R. 583). By sec. 68 of the Poor Law Act it was enacted that all assessments imposed and levied for the relief of the poor shall be applicable to the relief of occasional as well as permanent poor, provided that nothing herein contained shall be held to confer a right to demand relief on able-bodied persons out of employment. For some years, acting on the opinion of Lord Advocate (Rutherfurd) and Dean of Faculty (M'Neill), who took the view that while able-bodied persons were not entitled to *demand* relief, parochial boards were entitled to give it, parochial boards, with the entire sanction of the Board of Supervision, were in use to give temporary relief to able-bodied persons out of employment; but it was decided by the case of *Petrie*, 1859, 21 D. 614, that a parochial board were not entitled to relieve able-bodied persons under this section. The question was reconsidered and the principle affirmed in the case of *Isdale*, 1864, 2 M. 978; affd. 1866, 4 M. (H. L.) 1): "There could be no difference in principle between being entitled to relief and being entitled to demand relief. The right to give and the right to receive relief were correlative; and if there was no right to demand relief, there was none to give relief." If relief be refused, the applicant may apply to the Sheriff (8 & 9 Vict. c. 83, s. 73). If the applicant considers the relief offered inadequate, he may make a complaint to the Local Government Board, who shall inquire into the matter, and, if satisfied that the grounds of complaint are well founded, and if they are not removed, shall give the applicant a minute setting forth that he has a good ground of action against the parish from which he claims relief; and such poor person shall forthwith be entitled to the benefit of the Poor's Roll in the Court of Session; and the Local Government Board may, after an action has actually been commenced on behalf of the applicant, award him such interim aliment as they may think fit against such parish (s. 74). See POOR'S ROLL.

(*b*) FORM OF RELIEF.—The parish council may give relief to adult paupers in either of two ways: (1) outdoor, *i.e.* to the pauper in his own home; or (2) indoor, *i.e.* in the poorhouse. In the case of children, many parishes have adopted the system of boarding-out, which has been found to work well.

(1) *Outdoor Relief.*—This relief is generally given to the respectable, sober poor who, through no fault of their own, but through old age or ill-health, have become indigent. The amount of aliment (while not extravagant) should be sufficient to maintain the pauper. But an allowance which puts him in a better position than others of the same class who are not in receipt of relief must be regarded as excessive. The outdoor allowance must be allotted and fixed by the week (Local Government Board Circular, 30th October 1895).

(2) *Indoor Relief.*—By sec. 60 of the Poor Law Act a parish council in a parish of more than 5000 inhabitants may, with the approval of the Local Government Board, erect a poorhouse. By sec. 61 power is given to two or more contiguous parishes to agree to build a common poorhouse. The management of the poorhouse is in the hands of a committee appointed by the parish council or councils having interest in the house, and the responsibility for the management of the house and the welfare of the inmates rests with them and the officers under their control, the chief of which are the governor and matron. Parish councils may borrow money for the erection of poorhouses (s. 62), and they must frame rules for their regulation, which are subject to the approval of the Local Government Board. A parish council may receive into its poorhouse poor persons belonging to other parishes, and charge such rates for their maintenance

as may be approved of by the Local Government Board (s. 65). An offer of admission to a poorhouse in another parish twenty-five miles from the pauper's parish, and not contiguous thereto, is a sufficient offer of relief (*Watson*, 1853, 15 D. 448). An offer of admission to the poorhouse is in all cases a legal tender of relief (*Forsyth*, 1867, 5 M. 293).

It was early found, in the administration of the poor law, that it was necessary to test the *bona fides* of certain applicants for relief, and accordingly there was introduced what is known as the "poorhouse test," *i.e.* an offer of admission to the poorhouse, and a refusal of outdoor relief. The Local Government Board, in a circular issued on 30th October 1895, state :—"The necessity of a *test*, in certain cases at least, is now generally acknowledged, and the only practically effective *test* that can be applied is the offer of indoor relief. While outdoor relief is, and has been, the rule in Scotland, prolonged experience satisfied the bodies to whom the administration of the poor law was intrusted, that without the right to use a poorhouse they were powerless to check the growth of pauperism. It is now admitted on all hands that it is hurtful in practice (as tending to encourage imposture and immorality) to grant relief otherwise than in the poorhouse to the following classes :—Mothers of illegitimate children, including widows with legitimate families who may fall into immoral habits ; deserted wives ; wives of persons sentenced to penal servitude or any considerable term of imprisonment ; generally, all persons of idle, immoral, or dissipated habits. It has also been found advantageous to apply the 'poorhouse test' in the case of applicants who have children able to support them, or whose collateral relatives are in easy or affluent circumstances. The inmates of a poorhouse may be broadly divided into two classes : (1) the test class ; (2) the aged, the sick, and the infirm. It is obvious that the treatment of the two classes should be conducted on widely different principles. As regards the first class, strict discipline and deterrent administration are needed to make the *test* effective, and to secure order and decent conduct. As regards the second, the poorhouse should be looked upon rather as a 'house of refuge for the destitute,' and the inmates should receive liberal and sympathetic treatment" (Local Government Board Circular, 30th October 1895).

The religious wants of the inmates of a poorhouse are looked after by a chaplain, whose appointment lies with the parish council ; and a parish council may make a payment to a Roman Catholic priest in recognition of his services as a clergyman to the Roman Catholic inmates of a poorhouse (*Rankine*, 1893, 20 R. 980). By sec. 66 of the Poor Law Act the parish council have power to appoint a medical officer to attend the poorhouse, and to fix his remuneration, but, unlike the medical officer appointed by the parish council under sec. 69, he can only be removed by the Local Government Board (see *supra*).

(3) *Boarding-out of Pauper Children.*—This system was introduced with a view of giving pauper children a fair start in life, free from the handicap of being brought up as paupers in the poorhouse. Under it the children are placed by the inspector with respectable persons in some country district willing to receive them, and a small weekly aliment is paid to such persons for the children's upkeep. The Local Government Board have recently made the following statement in regard to the system :—"The system of 'boarding-out' pauper children with respectable guardians in country districts has been long in operation in Scotland, and, as repeated inquiries have proved, has been attended with the most beneficial results. But these inquiries have demonstrated at the same time that the continued success of

the system depends (*a*) upon the care and judgment with which the selection of guardians is made, (*b*) upon the thoroughness of the inspection and supervision, (*c*) upon the limitation of the number of children boarded-out in each dwelling or with each guardian, and (*d*) upon the limitation of the number of children boarded-out in each parish. Complaints have occasionally been made to the Board that the children of Roman Catholic parents have been boarded with Protestant guardians. It is obvious that friction will be avoided if the guardian to whose care an orphan or deserted child is intrusted by the parish council belongs to the religious denomination in which the child is registered, and this is the course which the Board recommend, and which is commonly followed. Any attempt at proselytism by poor-law authorities tends to impair public confidence in the impartial administration of the law" (Local Government Board Circular, 30th October 1895).

(4) *Miscellaneous.*—By sec. 69 of the Poor Law Act the parochial board were empowered to make provision for the education of "poor children who are themselves, or whose parents are, objects of parochial relief." By sec. 69 of the Education (Scotland) Act, 1872 (35 & 36 Vict. c. 62), the duty of paying for the education was extended to the case of children whose parents were "unable from poverty" to pay school fees in the compulsory standards. Owing, however, to the introduction of free education in Scotland, these sections, so far as regards the liability of parochial boards to pay for the education of poor children, have become inoperative; and sec. 88 of the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), repeals sec. 69 of the Education Act of 1872 in so far as it imposes liability on parochial boards to provide education for non-pauper children. The parochial board, however, not the school board, must provide the school books and materials required (*Haddow*, 1898, 25 R. 988). By sec. 3 of the Education of Blind and Deaf-mute Children (Scotland) Act, 1890 (53 & 54 Vict. c. 43), it is provided that if the parent of a blind or deaf-mute child between five and sixteen years of age is from poverty unable to pay for the education of such child, it shall be the duty of the school board of the parish or burgh in which such person resides to provide out of the school fund, at rates to be approved of by the Scotch Education Department, for the efficient elementary education of such child in reading, writing, and arithmetic, and for his industrial training either in a school belonging to such school board, or in some other school or institution approved of by the Scotch Education Department; and, where necessary, the school board shall be bound to provide for the boarding of the child, at some place approved of by the school board, and for the transit of such child to and from such school, provided that if the school board making any payment under this Act is not the school board of the parent's parish of settlement, it shall be entitled to relief against the school board of such parish. It is further enacted by sec. 7 that the parent of such child shall not be deprived of any franchise right or privilege, or be subject to any disability or disqualification, by reason of any payment made under the Act.

By the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41, s. 5 (4)), it is provided that parochial boards (now parish councils) shall provide for the reception of children brought to a workhouse in pursuance of the Act; and where the place of safety to which a constable takes a child is a workhouse, the master shall receive the child into the workhouse and keep him there till the case is determined, and any expenses incurred in respect of the child shall be deemed to be expenses incurred in the relief of the poor. It has been held in the Sheriff Court by Sheriff Jameson,

that the parish which receives a child into the poorhouse as a "place of safety" under the provisions of this Act has no right of relief against the parish to which the child belongs (*Stirling Parish Council*, 1898, P. L. M. (1898)).

IV. Recourse.

By sec. 70 of the Poor Law Act every parish is bound to relieve every proper case of destitution, and to continue such relief until it can find someone liable—it may be a rich relation or another parish (*Hopkins*, 1865, 3 M. 424, per Ld. Justice-Clerk). By sec. 71 the relieving parish can recover repayment of the relief granted from the parish to which the pauper may ultimately be found to belong, or "from his parents or other persons who may be legally bound to maintain him." While the relatives of the pauper liable to support him are legally bound to reimburse the parish for the advances which the parish have made, the parish has no right of action against the pauper himself for the repetition of past advances, should he thereafter be in a position to repay them (*Henderson*, 1857, 29 Sc. Jur. 559; *Campbell*, 1885, 12 R. 713). Nor is the pauper bound to grant a disposition *de futuro* of such means as he might acquire (per Ld. Rutherfurd Clark in *Campbell, supra*). But "if a pauper is put upon the poor's roll upon the footing that he is destitute, and it turns out that he has hidden away the savings of years,—in such a case the parochial board would be entitled to demand from these savings, which he had from the beginning of his alleged destitution, repayment of the moneys expended on his behalf" (per Ld. Ordinary (Fraser) in *Campbell, supra*; see also *Dick*, 1895, P. L. M. (1895), p. 130). Actions of relief may be brought either in the name of the parish council, or in that of the inspector of poor, as representing the parish council, and are competent either in the Sheriff Court or the Court of Session.

(*a*) Recourse against Relatives.—Certain persons are liable *ex debito naturali*, others *ex jure representationis*, to aliment their indigent relatives. Those liable *ex debito naturali*, in the order of their liability, are: (1) Husband for a wife. It has not been the subject of judicial determination in the Court of Session whether a wife with separate estate is bound to aliment her indigent husband, but it is thought that she is not so liable (*Fingzies*, 1890, 28 S. L. R. 6; *M'Dougall*, 1894, P. L. M. (1894), 595 (where it was so decided in the Sheriff Court of Lanarkshire)); (2) children; (3) grandchildren; (4) father; (5) mother; (6) paternal grandfather; (7) paternal grandmother; (8) maternal grandfather; (9) maternal grandmother, etc. Those only are liable, however, who are in such a position as "to have a superfluity after providing for the maintenance of themselves and their own families" (*Hamilton*, 1877, 4 R. 688, per Ld. Pres. Inglis). A husband married prior to the passing of the Married Women's Property Act, 1877 (40 & 41 Vict. c. 29), is bound to aliment his wife's indigent parents (*Reid*, 1866, 4 M. 1060; *Foulis*, 1887, 14 R. 1088), but if married subsequent to that Act, only to the extent to which he was *lucratus* by the marriage (*M'Allan*, 1888, 15 R. 863); an illegitimate son is not bound to aliment his parents (*Clarke*, 1891, 18 R. (H. L.) 63). A father is not bound to aliment the widow of his deceased son (*Hoseason*, 1870, 9 M. 37). A stepmother is not liable to aliment her stepson (*M'Donald*, 1846, 8 D. 830).

Collateral relatives are not liable *ex debito naturali* to aliment the pauper, but a son who succeeds to the family estate may be liable *ex jure representationis* to aliment his brothers and sisters (Ersk. *Inst.*, Ld. Ivory's

edition, i. 6. 58; *Stuart*, 1848, 10 D. 1275; *Hoscason*, per Ld. President, *supra cit.*). This liability, unlike the liability arising *ex debito naturali*, may be discharged by a single payment.

By sec. 80 of the Poor Law Act, 1845, a husband or father who neglects to maintain his wife or child, being in a position to do so, whereby the wife or children become chargeable to a parish, is liable to imprisonment. This applies to the case of a mother or putative father of an illegitimate child; and the mother of such a child, holding a decree for aliment to be paid by the putative father, may enforce payment of arrears by an application for a warrant of imprisonment under the Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42; *Cain*, 1892, 19 R. 813; *Cook*, 1889, 16 R. 565). A parish council who has supplied aliment can only obtain a decree for sums actually expended (*Den*, 1891, 19 R. 77); and where it has obtained a decree for reimbursement, has no power of applying for a warrant of imprisonment (*Tevendale*, 1883, 10 R. 852).

(*b*) Recourse against other Parishes.—By sec. 71 of the Poor Law Act, 1845, a parish council who has relieved a pauper under sec. 70 has recourse "against the parish or combination within Scotland to which he may ultimately be found to belong." (For the Law of Settlement, see Settlement.) The *onus* of proving that the pauper belongs to the parish against which recourse is sought is upon the relieving parish. It is not enough to call two adjoining parishes and say—"either one or other of you two is liable as the parish of birth," and then leave the question to be fought out between them. The relieving parish must make out its case against some parish (*Anderson*, 1864, 3 M. 253, per Ld. Cowan). It is different where the relieving parish has discovered the undoubted parish of birth, and also calls the parish of an alleged residential settlement; in that case the pursuer may retire from the field (*ib.*). In the latter case the *onus* is on the birth parish to show that a residential settlement has been acquired (*Allan*, 1868, 6 M. 358, per Ld. J.-Cl. Patton); but once a residential settlement has been acquired, in a question of liability between such settlement and a birth settlement, the *onus* is on the parish of the former to prove that such residential settlement has been lost (*Greig*, 1860, P. L. M. (1860), 593).

A parish which has relieved a pauper belonging to another parish shall have no right of relief against such parish unless the inspector of the former parish shall give written notice of chargeability to the inspector of the latter (8 & 9 Vict. c. 83, s. 71). The notice must be in writing, it must be addressed to the inspector of poor of the parish, and it must be accompanied by a statement of the circumstances of the case (Board of Supervision Circular, 6th June 1887). It is important to observe these three conditions, as the parish of settlement is not liable for relief given prior to the date of the statutory notice. Where a pauper has become chargeable, and notice is given of such chargeability to the parish of his settlement, and subsequently thereto such pauper ceases to be chargeable, and again becomes chargeable, it depends upon the circumstances of each case whether a new notice of the second chargeability is necessary (*Beattie*, 1866, 4 M. 427, per Ld. J.-Cl. Inglis). In one case, where a lapse of twenty months occurred between the pauper's rehabilitation and new chargeability, it was held that a new notice was necessary (*ib.*; see also *Beattie*, 1875, 2 R. 923). Whether a claim is barred by *mora* depends upon the special circumstances of each particular case (*Jack*, 1864, 2 M. 1221; *Lemon*, 2 M. 454).

It is the duty of the inspector of poor to whom statutory notice of

chargeability has been sent, to make inquiries, and either admit or refuse liability. An admission, once given, binds the parish. "When an admission is asked by one parish, and is deliberately and formally given by another parish, such admission, both in law and in fairness, should never be gone back upon so long as the pauper remains chargeable. If it be deliberately given, the matter is put an end to, just as if there had been a final decision by a Court of law, or by the Court of last resort" (*Dempster*, 1875, 6 R. 278, per Ld. Gifford; *Beattie*, 1875, 2 R. 330). Even where the admission was given on a wrong interpretation of the law (*Arthur*, 1871, P. L. M. (1871), 278), or on erroneous information obtained by the parish which received the statutory notice (*Innes*, 1868, P. L. M. (1868), 531), it was held that the admission was binding.

Relief of Seamen's Wives and Families.—The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 182 and 183), enacts that in the event of the wife or any of the children or step-children of a seaman becoming chargeable during his absence on a voyage, the parish shall be entitled to be reimbursed the amount advanced on their account out of the wages due the seaman, to the extent of one-half of his wages if only one member of his family is chargeable, and two-thirds if two or more are chargeable. Notice of the claim must be given to the owners of the vessel on which the seaman is serving, requesting them to retain the proportion of wages claimed, and the claim is made good by an application to a Court of summary jurisdiction.

In the case of a foreign seaman whose country has not a consular officer in the United Kingdom, and who, having been brought to the United Kingdom in a British or foreign ship, has been left there, and become chargeable within six months, the master or owner of the ship, or in the case of a foreign ship, the consignee of the ship, is liable to a fine of £30 unless he can show that the seaman quitted the ship of his own accord, or that he was afforded an opportunity of returning to his own country, or to the country in which he was shipped. In the case of a fine being imposed, the Court may order the whole or any part of the fine to the relief or sending home of such seaman (57 & 58 Vict. c. 60, s. 184).

Relief of Natives of India.—In the case of Lascars or other natives of India who have come as seamen to the United Kingdom, to whom relief has been granted, the Secretary of State for India, upon notice being given by the relieving parish, repays the amount expended on such relief (57 & 58 Vict. c. 60, s. 185).

Relief of Navy and Army Pensioners.—The pensions of army and navy pensioners who obtain relief for themselves or families are payable to the parish (Royal Warrant, 1890, s. 1193; and 19 Vict. c. 15): and it is made lawful, but not compulsory, for parish councils to grant relief to navy and army pensioners on their assigning their next quarterly payments of pension or allowance (2 & 3 Vict. c. 51).

V. Removal of Paupers.

(*a*) To Parish of Settlement.—This is regulated by sec. 72 of the Poor Law Act, 1845, which enacts that where the parish of the pauper's settlement does not make satisfactory provision for the weekly subsistence of a pauper, the relieving parish may, if the pauper is not so ill and infirm as to be unable to be removed, remove him to the parish of settlement at the expense of the latter parish. The parish of settlement is entitled to remove the pauper to its own district. The relieving parish is responsible

for the relief, proper treatment, and entire charge of the pauper; and it is not entitled to make a charge against the parish of settlement for visiting or inspecting (*Hay*, 1858, 20 D. 480). Where a relieving parish offers to remove a pauper to his parish of settlement, and the pauper declines to go, the relieving parish may refuse further relief (*M'Intosh*, 22 D. 1423). By the Poor Law (Scotland) Act, 1898 (61 & 62 Vict. c. 21), s. 3, subsec. 1, a right of appeal against removal to the Local Government Board is given to any pauper, provided he shall have resided continuously for not less than one year before the date of the application for relief in the parish in which he applies for relief.

(*b*) To England and Ireland.—This is now regulated by the Poor Removal Act, 1862 (25 & 26 Vict. c. 113). The inspector of poor, or some other officer authorised by the parish council, may make application, signed by him, to the Sheriff or any two justices of the peace of the county in which the parish is situated for a warrant for removal to England or Ireland of paupers belonging to those countries who have become chargeable. The Sheriff or justices must see the pauper himself, and be satisfied that he is in such a state of health as not to be liable to suffer bodily or mental injury by the removal (25 & 26 Vict. c. 113, ss. 1 and 2). The decision of the Sheriff or justices is not appealable. The warrant of removal must contain (1) the name and reputed age of every person ordered to be removed; (2) the name of the place in England or Ireland where the Court shall find that the pauper was born, or last resided for three years (three years being sufficient residence by the law of England to acquire a residential settlement), or, if that cannot be ascertained, the port or union or parish that seems most expedient; and (3) a statement that an examination into the state of the pauper's health was duly made. A copy of the warrant must be sent, twelve hours before the removal, to the parish to which the pauper is to be sent (s. 3). In the event of a pauper who has been removed returning to Scotland and applying for relief to the parish from which he was removed, he is liable to be imprisoned, on conviction, for such a period, not exceeding two months, as the Sheriff shall think proper (8 & 9 Vict. c. 83, s. 79). A pauper may be removed with his own consent without a warrant, but in that case the parish council or inspector of poor must make arrangements "for the due and proper removal" of such pauper (*ib.* s. 77). It is not a sufficient compliance with this section to supply the pauper with funds, and allow him to find his own way to his parish of settlement (Board of Supervision Circular, 15th February 1866). Removing officers, in carrying out removals, have the powers of constables (*ib.* s. 78). Women, and children under the age of fourteen, must not be removed as deck passengers during winter (25 & 26 Vict. c. 113, s. 7). A foreigner who has acquired a settlement by residence is entitled to relief (*Higgins*, 1824, 3 S. 239). By the Poor Law (Scotland) Act, 1898 s. 3, subsec. 1, it is enacted that where an English born or Irish born poor person has resided in Scotland for not less than five years (of which not less than one year shall have been continuously in the parish in which he applies for parochial relief), and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received parochial relief, he shall, on thereafter becoming chargeable to any parish in Scotland, be irremovable from Scotland, and shall be maintained by the parish to which he has so become chargeable. A right of appeal to the Local Government Board against removal is also given to those English and Irish paupers who have not resided continuously for five years in Scotland (*ib.* s. 5).

VI. Pauper Lunatics.

A pauper lunatic is any lunatic towards the expense of whose maintenance any allowance is given or made by a parish council (25 & 26 Vict. c. 54, s. 1). In every case in which any pauper is insane or fatuous, the parish council must, within fourteen days from the time when such pauper was declared or known to be insane or fatuous, provide for his removal to an asylum for lunatic patients (8 & 9 Vict. c. 83, s. 59). The inspector of poor must within seven days, under a penalty of £10 in case of failure, notify to the chairman of the parish council, and to the secretary of the Board of Lunacy, the name and residence of any pauper lunatic within the parish, whether the lunatic be chargeable to his parish or another, and whether the residence of such lunatic be in the asylum or elsewhere (Lunacy (Scotland) Act, 1857 (20 & 21 Vict. c. 71), s. 112). If a parish council, after receiving such notification, and after requisition by the Lunacy Board, shall refuse or neglect, for twenty-one days after the requisition, to provide for the removal of a lunatic pauper, the Board of Lunacy may take such measures as are necessary for the removal of such pauper lunatic to an asylum, house, or lunatic ward of a poorhouse, and the whole expense of such removal, and all subsequent expenses incurred for the maintenance in respect of such lunatic, shall be recoverable from the parish council, but subject to any right of relief which the disbursing parish council may have against the parish council liable for the support and maintenance of the lunatic (Lunacy (Scotland) Act, 1862 (25 & 26 Vict. c. 54), s. 18). Where lunatic paupers are not dangerous, they may be received in lunatic wards of poorhouses licensed for the purpose by the Board of Lunacy (*ib.* s. 3). This may be done without the order of the Sheriff (*ib.* s. 4). They may be received in houses licensed by the Lunacy Board (*ib.* s. 5). The parish of the pauper lunatic's settlement at the time of his reception into an asylum shall be liable for his maintenance therein while the lunacy continues (20 & 21 Vict. c. 71, s. 75). The settlement of the lunatic pauper cannot change so long as the lunacy continues (*ib.*; see Settlement). The parish of his settlement shall also be liable for the expense of his removal to an asylum (*ib.* s. 76); and if the lunatic pauper subsequently succeeds to means, the parish council are not entitled to be reimbursed for the sums expended on him (*Campbell*, 1885, 12 R. 713). If the parish of the settlement of the lunatic pauper cannot be ascertained, the parish in which he is found is liable in the first instance for the expenses of his removal and maintenance, the amount to be fixed by the Sheriff (*ib.* s. 78). The inspector of poor of a parish interested, or relations of the lunatic pauper, or other parties interested in the settlement, may have access to the pauper in presence of the inspector of the district (*ib.* s. 79). Pauper lunatics from other districts may be admitted into district asylums in other parishes if the accommodation in such districts is greater than they require (*ib.* s. 80). The Lunacy Board may grant licences to institutions for the reception of imbecile children (25 & 26 Vict. c. 54, s. 7). On the application of the inspector of poor of the parish liable for the maintenance of a pauper lunatic, the Board may authorise his removal or liberation on probation (*ib.* s. 16), but such pauper lunatic remains subject to inspection by the Board (Lunacy (Scotland) Act, 1866 (29 & 30 Vict. c. 51), s. 8). A parish council may authorise the discharge of any pauper lunatic chargeable to them, unless the superintendent of the asylum represents that he is not in a fit state to be discharged (*ib.* s. 9). A parish council may also direct that a pauper lunatic's name be removed from the poor-roll, and may

intrust the disposal of such lunatic to any party who shall undertake to provide, in a manner satisfactory to the parish council, for his care and treatment (*ib.* s. 11). (For the law applicable to the settlement of a lunatic pauper, see SETTLEMENT.) See LUNACY ACTS.

Poor's Roll; Probabilis causa litigandi. — The poor's roll is the roll of persons who, by reason of poverty, are admitted to sue or defend *in forma pauperis*. In the Scottish Courts this privilege rests upon statutory authority of very ancient date—the Act 1424, c. 45, which provides that "Gif there be onie pure creature, for faulte of cunning, or expenses, that cannot, nor may not follow his cause, the king for the love of God, sall ordaine the judge, before quhom the cause suld be determined, to purwey and get a leill and wise advocate to follow sik pure creatures causes: And gif sik causes be obtained, the wranger sal assyith baith the partie skaithed, and the advocatis coastes and travel."

It will be convenient to deal with the detailed regulations for admission to the poor's roll under the following divisions:—

I. Court of Session.
II. Sheriff Court.
III. House of Lords.
IV. Criminal Courts.

I. IN THE COURT OF SESSION.

The conditions of admission to the poor's roll are that the applicant is qualified on the ground of poverty, and that he has a *probabilis causa litigandi;* after admission, he is entitled to have his cause conducted gratuitously by the counsel and agents for the poor, and is exempt from all Court fees and charges. Admission may be granted at any stage of the cause (*Miller*, 1838, 16 S. 812).

It is unnecessary to recall the various Acts of Sederunt which have from time to time regulated the poor's roll. The present article is concerned only with those still in force.

APPOINTMENT OF COUNSEL AND AGENTS FOR THE POOR. — By A. S., 16th June 1819, the Faculty of Advocates are directed to appoint annually six of their number to be advocates for the poor; and the Writers to the Signet, and the Agents or Solicitors, are each directed to nominate four of their number to be writers and agents for the poor. The body of law agents admitted to practise in the Court of Session by the Law Agents (Scotland) Act, 1873, do not appoint agents for the poor. Under this Act of Sederunt it was formerly the duty of the counsel and agents so appointed to report to the Court whether the applicant had a *probabilis causa*, and, after admission, to conduct the pauper's cause. But the A. S., 21st December 1842, which now regulates the poor's roll, provides that the Faculty of Advocates, the Writers to the Signet, and Solicitors (in the Supreme Courts), besides electing counsel and agents for the poor as formerly, shall also respectively name two advocates, one writer to the signet, and one solicitor each year, to act exclusively as reporters on the *probabilis causa* of the pauper applicants for the benefit of the poor's roll (s. 1).

PROCEDURE FOR ADMISSION TO POOR'S ROLL.—The applicant must produce a certificate signed by the minister and two elders of the parish where he resides, setting forth his circumstances according to a formula annexed to the Act of Sederunt (s. 2). The formula states the applicant's age, whether married or not, the number of his children, the length of his

residence in the parish, the amount of his property, his trade and earnings, and whether he have any other depending lawsuit (Schedule A).

If the applicant's health permit, he must appear personally before the minister and elders, to be examined as to the facts required by the formula; and the minister and elders must then certify how far the applicant's statement consists with their own knowledge, or whether it rests on the information of others, or solely on the statement of the applicant, in which case they must certify whether he be of good character and worthy of credit (s. 3).

The applicant must emit the declaration before the minister and elders of his own parish, not of a parish whither he has gone to reside merely for the purpose of pursuing his litigation (*Paterson*, 1830, 8 S. 920). The Court may dispense with the attendance of the applicant before the kirk session, on the ground of his infirm health, and remit to them to report what they know of his circumstances and character (*Key*, 1878, 5 R. 524). In a petition by an invalid pauper to have the minister and elders ordained to meet in his house and receive his declaration, the Court pronounced no order, but intimated an opinion that there was "no reason why the minister and elders should not meet in the applicant's house" (*Clapperton*, 1884, 12 R. 19). Where an applicant resided in Ireland, and was in weak health, remit was made to a local magistrate (*Flynne*, 1882, 9 R. 909); and where he was in gaol, to the Sheriff-Substitute (*Frimbling*, 1831, 3 J. 364).

The certificate must be granted by the minister and elders of the Established Church of the parish, or of a legal *quoad sacra* parish (*Murrie*, 1853, 16 D. 325); not of a dissenting church (*Elphinstone*, 1836, 14 S. 463), or an illegal *quoad sacra* parish (*Bell*, 1834, 3 D. 204). Where the certificate was signed by two persons designed as elders who had long acted as such, the objection that they had never been ordained was repelled (*M'Intyre*, 1830, 8 S. 549; *A. B.*, 1833, 12 S. 127). The certificate need not be granted in kirk session; it is enough if it be signed by the minister and two elders, even on separate papers (*Morren*, 1842, 4 D. 396; *Wylie*, 1843, 5 D. 578). One elder is enough, where there is only one in the parish (*Mitchell*, 1851, 14 D. 248). Where there is no minister, or no elders, the Court will remit to the Sheriff or his Substitute (*A. B.*, 1836, 14 S. 1040; *Gellatly*, 1852, 14 D. 848). So, too, where the kirk session or any of its members are parties to the action (*Thomson*, 1829, 7 S. 301; *Anon*, 1831, 9 S. 308; *Mackellar*, 1863, 1 M. 1114). When a remit is made to the Sheriff, he is not required to grant a certificate, but merely to take the pauper's declaration (*Gellatly*, 1852, 14 D. 1046).

If the ministers and elders obstinately refuse to take the applicant's declaration, and cause him expense and delay, they may be found liable in expenses (*Morris*, 1835, 13 S. 1092); and if they refuse to grant a certificate, they may be cited to the bar, and examined on oath (*Craigie*, 1832, 10 S. 315; *Glass*, 1833, 11 S. 543; *Smith*, 1834, 12 S. 890).

The object of the certificate is to inform the Court of the truth of the applicant's declaration. It must therefore contain either (1) a docquet to the effect that the statements which it sets forth are consistent with the knowledge of the minister and elders subscribing, or of any one of them: or (2) that it is verified by persons known to them: or (3) that its credit depends entirely on the statement of the applicant. In the last-mentioned case, and then only, are they required to add whether he be of good character and worthy of credit (*M'Indoe*, 1849, 11 D. 516). A certificate that "the applicant, so far as known to us, has hitherto maintained a good character," has been held sufficient (*Dickson*, 1852, 14 D. 330). The kirk

session have no concern with the merits of the action (*Smith, supra*). Where an applicant was on the poor's roll of the parish, the Court remitted to the reporters, although the minister and elders had refused a certificate of character (*Muir*, 1849, 11 D. 517).

Ten days' intimation by post must be given to the adverse party of the time and place fixed for making the declaration before the minister and elders; the despatch of such letter to be certified by the pauper's agent, or a messenger-at-arms or other officer of the law, and one witness, in the form provided by the Act of Sederunt (s. 4, and Sched. B). Where the adverse parties are numerous, the Court may dispense with intimation (*Frimbling*, 1831, 3 J. 364; *Grassie*, 1836, 15 S. 116).

The declaration of the party, with the certificate of the minister and elders, and the certificate of intimation, are transmitted free of expense to one of the agents for the poor, and are lodged with an inventory not later than three months from the date of the declaration with one of the principal Clerks of Session, who enters the notice of application in the Minute Book (s. 5).

Eight days after the date of insertion in the Minute Book, or four days after publication of the Minute Book containing the intimation, if the papers have been lodged in vacation, the party's agent lodges a note to the Lord President of the Division, craving a remit to the reporters on *probabilis causa*. The motion for remit is then made in the Single Bills, when the Court, on hearing any objections, may either refuse the application *de plano*, or remit to the reporters. When the application comes before the reporters, they are to hear all objections, and to report whether the applicant has a *probabilis causa*, and otherwise merits the benefits of the poor's roll (s. 5).

It is to be noted that all objections to the form of the certificate and declaration must be stated when the motion is made for a remit; after remit, and a favourable report on *probabilis causa*, such objections will not be entertained (*Oal*, 1836, 14 S. 1120). So, too, the objection that the applicant is not entitled, on the ground of poverty, to the benefit of the poor's roll, must be stated before remit (*Allan*, 1872, 10 M. 510). When this is done, the terms of the remit are "to report whether the applicant has a *probabilis causa litigandi*, and also whether, in the circumstances of his application, he is otherwise entitled to the benefit of the poor's roll."

Under this special form of remit (but not otherwise), the reporters inquire and report to the Court what are the pecuniary circumstances of the applicant; and when the motion is made for admission to the roll, the objection may then be renewed. Where there is no special remit, the only question which the reporters have to consider is whether a *probabilis causa* has been established.

The report may not be made earlier than six days after the date of the remit, except of consent; and if not lodged within three months thereafter, it is held as abandoned; but the applicant may obtain new certificates, and apply *de novo* for admission (s. 5).

When an application is remitted to the reporters, the applicant's agent must lay before them a memorial of the circumstances of the case, intimating the lodgment thereof to the opposite party by post; and must direct and assist the applicant in procuring any further information required (s. 11).

The reporters are the sole judges whether the applicant has a *probabilis causa* or not; and the Court will not review their decision, unless there has been gross miscarriage of justice or failure of duty on their part (*Currie*, 1829, 7 S. 302; *Irvine*, 1842, 5 D. 372; *Robson*, 1876, 13 S. L. R. 421;

M'Intosh, 1898, 6 S. L. T. 12). But if the applicant have not been fully heard before the reporters, the Court will make a new remit (*Currie, supra*).

Circumstances which Warrant Admission.—In considering the application for admission to the roll, the Court have regard to all the circumstances—the means of the applicant, and the nature of the action.

"It is not enough that it should be inconvenient, or even highly inconvenient, for a party to bear the expense of litigation: he must make out a case of necessity, or we cannot listen to his petition" (per Ld. Gillies in *Christie*, 1830, 9 S. 169). It is impossible to formulate a more definite rule than that here stated from the numerous cases which have been decided by the Court. But some of the more recent decisions may be usefully noted.

1. *Where the Applicant has been admitted to the Roll.*—The pursuer of an action of damages for personal injury, earning 27s. a week, with a wife and four children dependent on him (*Paterson*, 1888, 15 R. 826). A wife suing with her husband for reduction of a deed on the ground of forgery, their earnings being £1 a week (*M'Gill*, 1876, 3 R. 427). A husband pursuing an action of divorce, earning 23s. a week, and burdened with two young children, in which case the wife was also admitted to the roll (*Robertson*, 1880, 7 R. 1092). An undischarged bankrupt, defender in an action of damages for seduction (*Whyte*, 1884, 11 R. 1145). The pursuer of an action of reduction, earning £1 a week, with an invalid son dependent on him (*Stevens*, 1885, 12 R. 548). In an earlier case an applicant who made relevant averments, but produced no evidence, was admitted in respect that evidence would be recoverable under a diligence, after the action was raised (*Wilkie*, 1836, 14 S. 668).

2. *Where the Applicant has been refused Admission.*—An applicant earning 25s. a week, holding two favourable judgments in the Sheriff Court, against which the adverse party advocated for jury trial (*Collins*, 1867, 39 J. 257). An unmarried man, earning 24s. a week (*Mackenzie*, 1892, 29 S. L. R. 594). The pursuer of an action of reduction and declarator, earning 31s. 6d. a week, with a wife and two children (*Macaskill*, 1897, 24 R. 999).

Reporters divided in Opinion.—When the reporters are equally divided in opinion whether the applicant has a *probabilis causa* or not, the recent practice of the Court has been to admit where the case is appropriate for trial in the Court of Session (*Marshall*, 1881, 8 R. 939; *Drummond*, 1889, 17 R. 51). But where the applicant sought to appeal against adverse judgments of the Sheriff-Substitute and Sheriff, admission was refused (*Carr*, 1885, 13 R. 113; *Watson*, 1888, 16 R. 111); and the same result followed where the appellant appealed direct from the Sheriff-Substitute to the Court of Session (*Ormond*, 1897, 24 R. 399). See also *Shanks* (1886, 13 R. 749), where the Court refused admission on the ground of the special nature of the action.

The Poor Law Amendment (Scotland) Act, 1845, provides (s. 74) that where, on a complaint by a pauper of inadequate relief, the Local Government Board minute their opinion that the complainer has a just cause of action, he shall be forthwith entitled to the benefit of the roll.

After the reporters have heard the agent for the applicant, and made their report, the case is enrolled in the Single Bills, and a motion is made for admission to the roll. An applicant under curatory should have the curator's concurrence (*A. B.*, 1833, 12 S. 197; *Rennie*, 1851, 13 D. 1257). Where a pupil applicant has no tutors, the Court will appoint a *tutor ad litem* (*Davidson*, 1865, 4 M. 276).

Procedure after Admission.—When the Court admit the applicant,

they remit his cause to one advocate, one writer to the signet, and one solicitor (in practice, either a writer to the signet or a solicitor), whose names are taken in regular rotation from the list of counsel and agents for the poor (s. 6). By them the cause is conducted to its conclusion, or as long as the party remains on the poor's roll, though they may have ceased to be counsel and agents for the poor. An entry of the admission or refusal of the application is inserted in the Minute Book (s. 7).

All warrants for admission to the roll remain in force during the dependence of the cause, provided the action is raised within three months from the date of admission; otherwise the warrant is held as recalled (s. 8). But the Court may re-admit the applicant, where there is reasonable excuse for the delay, after intimation to the adverse party (*Morrison*, 1897, unreported).

Striking off Roll.—But if the opposite party allege that such a change in the pauper's circumstances has taken place that he is no longer entitled to remain on the roll, the Court may, after inquiry, strike him off (s. 8). Similarly, if any circumstances should emerge during the dependence of the cause which, in the opinion of the Lord Ordinary, show that the pauper has not a *probabilis causa*, the Lord Ordinary may report verbally to the Court, or remit to the reporters; and if the Court or the reporters are of opinion that he has no *probabilis causa*, he may be removed from the roll unless he find caution for expenses (s. 9). A pauper may be struck off the roll if he refuse an adequate tender (*M'Intosh*, 1821, 1 S. 218; *A. B.*, 1836, 14 S. 1114).

Where an applicant has obtained a favourable report on *probabilis causa*, it is competent, before admitting him, to remit of new to the reporters, in respect of an offer by the opposite party (*Forbes*, 1834, 7 J. 65, 302).

Regulations for Counsel and Agents.—The names of the advocates and agents must be marked on the summons and defences, and upon every paper given in for the party in the cause; and no enrolment can be made except by the appointed agent, nor in the name of any but the appointed counsel. The word "poor" must be prefixed to the name of the party on every paper given into Court (s. 12).

No other advocate or agent except those so appointed may be employed, or allow their names to be used at any stage of the cause, unless, on application to the Lord Ordinary or the Court, by note signed by the advocate or agent already appointed, the assistance of one of the other advocates or agents for the poor is specially authorised (s. 13). Notwithstanding this provision, the Court have held that the Dean of Faculty, or any senior counsel, is entitled to give his assistance without special authority, on the request of counsel for the poor (*Garvie*, 1832, 10 S. 758; *Bell*, 1833, 12 S. 187); and such services are held to be gratuitous (*Robertson*, 1849, 12 D. 393; *Wark*, 1850, 12 D. 1074). And the rule has been relaxed where an agent, not authorised to act for the poor, but who had acted as agent, was found entitled to expenses for services actually performed (*Barr*, 1832, 10 S. 408). An agent refusing to act, or infringing the Act of Sederunt, forfeits his claim for expenses, and is liable to censure by the Court (s. 13). In case of neglect or failure in any of the particulars above specified, the Court, on the application of the adverse party, may open up and set aside the previous proceedings, and deprive the party of the benefit of the poor's roll, or apply such other remedy as the circumstances require (s. 14). Where a reclaiming note had been received without payment of fee-fund dues, in consequence of "poor" being improperly prefixed to the party's name, it

was held that the proceeding was illegal, and could not stop the finality of the interlocutor (*Panario*, 1828, 6 S. 695).

An agent for the poor has the same responsibility to his client for the due performance of his instructions as any other agent (*Hay*, 1868, 7 M. 32).

Expenses.—The expense of the application for admission, and procedure thereon, is not chargeable against the pauper at any future time, except to the extent of the agent's actual outlay; nor may it be charged as "expenses of process" against the adverse party; but if there have been unreasonable or vexatious opposition to the applicant's admission, the Inner House have discretion in the matter of expenses (s. 15).

A party litigating *in forma pauperis* is exempt from payment of the fees of Court; but where he is found entitled to expenses, the ordinary fees of Court, including all dues of extract issued or to be issued, must be charged in his account as if he were not on the poor's roll, and duly paid (A. S., s. 16; 1 & 2 Vict. c. 118, Sched.; A. S., 18th December 1896, s. 4); and in consistorial causes, the Court may, on cause shown, remit all or part of the fees paid by both or either of the parties (*ib.* s. 5).

But a party on the poor's roll may be subjected in expenses like any other litigant (*Gordon*, 1865, 3 M. 938); and he is liable to his agent for expenses *bonâ fide* incurred, not merely for outlay, though the Court will not permit summary diligence for their recovery (*Taylor*, 1841, 3 D. 892, 16 F. C. 936).

A pauper litigant, who has granted a disposition *omnium bonorum*, is not bound to find caution for expenses (*Barry*, 1827, 5 S. 678; *Weepers*, 1859, 21 D. 305); nor to sist a mandatary who shall be liable for expenses (*Carling*, 1826, 4 S. 556; *Middlemas*, 1828, 6 S. 511).

A pursuer in receipt of parochial relief must sue *in forma pauperis*, or find caution (*Hunter*, 1874, 1 R. 1154; *Robertson*, 1898, 35 S. L. R. 455).

Under the A. S., 1828, ss. 72, 73, a pauper litigant could not be reponed against a decree in absence without payment of such expenses as the Lord Ordinary might deem reasonable, unless under certain circumstances set forth in the Act of Sederunt (*Ord*, 1861, 24 D. 25). Since reponing notes were abolished by the Act of 1868, it seems doubtful whether the Lord Ordinary has power under sec. 23 to dispense with the statutory payment of £2, 2s. as a condition of recalling a decree in absence (Mackay, 212). But where the action is to reduce a decree in absence, at the instance of a party on the poor's roll, the Court has discretion to allow him to proceed, without paying the expenses of that decree (*Paterson*, 1844, 6 D. 953).

A husband on the poor's roll, pursuing an action of divorce, is bound to pay only such of his wife's expenses as are not avoided by her admission to the roll; and she will also be admitted (*M'Gregor*, 1841, 3 D. 1191; *Baxter*, 1845, 7 D. 639).

II. In the Sheriff Court.

The regulations regarding admission to the poor's roll in the Sheriff Court are contained in the A. S., 10th July 1839, and A. S., 16th January 1877.

Appointment of Agents for the Poor.—The Sheriff annually ordains the procurators of each district within his sheriffdom to meet and nominate such number of agents for the poor as he may direct. The agents present elect by a majority, and the Sheriff must confirm their nomination (A. S., 1877, ss. 2, 3). Where an agent so appointed resided twenty miles from the Court, the Sheriff was held to have rightly refused to confirm his

nomination (*Colquhoun*, 1850, 12 D. 851). Where the agents fail to meet or to report, or if the Sheriff decline to confirm a nomination, he may himself appoint (A. S., 1877, s. 4).

Procedure for Admission to Poor's Roll.—Generally, the procedure is similar to that in the Court of Session, and the decisions already noticed may be usefully consulted with reference to applications in the Sheriff Court.

The applicant must present, along with his petition, a certificate by the minister of the parish, or the heritor on whose lands he resides, or by two elders, bearing that it consists with their personal knowledge that he does not possess funds to pay the expense of his action. The petition is remitted to the agents for the poor, who intimate it to the adverse party. After hearing parties, or inquiring into the case, the agents report to the Sheriff, whether the petitioner has a *probabilis causa* (A. S., 1839, s. 135). They are not required, by the terms of the Act of Sederunt, to inquire into the circumstances of the applicant; but it would seem that they can competently do so, if objection is stated on that ground (Dove Wilson, 205).

The Sheriff, on considering the report, either refuses the petition or remits the cause to one of the agents for the poor (A. S., 1839, s. 135).

Procedure after Admission.—The agent so appointed is bound to act, and he continues to conduct the cause to an issue although he may have ceased to be a poor's agent.

No person other than a poor's agent may conduct a cause on the poor's roll (*ib.*; A. S., 1877, s. 6).

The Sheriff may at any time, when he sees cause, remove a party from the poor's roll (A. S., 1839, s. 135).

Expenses.—A party litigating on the poor's roll is not liable in payment of any of the dues of Court, or fees to his agent, or the sheriff officer, except actual outlay, unless expenses be awarded and recovered (A. S., 1839, s. 135). Where unsuccessful, he may be found liable in expenses, like other litigants. A poor's agent is not liable for the expenses of witnesses or the charges or allowances of sheriff clerks, shorthand writers, sheriff officers, or bar officers (A. S., 4th Dec. 1878, s. 13).

Duties of Poor's Agents.—In addition to the duty of conducting ordinary civil actions, and appearing in defence of poor persons in the Sheriff Criminal Courts, the agents for the poor are bound to act for poor persons charged criminally at the Circuit Court, and to obtain precognitions for the poor's agent in the circuit town (A. S., 1877, s. 6); to attend proofs by commission when required; and to precognosce witnesses within their district when required on behalf of pauper litigants in other districts (*ib.* s. 7).

Under the Poor Law Amendment (Scotland) Act, 1845, s. 73, where a poor person complains to the Sheriff that relief has been refused him, the proceedings are to be conducted as if the complainer were on the poor's roll (A. S., 12th Feb. 1846, s. 8).

III. In the House of Lords.

The Court of Session has no power to grant leave to appeal *in forma pauperis* to the House of Lords (*Urquhart*, 1865, 3 M. 882). Leave must be sought by petition to the House, and the applicant must establish to the satisfaction of the Appeal Committee, a *primâ facie* case for the appeal; otherwise his petition may be refused (Appeal (*Forma Pauperis*) Act, 1893, s. 1). The petition for leave must be lodged within a week from the date of presenting the appeal; otherwise the appeal will be dismissed, in respect of no security for costs; and the applicant must also lodge a copy of the

proceedings in the Courts below (House of Lords Standing Orders, Ann. Practice, 1898, ii. 446).

Leave to sue *in forma pauperis* will not be granted to one suing as a member of the public, to establish a public right (*Bowie*, 1887, 13 App. Ca. 371).

Expenses.—A pauper litigant, when unsuccessful, is not found liable in costs, nor are any official fees exacted; and he obtains gratuitously the services of counsel and agent. Where he is found entitled to expenses, the fees of the House, as well as counsel's fees, are disallowed, but the agent is entitled to his costs out of pocket, with a reasonable allowance for office expenses and clerks (*Johnston*, [1892] App. Ca. 110).

IV. In the Criminal Courts.

With the exception of the A. S., 1877, already mentioned, which requires that poor's agents shall assist in the defence of persons criminally charged before the Sheriff, and at the Circuits of the High Court of Justiciary, there are no Acts of Adjournal or other regulations which deal with this matter. But the practice in the High Court may be shortly stated.

The counsel appointed for the poor under the A. S., 1819, act alike in civil and criminal causes; while the other legal bodies who appoint agents for the poor are in use to nominate two for civil and two for criminal causes. Before each diet of the High Court the Clerk of Justiciary sends notice to one of the counsel and one of the agents for the poor in criminal causes (the names being taken in rotation); and the persons accused are entitled to the services of such counsel and agent in conducting their defence.

When the High Court holds sittings in a circuit town, any member of the bar of less than three years' standing, who may, in accordance with established usage, be in attendance at the circuit, may defend any prisoner, being instructed by the local agent for the poor, whose duty, as has been already seen, is to obtain precognitions and assist the accused in the preparation of his defence (A. S., 1877, s. 6). Where it happens that the accused has no legal adviser, the Court will appoint one to act for him, unless he expressly decline professional services (Act 1587, c. 91). If no counsel are present at circuit, the Court may appoint a Sheriff to appear on behalf of accused (*Hannah*, 1836, 1 Swin. 289).

[Mackay, *Manual*; Dove Wilson, *Sheriff Court Practice*; Macdonald, *Criminal Law.*]

Popular Action.—In Roman law a distinction was taken between *actiones privatæ*, competent only to persons who had themselves an interest in the case, and *actiones populares*, competent to any member of the public. *In popularibus actionibus . . . . quis quasi unus ex populo agit* (*Dig.* 3. 3. 43. 2). A popular action might be brought at any time in the interest of public order, or when any public right was infringed or threatened. The person who brought a popular action might, in addition to his interest as a member of the public, have a private interest of his own in the matter at issue, provided that it was not a pecuniary interest; and where several persons brought such an action at one time, the prætor selected as pursuer the person whose private interest was most considerable. Among popular actions were included those criminal actions, designed to maintain public order and protect the public interest, which any citizen was empowered to take up as representing the State. The penalty inflicted in such a criminal

action went, as a rule, to the State, but part of it frequently was given to the pursuer as a reward.

In Scots law the general rule is that no action can be brought on a question of civil right by anyone other than a person personally interested. At the same time a few actions have been admitted in our law, which in some measure partake of the character of the *actiones populares* of Roman law. Thus in actions for the punishment of usury, 1594, c. 222, abolished in 17 & 18 Vict. c. 90; in actions for penalties against gaming, 1707, c. 13; and in various actions authorised by special statutes, a reward, consisting of a certain proportion of the penalty inflicted, has been allowed to the informer. Under the head of *actiones populares*, Erskine reckons the action competent to the kinsmen of minors under the Act 1672, c. 2, and the reduction by kinsmen of a minor of deeds granted by the minor to his lesion under the Act 1681, c. 19 (Ersk. *Inst.* iv. 1. 17). Again, an action for the vindication of a public right of way may properly be described as an *actio popularis* (*Torrie & Others*, 1849, 12 D. 328; affd. 1852, 1 Macq. 65). Similarly, in an action by an inhabitant of a burgh, suing as a member of the community, against the magistrates of the burgh, concluding for declarator that the ground was vested in the inhabitants for the bleaching of clothes, and recreation, and that the magistrates had no right to erect buildings thereon, Ld. Watson observed: "This suit is truly an *actio popularis*, inasmuch as it is brought for the vindication of a right common to all the inhabitants, and in disposing of it the Court must, according to my apprehension, consider, not the interest of the individual pursuer, but the interest of the general community" (per Ld. Watson in *Grahame*, 1882, 9 R. (H. L.) 91, at p. 93).

[Hume, ii. 118; Bankt. iv. 24. 10; Kames, *Equity*, 237; Ersk. iv. 1. 17.]

Ports and Harbours.—The public general Acts relating to ports and harbours in Scotland (excepting those dealing with grants and loans, which are enumerated below, p. 355) are:—

11 Geo. III. c. 31 (White Herring Fisheries Act, 1771), ss. 11–13.
46 Geo. III. c. 143 (Public Harbours Act, 1803).
54 Geo. III. c. 159 (Harbours Act, 1814), ss. 11–16, 21–26, 28.
10 & 11 Vict. c. 27 (Harbours, Docks, and Piers Clauses Act, 1847).
14 & 15 Vict. c. 42 (Crown Lands Act, 1851), s. 2.
16 & 17 Vict. c. 93 (Burgh Harbours (Scotland) Act, 1853).
24 & 25 Vict. c. 45 (General Pier and Harbour Act, 1861).
25 & 26 Vict. c. 19 (General Pier and Harbour Act, 1861, Amendment Act).
25 & 26 Vict. c. 69 (Harbours Transfer Act, 1862).
25 & 26 Vict. c. 105 (Highland Roads and Bridges Act, 1862).
28 & 29 Vict. c. 125 (Dockyard Port Regulation Act, 1865).
39 & 40 Vict. c. 36 (Customs Consolidation Act, 1876).
57 & 58 Vict. c. 60 (Merchant Shipping Act, 1894).

In the law of England a distinction is drawn between a port and a harbour, the former being defined as a place where goods are imported or exported to foreign countries, the latter as simply a place for the safe riding of ships. At *legal ports* alone is it lawful for a ship to discharge or load when engaged in foreign trade, and the right of the Crown to determine what are legal ports has always been jealously guarded (Blackstone, *Com.* bk. I. ch. vii.). This distinction is not apparent in Scots law, and there

does not appear to be any direct prohibition of loading or discharging foreign goods at other places than legal ports. Such a restriction is implied, however, in the Customs Statutes (see 39 & 40 Vict. c. 36, ss. 46–48); and the laws concerning regulations of trade and customs are by the Treaty of Union (art. 18) declared to be the same in Scotland as in England. The Board of Trade has now the power of defining the limits of legal ports (39 & 40 Vict. c. 36, ss. 11–16).

The construction of the word "port," when it occurs in maritime documents and agreements, has occasioned considerable difficulty. The limits of a port may vary for different purposes (*General Steam Navigation Co.*, 1869, L. R. 4 Exch. 238, 245). The meaning of the word must be determined by custom and usage and the character of the document in which it appears. It may include an open roadstead, where there are no artificial works or protections for loading or unloading (*Sea Insurance Co. of Scotland*, 1830, 4 W. & S. 17); or it may be restricted, if so understood by merchants and mariners, to the limits of an artificial harbour (*The Afton*, 1887, 14 R. 544; affd. 1888, 15 R. 72). In a policy of insurance, "in the absence of qualifying words, it is never received as comprehending all that is subject to one custom-house or one port jurisdiction, but rather as being synonymous with 'place,' and identical in meaning" (M'Lachlan, *Merchant Shipping*, 393). A vessel would seem to be within the limits of a port when she is at a place where dues are payable or cargo is usually loaded and discharged (opinion of Ld. Chan. Halsbury in *The Afton*, p. 74; see also *Roelandts*, 1854, 9 Exch. 444; *General Steam Navigation Co.*, 1869, L. R. 4 Exch. 238, 245; *Sailing Ship Garston Co.*, 1886, L. R. 18 Q. B. D. 17).

Ports and harbours are either (1) *natural*, such as creeks and bays suitable for the safe anchorage of ships, without the addition of walls or breakwaters, or (2) *artificial*, which require to be made and kept in repair (Stair, ii. 3. 61). The former are free to all men for purposes of navigation (Stair, ii. 1. 5); for the use of the latter, charges may be made. The right to construct ports and harbours is *inter regalia* (Craig, *De Feudis*, i. 16. 12; Stair, ii. 3. 61). No individual has, without the consent of the Crown, a right to appropriate the shore for the purpose of making a harbour. If he does so, he cannot make a charge for the use of it (*Earl of Stair*, 1880, 8 R. 183). A proprietor of lands at the side of the sea would, however, appear to have the right to build a private pier from his lands into the sea, and to make use of the foreshore for the purpose, provided he does not *enclose* any part of it (*Colquhoun*, 1859, 21 D. 996; Rankine, *Landownership*, 257).

Erection and Maintenance.—The Crown seldom or never itself exercises the right of erecting harbours. In former times the right was usually granted by charter to subjects, frequently to burghs. In modern times harbours are usually constituted by Act of Parliament.

A grant of the right of harbour may be of any extent geographically. Its limits may be beyond the boundaries of an artificial harbour, or of burgh lands (*Magistrates of Edinburgh*, 1836, 14 S. 922; *Magistrates of Campbeltown*, 1844, 7 D. 220, 255, 482; *Trustees of the Dundee Harbour*, 1852, 1 Macq. 317). A title to a right of "free port" may be acquired by prescription (Stair, ii. 3. 61; *Macpherson*, 1881, 8 R. 706). It may likewise be lost by the operation of the negative prescription (*Trustees of the Dundee Harbour*, *supra*; *Magistrates of Renfrew*, 1854, 16 D. 348).

The right of free port is naturally accompanied by the power of exacting shore and harbour dues (Bell, *Prin.* s. 654). The amount of the dues is fixed by custom (Bell, *Prin.* s. 655; *Cowan*, 1828, 6 S. 586; *Christie*,

1828, 6 S. 813). The nature of a grant of free harbour was thus explained by Ld. Pres. Inglis: "The grantee of a harbour enjoys a beneficial interest in the subject of the grant, under certain burdens in favour of the public. He is bound to apply the harbour revenues, in the first place, to the maintenance and repair of the harbour, and to providing suitable and necessary machinery for the accommodation of vessels frequenting it. But he is not bound to extend or improve the subjects; and the balance of revenue, after providing for repairs, belongs to himself, as proprietor, for his own beneficial use (*Officers of State* v. *Christie*, 1854, 16 D. 454, 26 Sc. Jur. 206). The extent to which a grant of harbour may be profitable to the grantee may be well illustrated by the history of the harbour of Leith, which belonged under royal charter to the corporation of the city of Edinburgh, and the revenues derived from which constituted no inconsiderable part of the income of that corporation" (*Oswald*, 1883, 10 R. 472, at p. 481; see also opinion Ld. Pres. Inglis in *Milne Home*, 1868, 6 M. 189, and Bell, *Prin.* s. 655). This statement of the law ought, perhaps, to be qualified to this extent, that a grantee would appear to be bound to make such *improvements as are absolutely necessary* for the benefit of the shipping, in so far as those can be accomplished by the application of the harbour dues (*Officers of State*, *supra*, at pp. 465, 466; Bell, *Prin. ut supra*; Rankine, *Landownership*, 265), even to the extent of providing *lights* (*Bruce*, 1885, 13 R. 358). The harbour dues must be expended, in the first place, in maintaining the harbour, before paying interest on borrowed money (*ib.*).

Many harbours which were originally established under a royal grant are now managed under the provisions of local Acts of Parliament; for examples, see the cases of *Milne Home*, 1868, 6 M. 189; *Ayr Harbour Trs.*, 1876, 4 R. 79; and *Haldane's Trs.*, 1879, 6 R. 987). Statutory trustees appointed for the management of a harbour have no property in the *solum* (*Milne Home*, *supra*; see also *Carswell*, 1878, 6 R. 60). The provisions generally inserted in these local Acts were collected in the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27); and the provisions of this Act are, together with certain portions of the Lands Clauses Acts, 1845 and 1860, usually incorporated in any private Act passed since that date. The Act has no force unless it is so incorporated (s. 1). A special statute, the Burgh Harbours (Scotland) Act, 1853 (16 & 17 Vict. c. 93), was passed for the benefit of royal burghs which have not obtained private Acts of Parliament for the regulation of their harbours. Provision is made by this Act for the Town Council of any royal burgh possessing a harbour, which is not under the regulations of any local Act of Parliament, by means of simple machinery, adopting the Act. The Act incorporates the Harbours, Docks, and Piers Clauses Act, 1847 (Act 1853, s. 5), and the Lands Clauses Consolidation (Scotland) Act, 1845 (Act 1853, s. 4), except in so far as the latter Act gives power to acquire land compulsorily. The Act provides for the imposition of harbour rates by Town Councils, subject to the approval of the Board of Trade (ss. 12–15, 21–22). Power is given to the Town Council to borrow money for the purpose of extending or improving the harbour (ss. 18, 19). The bond granted under the Act for repayment is not limited to the harbour rates, but binds the burgh to pay out of the common good (*Royal Burgh of Renfrew*, 1892, 19 R. 822).

Harbours and piers may be constructed under the provisions of the General Pier and Harbour Acts, 1861 and 1862 (24 & 25 Vict. c. 45, and 25 & 26 Vict. c. 19). By this Act, provisional orders may be issued by the Board of Trade authorising the erection of piers and harbours. The consent of the Commissioners of Woods is required (Act 1861, s. 10), and the con-

struction of works is subject to the approval of the Board of Trade (1862, s. 7, as amended by 25 & 26 Vict. c. 69, s. 14). The provisions of the Harbours, Docks, and Piers Clauses Act, 1847, are deemed, subject to the provisions of any provisional order, to be incorporated with every provisional order (1862, s. 19). Every provisional order requires confirmation by Act of Parliament (1861, s. 16). These Acts only apply to works the estimated expenditure whereon does not exceed £100,000 (1861, s. 3). The port and harbour of Glasgow and the limits of the river Clyde are excluded from the Acts (1861, s. 13).

Certain piers and harbours in the Highlands are, by statute, under the control and management of the County Councils (25 & 26 Vict. c. 105, ss. 19–21; 52 & 53 Vict. c. 50, s. 11).

No person is allowed to erect any pier or quay in or adjoining to any harbour, or in any tidal river communicating therewith, without giving notice to the Board of Trade (46 Geo. III. c. 153, s. 1, as amended by 25 & 26 Vict. c. 69, s. 15). By various statutes the Public Works Loan Commissioners are authorised to lend money to harbour authorities, and by several other Acts different local authorities receive grants or loans from the Treasury for providing and maintaining harbours. Grants or loans in the latter category are mostly for the Highlands and Islands and the improvement of the fisheries. It is specially to be noted that a harbour authority has power to borrow whether or not such power is given in a special Act, and also to borrow to any extent notwithstanding any limitation of borrowing powers in a special Act (25 & 26 Vict. c. 69, ss. 20, 21). The statutes dealing with this branch of the subject applicable to Scotland are as follows:—

5 Geo. IV. c. 64 (Fisheries Act, 1824), ss. 9, 10.

17 & 18 Vict. c. 94 (Public Revenue and Consolidated Fund Charges Act, 1854).

24 & 25 Vict. c. 47 (Harbours and Passing Tolls, etc., Act, 1861).

25 & 26 Vict. c. 69 (Harbours Transfer Act, 1862), ss. 20, 21.

25 & 26 Vict. c. 105 (Highland Roads and Bridges Act, 1862).

26 & 27 Vict. c. 81 (Public Works and Fisheries Acts Amendment Act, 1863).

29 & 30 Vict. c. 30 (Harbour Loans Act, 1866).

38 & 39 Vict. c. 89 (The Public Works Loans Act, 1875), ss. 9, 10.

45 & 46 Vict. c. 62 (Public Works Loans Act, 1882), s. 7.

50 & 51 Vict. c. 37 (Public Works Loans Act, 1887), s. 4.

57 & 58 Vict. c. 14 (Fishery Board (Scotland) Extension of Powers Act, 1894).

58 & 59 Vict. c. 42 (Sea Fisheries Regulation (Scotland) Act, 1895).

Dues and Rates.—These are levied according to usage, or under the provisions of Acts of Parliament (public or private). Where the language of private Acts of Parliament was ambiguous as to the rates to be levied, the Court allowed parole proof of usage (*Girdwood*, 1829, 7 S. 840; *Magistrates of Dunbar*, 1829, 8 S. 128). Where a vessel was wrecked in a harbour, and the wreckage partly drifted ashore and was partly brought ashore within the precincts of the harbour, the harbour authorities were held not entitled to exact dues upon the wreckage (*Wallace*, 1876, 4 R. 368).

Harbour Regulations.—Power to frame harbour regulations is generally granted by their private Acts to harbour authorities. The Harbours Clauses Act, 1847 (ss. 51–76), contains regulations dealing with a number of subjects; and power is given to harbour authorities to make bye-laws

(ss. 83–90), subject to the approval of the Sheriff (s. 85). These bye-laws must come strictly within the terms of the powers in the Act (*Galloway Saloon Steam Packet Co.*, 1888, 25 S. L. R. 732).

By the Harbours Act, 1814, penalties are imposed upon persons casting ballast, rubbish, etc., into harbours. Regulations are also made by this Act for discharging and loading ballast. Statutory trustees appointed for the administration of a harbour, and having no property in the *solum*, have no right to authorise gravel and stones to be taken out of the harbour for the purpose of supplying ships with ballast (*Milne Home*, 1868, 6 R. 189; *Carswell*, 1878, 6 R. 60).

By the Merchant Shipping Act, 1894 (ss. 530–534), harbour authorities have power to remove wrecks which are dangerous to navigation; and it would appear to be incumbent upon them to do so, or to buoy them properly (*Darmont*, 1883, 11 Q. B. D. 496; see also on this subject, *The Chrystal*, [1894] App. Ca. 508; *The Utopia*, [1893] App. Ca. 492).

Masters of ships are bound to obey the lawful orders of harbour-masters, and move their vessels in accordance with them (*The Excelsior*, 1868, L. R. 2 A. & E. 268; see also *Niven*, 1897, 24 R. 883; affd. H. L. 13 May 1898, 35 S. L. R. 688).

The Act 28 & 29 Vict. c. 125 (The Dockyard Port Regulation Act, 1865) enacts rules and makes provision for the regulation of ports and harbours at or near which Her Majesty has any "dock, dockyard, steam factory yard, victualling yard, arsenal, wharf, or mooring." The rules and regulations under this Act differ from those commonly in force in ordinary ports and harbours. It is believed that there is no port or harbour of this description in Scotland, but such might be created at any time (ss. 2, 3).

Duties and Liabilities of Harbour Authorities.—It is the duty of harbour authorities to keep their harbours in such a state as to be reasonably safe for navigation, and they will be responsible for damage caused by defects (*Thompson*, 1860, 2 B. & S. 106, 119; *Buchanan*, 1884, 11 R. 531). A harbour authority is also responsible for damage to ships caused through the fault of a harbour-master, dock-master, or other employee (*The Rhosina*, 1885, 10 P. D. 24, 131; *Darmont*, 1883, 11 Q. B. D. 496; *The Apollo*, [1891] App. Ca. 499; *Renney*, 1892, 19 R. (H. L.) 11; [1892] App. Ca. 264; *Parker*, 1 July 1898, 6 S. L. T., No. 108).

Where the dock or harbour master has the absolute power of moving ships, in the event of one ship doing damage to another ship while obeying the harbour-master's lawful orders, the owner of the ship doing the damage is discharged from liability (*The Bilbao*, 1860, Lush. 149). But it is only if the damage is caused directly and solely by the order of the harbour-master that the shipowner is free. Contributory fault on the part of the crew makes the shipowner responsible (*The Cynthia*, 1876, L. R. 2 P. D. 52). The master of a ship, even while obeying the orders of a harbour-master, must move his ship in a seamanlike manner, and take all proper precautions (*ib.*). The principles applied to a vessel moving under the orders of a harbour-master are the same as those that rule in compulsory pilotage. (See PILOT, *ante*, p. 268.)

Posse comitatus—The force of the county on which the Sheriff may call to enforce legal diligence and warrants (Acts 1424, c. 44; 1425, c. 60; 1456, c. 56; 1471, c. 44; 1481, c. 80; 1540, cc. 87, 88).

Possessio decennalis et triennalis.—Because the rights of churchmen are more exposed to accidents than those of other men, owing to the frequent change of incumbents, the maxim *Decennalis et triennalis possessio non tenetur docere de titulo* has been adopted into the law of Scotland from the Canon law. Thirteen years' possession is thus sufficient to support a churchman's right to any subject as part of his benefice without a title. The presumption of a good title arising from possession may be displaced by contrary proof, and if the churchman's title is recovered, and it appears that his possession was inconsistent therewith, his right will, in the future, be strictly commensurate with his title (*Greig*, Nov. 21, 1809, F.C.; *Bishop of Dunblane*, 1676, Mor. 7950; *Representatives of Rule*, 1708, Mor. 11002). But when the minister's right, presumed from his possession, has been judicially declared, he has a title of property equivalent in every way to a proper written title. The right arising from thirteen years' possession is dependent upon the continuance of possession; but incumbents are entitled to found on the possession of their predecessors in office (*Cochrane*, 1859, 22 D. 252). A precentor is not entitled to the benefit of the rule (*Traill*, 1870, 8 M. 579).

[*Authorities.*—Stair, ii. 1. 25; More, *apud* Stair, exlvii.; Ersk. *Inst.* 3. 7. 33, 34; Ersk. *Prin.* 3. 7. 13.]

Possession.—Possession denotes the fact of having or holding a thing so that it is subject to the possessor's control (Bell, *Prin.* s. 1311; Rankine, *Landownership*, p. 1). From the mere fact of possession there arises to the possessor the power, as distinguished from the right, to exclude the interference of others. The exercise of this power introduces within the sphere of law the *animus* or intention of the possessor with regard to the subject possessed (Stair, ii. 1. 17). This *animus* is a fact, subject to proof like any other fact, though sometimes regarded as of the nature of a right (see Ersk. ii. 1. 20), and may be to hold the subject either (1) wholly for the possessor's behoof; (2) partly for behoof of the possessor, partly for behoof of another, as in the case of an ordinary tenant; or (3) wholly for behoof and in the interest of another, as in the case of a bare custodier (Stair, *v.s.*). The exercise of possession may thus be direct or indirect: by the possessor himself, which has been termed natural possession; or civilly by the hands of another for his behoof, *e.g.* by an agent, factor, trustee, or tenant (Bell, *Prin.* s. 1312; Stair, ii. 1. 10; Ersk. ii. 1. 22; Ld. Pres. M'Neill, *Union Bank*, 1865, 3 M. 765, at 772; *Orr's Tr.*, 1870, 8 M. 936).

From these facts,—the physical detention of the subject, and the *animus* or intention with which the subject is held,—certain rights relative to the subject possessed arise. For although possession is not itself a right, being "more *facti* than *juris*" (Stair, ii. 1. 8; Ld. Neaves, *Moore*, 1869, 7 M. 1016, at 1020), it is, so far as protected by the law, as much a source of legal rights as ownership or property is when similarly protected. For, a legal right is nothing more than a permission to exercise certain powers, and, in so doing, to obtain protection by the aid of the State power (see Holmes, *Common Law*, pp. 215 *seq.*).

The rights which spring from possession, and to the constitution of which possession is an essential factor, are, as regards heritable subjects, whether corporeal or incorporeal, (1) the right of the possessor to maintain or to recover possession, and (2) the right to prescribe. These rights constitute the *jura* or *commoda possessionis*, corresponding to the *possessio ad interdicta* and the *possessio ad usucapionem* of the civil law. For the rights

and remedies which arise from possession under the first head, see POSSESSORY ACTION; POSSESSORY JUDGMENT; under the second, see PRESCRIPTION.

While, in the case of heritable property, possession does not *per se* confer a title or right of property (Stair, iii. 2. 6), the want of possession does not deprive a person of the right of property whose title stands upon charter and sasine or other writ; unless there has been prescriptive possession upon an adverse title. In the case of tacks, possession is, of course, necessary in order to confer a real right. See LEASE.

In the case of moveables, possession has a wider effect. It is acquired originally by the occupation of things not formerly appropriated (see OCCUPATIO); it is acquired derivatively by tradition or delivery (Bell, *Prin.* s. 1311; Ersk. ii. 1. 10; ii. 1. 18). See DELIVERY. The principal effect of possession is to confer a real right: it converts the *jus ad rem* created by a personal contract into a *jus in re*. "Possession in moveables is like sasine in heritage. It is the badge of real right" (Ld. Neaves, *Moore*, 1869, 7 M. 1016, at 1022). Thus, the right of a purchaser of moveables (under our former law), or of a pledgee, was not perfected till possession, the real right thence arising conferring either the right of property or a right of lien or retention, according as the preceding personal contract was or was not intended to pass the property in the goods (see Ld. Neaves, *supra*). It will be observed, however, that in all these cases the resulting rights do not properly spring from possession. Thus, in occupancy, in sale, or other contracts in which delivery of possession is intended to pass the property, the rights resulting spring not from possession, but from the right of property which is thereby acquired or completed. And the same is true of the *bonâ fide* perception of rents and fruits (Rankine, *Landownership*, p. 6). See BONA FIDES. Possession, in short, is in such cases the *modus* in which property is acquired: it is the badge of property (Bell, *Com.* i. 269); the right of property attained, the subsequent rights are independent of possession. Again, in pledge, deposit, and other real contracts, the rights of lien, retention, etc., truly arise from the preceding contract, although dependent for their continuance upon possession (see Bell, *Prin.* ss. 1364, 1410).

Consequent upon its effect in completing the right of property, possession of moveables raises a presumption of property, expressed in the maxim *In pari casu potior est conditio possidentis* (Stair, iii. 2. 7; iv. 45. 17 (8); Ersk. ii. 1. 24; Bell, *Prin.* s. 1313; see *Macdougall*, 1840, 2 D. 500). This presumption may, of course, be overcome by other presumptions (*Warrander*, 1715, Mor. 10609), or by proof, which must instruct the loss of possession (Stair, *v.s.*; Ersk. *v.s.*; see *Scot*, 1665, Mor. 11616; *Ramsay*, 1665, Mor. 9114).

But possession of moveables alone is not a ground upon which creditors of the possessor are entitled to rely; nor does it entitle them to attach such moveables in their debtor's hands as if they were his own. "Every legitimate cause of possession makes an exception to the credit of apparent ownership" (Bell, *Prin.* s. 1315); and the temporary possession of goods had upon a fair and lawful title (*Scott*, 1837, 15 S. 916—furniture in possession of liferenter), by virtue of a contract of hiring (*Eadie*, 1815, Hume, 704; *Orr's Tr.*, 8 M. 936; *Duncanson*, 1881, 8 R. 563; *Union Bank*, 1865, 3 M. 765; *Marston*, 1879, 6 R. 898—hiring, with option to purchase; cf. *Hogarth*, 1882, 9 R. 964; *Murdoch*, 1889, 16 R. 396; see, however, 56 & 57 Vict. c. 71, s. 25 (2)); of location (*Robertsons*, 1882, 9 R. 772), deposit, pledge, factory, or other similar contracts, including the whole class of

contracts known to English law under the general name of bailments—has no effect in questions with the creditors of the bailee in rendering the goods subject to the diligence of the latter. In the course of ordinary contracts the necessities of commerce require that there should be a temporary separation of possession and property (Bell, *Com.* i. 271, 274 *seq.*; Lds. Ivory and Cuninghame, *Shearer*, 1842, 5 D. 132, at 136, 146). The general rule, accordingly, is that creditors are put upon inquiry as to the true nature of the title upon which moveables in the possession of their debtor are so held by him (Bell, *Prin.* s. 1366; Ld. Neaves, *Moore, v.s.* at 1022).

There may, however, be circumstances attending the possession which, upon principles of equity, are held to have the effect of exposing the goods to the diligence of the possessor's creditors, although the possessor be not the true owner. This principle is generally known as the doctrine of ostensible or reputed ownership. It has been thus stated: "As in general the possession of moveables presumes property, and the true owner ought to be aware that while the power of disposing of his goods remains uncontrolled, or ostensibly so, in another, it may raise a false credit to that other, as if he were the proprietor of the effects; so every apparent ownership of moveables which is either fraudulent, or at least careless or collusive, as not being necessary in the course of honest contracts, should entitle the creditors of the holder to take the subject, as if it actually were his property" (Bell, *Com.* i. 269; Bell, *Prin.* ss. 1315, 1316).

The circumstances which were regarded as most favouring the admission of this principle were those in which a proprietor in possession of moveables ceased to be the true proprietor, the cesser of ownership, however, being unaccompanied by any ostensible change in the possession. A recent series of cases has, however, decided that such continued possession will not avail creditors of the possessor if it be shown to be referable to a new title, *e.g.* a contract of hiring or location, following upon a fair and *bonâ fide* contract of sale (*Orr's Tr., v.s.*; *Robertsons, v.s.*; see *Darling*, 1887, 15 R. 180; *Mitchell's Trs.*, 1894, 21 R. 586). The Court will, of course, in such cases anxiously inquire into the true nature of the transaction and the good faith of parties, and a mere colourable device or simulate dealing with the goods will not receive effect. Even delivery of the goods will not avail if it be in fact merely nominal, and its effect be cancelled by an immediate restitution (see Bell, *Prin.* s. 1317; Ld. J.-Cl. Moncreiff and Ld. Neaves, *Orr's Tr., v.s.* at 949, 951; see also *Herit. Security Invest. Assoc.*, 1880, 7 R. 1094; *Cropper*, 1880, 7 R. 1108; cf. *McBain, v.i.*; *Stiven*, 1871, 9 M. 923; and cases of *Darling* and *Mitchell's Trs., supra*). The ratio of these decisions shows the true ground upon which the doctrine rests. It is not, as is sometimes stated, an extension of, nor is it based upon, the maxim that possession presumes property. The conditions, in fact, which give room for the application of each may be the same, but they are distinct in principle and in effect. The maxim is a rule of evidence—a presumption which determines upon whom shall rest the burden of proof; it goes no further, and, being a mere presumption, it yields to the fact—*presumptio cedit veritati* (Stair, iv. 45. 17; Bell, *Com.* i. 271). The doctrine of reputed ownership, in cases to which it applies, does not depend upon the presumption of property arising from possession. It prevails against the fact, and proof of the title of the true owner does not overcome it (see Brown, *Sale of Goods Act*, 80). For it draws its force from the element of fraud, collusion, or something implying negligence, fault, or at least acquiescence pleadable against the true owner (Bell, *Prin.* ss. 1316, 1317; Ld. Mackenzie,

Scott, *v.s.* at 923); in other words, it rests upon a personal bar (Lds. Blackburn and Watson, *McBain*, 1881, 8 R. H. L. 106, at 112, 116; Ld. Watson, *Herit. Reversionary Co.*, 1892, 19 R. H. L. 43, at 47: *Mitchell*, 1894, 21 R. 600; Ld. Herschell, *London Joint Stock Bank*, [1892] App. Ca. 201, at 215). "The principle of all estoppels or personal exceptions which go to bar a party from pleading a certain fact from which he would derive benefit in a question with another,—of that, *e.g.*, which in this case bars the true owner from proving, what is the actual truth, that he and not the reputed owner is proprietor,—the principle of all estoppels is that the party estopped has by his words or conduct amounting to a representation, wilfully caused the other, against whom he now attempts to set up the truth, to believe something different from that truth, and has induced him to act upon that belief, so as to alter his own previous position" (Bell, *Com.* i. 272, Ld. M'Laren's note, p. 305, where the point is fully discussed).

It has been said that the operation of this principle was affected by the passing of the Mercantile Law Amendment Act, by the provisions of which goods sold, but remaining undelivered in the custody of the seller, were declared to be excluded from the diligence of the seller's creditors (19 & 20 Vict. c. 60, s. 1). This, however, was not really so. The statute did not operate so as to pass the property in the goods: and the seller being undivested of the right of property, there was no room for any "reputed ownership" (see *Sim*, 1862, 24 D. 1033; *Edmond*, 1868, 7 M. 59).

It will be observed, however, that while "reputed ownership" is inapplicable to these and similar cases, the principle of personal exception, on which, as already stated, the doctrine is truly founded, is not excluded. A personal exception is as pleadable against the holder of a *jus ad rem* as against the holder of a *jus in re*; and this is the true ground of decision in *Sim* and like cases (see Ld. J.-Cl. Inglis, *Sim*, *v.s.* at 1039). "It is very true that inasmuch as the vendor had by the common law of Scotland before this Act (19 & 20 Vict. c. 60) was passed, the legal right of property, you could not properly say that he was the 'reputed owner' of goods of which he was himself the actual owner. But the same principle which would have made a third person become the reputed owner, so as to give a creditor the right to seize them in his possession, because the true owner had allowed them to be in his possession, appears to me to apply when you are applying the statute. If you can show that the man who has acquired the *jus ad rem* has allowed the vendor to keep possession of the goods in such a way as is quite inconsistent with his *jus ad rem*, it seems very reasonable indeed to say that that shall be considered as analogous to a case of reputed ownership, and, that being so, the Mercantile Law Amendment Act does not take the goods out of it" (Ld. Blackburn, *McBain*, *v.s.* at 113). In no view, therefore, could this statute impinge upon the principle. The provisions of the Mercantile Law Amendment Act have been repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and now, in certain cases, the property of goods is declared to pass upon the completion of the contract of sale (see ss. 16, 17, 18). The only effect upon the principle under consideration will be that the personal exception which was formerly pleaded against a *jus ad rem*, will now be pleaded against a *jus in re*, and that the term "reputed ownership" will become appropriate in cases to which these provisions apply. The doubt, therefore, which has been expressed that the effect of the statute may be to prejudice the just rights of creditors, seems unfounded (see Brown, *Sale of Goods Act*, 82).

A statutory reputed ownership, based upon similar provisions in the Factors Acts, has been introduced by the same statute (56 & 57 Vict. c. 71,

s. 25). Its operation, however, is limited to an individual purchaser or pledgee transacting with the reputed owner, and is not available to general creditors of the latter.

The effects attendant upon possession of goods, etc., by factors and mercantile agents have been elsewhere considered. See FACTORS ACTS.

The right to recover the possession of goods, failing which to demand restitution or damages for the loss, is part and parcel of the benefits of ownership. In such cases the pursuer's title to sue rests upon his right of property, not upon his possession; the old action of spuilzie, perhaps, excepted, in which the pursuer needed no other title but possession. See POSSESSORY ACTION; SPUILZIE.

Possessory Action.—The distinguishing characteristic of what is termed a possessory action is that it is based, not upon an absolute right in the person of the pursuer, but upon the fact of possession. It is described by Stair (iv. 3. 47) as an action "wherein an absolute right is not insisted for, but possession is claimed to be attained, retained, or recovered." Possessory actions, regarded in these three aspects, roughly correspond to the possessory interdicts of the civil law, the *interdicta adipiscendæ, retinendæ, et recuperandæ possessionis*—of which the best-known forms, respectively, were the interdicts *Quorum bonorum*, *Uti possidetis*, and *Unde vi* (Ersk. iv. 1. 47; see INTERDICTS IN ROMAN LAW). In the strict acceptation of the term, accordingly, possessory actions are contrasted with petitory actions, in which the pursuer proceeds upon some right in his person which is complete in itself, or which is at least prior and preferable to that of the defender (Stair, iv. 26. 1; see Ld. Deas, *Stobbs*, 1873, 11 M. 530, p. 534). Except in connection with what is termed a possessory judgment (*q.v.*), purely possessory actions are now seldom known in practice.

In our older law, however, special forms of possessory actions were in use, *e.g.* spuilzie, an action directed against one who intermeddled with moveables in the lawful possession of another, without his consent or due process of law (Stair, i. 9. 16 *seq.*; iv. 3. 47; Bankt. i. 10. 124); and, as regards heritable subjects, the action of molestation, directed to protecting the possession of a person who was disturbed in the enjoyment of a right, chiefly used in questions as to marches (Stair, i. 9. 28; iv. 27. 1 *seq.*; Bankt. i. 10. 150; Ersk. iv. 1. 48); the actions of ejection and intrusion, the first given against an ejector to a lawful possessor or tenant of a heritable subject, who was violently turned out of his possession, the second directed against one who had intruded into the void possession of any heritable subject (Stair, i. 9. 25; iv. 28. 1 *seq.*; Bankt. i. 10. 145; Ersk. iii. 7. 16; Rankine, *Landownership*, p. 19); and the action of succeeding in the vice, which applied to cases where one entered into possession in the place of a tenant bound to remove: such entry being made in collusion with the outgoing tenant, and without the landlord's consent (Stair, ii. 9. 45; Bankt. i. 10. 149). See SPUILZIE; MOLESTATION; EJECTION AND INTRUSION.

These special forms of action, although now obsolete in practice, may still be competently resorted to, and, in certain cases, afford the appropriate remedy (see *Dickson*, 1863, 1 M. 1157). In the vast majority of cases, however, procedure by interdict, or suspension and interdict, is resorted to for the determination of possessory questions. Interdicts, of course, may be, and frequently are, based upon an absolute right in the complainer as

well as on the fact of possession, and to this extent may thus fall within actions petitory as defined by Stair; but in all interdicts the immediate question in dispute, whatever be the ground of action or the practical result of declaring the interdict perpetual, refers to possession or the temporary use of a right, and they may thus be considered possessory in their nature (Mackay, *Prac.* i. 360; More, *Lect.* ii. 252).

The remaining actions which may be classed as possessory are the actions of Removing and of Maills and Duties, by which the possession or the rents of lands are recovered. These actions may be either petitory or possessory in their nature (Stair, iv. 22. 14; iv. 26. 4 (5); Bankt. iv. 24. 49; Ersk. iv. 1. 49), according to the nature of the possession had, and whether parties are in a position to plead the benefit of a possessory judgment. See MAILLS AND DUTIES; TENANT; see also POSSESSORY JUDGMENT.

The Sheriff has jurisdiction in all possessory actions (Ersk. i. 4. 3; *Somerville*, 1739, Mor. 10653; *Wright*, 1827, 6 S. 132; *Gibb*, 1837, 16 S. 169; *Johnstone*, 1862, 24 D. 709; see *Thomson*, 8 S. 630); and the Dean of Guild has a similar jurisdiction within burgh (Ersk. i. 4. 24; *Neilson*, 1750, Mor. 7584; see *Smellie*, 1868, 6 M. 1024).

As already stated, questions as to possession now generally occur as incidental to actions in which the question of right is raised, the Court having, of course, the power of regulating interim possession. And now, by the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 89), the restoration of a state of possession already inverted may be obtained under a process of suspension and interdict. "Where a respondent in any application or proceeding in the Bill Chamber, whether before or after the institution of such proceeding or application, shall have done any act which the Court, in the exercise of its preventive jurisdiction, might have prohibited by interdict, it shall be lawful for the said Court, or for the Lord Ordinary on the Bills, upon a prayer to that effect in the note of suspension and interdict, or in a supplementary note, to ordain such respondent to perform any act which may be necessary for reinstating the complainer in his possessory right, or for granting specific relief against the illegal act complained of." Prior to this enactment, procedure by suspension and interdict was generally regarded as no longer timeous when the act complained of was already completed (Mackay, *Prac.* ii. 217). By the same statute, also, the restoration of property, real or personal, which has been violently or fraudulently taken away, may be decreed under a summary petition to the Court (31 & 32 Vict. c. 100, s. 91). See POSSESSION.

Possessory Judgment.—What is known as a possessory judgment is really a privilege accorded by our law, whereby one who has been in the lawful possession of heritable property upon a written title for seven years without interruption is entitled to be continued in his possession until his title of possession be reduced, or a preferential right be established by declarator (Stair, iv. 17. 2; iv. 45. 17; Bankt. ii. 1. 33; Mackay, *Pr.* i. 360). The origin of this particular rule of our law is by Stair and Erskine stated to have arisen from the necessity for protecting those in possession of subaltern rights of feu. Such persons, not being masters of the writs and titles of the lands, which in general remained with the overlord, were exposed to the risk of eviction by one who, having no good title to the property, might yet produce a title prior to that in the hands of the possessor. In

such cases, the benefit of a possessory judgment enabled him to resist summary dispossession, unless and until it was determined in course of law that his adversary's right was truly preferential. Opportunity was thus afforded to the possessor of defending himself by his author's rights (see Stair, iv. 26. 3; Ersk. iv. 1. 50). The benefit of a possessory judgment was twofold: in the first place, as above stated, it afforded a defence against dispossession until reduction or declarator; in the second place, until he was put in *malâ fide* by an adverse decree, it secured to the possessor in the meantime, and without liability to account therefor, all the rents and profits of the subject possessed (Stair, iv. 17. 2; iv. 45. 17; Bankt. ii. 1. 33; iv. 24. 49).

As regards the title required as the foundation for a possessory judgment, either in resisting disturbance when in possession, or when seeking to summarily recover possession which has been lost, it suffices that this be a lawful title of possession *ex facie* applicable to the subjects. Originally either infeftment, which, however, might be on a limited title, *e.g.* in life-rent or in security (Stair, iv. 22. 5, 8), or a lease, seems to have been requisite (Stair, iv. 26. 3; Bankt. ii. 1. 33; Ersk. iv. 1. 50; see *Baird*, 1695, Mor. 10623; *Johnstone*, 1668, Mor. 10621); but this restriction has been departed from. Thus a charter or disposition without infeftment or other personal title, will ground right to a possessory judgment (*Knox*, 1827, 5 S. 714; cf. *Glendinning*, 1716, Mor. 9643, 10610, where, however, the possession, which was of church lands, was of long standing; *Thomson*, 1830, 8 S. 630, per Ld. Newton, at 631). In a comparatively recent case, however, Ld. J.-Cl. Inglis expressed doubts as to how far a possessory judgment in a process of interdict could competently be granted, the complainer not being infeft (see *Dickson*, 1863, 1 M. 1157, at 1161). A sasine without its warrant has been held a sufficient title (*Macadam*, 1766, Mor. 2755, 10654). A tack has always been regarded as grounding right to a possessory judgment (Ld. Cowan, *Macdonald*, 10 M. 94, at 98; *Galloway*, 1885, 12 R. 578); at least where the tack has a longer duration than seven years, and bears to flow from the heritable proprietor (Stair, ii. 9. 10; Ersk. ii. 6. 28; *Hume*, 1676, Mor. 10641; *Robertson*, 1681, Mor. 10643; see *Duke of Lauderdale*, 1678, Mor. 6427; *Hepburn*, 1706, Mor. 10644; *St. Andrews Golf Club*, 1887, 14 R. 686). Possessory judgments may proceed upon servitude rights, upon any title which is not expressly exclusive of the servitude claimed (Stair, ii. 7. 22; iv. 17. 2; *Stewart*, 1698, Mor. 10644, 15991; cf. *Maxwell*, 1636, Mor. 10639). Thus, a bounding charter without a clause of parts and pertinents, containing no reference to a servitude, and upon which no infeftment had passed, has been held sufficient (*Liston*, 1835, 14 S. 97, questioning *Saunders*, 1830, 8 S. 605; *Knox*, *v.s.*, Ld. Balgray, at 714; see *Macdonald*, *v.s.*; *Carson*, 1863, 1 M. 604). As to the parties whose possession may, in such cases, be founded on, see *Drummond*, 1890, 17 R. 316. But there must be some writ upon which to found the possession (*Neilson*, 1828, 7 S. 182; *Carson*, *v.s.*); unless, perhaps, where the possession is based upon a public right (Ld. J.-Cl. Moncreiff, *Calder*, 1870, 8 M. 645, at 647; see *M'Kerron*, 1876, 3 R. 429, Ld. Ormidale, at 434). The title also must be one to which the alleged possession can be imputed (*Hunter*, 1827, 5 S. 238), and must be unambiguous, and *primâ facie* applicable to the subjects alleged to have been possessed in virtue thereof. So, where a declarator is necessary in order to explicate this question (*Cruickshank*, 1854, 17 D. 286), or where other extrinsic proof of the applicability of the title is required (*Mackie's Trs.*, 1832, 11 S. 157), such title will not form a sufficient basis for a possessory judgment. No possession will avail where the title clearly

excludes or is inconsistent with the possessory right claimed (see More, *Notes*, cxlviij: *Bridges*, 1 S. 373: *Haigues*, 1705, Mor. 10623—where the title was expressly conditioned by the encroachment complained of: *Lockhart*, 1724, Mor. 10625).

The benefit of a possessory judgment cannot be pleaded by the creditor in a *debitum fundi*, *e.g.* an annualrent, whether in a question with the owner or another creditor (*Lady Clerkington*, 1668, Mor. 10646: *Boyd*, 1675, Mor. 10651), for such "give no right to possess the rents or fruits, but only to distrain for the debt, and the possession is in him who has the right of property" (Bankt. ii. 1. 33: see *Cant*, 1683, Mor. 10633, 10643). Nor, for similar reasons, is a possessory judgment pleadable in defence against the diligence of a creditor in a *debitum fundi* (Stair, iv. 17. 3: *Adamson*, 1662, Mor. 3346, 10645: *White*, 1665, Mor. 10646: *Guthries*, 1677, 3 Bro. Supp. 140: *Cant*, *v.s.*). Finally, upon the principle of personal exception, the benefit of a possessory judgment will not be granted to any party in prejudice of one to whom that party has himself disponed, whether as principal or as consenter (*Lady Knapcirn*, 1665, Mor. 10432).

As regards the character of the possession requisite to found a possessory judgment, it is similar to that which is required in the case of positive prescription. It must be *bonâ fide* (see *Montgomery* and *Countess of Dunfermline*, *infra*), at least in a question between the party pleading it and his author: not violent, clandestine, or precarious (Bankt. ii. 1. 33; see Ld. Benholme, *Calder*, 1870, 8 M. 645, at 648): continuous (*Harper*, 1672, Mor. 10628): peaceable and uninterrupted (*Montgomery*, 1664, Mor. 10627: *Earl of Winton*, 1668, Mor. 10627: *M'Kerron*, *v.s.*): and as matter of right, not of mere tolerance (Ld. J.-Cl. Moncreiff, *Calder*, *v.s.*, at 647). It runs against minors (*Earl of Winton*, *v.s.*). The privilege of a possessory judgment may be pleaded even although the seven years' possession had by the possessor or his authors do not immediately precede the action, provided that seven years have not intervened since his possession for that period (Stair, iv. 26. 4: iv. 26. 10: Ersk. iv. 1. 49: *Dalmahoy*, 1628, Mor. Sup. Vol., Durie, p. 49; see *Wilson*, 1855, 17 D. 534). In determining the character of the possession had, the possession prior to the seven years may be inquired into by the Court, not in order to determine any question of right, but in order to clear the quality of the possession (Ld. Deas, *Stobbs*, 1873, 11 M. 530, at 535; Ld. Ormidale, *M'Kerron*, *v.s.* at 433, see Ld. Gifford, at 437). For although the presumption is that the possession has been lawful (Stair, iv. 45. 17 (7)), this may be rebutted: and if it be shown to have begun in violence or not in *bona fides* (Ld. Neaves, *Calder*, *v.s.* at 648), the initial vice will taint the subsequent possession, and prevent the benefit from attaching (*Maxwell*, 1673, Mor. 10628: *Countess of Dunfermline*, 1698, Mor. 10630).

The effect of a possessory judgment, as already noticed, is to secure the possessor in his rights until his title be reduced or declared void, and he be put in *mala fide*. Till this happen, he enjoys all the rights of a *bonâ fide* possessor. Replies against his title are reserved against the process of reduction or declarator (*Cunningham*, 1623, Mor. 2719: *Bishop of Edinburgh*, 1636, *id.*: *Hume*, *v.s.*: *Macadam*, *v.s.*: see *Hunter*, 1827, 5 S. 238): in which process the prior possessory judgment cannot generally be pleaded as *res judicata* (see Ld. Kinloch, *M'Callum*, 1861, 23 D. 729, at 731).

The benefit of a possessory judgment may be appealed to either in support of the pursuer in a possessory action, or as a defence (Stair, iv. 22. 5: iv. 26. 10: iv. 26. 15: Ersk. ii. 6. 28). See also Possessory Action.

Posthumous Child.—A posthumous child is one born after the death of the father. He has the same legal rights as one born during the father's lifetime. A posthumous child was found entitled, as a creditor, to aliment out of the father's trust estate (*Spalding*, 1874, 2 R. 237). He is entitled to legitim (*Jervey*, 1762, Mor. 8170). He cannot be charged to enter heir until a year and day after his birth (*Livingston*, 1627, Mor. 6870, Bro. Supp. i. 375). [Bell's *Prin.* ss. 1629 (note *a*), 1632, 1642, 1779.] See CONDITIO SI SINE LIBERIS; PREGNANCY.

Postliminium; Jus postliminii.—The *jus postliminii*, as explained by Pomponius (*Dig.* 49. 15. 14 pr.), had two aspects in Roman law. It related to (1) the rights of Roman citizens who were captured in war and subsequently returned to their own country, or (2) the rights of Roman citizens, who had not themselves been captured by the enemy, over things captured in war, which, after such capture, were recovered from the enemy.

As regards the former aspect of *postliminium*, if a Roman citizen was taken prisoner by the enemy, he underwent *capitis deminutio maxima, i.e.* he lost his liberty and citizenship, and became a slave. If, however, he returned from captivity, he, in virtue of the *jus postliminii*, became a Roman citizen again, and recovered at the moment of his return all those rights which belonged to him at the time of his capture. He recovered his *patria potestas*, the ownership of his property, his rights against his debtors, and so on. If the citizen had made a will before he was taken prisoner, the will was held valid *jure postliminii* notwithstanding his intermediate slavery. Finally, if he died in captivity, he was assumed by a legal fiction, the so-called "*fictio legis Corneliæ*," to have died a Roman citizen. In other words, he was deemed to have died at the moment of his being taken captive, so that his will was valid (*Inst.* ii. 12. 5; *Dig.* 28. 1. 12). Originally marriage was dissolved by the capture of either spouse, and did not revive *jure postliminii* on the return of the captive, unless a fresh *consensus* was given by the parties (*Dig.* 49. 15. 14. 1); but in the latest law captivity did not differ in its effect from ordinary absence, proof being required of the absent party's death before the other could lawfully marry again (*Nov.* 117. 11).

In Roman law it was recognised that capture in war was a source of ownership; and, accordingly, the property of Roman citizens, which had fallen into the hands of the enemy, passed into the ownership of the enemy. *Postliminium*, however, operated to restore such property, as soon as it was recovered from the enemy, to the ownership of the persons who held it at the time of its capture. On the same principle, free persons *in potestate*, if they returned from captivity, fell again under the *potestas* of their former *pater-familias* (*Dig.* 49. 15. 14 pr.).

Capture by robbers, pirates, or rebels, who had no political organisation, did not change the *status* of the persons, or the ownership of the things, captured. Free persons so captured continued to be free, and property falling into the hands of pirates or robbers never ceased to belong to its rightful owners, so that no occasion arose for the application of *postliminium*.

In public international law there is recognised what is called the right of *postliminium*, from its analogy to the *jus postliminii* of Roman law. In virtue of this rule, when territory which has been occupied by an enemy comes again into the power of its own State during the progress of

a war, or when a portion of a State, which has been brought under foreign domination, is freed from such domination before a conquest of it has been consolidated, the legal state of things existing prior to the hostile occupation is re-established. Similarly, when property has been captured by the enemy during war, and is afterwards recaptured by the State to which it belongs, or to which the person to whom it belongs is subject, before it so becomes the property of its captor that third parties can receive a transfer of it, the owner is replaced in legal possession of it. Property recaptured from an enemy on land, if possible of identification, reverts to its owner without payment. Property recaptured from an enemy at sea, is restored to its owner, subject to a reward known as salvage, paid to the recaptors (see SALVAGE).

The operation of the right of *postliminium* in the case of occupied territory is subject to the limitation that the judicial and administrative acts done during the continuance of the enemy's control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good. This limitation preserves the social and commercial life of an invaded community from the paralysis which would otherwise be inevitable.

[See Hall, *International Law*, 4th ed., pp. 505 *et seq.*]

Post Office.—The Post Office is the Government department charged with the conduct of the monopoly claimed by the State of the conveyance of letters, as well from foreign parts as from place to place within the kingdom.

A General Post Office was established in England in 1660, by 12 Car. II. c. 35, and in Scotland in 1695, by c. 31 of that year. These Acts were repealed in 1710 by 9 Anne, c. 10, which consolidated their provisions, and established a Post Office for all Her Majesty's dominions.

The statute which now regulates the Post Office is "The Post Office (Management) Act, 1837," 7 Will. IV. & 1 Viet. c. 33. By it Her Majesty's Postmaster-General is declared to be the master of the Post Office, and to have the exclusive privilege of conveying letters from one place to another within Her Majesty's possessions, and also of receiving, collecting, sending, despatching, and delivering all letters, with the exception of letters sent by private friends, or by special messengers on private affairs, letters sent out of the kingdom by a private vessel, letters concerning merchandise sent by the vessel or carrier conveying such merchandise, and some others which are detailed in sec. 2 of that Act.

The powers of the Postmaster-General under this Act have been largely extended by a long series of Acts down to the present year, which are cited as "The Post Office Acts, 1837 to 1897." By these he is entitled to apply to the Treasury to issue warrants regulating the rates of postage which he may charge, and the conditions which he may impose upon the public. The existing exercise of this authority is "The Inland Post Warrant, 1897," which is Statutory Rule and Order No. 429 of 1897, and is published in the volume of Statutory Rules and Orders for that year at page 522. As regards Foreign and Colonial Postage, the existing regulations are to be found in "The Foreign and Colonial Post Warrant, 1892" (S. R. & O. 1892, p. 714).

By 45 & 46 Viet. c. 74, the Postmaster-General has also been authorised to carry parcels. The regulations as to these are to be found in "The Inland Post Warrant, 1897," *cit. sup.*, and in "The Foreign and Colonial

Parcel Post Warrant, 1897," No. 721, and three amending warrants of the same year, Nos. 850, 916, and 917 (S. R. & O. 1897, pp. 547–563).

He is also authorised by 3 & 4 Vict. c. 96, and 11 & 12 Vict. c. 88, to issue Money Orders. Under powers conferred upon him by these Acts he has issued "The Money Order Regulations, 1897" (S. R. & O. 1897, Nos. 4 and 270, pp. 564 and 573).

By 43 & 44 Vict. c. 33 and 46 & 47 Vict. c. 58, he is also authorised to issue Postal Orders. Regulations as to these were published in 1892 (S. R. & O. 1892, p. 757).

By "The Post Office Savings Bank Acts, 1861 to 1891," he is authorised to receive deposits to a limited extent, and to issue regulations as to this business. Those at present in force are "The Post Office Savings Bank Regulations, 1893" (S. R. & O. 1893, p. 510), as amended in 1894 (S. R. & O. 1894, No. 395, p. 408) and in 1896 (S. R. & O. 1896, No. 316, p. 578).

By "The Government Annuities Acts, 1864 and 1882," and "The Savings Banks Act, 1887," he is authorised to issue Annuities and policies of Life Insurance, and to make regulations thereanent. Those at present in force are "The Post Office Annuity and Insurance Regulations" of 1888 (*London Gazette*, Aug. 21, 1888, p. 4521) and 1895 (S. R. & O. 1895, No. 310, p. 685).

By "The Telegraph Act, 1868," he was authorised to acquire the business of all existing Telegraph Companies, excepting those owning North Atlantic cables, and having exercised this power to a very large extent, he was granted, by "The Telegraph Act, 1869," the exclusive privilege of transmitting telegrams for hire within the United Kingdom. This privilege has been held to cover telephonic messages (*Attorney-General* v. *Edison Co.*, 1880, L. R. 6 Q. B. D. 244). By these Acts, and by 48 & 49 Vict. c. 58, the Postmaster-General is authorised to issue regulations as to telegrams. Those now in force are "The Inland Telegram Regulations, 1885" (S. R. & O. Revised Vol. VIII. p. 11), as amended in 1890 (S. R. & O. 1890, p. 980) and in 1896 (S. R. & O. 1896, No. 893, p. 590), and "The Foreign Telegram Regulations, 1892" (S. R. & O. 1892, p. 918).

By 20 & 21 Vict. c. 44, the Post Office sues and is sued in Scotland in name of the Lord Advocate for the time.

See also POST OFFICE OFFENCES.

Post Office Offences.—PRELIMINARY.—Offences against the Post Office have from an early period been dealt with under special statutes. The older statutes, 5 Geo. III. c. 25; 7 Geo. III. c. 50; 42 Geo. III. c. 81; and 52 Geo. III. c. 143, were, with the exception of a few clauses immaterial to the present question, repealed by the Act 1 Vict. c. 32, and offences against the Post Office are now mainly dealt with under the Acts 1 Vict. c. 36 (Post Office (Offences) Act, 1837), and 47 & 48 Vict. c. 76 (Post Office (Protection) Act, 1884), cited together as the Post Office (Offences) Acts 1837 and 1884. These Acts will hereinafter be referred to as the "Act of 1837" and the "Act of 1884." In addition, however, supplementary provisions are contained in the Acts 3 & 4 Vict. c. 96: 11 & 12 Vict. c. 88, s. 4: 33 & 34 Vict. c. 79, s. 16; 43 & 44 Vict. c. 33, s. 4 (4); 45 & 46 Vict. c. 74, s. 16; and 54 & 55 Vict. c. 46, s. 10, and these provisions will be afterwards noticed. As the telegraph is now practically combined with the Post Office, various offences after mentioned, relating to that department, are dealt with both under the Act of 1884 and the special Acts relating to telegraphs, viz. the Telegraph Act, 1868 (31 & 32 Vict. c. 110); the Telegraph Act, 1869

(32 & 33 Vict. c. 73)—sec. 24 of this Act declares that these Acts are to be Post Office Acts; the Telegraph Act, 1878 (41 & 42 Vict. c. 76); the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49); and the Telegraph Act, 1892 (55 & 56 Vict. c. 59)—Telephones.

Although, however, elaborate provision has been made by statute for the punishment of offences against the Post Office, such offences, so far at all events as possessing a proper criminal character, can be dealt with at common law. Alison (i. 347) cites various cases in which the detention, secretion, destruction, and opening of letters were so indicted (see *Smith*, 1827, Syme, 185). Under the old form of libelling it was usual to found both on the statute and the common law; but having regard to sec. 62 of the Criminal Procedure (Scotland) Act, 1887, this seems no longer necessary, as under that section it is competent to convict of the common-law charge under an indictment laid on the statute alone.

The provisions of the Post Office Acts appear to be directed to the following objects, viz:—

1. The Protection of the Exclusive Privileges of the Post Office.
2. The Protection both of the Post Office and the Public in regard to
   - (*a*) *The Efficiency, Secrecy, and Honesty of Employees of the Post Office.*
   - (*b*) *Interference with Letters, or Dishonest Practices on the Part of Anyone.*
   - (*c*) *Improper Interference with Post Office Property, or Improper Use of the Post Office, in respect of the Articles and Letters sent for Transmission.*
3. General Provisions to Facilitate the Enforcement of the Acts.

Interpretation Clauses.—The interpretation of terms and expressions, for the purpose of Post Office offences, is mainly provided for under sec. 47 of the Act of 1837, and secs. 19 and 20 of the Act of 1884. The following definitions may be quoted:—Act of 1837, s. 47: The term *letter* shall include *packet*, and the term *packet* shall include *letter*; the term *mail* shall include every conveyance by which post letters are carried, whether it be a coach or cart or horse, or any other conveyance, and also a person employed in conveying or delivering post letters, and also every vessel which is included in the term packet boat; the term *mail bag* shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post letters are conveyed, whether it does or does not contain post letters: the expression *officer of the Post Office* shall include the Postmaster-General, and every deputy postmaster, agent, officer, clerk, letter carrier, guard, post-boy, rider, or any other person employed in any business of the Post Office, whether employed by the Postmaster-General, or by any person under him, or on behalf of the Post Office; the expression *persons employed by or under the Post Office* shall include every person employed in any business of the Post Office, according to the interpretation given to officer of the Post Office; the term *post letter bag* shall include a mail bag or box, or packet or parcel, or other envelope or covering in which post letters are conveyed, whether it does or does not contain post letters. Under Act of 1884, s. 19: the expression *post letter* shall mean a postal packet, as defined by this Act (*infra*), from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed, and a delivery of a postal packet of any description to a letter carrier or other person authorised to receive postal packets of that description for the post shall be a delivery to the Post Office, and a delivery at the house or office of the person to whom

the postal packet is addressed, or to him or to his servant or agent, or other person considered to be authorised to receive the postal packet according to the usual manner of delivering that person's postal packets, shall be a delivery to the person addressed; the expression *Post Office* shall mean any house, building, room, carriage, or place where postal packets, as defined by said Act, or any of them, are by the permission or under the authority of the Postmaster-General received, delivered, sorted, or made up, or from which such packets, or any of them, are by the authority of the Postmaster-General despatched, and shall include any Post Office letter-box; the expression *Post Office letter-box* shall include any pillar-box, wall-box, or other box or receptacle provided by the permission or under the authority of the Postmaster-General for the purpose of receiving postal packets, or any of them, for transmission by or under the authority of the Postmaster-General.—Sec. 20, the expression *postal packet* has the same meaning as in 38 & 39 Vict. c. 22, s. 10, as amended by this Act, inclusive of such postal packets as are defined by regulations of the Treasury to be parcels, and includes a *telegram* (see also sec. 23 of Telegraph Act, 1869). (By said Act, 38 & 39 Vict. c. 22, s. 10, the expression *postal packet* means a letter, post-card, *newspaper*, book-packet, pattern or sample packet, circular, legal and commercial document, packet of photographs, and every packet or article which is not for the time being prohibited by or in pursuance of the Post Office Acts from being sent by post. The Post Office Acts apply to *parcels* in like manner as to postal packets (45 & 46 Vict. c. 74, s. 16)).

1. The Protection of the Exclusive Privileges of the Post Office.

Under the Act of 1837 the acts specified in the following sections are prohibited:—

Sec. 2. The carriage or delivery, otherwise than by post, of letters (term "letter" includes a packet) not exempted from the exclusive privilege of the Postmaster-General, or the performance, otherwise than by post, of services incidental to the conveyance of letters. The sender is liable as well as the carrier. (Penalty, £5 for each letter, and £100 for every week the practice is continued.) See case of *Pollock*, 9 May 1895, *Sheriff Court Reports*, vol. xi. p. 234 (delivering circulars).

[The letters exempted from the Postmaster-General's exclusive privilege will be found detailed in sec. 2 of 1 Vict. c. 33, and sec. 5 of 54 & 55 Vict. c. 46. As to exclusive privilege *re* telegrams, see Telegraph Act, 1869, ss. 4, 5, 6. The privilege extends to telephone messages (*A.-G.* v. *Edison*, 1881, 6 Q. B. D. 244).]

Sec. 3. Retention of any letter by a shipmaster, etc. (Penalty, £5, and £10 if detained after demand made.)

Sec. 6. Refusal of masters of ships to take and deliver letter-bags, etc.

Sec. 9. Refusal of privilege of Post Office as regards tolls.

Under the Act of 1884 the acts mentioned in the following sections are prohibited:—

Sec. 6.* Imitation of Post Office marks and envelopes. (Penalty, £2.)

Sec. 7.* Manufacture, uttering, possession, or sale of fictitious stamps. (Penalty, £20, and forfeiture of die-plate, etc.)

Sec. 8. False notices as to places for reception of letters. (Penalty, £2, and five shillings per day for continuing offence.)

* See also 3 & 4 Vict. c. 96, ss. 22, 23, 29, 30.

2. The Protection both of the Post Office and of the Public as regards—

(*a*) *Efficiency, Secrecy, and Honesty of Employees.*—The following sections of the Act of 1837 apply exclusively to persons employed by or under the Post Office :—

[Note.—*For brevity, "post letter" is hereinafter referred to as "letter," and "post letter-bag" as "post-bag." The definition of "post letter"* ante *will be kept in view.*]

Sec. 7 deals with carelessness on the part of carriers, delays in the transmission of letters, attempts to account for losses by false information as to assaults, etc., and permitting, where not authorised to do so, other parties to travel in Post Office conveyances, etc. (Penalty, £20.)

Sec. 25 prohibits the opening or wilful detention of a letter, except where, owing to misdirection, death, non-payment of postage, or by virtue of special warrant by a Secretary of State, opening or detention is necessary and permissible. (Penalty, £5, or imprisonment, or both.)

Sec. 26 deals with the theft, secretion, or destruction of a letter. (Penal servitude, seven years ; imprisonment, maximum, two years. If said letter contains any chattel, money, or valuable security, penal servitude for life. Valuable security includes money order (43 & 44 Vict. c. 33, s. 4 (4)).

Secs. 27 to 31 inclusive are not confined to Post Office employees, and are therefore dealt with under subdivision (*b*); but it will be kept in view that they are also applicable to those employed by or under the Post Office.

Sec. 10 of the Act of 1884 provides for surrender of clothing, etc., by officers of Post Office on their ceasing to hold office, and imposes penalties for failure to surrender.

Sec. 11 provides that if any person, being in the employment of a *telegraph company* as defined by that section, improperly divulges to any person the purport of any *telegram*, such person shall be guilty of a misdemeanour. (Penalty, £20, or, on indictment, imprisonment, with or without hard labour, not exceeding one year, or a fine not exceeding £200.)

By the Telegraph Act, 1868, s. 20, "any person having official duties connected with the Post Office, or acting on behalf of the Postmaster-General, who shall, contrary to his duty, disclose or in any way make known or intercept the contents, or any part of the contents, of any telegraphic messages, or any message intrusted to the Postmaster-General for the purpose of transmission," shall be guilty, in Scotland, of a crime and offence. (Imprisonment, maximum, twelve months.)

By 11 & 12 Vict. c. 88, s. 4, "every officer of the Post Office who shall grant or issue any money order with a fraudulent intent," shall, in Scotland, be guilty of a high crime and offence. (Penal servitude, seven years: imprisonment, two years, maximum.)

By 43 & 44 Vict. c. 33, s. 4 (3), an officer of the Post Office who reissues an (postal) order previously paid, shall be deemed to have reissued the order with a fraudulent intent within the meaning of the above Act.

The question as to what is included under the words "*employed by or under the Post Office*" does not seem to have given rise to much difficulty in Scotland, where the words have received a somewhat liberal interpretation (Alison, i. 346, and cases there cited; Hume, i. 80; Bell, *Notes*, 24). In England the question appears to have been attended with more difficulty (Russell on *Crimes*, vol. ii., cases cited at pp. 381–383). The following cases

may be specially referred to: *Clay*, 2 East, 580 (objection that Post Office oath not taken by accused overruled); *Rees*, 6 C. & P. 606; *Borret*, 6 C. & P. 124 (sufficient to show that accused acted in capacity charged—wife acting as assistant to husband, who held the office of postmaster); *Pearson*, 4 C. & P. 572 (a servant employed to clean boots or shoes, but who occasionally assisted his master, who held Post Office appointment, in sorting letters, held not a person employed by or under the Post Office). On what is to be deemed a *post letter*, see Russell, vol. ii., cases pp. 383–390. The following cases may be specially referred to: *Mence*, C. & M. 234 (a penny put in letter to pay postage, secured by pin, posted: held to be a post letter containing money within meaning of sec. 26 of 1 Vict. c. 36, although penny not meant for transmission); *Rathbone*, C. & M. 220 (a marked sovereign put in letter stolen by prisoner, but letter not posted: held not a post letter); *Gardner*, 1 C. & K. 628 (letter containing money, posted with fictitious address, appropriated: held not a post letter). In the cases of *Newey*, 1 C. & K. 630, and *Young*, 2 C. & K. 466, where the circumstances appear almost identical with the case of *Gardner*, the cases were held to come within the statute. See also *Bickerstaff*, 2 C. & K. 761, and *M'Elfrish*, 1877, 3 Coup. 456 (letter delivered to panel open, with money to obtain Post Office order to be put in letter and then posted: held relevant under statute).

(*b*) *Interference with Letters, or Dishonest Practices on the Part of Anyone.*—The following sections of the Act of 1837 apply to *any person*:—

Sec. 27. Theft from a letter of any chattel, money, or valuable security. (Penal servitude for life.)

Sec. 28. Theft of a post-bag, or letter from such bag, or from a post office, or from a mail, or stopping mail with intent to rob or search same. (Penal servitude for life.)

Note.—A person contravening sec. 28 by stealing a letter may contravene sec. 27 by theft of valuable out of the same letter (*Mackay*, 1861, 4 Irv. 88).

Sec. 29. Theft of post-bag sent by a packet boat, or theft of a letter from such bag, or the opening of such bag. (Penal servitude for fourteen years.)

Sec. 30. Receiving any letter or post-bag, or chattel, money, or valuable security, appropriation of which is felony under the Post Office Acts, knowing the same to have been so appropriated, and to have been sent, or intended to be sent, by post. (Penal servitude for life.)

Sec. 31. The fraudulent or wilful retention, secretion, or neglect or refusal to deliver up a letter intended for someone else, or a post-bag lost in course of transit. (Fine or imprisonment.)

Sec. 32 deals with the theft of *newspapers, etc.*, but this section was repealed by the Act of 1884. *Newspapers, etc.*, are now included in the definition of *postal packet*, and it, again, is now deemed a *post letter*. (See *ante*.)

Sec. 35 deals with accessories, who are to be treated in the same manner as the principal offenders.

Sec. 36 deals with solicitation or endeavour to procure the commission of felony or misdemeanour under the Post Office Acts. (Penalty, imprisonment not exceeding two years.)

The offences under secs. 26 to 30 are declared, as regards Scotland, to be in each case a high crime and offence. These sections provide for transportation for terms varying from seven years to life, but penal servitude has now been substituted for transportation,—the minimum period being three years. See also sec. 13 of Act of 1884, which provides for the mitigation

of punishment by the substitution for penal servitude of imprisonment with or without hard labour for a period not exceeding two years. This seems to have the effect of superseding the former limit of three years' imprisonment.

Sec. 11 of the Act of 1884 prohibits the forging, uttering, and altering of telegrams, or transmitting as telegrams what are known not to be so, and provides that the offender, whether or not he had intent to defraud, shall be guilty of a misdemeanour. (Penalty, summary, £10, or, on indictment, twelve months (hard labour).)

By the Post Office Act, 1891 (54 & 55 Vict. c. 46), s. 10, "any person not in the employment of the Postmaster-General, who wilfully and maliciously, with intent to injure any other person, either opens or causes to be opened any letter which ought to have been delivered to such other person, or does any act or thing whereby the due delivery of such letter to such other person is prevented or impeded, shall be guilty of a misdemeanour. (Penalty, £50, or imprisonment, six months, maximum.)

The section is not to apply to a parent or guardian of the person to whom the letter is addressed. A prosecution is not to be instituted except by direction of the Postmaster-General.

(*c*) *Improper Interference with Post Office Property, or Improper Use of the Post Office in respect of the Articles and Letters sent for Transmission.*—The following sections of the Act of 1884 deal with the above matters :—

Sec. 3. Placing fire, explosives, or other noxious or objectionable matter in or on post office letter-box. (Penalty, £10, or, on indictment, twelve months.)

Sec. 4. Sending by post explosives, dangerous or noxious substances or articles or living creatures, noxious or likely to be injurious or dangerous, or sending indecent matter, whether written or printed or pictures. (Penalty, £10, or, on indictment, twelve months (hard labour).)

Sec. 5. Placards, advertisements, etc., not to be put on post office, post office letter-box, or telegraph post. (Penalty, £2.)

Sec. 9 prohibits obstructing officers of the Post Office or the business of the Post Office. (Penalty, £2, and a further penalty of £5 if offender refuses to leave the premises on being required to do so by an officer of the Post Office.)

Secs. 8 and 9 of the Telegraph Act, 1878, and sec. 3 of the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), deal with injuries to telegraphic lines and submarine cables.

3. General Provisions to Facilitate the Enforcement of the Acts.

Sec. 37 of the Act of 1837 provides for the trial of offences against the Post Office Acts, and for serious offences being dealt with in Scotland by the Court of Justiciary in Edinburgh or on circuit. This section also contains provisions for facilitating prosecution of offences by providing that the offender may be tried in any place where he may be apprehended or be in custody, as well as in the place where the offence was committed; and also provides for offences against the mail, post letter-bags, or post letters being dealt with in any place through which they may have passed in course of a journey. These provisions are also declared to apply to an accessory as well as to the principal offender. Serious offences against the Post Office Acts are now tried either in the High Court or in the Sheriff Court with a jury. All offences are bailable (see Bail Act, 51 & 52 Vict. c. 36). The Act of 1837 contains a number of provisions for dealing summarily with certain cases. These provisions, so far as regards Scotland, are practically super-

seded by the Act of 1884, which repealed most of them. By sec. 12 of that Act the forum in summary cases in Scotland is to be the Sheriff Court, and offences may be prosecuted either by the procurator-fiscal or by any person on that behalf authorised by the Postmaster-General. Where the penalty or forfeiture, with or without expenses, does not exceed £20, the prosecution may be summary. Subsec. 5 provides: "on the prosecution of any offence under the Post Office Acts, whether on summary conviction or on indictment, evidence that any article is in the course of transmission by post, or has been accepted on behalf of the Postmaster-General for transmission by post, shall be sufficient evidence that such article is a postal packet."

Modus in Libel.—". . . . you did, being employed under the Post Office, open a post letter contrary to the Act 7 Will. iv. and 1 Vict. c. 36, s. 25" (Criminal Proc. Act, 1887, Sched. A.). The prosecutor is not required to choose between the charges of stealing, embezzling, secreting, or destroying, under sec. 26, but may state them all in one charge (*M'Gregor*, 1886, 1 White, 211). "Steal or secrete" are not alternative charges, but merely alternative *modi* of committing one offence (*Teesdale*, 1896, 2 Adam, 137).

Power.—See Power of Attorney; Power of Sale; Appointment, Power of; Trust; etc.

Power of Appointment.—See Appointment, Power of.

Power of Apportionment.—See Appointment, Power of.

Power of Attorney.—A power or letter of attorney is a term of English law. It is a deed by which one person constitutes another his agent or mandatary. The person who grants the deed is called the mandant or constituent. The person in whose favour it is granted is the mandatary, or factor, or attorney. When the relation of mandant and mandatary is constituted by deed in Scotland, that is usually done by a Factory and Commission (*q.v.*). The use of powers or letters of attorney is reserved for those cases in which execution is to be in England or one of the colonies or a foreign country, or in which the authority given is to purchase or sell stock and shares in this country. When the deed is to be executed abroad, its authority and construction will depend, as a rule, on the law of the place of execution, and the legal requisites in its preparation will therefore have regard to that law. A number of the forms more commonly in use will be found in *Juridical Styles*, 5th ed., vol. ii. p. 63. Powers of attorney are general or special, or general and special. They may confer on the mandatary general powers of management and administration; or they may authorise only a particular transaction or set of transactions; or they may contain general powers, with the addition of special clauses. In the last-mentioned case the special clauses may limit the general powers in accordance with the rule by which general powers are confined to the class of acts comprised in the special clauses. But the effect may be not to limit, but rather to extend, the general powers, *e.g.* when there have been conferred powers of general management, followed by special powers of selling or borrowing on the security of the estate. The granting of a power of attorney does not divest the constituent of power to act for himself. When it is granted to

two or more attorneys, their action, in the absence of contrary direction, must be joint. The maxim applies: *Delegatus non potest delegare*; and the acts of the factor, in order to free himself from personal liability and bind his constituent, must be done *factorio nomine*, not in his own name as principal. The relation set up by the power of attorney is brought to an end by death or incurable insanity either of the constituent or the attorney, by the bankruptcy of the constituent, by resignation on the part of the attorney, or by revocation. See FACTORY AND COMMISSION; MANDATE; PRINCIPAL AND AGENT.

Power of Sale.—A power of sale, on default of payment, is one of the ordinary clauses of a heritable security. By sec. 119 of the Consolidation Act, 1868 (31 & 32 Vict. c. 101), the meaning of the phrase "on default of payments grant power of sale," which appears in the form of a bond and disposition in security given in Schedule FF of that Act, is declared to be as follows: "as if it had been thereby further provided and declared that if the grantor should fail to make payment of the sums that should be due by the personal obligation contained in the said bond and disposition in security within three months after a demand of payment intimated to the grantor, whether of full age or in pupillarity or minority, or although subject to any legal incapacity, personally or at his dwelling-place, if within Scotland, or, if furth thereof, at the office of the Keeper of the Record of Edictal Citations above mentioned, in presence of a notary public and witnesses, and which demand for payment may be in, or as nearly as may be in, the form of No. 2 of Schedule FF hereto annexed, and a copy thereof certified by such notary public in the form of No. 3 of Schedule FF hereto annexed, or when such demand has been intimated to more persons than one, a copy so certified of the demand intimated to one of such persons, with a certificate by the notary public that a similar demand has been intimated to the other persons, and stating the names and designations of such persons, and the dates and places of intimation to them, shall be sufficient evidence of such demand, then and in that case it shall be lawful to and in the power of the grantee, immediately after the expiration of the said three months, and without any other intimation or process at law, to sell and dispose, in whole or in part, of the said lands and others, by public roup at Edinburgh or Glasgow, or at the head burgh of the county within which the said lands and others, or the chief part thereof, are situated, or at the burgh or town sending or contributing to send a member to Parliament, or at the burgh or town which may have previously adopted the General Police and Improvement (Scotland) Act, 1862, or part thereof, which, whether within or without the county, shall be nearest to such lands, or the chief part thereof, on previous advertisement, stating the time and place of sale, and published once weekly for at least six weeks subsequent to the expiry of the said three months, in any newspaper published in Edinburgh or in Glasgow, and in every case in a newspaper published in the county in which such lands are situated; and if there be no newspaper published in such county, then in a newspaper published in the next or a neighbouring county, and a certificate by the publisher of such newspapers for the time shall be *primâ facie* evidence of such advertisement, the grantee being always bound, upon payment of the price, to hold count and reckoning with the grantor for the same, after deduction of the principal sum received, interest due thereon, and liquidated penalties corresponding to both which may be incurred, and all expenses attending the sale, and for that end to enter into articles of

roup, to grant dispositions containing all usual and necessary clauses, and in particular a clause binding the grantor of the said bond and disposition in security in absolute warrandice of such dispositions, and obliging him to corroborate and confirm the same, and to grant all other deeds and securities requisite and necessary by the laws of Scotland for rendering such sale or sales effectual, in the same manner and as amply in every respect as the grantor could do himself; and as if it had been thereby further provided and declared that the said proceedings should all be valid and effectual, whether the debtor in the said bond and disposition in security for the time should be of full age, or in pupillarity or minority, or although he should be subject to any legal incapacity, and that such sale or sales should be equally good to the purchaser or purchasers as if the grantor himself had made them, and also that in carrying such sale or sales into execution it should be lawful to the grantee to prorogate and adjourn the day of sale from time to time as he should think proper, previous advertisement of such adjourned day of sale being given in the newspapers above mentioned once weekly for at least three weeks; and as if the grantor had bound and obliged himself to ratify, approve of, and confirm any sale or sales that should be made in consequence thereof, and to grant absolute and irredeemable dispositions of the land and others so to be sold to the purchaser, and to execute and deliver all other deeds and writings necessary for rendering their rights complete."

By whom exercised.—Prior Bondholder.—A sale under a power of this or a similar character may be carried out by a prior, a *pari passu*, or a postponed bondholder. But, even when exercised by a prior bondholder, a power of sale is a right which must be exercised subject to the equitable control of the Court; and a sale under specially unfavourable circumstances, or at an inadequate upset price, would be restrained at the instance of postponed bondholders, or even of the debtor or his trustee in bankruptcy (*Beveridge*, 1829, 7 S. 279; *Kerr*, 1848, 11 D. 301; *Stewart*, 1882, 10 R. 192). And a creditor who proposes to exercise a power of sale is bound to grant an assignation of his security, on payment of the sum due under his bond, to a postponed creditor or to anyone having the authority of the debtor, unless he can show that he has a legitimate interest to refuse such an assignation (*Smith*, 1844, 6 D. 1164; *Fleming*, 1867, 5 M. 856; *Mackintosh's Trs.*, 1898, 35 S. L. R. 451).

Pari passu *Bondholder.*—A *pari passu* bondholder who desires to exercise a power of sale may do so with the concurrence of the holder of the other *pari passu* bond, or, if he cannot obtain that concurrence, he may take advantage of the provisions of the Heritable Securities Act, 1894 (57 & 58 Vict. c. 44). By sec. 11 of that Act he is entitled to apply to the Sheriff or the county in which the lands lie for a warrant to sell, and to call the other *pari passu* bondholder as a defender. The Sheriff may order a sale, if that course seems to him expedient, fix the upset price, and authorise either or both of the creditors, or some third party, to carry it out, and also authorise such party, on payment or consignation of the price, to grant a conveyance to the purchaser, which shall have the effect of disencumbering the lands as fully as if the parties had carried out a sale by joint agreement.

Postponed Bondholder.—A postponed bondholder is entitled to sell the subjects, and, in order to do so, to give formal premonition to prior bondholders, and insist on their accepting payment and granting a discharge (*Adair's Tr.*, 1895, 22 R. 975). According to the opinion of Ld. Young in *Adair's Tr.*, a postponed bondholder is bound, under

sec. 122 of the Consolidation Act, 1868, to obtain a discharge of the prior bonds before selling, and a sale by him subject to the prior bonds would be incompetent.

Right of Creditor to purchase Subjects.—At common law a creditor, selling subjects under a power of sale in a heritable security, is not entitled to purchase the subjects (Menzies, *Conveyancing*, p. 860; *Taylor*, 1846, 8 D. 400), though he can do so where the sale is at the instance of another creditor (*Begbie*, 1837, 16 S. 232), or of the trustee in the debtor's sequestration (*Cruickshank*, 1849, 11 D. 614; 19 & 20 Vict. c. 79, s. 120). A method by which the creditor may acquire the subjects has recently been provided by the Heritable Securities Act, 1894, of which advantage is believed to have been frequently taken. By sec. 8 a creditor who has exposed the lands for sale at a price not exceeding the amount of his security, together with that of any *pari passu* or prior security, or at a lower price, and has failed to find a purchaser, may apply to the Sheriff for a decree of forfeiture, for which a form is provided (Sched. D). After service on the proprietor of the lands, and on other creditors, if any exist, and after such inquiry as he may think fit, the Sheriff may grant the application and issue decree. On an extract of such decree being registered in the Register of Sasines, the right of the debtor to redeem shall be extinguished, the creditor shall have the same right to the lands as if his bond had been an irredeemable disposition granted as of the date of the decree, and the land shall be disencumbered of all securities and diligence posterior to the security of the petitionary creditor. Alternatively, the Sheriff may order the lands to be re-exposed at a price to be fixed by himself, in which case the creditor is entitled to bid for and purchase the lands, and to grant a disposition in his own favour. Under the Stamp Act, the decree or disposition under this procedure is regarded as a "conveyance on sale," and requires an *ad valorem* stamp (*Commissioners of Inland Revenue*, 1897, 24 R. 934; rev. 1898, 35 S. L. R. 671).

Procedure.—The procedure in the exercise of a power of sale should be strictly carried out, as any failure in this respect will entitle the purchaser to resile (*Ferguson*, 1895, 22 R. 643), and subject the sale to reduction at the instance of the debtor or of other bondholders, provided that they take action within a reasonable time (*Stewart*, 1882, 10 R. 192). Certain points, established by decision or by statute subsequent to the Consolidation Act, 1868, may be noted. The demand for payment, known as intimation, requisition, and protest, when once duly made, need not be renewed at subsequent exposures of the subjects (*Howard & Wyndham*, 1890, 17 R. 990). It is not indispensable that intimation of a sale should be made to postponed bondholders, or to the holder of an *ex facie* absolute disposition of the lands (*Stewart*, 1882, 10 R. 192; *Leask*, 1886, 24 S. L. R. 78). When the debtor in the security is dead, and no title has been made up to the lands, and the creditor cannot ascertain the name of the debtor's heir or other representative; or if the creditor cannot ascertain the address of the debtor, or the fact of his existence; or if the creditor cannot ascertain the address of the person who, in terms of the bond, would be entitled to receive intimation of the demand for payment;—application may be made to the Sheriff for warrant to intimate the demand for payment at the office of the Keeper of the Record of Edictal Citations, in such terms, and addressed to such person, as the Sheriff may think fit; and a demand so intimated shall have the same effect as if it had been personally made (57 & 58 Vict. c. 44, s. 16).

Advertisement.—The advertisement of a sale may be made in a news-

paper containing nothing but advertisements (*Earl of Rosslyn*, 1830, 8 S. 964), but must be continued for the whole statutory period of six weeks; and it was in consequence held that a sale held five weeks and five days after the first advertisement was irregular, and entitled the purchaser to resile (*Ferguson*, 1895, 22 R. 643). Three weeks' advertisement of an adjourned sale is sufficient (Consolidation Act, s. 119); but if an exceptionally long period intervenes between the first and the subsequent exposure, it would be prudent to advertise for the full period of six weeks (*Stewart*, 1882, 10 R. 192; *Howard & Wyndham*, 1890, 17 R. 990).

Clearing Record.—On a sale being carried out, the creditor is entitled to take credit for his debt and interest, the expense of discharging any prior incumbrances, the expense of the sale, and any expenses which he may have incurred while in possession of the lands (Consolidation Act, s. 122). The surplus must be consigned in any Scotch bank incorporated by Act of Parliament or royal charter, in the joint names of the purchaser and creditor, for behoof of the persons having right thereto, and the particular bank must be specified in the articles of roup (Consolidation Act, 1868, s. 122). When such consignation is made, the registration of the disposition from the seller to the purchaser in the Register of Sasines has the effect of completely freeing and disencumbering the lands of all posterior diligence and securities, as well as of the security of the creditor who carries out the sale (Consolidation Act, 1868, s. 123). If no surplus remains, the record may be cleared to the same effect by the registration of the disposition by the seller to the purchaser, together with a notarial instrument stating that no surplus remained (Conveyancing Act, 1874, s. 48, Sched. L, No. 1).

Sale under ex facie *Absolute Disposition.*—When a heritable security is taken in the form of an *ex facie* absolute disposition, with or without a back bond, the security-holder has a title which enables him to sell the lands, and to give a title which a purchaser is bound to accept, without an express power of sale (*Baillie*, 1884, 12 R. 199; *Duncan*, 1893, 21 R. 37). It is usual, however, to provide a power of sale, and to regulate the method thereof, in the back bond. If this is done, the creditor is bound by the conditions expressed, and the debtor is entitled to interdict a sale in which they are not observed (*Lucas*, 1876, 4 R. 194). But when a sale is actually carried out, the debtor cannot reduce it on the plea that the conditions expressed in the back bond were not observed, even if the back bond has been recorded in the Register of Sasines. His sole remedy is an action of damages against the creditor who carried out the sale (*Duncan, cit.*).

[Menzies, *Conveyancing*, p. 859; Montgomerie Bell, *Conveyancing*, 3rd ed., pp. 1164 *et seq.*; Gloag and Irvine, *Rights in Security*, pp. 110 *et seq.*]

Præcarium, a form of Loan (*q.v.*) where the thing is lent gratuitously, without specifying any time of redelivery, and which is revocable at the lender's pleasure. The borrower is only liable *de dolo et culpâ latâ*. Being entered into from a personal regard to the borrower, it ceases by his death.—[L. 12, s. 1, *de præc.*; Stair, i. 11. 10; Ersk. *Inst.* iii. 1. 25; Ersk. *Pr.* iii. 1. 9; Bell, *Pr.* 195.]

Præceptio hæreditatis.—See Passive Titles in Heritage.

Præcipuum.—See Heirs-Portioners.

Prædial Servitudes.—See SERVITUDES.

Præpositura—This is a form of mandate. The term is usually, though not necessarily, applied to the authority of a wife who acts as agent or mandatary of her husband. She is said to be *præposita negotiis* of him. This mandate may be due to an actual grant of authority by factory and commission or other deed, or to tacit consent, *i.e.* actual management by the wife, approved or acquiesced in by the husband. She may thus be intrusted with the management of her husband's whole affairs, or only part of them, and her acts bind her husband according to the ordinary rules regulating the contract of mandate (*q.v.*). The question whether she is acting as her husband's mandatary is always one of fact.

There is a presumption of law that a wife, living in family with her husband, is *præposita negotiis domesticis* (Ersk. i. 6. 26; Bell, *Com.* i. 479; *Prin.* s. 1565; Fraser, *H. & W.* i. 604; Walton, 182). Her authority is not in any way derived from the fact of marriage, but effeirs to her as the natural manager of her husband's household. If a man has no wife living with him, the same authority is presumed on the part of any other domestic manager, *e.g.* a daughter, sister, or niece (*Hamilton*, 1825, 3 S. 572). A woman who cohabits with a man, although they are not married, may have the same authority. "If there is an establishment of which there is a domestic manager, although the wife may be the most natural domestic manager, and though the presumption may be strongest when she is so, yet the same presumption may, and often does arise from similar facts, when the actual manager is not a wife, but merely a woman living with a man, and passing as his companion, with or without the assumption of the name of wife. It is also the same when the person to whom the domestic management is delegated is a housekeeper or a steward, or any other kind of superior servant. Therefore it is, in all these cases, really a mere question of fact" (per Ld. Chan. Selborne in *Debenham*, 1880, 6 App. Ca. 24, at 33). In Scotland a domestic servant, although she has the actual management of her master's household affairs, is not presumed to have such a general *præpositura* as a wife or other relative. Her authority is strictly limited by the mandate she actually receives from her master by specific grant, or implied from holding out.

The wife's *præpositura* extends to the providing of necessaries for her husband's family. Necessaries include food, clothing, medicine and medical attendance (*Kinfauns*, 1711, Mor. 5882), furniture, domestic servants. They must be such as are suitable to the husband's standard of living and material condition, rather than to his rank and position in society (*Kinfauns, cit. supra*; *Buie*, 1831, 9 S. 923). The wife has no authority in virtue of her *præpositura* to borrow money (*M'Intyre*, 1795, Hume, 203); but when a wife borrowed money to take a journey rendered necessary by her health, her husband was found liable in repayment (*Kinfauns, cit. supra*). She is not empowered to grant or assign bills (*Forrest*, 1749, Mor. 6019; *Binny*, 1836, 14 S. 355; but see *Scott*, 1800, Hume, 207); nor to uplift debts due to her husband (*Nairn*, 1680, Mor. 6016; *Howie*, 1888, 4 S. L. Rev. 320); nor to receive or discharge yearly duties (*Boyd*, 1582, Mor. 6013; *Pitarrow*, 1587, Mor. 6014); nor to grant or accept leases, or receive notice to quit premises let to her husband (*Lambert*, 1864, 3 M. 43; *Slowey*, 1865, 4 M. 1); nor to pawn her husband's goods (*Tweddel*, 1841, 3 D. 998; *Douglas*, 1868, Guthrie's *Sh. Ct. Cas.* i. 219). Neither has she any presumed authority to bind her son as an apprentice (*Arnot*, 1698, Mor. 6017). But if the wife

borrows money for the purpose of providing for the family by authority of her husband, or if he homologates her act, or the money is *in rem versum* of him, he is liable to repay (*Thomson*, 1827, 6 S. 204; *Grant*, 1830, 8 S. 606; *M'Intyre, cit. supra*). And advances made to the husband and wife for the maintenance of the family are presumed to be made on the husband's account only (*Sandilands*, 1833, 11 S. 665; *Macara*, 1848, 10 D. 707). If a wife buys goods suitable for house furnishing, but never so applies them, and the family gets no good of them, the husband is not liable therefor (*London Clothing Co.*, 1886, 2 S. L. Rev. 116). The husband is liable for *quasi*-delicts committed by the wife in the course of acting in those things over which her *præpositura* extends (*Ludquhairn*, 1590, Mor. 13982), but not otherwise (*Scot*, 1628, Mor. 6015). He is not liable for slander committed by her (*Martin*, 1803, Hume, 619; *Barr*, 1868, 6 M. 651; *Milne*, 1892, 20 R. 95), unless he has made himself a party thereto by authorising it or otherwise identifying himself with his wife's act (*Scorgie*, 1872, 9 S. L. R. 292). The presumption in favour of a wife's authority to bind her husband *in rebus domesticis* is in Scotland so strong, that he has been found liable even when he had supplied his wife with money to pay for necessaries, and she had misspent the money, and received goods on credit (*Dalling*, 1675, Mor. 6005; *Alston*, 1682, Mor. 6007; but see *contra*, *Hamilton*, 1634, Mor. 6030; Fraser, *H. & W.* i. 608). This is contrary to the English rule (*Rencaux*, 1853, 8 Wels. H. & G. 680). On the other hand, when a master gave a domestic servant a weekly sum to provide for household requirements, and she had been in the habit of paying ready money, but afterwards took goods on credit, and appropriated the money, the master was held not liable to the tradesman, on the ground that the custom of ready-money payment showed the extent of her authority (*Mortimer, cit. supra*; *Oliver*, 1792, Hume, 319; *Inches*, 1793, Hume, 322; *Dewar*, 1804, Hume, 340).

So long as the wife acts within the limit of her *præpositura*, she incurs no personal liability, but binds her husband alone (*Aiton*, 1629, Mor. 5952; *Scougal*, 1630, Mor. 5953; *Howieson*, 1631, Mor. 5954). And this is so although the husband should become bankrupt, or the wife have separate estate (*Mitchelson*, 1780, Mor. 5886; *Robertson*, 1801, Hume, 208; *Scott*, 1818, Hume, 221; *Sandilands, cit. supra*). But the wife will be liable if she has given a promise to pay out of her own funds (*Thomson*, 1827, 6 S. 204); or if it is shown that the goods were furnished on her credit alone (*Gairns*, 1667, Mor. 5954). In England a wife has been held not to subject herself to personal liability for necessaries supplied to her subsequent to her husband's death, while she remained *bonâ fide* in ignorance of that event (*Smout*, 1842, 10 M. & W. 1).

Reference to the wife's oath, not as a witness but as a party, is competent to prove the constitution of the debt (*Dalling*, 1675, Mor. 12480; *Barclay*, 1630, Mor. 12479; *Paterson*, 1771, Mor. 12485; *Cochran*, 1740, Mor. 6018). As to its resting-owing, an opinion was recently expressed (per Ld. Young in *Mitchell*, 1880, 10 R. 378; and see *Paterson*, 5 B. S. 474) that reference to the wife's oath would not suffice; but the contrary has been decided, on the ground that, "being *præposita* as to furnishing, she must also be *præposita* as to paying for these furnishings" (*Young, Trotter, & Co.*, 1802, Mor. 12486).

The wife's *præpositura* may be determined by inhibition (see INHIBITION OF A WIFE), or by private notice to the tradesman (*Buie*, 1827, 5 S. 464). But these are effectual in so far only as the wife is provided for *aliunde* (*Auchinleck*, 1675, Mor. 5879; *Campbell*, 1676, Mor. 5879; *Lauder*, 1685, Mor. 12481; *Buie*, 1827, *cit. supra*).

Prætor; Prætorian Edict.—The judicial functions at Rome were, in B.C. 367, separated from the consulship, and thenceforth were exercised by a special official, *prætor urbanus*, who was elected annually. In B.C. 246 a second prætor was appointed, called *prætor peregrinus*, to administer justice in disputes between peregrines or between peregrines and citizens. As the territories of Rome extended, new prætors were from time to time created, until, under Julius Cæsar, the number was raised to sixteen. Under the early emperors, several prætors were appointed for special departments of judicial business.

The prætors, like other higher magistrates at Rome, had the *jus edicendi*, the power of issuing edicts. At the beginning of his year of office each prætor issued the edict (*edictum perpetuum*), from which it was illegal (Lex Cornelia, B.C. 67) for him to depart in administering justice. It became the practice for each prætor to adopt the edict of his predecessor, in whole or in part, and the portion of the edict regularly transmitted in this way from prætor to prætor (*edictum tralaticium*) soon came to constitute a large body of law, and practically formed the more valuable part of the law. To meet unforeseen cases, the prætors were in the habit of issuing additional edicts during their year of office (*edicta repentina*), but the number of edicts of this latter class gradually grew smaller, for when a case had arisen twice or thrice the edict applicable to it, if it had been found to work well, would be incorporated in the *edictum perpetuum*. The body of law thus evolved by the combined wisdom and experience of a long series of prætors was known as the *jus honorarium*.

The purpose of the edict was to aid, supplement, and correct the *jus civile*, and hence it was felicitously described as *viva vox juris civilis*. No machinery could have been devised more effectual for the attainment of this purpose. It provided an easy, if indirect, means of altering the existing law and adapting the old law to meet the needs of the constantly changing social environment. The prætors, it is true, were not law-makers: the validity of an edict expired with the year of office of the prætor who issued it. But this theoretical inferiority of the edict constituted, in fact, its practical superiority, as compared with the *leges* or statutes. The edict, unlike a *lex*, could be dropped, or resumed, or amended according to public requirements. Those edicts which stood the test of time remained; those that failed were modified or disappeared without the necessity of any agitation for their repeal.

During the later centuries of the republic the prætorian edict was the leading factor in the development of Roman law. It was mainly by means of the edict of the peregrine prætors that the *jus gentium* was built up, and it was through the edict of the urban prætors, in the first instance, that the equitable rules of the new system were introduced into the old Roman law. The result was, as Mr. Poste has observed, that the antithesis between *jus civile* and *jus honorarium* became nearly coincident with the antithesis between *jus civile* and *jus gentium*.

After the rise of the empire the existence of an authority and source of law, independent of the emperor, could not long be tolerated. By this time, too, the prætorian development of the law had reached its full maturity. The regular reissue of the whole mass of the edict had become a matter of form, and innovations or changes were both rare and unimportant. The edict, in short, had become stereotyped; it had ceased to be a *viva vox*, and had become a dead letter. The prætors' work was finished, and the time had come to cast it into a final shape, to systematise and codify it. To this end Hadrian instructed the jurist, Salvius Julianus, to revise and consolidate

the whole edict. In its consolidated form the edict was approved and ratified by a *senatus consultum*, and, being thus embodied in a statutory form, it became law in the strict sense of the word, as it had never been before. It was this official consolidated edict that formed the subject of the voluminous commentaries of the later jurists. The best reconstruction of the fragments of the edict is in Bruns, *Fontes juris Romani antiqui*, 5th ed. (1887), p. 188. See EQUITY.

Preamble.—See STATUTE.

Precarium.—See PRÆCARIUM.

Precedence or Precedency.—The general rules of precedence are that among persons of unequal rank the person of the higher rank takes the more honourable place; and among persons of the same rank, or of equal ranks, the more honourable place belongs to the person who enjoys the older title to belong to that rank.

During the subsistence of the Holy Roman Empire there were controversies regarding the relative precedence of the Emperor and the Pope, and regarding the precedence of the rulers of the various States within the Empire and beyond it (Camden, *Lib. Annal.*; Mackenzie, *Precedency*, and authorities there cited). The rules of precedence at present are mostly concerned with the relative rank of Diplomatic Agents at foreign Courts, and the relative rank among themselves of subjects of the same State. The precedence of Diplomatic Agents is now regulated in accordance with the articles annexed to the Vienna Congress Treaty of 9 June 1815, which are inserted in the Protocol of the Plenipotentiaries who signed the Treaty of Paris, 19 March 1815, and by the Protocol of the Conference of the Five Powers at Aix-la-Chapelle, 21 November 1818. By those protocols, Diplomatic Agents are divided into four classes: (1) Ambassadors, Legates, or Nuncios; (2) Envoys, Ministers, or other persons accredited to Sovereigns; (3) Ministers Resident accredited to Sovereigns; (4) Chargés d'Affaires accredited to Ministers of Foreign Affairs. Diplomatic Agents take precedence in their respective classes according to the date of the official notification of their arrival (Annex to Treaty of Vienna, art. 4), irrespective of considerations of consanguinity or family alliances between Courts (art. 6). It is provided that the regulation in article 4 shall not affect the precedence of the representative of the Pope. A uniform mode shall be decided in each State for the reception of Diplomatic Agents of each class (art. 5). Of the classes enumerated above, only the first class are representatives of Sovereigns (art. 2). Diplomatic Agents Extraordinary have in that capacity no superiority of rank (art. 3). In Acts or Treaties between Powers which grant each other alternate precedence, the order of signature by their Ministers shall be decided by lot (art. 7).

The Sovereign, as the Fountain of Honour, rules all matters of precedence among his subjects, except in so far as their precedence has been made the subject of parliamentary enactment. The Queen's Regulations have fixed the precedence of officers of the navy among themselves, and similarly the precedency of the officers of the army, and of the consular service; also the ranking of the officers of the navy with those of the army, and of the officers of these services along with those of the consular service, and of the naval

and military attachés to Diplomatic Officers (Foreign Office List, 1898, p. 294). The precedence of colonial officers is in some cases determined by colonial enactments, by royal charters, by instructions either under the Royal Signet and Sign Manual through the Secretary of State, or by authoritative usage. In absence of any such special authority, Governors are to guide themselves by the table of precedence contained in chapter vi. of the Rules and Regulations of the Colonial Office (Colonial Office List, 1898, p. 338). There is a special table of precedence for Canada (Colonial Office List, p. 70). A Royal Warrant (18 October 1876) regulates official precedence in India, adopting among its provisions the Graded List of Civil Offices not reserved for the members of the Covenanted Civil Service, which was prepared under the orders of the Governor-General in Council (India List, 1898, p. 146).

Right of precedence in a colony, India, or in a foreign country does not infer a right of precedence in the United Kingdom, and *vice versâ*. The general order of Social and Official precedence in the United Kingdom itself is the creation partly of ancient use, of parliamentary enactment, and of Royal Patents, Warrants, etc. (see below).

The rank which entitles the holder of it to precedence is (*a*) official, or (*b*) personal. The precedence attaching to an office may vary according to the personal rank of the person holding it, or according as the official is in the actual performance of duty or not, or is within his own jurisdiction or not. An official who has a personal precedence higher than that of his office retains his personal precedence in the general scale; but precedence in a Court of justice among the members of the Court, or of officers of a public service within the service, is regulated entirely by rank in the individual service. Ambassadors, as representatives of Sovereigns, take precedence immediately after the Royal Family of the Court to which they are accredited, and of the sons and brothers of Sovereigns. Foreign Ministers and Envoys have no real precedence . . . . but of late years place has been allowed them in this country after Dukes and before Marquesses (Burke, *Rules of Precedence*, xii.). Official rank in Church or State confers no precedence on the holder's wife or children.

(*b*) *Personal Rank.*—Precedence among the holders of any hereditary dignity is governed by the order in date of the original grants of the dignity, and not by the ages or dates of succession of the present holders. Personal rank, whether hereditary or not, confers an equal rank on the wife of the person who enjoys it, unless she has a higher of her own, and confers a certain rank on his issue. The case of the knight-banneret made in the field by the king in person is said to be an exception to this rule. He has precedence of baronets, but because baronets have their precedence from a hereditary dignity, their wives precede the wife of the banneret (Mackenzie, 52).

A lady who ranks as a peeress by marriage, ranks according to her husband's precedence, in questions with peeresses in their own right as well as with other peeresses by marriage. If a lady who enjoys courtesy rank in her own right marries a commoner beneath her rank, she retains her own precedence. If she marries a peer beneath her rank, she descends to his rank. If she is a peeress in her own right, she retains the rank and title which belong to it in any case save where she marries a peer of higher rank. A lady who enjoys rank by marriage, loses it by remarriage, and reverts to her own rank by right of birth, or takes her new husband's rank according to the rules already mentioned. In spite of this rule, the widows of peers, baronets, knights, and of the sons of the higher peers, on remarrying,

frequently continue to use the name and style which they derived from their first husband if the second husband is inferior to him in rank. A lady who takes rank in virtue of her marriage retains it though her husband is afterwards forfeited (Mackenzie, 92). A dowager takes precedence of the wife of any subsequent holder of her deceased husband's title. The daughters of the holder of the dignity rank after the wife of their eldest brother. Personal rank gives a judge no precedence on the bench over an older judge of inferior personal rank. If the heir to a peerage dies before he succeeds to it, his widow does not, in virtue of her marriage with him, rank as a peeress, even though her son or daughter becomes the peer or peeress. On the succession opening to one of his children, the rest do not rank of right as the sons or daughters of a peer. The Queen, however, is in the habit of granting them the precedence and courtesy titles which they would have enjoyed if their father had survived to succeed to the peerage. It is the same in the baronetage.

Under the provisions of the Act of Union of 1 May 1707, the peers of Scotland take precedence in the general scale of the United Kingdom after the peers of England of their respective ranks. In other words, they rank as if they had become peers of the realm at the date of the Union. Among themselves, however, they rank according to the dates of their creations as peers of Scotland. Thus the Scottish Duke of Hamilton, whose dukedom dates from 1643, takes precedence of the Duke of Buccleuch, whose dignity was conferred on him in 1673, but they, with the other Scots dukes, give place to the last created English duke—the Duke of Rutland, whose title was created in 1703. Similarly, by the Act of Union of 1 January 1801 with Ireland, the peers of Ireland created before the Union rank after the peers of equal degrees of Great Britain. Thus the Marquis of Bute, whose marquisate of Great Britain dates from 1796, takes precedence of the Irish Marquis of Waterford, whose date is 1789. The peers of Ireland created since the Union rank according to the dates of their creations with the peers of like degrees of the United Kingdom.

The relative precedence of the Orders of baronets of the three kingdoms is unaffected by the Acts which regulated the precedence of the peers. The members of the several Orders rank, therefore, together according to the dates of their respective individual creations as baronets, irrespective of the particular order to which they belong. King Charles I. bound himself, at the founding of the Order of Nova Scotia, not to prefer any baronet to those created before him, nor to place any degree save that of banneret between them and the peers. This last provision, however, has been infringed.

The Scale of General Precedence.

The Sovereign.
The Prince of Wales.
The Sovereign's younger sons.
The Sovereign's grandsons.
The Sovereign's great-grandsons.
The Sovereign's brothers.
The Sovereign's uncles.
The Sovereign's nephews.
The Archbishop of Canterbury.
The Lord High Chancellor or Lord Keeper, if a peer.
The Archbishop of York.
The Lord Chancellor of Ireland.
The Lord High Treasurer, if a peer.
The Lord President of the Council, if a peer.
The Lord Privy Seal, if a peer.

The Lord Great Chamberlain, if in the actual performance of duty (1 Geo. I. c. 3).
The Lord High Constable
The Earl Marshal
The Lord High Admiral
The Lord Steward of Her Majesty's Household
The Lord Chamberlain of the Household
} if dukes. In any case, they precede all peers of their own degree.
Dukes of (1) England ; (2) Scotland ; (3) Great Britain ; (4) Ireland, created before the Union ; (5) the United Kingdom and of Ireland, created since the Union.
Eldest sons of Dukes of the Blood Royal.
Marquises, in the same order as the Dukes.
Eldest sons of Dukes.
Earls, in the same order as the Dukes.
Younger sons of Dukes of the Blood Royal.
Eldest sons of Marquises.
Younger sons of Dukes.
Viscounts, in the same order as the Dukes.
Eldest sons of Earls.
Younger sons of Marquises.
Secretary of State, if a bishop.
The Bishop of London.
The Bishop of Durham.
The Bishop of Winchester.
The rest of the Bishops of the Church of England, in the order of their consecration.
The Moderator of the Church of Scotland.
Irish Bishops consecrated before the passing of the Irish Disestablishment Act, in the order of their consecration.
The Secretary of State and Chief Secretary to the Lord-Lieutenant of Ireland, if a baron.
The Barons in the same order as the Dukes.
The Speaker of the House of Commons.
Commissioners of the Great Seal.
Treasurer of the Household.
Comptroller of the Household.
Master of the Horse.
Vice-Chamberlain of the Household.
Secretary of State and Chief Secretary for Ireland, if below the rank of a baron.
Eldest sons of Viscounts.
Younger sons of Earls.
Eldest sons of Barons.
Knights of the Garter.
Privy Councillors of the United Kingdom and of Ireland together, in the order of their seniority.
Chancellor of the Exchequer.
Chancellor of the Duchy of Lancaster.
Lord Chief Justice.
Master of the Rolls.
Lords Justices of Appeal, according to their seniority.
Judges of the High Court of Justice, Queen's Bench Division, in order of appointment.
Judges of the High Court of Justice, Common Pleas Division, in order of appointment.
Judges of the High Court of Justice, Exchequer Division, in order of appointment.
Judge of the Court of Probate ranking with Judges of High Court of Justice, according to the date of his appointment.
Knights Bannerets made by the Sovereign or Prince of Wales under the Royal Banner displayed in an Army Royal.
Younger sons of Viscounts.
Younger sons of Barons.
Sons of the Lords of Appeal in Ordinary.
Baronets.
Bannerets not made by the Sovereign in person.
Knights Grand Cross of the Bath.
Knights Grand Commanders of the Star of India.
Knights Grand Cross of St. Michael and St. George.
Knights Grand Commanders of the Order of the Indian Empire.

Knights Grand Cross of the Royal Victorian Order.
Knights Commanders of the five Orders, in the same order as the Knights Grand Cross, and Grand Commanders.
Commanders of the Royal Victorian Order.
Knights Bachelors.
Judges of County Courts.
Serjeants-at-Law.
Masters in Lunacy.
Companions of (1) the Bath; (2) the Star of India; (3) St. Michael and St. George; (4) the Order of the Indian Empire.
Members of the Fourth Class of the Royal Victorian Order.
Companions of the Distinguished Service Order.
Members of the Fifth Class of the Royal Victorian Order.
Eldest sons of the younger sons of Peers.
Eldest sons of Baronets.
Eldest sons of Knights of the Garter.
Eldest sons of Bannerets.
Eldest sons of Knights.
Younger sons of Baronets.
Younger sons of Knights.
Esquires } not included in any of the classes above mentioned.
Gentlemen }
Yeomen.
Tradesmen.
Artificers.
Labourers.

31 Hen. VIII. c. 10; The Act of Union, 1707; 1 Will. & Mary, c. 21; 10 Anne, c. 8 (Ruff. c. 4); 1 Geo. I. c. 3; Letters Patent, 9, 10, and 14, James VI. and I.; see Selden, *Tit. of Honour*, ii. 5. 46; ii. 11. 3; The Act of Union, 1801.

The precedence of the English judges has been fixed by a series of statutes: 5 Vict. sess. i. c. 5. s. 25; 8 & 9 Vict. c. 100, s. 2; 14 & 15 Vict. c. 83, s. 3; Judicature Acts of 1873, s. 11; 1875, s. 6; 1881, s. 4.

See Camden's *Britannia*, tit. "Ordines"; Milles's *Catalogue of Honour*, ed. 1610; Chamberlain's *Present State of England*, bk. ii. ch. iii.; Coke, *Institutes*, 6th ed., ii. p. 363; Blackstone's *Commentaries*, bk. i. c. 12; Sir Charles G. Young's *Order of Precedence*, 1851; Burke on *Precedence*.

An Order dated Osborne, 6th February 1895, fixes the Moderator's precedence.

The precedences of the members of the several Orders of Knighthood and of the Distinguished Service Order are fixed by the statutes of the Orders.

Scale of Precedence of Ladies.

The Queen.
The Princess of Wales.
The Sovereign's daughters.
Wives of the Sovereign's younger sons.
The Sovereign's granddaughters.
Wives of the Sovereign's grandsons.
The Sovereign's sisters.
Wives of the Sovereign's brothers.
The Sovereign's aunts.
Wives of the Sovereign's uncles.
The Sovereign's nieces.
Wives of the Sovereign's nephews.
Duchesses of (1) England; (2) Scotland; (3) Great Britain; (4) Ireland before the Union; (5) the United Kingdom, and of Ireland since the Union.
Wives of the eldest sons of Dukes of the Blood Royal.
Marchionesses—in the same order as the Duchesses.
Wives of the eldest sons of Dukes.
Daughters of Dukes.
Countesses—in the same order as the Duchesses.
Wives of the younger sons of Dukes of the Blood Royal.
Wives of the eldest sons of Marquises.
Daughters of Marquises.
Wives of the younger sons of Dukes.
Viscountesses—in the same order as the Duchesses.
Wives of the eldest sons of Earls.
Daughters of Earls.
Wives of the younger sons of Marquises.

Baronesses—in the same order as the Duchesses.
Wives of the eldest sons of Viscounts.
Daughters of Viscounts.
Wives of the younger sons of Earls.
Wives of the eldest sons of Barons.
Daughters of Barons.
Maids of Honour to the Queen.
Wives of Knights of the Garter.
Wives of Bannerets made by the King in person (but see Mackenzie on *Precedence*, 52).
Wives of the younger sons of Viscounts.
Wives of the younger sons of Barons.
Daughters of the Lords of Appeal in Ordinary.
Wives of sons of the Lords of Appeal.
Wives of Baronets.
Wives of Bannerets not made by the King in person.
Wives of Knights Grand Cross of the Bath.
Wives of Knights Grand Commanders of the Star of India.
Wives of Knights Grand Cross of St. Michael and St. George.
Wives of Knights Grand Commanders of the Indian Empire.
Wives of Knights Grand Cross of the Royal Victorian Order.
Wives of Knights Commanders of (1) the Bath ; (2) the Star of India ; (3) St. Michael and St. George ; (4) Indian Empire ; (5) Royal Victorian Order.
Wives of Commanders of the Royal Victorian Order.
Wives of Knights Bachelors.
Wives of Companions of (1) the Bath ; (2) the Star of India ; (3) St. Michael and St. George ; (4) the Order of the Indian Empire.
Wives of Members of the Fourth Class of the Royal Victorian Order.
Wives of Members of the Distinguished Service Order.
Wives of Members of the Fifth Class of the Royal Victorian Order.
Wives of the eldest sons of the younger sons of Peers in the order of their father's precedence.
Wives of the eldest sons of Baronets.
Daughters of Baronets.
Wives of the eldest sons of Knights of the Garter.
Daughters of Knights of the Garter.
Wives of the eldest sons of Knights Bannerets.
Daughters of Knights Bannerets.
Daughters of Knights Bachelors.
Wives of younger sons of Baronets.
Wives of younger sons of Knights.
Wives of Esquires } not included in any of the classes mentioned above.
Wives of Gentlemen }

The Officers of State of Scotland, and other Scottish officials, with the exception of the Moderator of the Church, are as yet unplaced in the General Scale. But the following is the order of precedency in Scotland which is recognised by the Lyon King of Arms :—

The Sovereign.
The Lord High Commissioner to the General Assembly of the Church of Scotland during the sitting of the General Assembly.
The Prince of Wales.
The other members of the Royal Family as in the General Scale.
The Lord Provost of Edinburgh within that city.
Hereditary High Constable.
Hereditary Master of the Household.
Lord Chancellor and Lord Keeper, if a Baron.
Dukes of Scotland, England, Great Britain, Ireland, and the United Kingdom and Ireland.

The order of precedence is then the same down to and including the younger sons of Marquises, after which it proceeds—

At Court functions the Moderator of the Church of Scotland ranks next after the Bishops of the Church of England.
Privy Councillors.
Lord Justice-General.

Lord Clerk-Register.
Lord Advocate.
Lord Justice-Clerk.
Lords of Session according to the order of their appointments.
Younger sons of Viscounts.
Younger sons of Barons.
Knight Marischal.
Baronets.
Knights of the Thistle.

The Knights Grand Cross and Knights Commanders of the five great Orders of Knighthood now come in as in the General List. After which the List proceeds—

Lyon King of Arms.
The Ushers.
Knights Bachelor.
Companions of the Bath.

The order then proceeds as in the General Scale down to the younger sons of Knights, after which it continues—

Dean of the Faculty of Advocates.
Solicitor-General for Scotland.
Heralds and other Esquires not included above.
Gentlemen, including Pursuivants at Arms, etc.

There are occasions when special scales of precedence override the general order. Thus in the College of Justice the order is: the Lord President of the Court, the Lord Justice-Clerk (President of the Second Divison), after whom come the other Senators in the order of their appointment, irrespective of their relative social rank; the Dean of Faculty, the Vice-Dean, the Treasurer to the Faculty, the other members of the Dean's Council; Queen's Counsel in the order of their appointment; the other members of the Bar in the order of their admission to the Faculty; the Deputy Keeper of the Signet; the members of the Society of Writers or Clerks to the Signet; the President of the Society of Solicitors before the Supreme Courts; the members of the Society.

In Ecclesiastical Courts the Moderator of the Church Court has precedence in the Court, although the Moderator of a superior Court is a member of the Court. The clergy precede the laity; and though age alone gives precedence among a clergy who are theoretically equal, precedence is usually given to those who are Doctors of Divinity. The laity are usually granted their social precedence. Old Moderators of the General Assembly have no legal precedence, but are usually placed next after the Moderator, and styled Very Reverend.

In Universities the order is: the Chancellor, the Principal and Vice-Chancellor, the Rector, the Dean of Faculty where there is only one, otherwise the Faculties in the order of their antiquity, each headed by its Dean. The College of Justice takes precedence of Universities. These latter rank among themselves in the order of their creations. The Royal College of Physicians of Edinburgh has hitherto taken precedence of the Royal College of Surgeons of Edinburgh, though the relative precedence of Royal Colleges and of other Colleges and Societies in Scotland has not been specially fixed.

Precept of Clare constat.—See CLARE CONSTAT (WRITS AND PRECEPTS OF).

Precept of Sasine.—See INFEFTMENT.

Precognition.—In Scottish criminal practice, after an accused person has been examined on declaration, the magistrate's duty (unless he sees cause to immediately release the accused) is to commence an inquiry, which is called a precognition, concerning the grounds of suspicion against him, by taking the declarations of all the persons who have knowledge of the facts, and collecting all the articles of evidence which are calculated to throw light on the case (Hume ii. 81 *et seq.*). In modern practice this investigation is conducted by the procurator-fiscal. The course for compelling the attendance of witnesses is by a warrant of citation, granted by the judge-examinator, which is usually craved in the petition for apprehension, but which may be competently applied for at any subsequent stage of the proceedings. The judge-examinator may also grant such warrant on his own motion. If the witnesses refuse or contumaciously fail to attend, letters of second diligence may be used, and the defaulting witnesses may be apprehended and brought before the judge for examination. If they obstinately refuse to answer, they may be coerced with imprisonment until they comply. Witnesses may also be put on oath when deponing on precognition (Hume, *ib.*; Dickson, s. 1590); but this is not frequently done in modern practice. A person who may possibly be himself charged in connection with the offence under investigation is not precognosced; and where a person has been put on oath when examined on precognition, he cannot afterwards be charged with the crime (Alison, ii. 138). The precognition of each witness ought to be taken separately, and not in the presence of other witnesses. Alison considers that, while it is proper that the witnesses should be examined apart from each other, "it is no objection to a witness at the trial that he has heard the declarations of others before the committing magistrate" (ii. 141); but except in very special circumstances the law seems to be otherwise (see Hume, ii. 82; Dickson, ss. 1592, 1593; *Duncan*, 1834, 12 S. 935, and *Reid*, 1843, 5 D. 656, per Ld. Jeffrey). The accused is not entitled to have a copy of the precognition; nor is he entitled to be present or to be represented at the examination, the precognition proceedings being entirely *ex parte* on the part of the prosecutor (Hume, *ib.*; Alison, ii. 139). As regards competency of witnesses, etc., the ordinary rules of evidence regulate this inquiry. The precognition ought always to be reduced to writing, and signed by the witnesses according to their usual mode of spelling. The precognition, when completed, is reported to the Crown Agent, and by him laid before Crown counsel, who then decide whether any proceedings shall follow.

In civil practice the notes of the evidence of witnesses taken by parties' agents before a trial or proof are also called precognitions.

As to the competency of contradicting a witness by what he stated in precognition, there has been a variance in judicial opinion. Dickson (s. 265) considers that the balance of authority is against the admission of such evidence. In *Emslie*, 1862, 1 M. 209, Ld. J.-Cl. Inglis stated that he had rejected such evidence in criminal cases; and Ld. Neaves said that his own impression was that it is not competent to contradict a witness by proof of what he said on precognition. (See also *O'Donnell and Maguire*, 1855, 2 Irv. 236; *Dysart Peerage* case, 1881, L. R. 6 H. L. (Sc.) 489, per Ld. Watson, 509; *Lauderdale Peerage* case, 1885, L. R. 10 H. L. (Sc.) 692, per Ld. Chan. Selborne, 710). On the other hand, Ld. Ardmillan observed that the rule disallowing such evidence is not quite inflexible even as regards examination in chief (*Robertson*, 1873, 2 Coup. 495; see also *Inch*, 1856, 18 D. 997; in both of which cases such evidence was admitted; as it was also, though without objection being raised, in *Whyte*, 1884, 11 R. 710). "The

case is different in cross-examination; and the party cross-examining is entitled to test the credibility of the witness" (Dickson, s. 265 (*a*)). Hume's opinion on the subject, as regards criminal proceedings, is that precognitions, whether on oath or not, "are merely preparatory to the libel, and can never in any shape be made use of against the witnesses; indeed, they may call for them if they please, and see them cancelled, before they give their evidence at the trial" (ii. 381; Alison, ii. 534, 535; Macdonald, 462).

It is not competent to prove statements of a deceased person by his precognition (Dickson, s. 271, and cases cited there; Kirkpatrick, s. 39; Macdonald, 480; but cf. *Wards*, 1869, 1 Coup. 186; *Stephens*, 1839, 2 Sw. 348).

The Court will not order production of precognitions taken by Crown authorities, except in very special circumstances (*Hill*, 1841, 10 D. 37; cf. *Donald*, 1844, 6 D. 1255; *Hastings*, 1890, 18 R. 244; Dickson, ss. 1654 *et seq.*).

Preferential Payments in Bankruptcy Act, 1888

(51 & 52 Vict. c. 62).—The application of this Act to Scotland is a question which has given rise to considerable controversy in practice. The Act is not in terms limited to England. Ireland is expressly excluded from its operation, but Scotland is not mentioned in the Act. It has been recently held in the Outer House that the Act applies to company windings up in Scotland (*Liquidator Scottish Poultry Journal Co.*, 1896, 4 S. L. T. 253, per Ld. Stormonth Darling, Ordinary), the decision proceeding mainly on the ground that the Act contains a repeal of a previous Act undoubtedly applying to Scotland, viz. the Companies Act, 1883, and makes provisions in substitution for those of the repealed Act. So far, however, there has been no decision in the Supreme Court as to the application of the Act in the case of sequestration or cessio. (For Sheriff Court decisions, see *Crawford*, 6 S. L. Rev. p. 11; *City Chamberlain of Aberdeen*, 7 S. L. Rev. p. 335.) Its provisions, so far as dealing with the case of bankruptcy as distinguished from winding up, are undoubtedly framed with reference to English bankruptcies only. Sec. 1, which is the chief enacting section, provides that "this section, so far as it relates to the property of a bankrupt, shall have effect as part of the Bankruptcy Act, 1883"; while sec. 3 provides that the Act "shall apply only in the case of receiving orders and orders for the administration of the estates of deceased debtors, according to the law of bankruptcy, made and windings up commenced after this Act." Possibly the correct view of the matter is that while the Act does apply to Scotland, it applies only in the case of windings up, inasmuch as the conditions of its application otherwise, as above defined, do not exist in this country. On the other hand, it has been held that the fact of a statute, which does not exclude Scotland from its provisions, being framed with exclusive reference to English institutions and procedure, does not necessarily limit the application of the Act to England if there are equivalents in the institutions and procedure in this country to which the Act can fairly be applied (see, *e.g.*, *Perth Water Commrs.*, 1879, 6 R. 1050).

The main provisions of the Act are as follows:—

I. *Priority of Debts.*—(1) In the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound up under the Companies Act, 1862, and the Acts amending the same, there shall be paid in priority to all other debts—

(*a*) All parochial or other local rates due from the bankrupt or the company at the date of the receiving order or, as the case may be, the commencement of the winding up, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax

assessed on the bankrupt or the company up to the fifth day of April next before the date of the receiving order, or, as the case may be, the commencement of the winding up, and not exceeding in the whole one year's assessment;

(*b*) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt or the company during four months before the date of the receiving order, or, as the case may be, the commencement of the winding up, not exceeding fifty pounds; and

(*c*) All wages of any labourer or workman not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the bankrupt or the company during two months before the date of the receiving order, or, as the case may be, the commencement of the winding up: Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order, or, as the case may be, the commencement of the winding up.

(2) The foregoing debts shall rank equally between themselves and shall be paid in full, unless the property of the bankrupt is, or the assets of the company are, insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor, or the assets of the company, as the case may be, is or are sufficient to meet them.

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt or a company being wound up within three months next before the date of the receiving order or the winding-up order respectively, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof.

Provided, that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made.

(5) This section, so far as it relates to the property of a bankrupt, shall have effect as part of section forty of the Bankruptcy Act, 1883.

(6) This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order.

Pregnancy.—Questions as to pregnancy arise in various branches of the law of Scotland. In criminal law the concealment of pregnancy is a crime which was formerly punishable by death (see CONCEALMENT OF PREGNANCY). When a woman who alleges that she is pregnant has been found guilty of a capital crime, a remit is made to skilled persons; and if pregnancy exists, the diet will be continued, and sentence will be delayed till the child has been born (Macdonald, 512). If the condition of the woman is not known till after sentence has been pronounced, execution will be delayed (Hume, ii. 452; see Statute 2 Rob. I. c. 26, Skene's *Coll.*). Questions as to the possible duration of pregnancy have frequently come before the Court in cases as to the paternity of a child, and in divorce cases, where the husband was proved not to have had access to his wife during the period within which the child must have been conceived. Ld. Fraser says: "The law applicable to the period of utero gestation is not settled with any precision; nor can it, from the nature of things, be otherwise." The question is a medical rather than a legal one, and is fully discussed in books on medical jurisprudence. See Taylor, vol. ii. pp. 245–259. The ordinary period of gestation is ten lunar months, or forty weeks, or 280 days, but cases have been reported where the period was 300, 311, and 313 days (*Gardner Peerage*, 1824, by Le Marchant, 1828; *Innes*, 1837, 2 S. & M'L. 417; *Boyd*, 1843, 5 D. 1213). In considering the possibility of a

long or short period of gestation, a difference has been recognised between cases of children born in wedlock and cases of filiation. In *Boyd's* case, which was a filiation where the defender admitted connection 306 days before the child's birth, Ld. Jeffrey said: "In cases of legitimacy there is a presumption in favour of the woman and child, which the husband can only get over by proving that it is impossible he can be the father. If there are strong opinions and decisions to the effect that ten months is the time from which the husband must prove non-intercourse, we must hold it to be so. The period is, however, not a rule of law, but a canon of evidence, capable of limitation and extension; and it is quite clear that the recent alteration in the opinion of learned persons has gone to narrow and not to extend the latitude formerly allowed. But here we are out of all these cases. The question is what is proved. The *onus probandi* lies upon the pursuer; and admitting that there have been cases of pregnancy of ten months' duration, the question is, Has she proved her case, by proving a naked possibility that the defender is the father? I think not."

What has been said as to the length of pregnancy applies also to cases where a child is born too soon after the earliest possible access to the mother by her husband or the alleged father. In such cases the condition of maturity or immaturity of the child is the best evidence as to whether the child was or was not prematurely born. In certain circumstances an application may be made to the Court *de ventre inspiciendo* where a widow alleges that she is pregnant, and there is reason to suspect that she is pretending to be pregnant in order to defeat the rights of the husband's heirs. Ld. Fraser, *P. & C.* p. 2, says that this is authorised by express statute, and refers to Stat. 2 Rob. I. c. 27; but that Act says nothing about an *inspectio corporis* of a widow alleging pregnancy, but provides for her custody with some honest woman till the child is born, allows the husband's relatives to place keepers at the door of the house where the child is to be born, and stipulates that three candles shall be lit in the house when the child is being born, to prevent another woman's child being brought into the house. The granting of an application *de ventre inspiciendo* does not depend on statute, but follows what was the practice under the Roman law (*Dig.* lib. xxv. tit. 4). There are several instances in our case law where such an application has been granted, and these precedents might still be followed. In one case a writer in Edinburgh was informed, on his deathbed, that his wife gave herself out to be with child. He, "considering the many attempts she had made to strangle him, and the suspicions on her disloyalty to his bed, and that he had not cohabited with her for sundry months," signed a declaration that if she brought forth a child it might not succeed to any part of his estate. After the husband's death the Court, on the application of his sisters, remitted to a Lord Ordinary to call the wife and intimate to her that she should give advertisement some time before her delivery, that he might ordain midwives to be present, and also, if he thought fit, to cause inspect her presently whether they thought her with child or not (*Ross*, 1699, Mor. 16455). Though an application *de ventre inspiciendo* is granted in cases where pregnancy is alleged, it will not as a rule be granted where the object is to prove that a woman is still a virgin, or that she had never borne children, as in a defence to a criminal charge of rape, or in an action of damages for slander by a person who was stated to have been of loose character, and to have borne a bastard child (*Foulden*, 1732, Mor. 16456; *De Grosberg*, 1765, Mor. 16456; see also *Davidson*, 1860, 22 D. 749). In England a writ *de ventre inspiciendo* may at common law be granted where a widow is suspected to feign herself with child. The woman is

examined by a jury of matrons. If she be found with child, she is removed to a castle to be in the safe keeping of the Sheriff till her delivery. Such a writ was issued in 1845 (see *Wallop*, 1792, 4 Bro. Ch. 90; *Blakemore*, 1845, 14 L. J. N. S. Ch. 336). It is not necessary here to deal with the question of what are the usual signs of pregnancy which have often to be considered in criminal and other cases, but which are not questions of law. The usual conditions which may be expected to be found at the various stages of pregnancy are fully described in books on medical jurisprudence. See Taylor, *Med. Jur.* vol. ii. 152–65.

In certain cases it has been presumed that a woman of a certain age (60 or 61) will not bear children (*Lowson's Trs.*, 1886, 13 R. 1003; *Urquhart's Trs.*, 1886, 14 R. 112), but in later cases the Court has refused to presume that a woman was past child-bearing at any particular age (*Anderson*, 1890, 17 R. 337; *Beattie's Trs.*, 1898, 5 S. L. T. No. 469).

Prerogative.—See Sovereign.

Presbytery.—See Church Courts.

Prescription, which originally signified any exception, came latterly in the Roman law to be identified with the *exceptio ratione temporis*. In some form or other it has found a place in the jurisprudence of all civilised nations, and in Scotland there are ample traces of a common law doctrine of prescription. A claim to a servitude has been sustained without a title (*Neilson*, 1623, Mor. 10880; cf. *Knockdolian*, 1583, Mor. 14541; *Henderson*, 1672, 2 Bro. Supp. 706), and possession for more than forty years of seats in a parish church has been held to protect those who have enjoyed it from dispossession (*Magistrates of Hamilton*, 1846, 8 D. 844; 7 Bell's App. 1). A right to interrupt the flow of water in a stream by means of a dam has been found to rest entirely upon possession for a certain period, irrespective of title (*Hunter & Aitkenhead*, 1880, 7 R. 510, per Ld. Shand, 519; but contrast, as regards a road, *Stewart*, 1878, 6 R. 35). The most important class of cases in which an old common law rule of prescription appears to be given effect to is that concerned with public Right of Way (*q.v.*). The constitution of such a right depends upon no statute and upon no legal fiction of implied grant. It rests upon "the fact of user by the public, as matter of right, continuously and without interruption for the full period of the long prescription [*i.e.* forty years]" (*Mann*, 12 R. H. L. 52, per Ld. Watson).

Apart, however, from the question of right of way and the exceptional cases just referred to, prescription in Scotland may be taken to be, for all practical purposes, wholly statutory. The first attempt of the national legislature to deal with the subject is to be found in the Act 1469, c. 28, which, as interpreted by the later Act, 1474, c. 54, ordained that all old obligations, that is, obligations older than the date of forty years, should be of no strength; and likewise that in time to come all obligations "that beis not followed within fourtie yeiris, shall preserive and be of nane availe."

A very liberal construction came to be put upon these statutes in course of time (*Lauder*, 1630, Mor. 10655; *Ogilvy*, 1630, Mor. 10719; *Lindsays*, 1627, Mor. 18718; *A.* v. *B.*, 1618, Mor. 10717; *Minister and Session of*

Aberchirder, 1633, Mor. 10672); but heritable subjects were necessarily altogether excluded from their operation, or indeed anything savouring of the nature of heritage (*Lord Cathcart*, 1585, Mor. 10716; *A.* v. *B.*, 1589, Mor. 10717). No length of mere possession of lands could protect the proprietor from attack at the instance of anyone who could produce a perfect progress of titles. *Nulla sasina, nulla terra* was a feudal maxim rigidly enforced. The Act 1594, c. 218, was intended to diminish this hardship. It enacted that where there had been possession for forty years, and where the proprietor's charter or charters and the instruments of sasine were extant, none of the lieges should be compelled, after the space of forty years, to produce procuratories or instruments of resignation, precepts of *clare constat*, or other precepts of sasine of lands, and it further enacted that the wanting of such documents should be no cause of reduction of the infeftments granted to the proprietors, or their predecessors or authors, of the lands.

Important as was this step towards creating security of tenure in landed property, the goal was not attained until the passing of the Act 1617, c. 12, "the palladium of our land proprietors" (Kames, *Eluc.* p. 262), upon which, in combination with the Conveyancing Act, 1874, our long prescription, as it is called, still depends. There are other and shorter periods of prescription appointed for other matters by a variety of statutes. These—which have sometimes, though not generally, been denominated limitations rather than forms of prescription—are dealt with under their respective headings, of which an enumeration will be found at the end of this article. Our concern here is with the statute of 1617 and its developments.

The words of the enactment are as follows:—

Anent Prescription of Heritable Rights.

"Our Sovereign Lord, considering the great prejudice which his Majesty's Lieges sustain in their Lands and Heritages, not only by the abstracting, corrupting, and concealing of their true evidents, in their minority and less-age, and by the amission thereof by the injury of time, through war, plague, fire, or such like occasions,—but also by the counterfeiting and forging of false evidents and writs, and concealing of the same to such a time that all means of improving thereof is taken away; whereby his Majesty's Lieges are constitute in a great uncertainty of their heritable rights, and divers pleas and actions are moved against them, after the expiry of thirty or forty years, which nevertheless by the Civil Law, and by the laws of all nations, are declared void and ineffectual; and his Majesty, according to his fatherly care which his Majesty hath to ease and remove the griefs of his subjects, being willing to cut off all occasion of pleas, and to put them in certainty of their heritage in all time coming,—Therefore his Majesty, with advice and consent of the Estates of Parliament, by the tenor of this present act, statutes finds and declares, that whosoever his Majesty's Lieges, their predecessors and authors, have brooked heretofore, or shall happen to brook in time coming,—by themselves, their tenants, and others having their rights,—their lands, baronies, annual rents, and other heritages, by virtue of their heritable infeftments made to them by his Majesty, or others their superiors and authors, for the space of forty years, continually and together, following and ensuing the date of their said infeftments, and that peaceably, without any lawful interruption made to them therein, during the said space of forty years; that such persons, their heirs and successors, shall never be troubled, pursued nor inquieted, in the heritable right and property of their said lands and heritages foresaid, by his Majesty, or others their superiors and authors, their heirs and successors, nor by any other person pretending right to the same by virtue of prior infeftments, public or private, nor upon no other ground, reason or argument, competent of law except for falsehood: Providing they be able to show and produce a charter of the said lands, and others foresaid, granted to them, or their predecessors, by their said superiors and authors, preceding the entry of the said forty years' possession, with the instrument of sasine following thereupon: Or, where there is no charter extant, that they show and produce instruments of sasine, one or more, continued and standing together for the said space of forty years, either proceeding upon retours, or upon precepts of *clare constat*: Which rights his Majesty, with advice and consent of the Estates foresaid, finds and

declares to be good, valid, and sufficient rights (being clad with the said peaceable and continual possession of forty years), without any lawful interruption, as said is, for brooking of the heritable right of the said lands, and others foresaid. And sicklike, his Majesty, with advice foresaid, statutes and ordains, that all actions competent of the law, upon heritable bonds, reversions, contracts, or others whatsoever, either already made, or to be made after the date hereof, shall be pursued within the space of forty years after the date of the same; except the said reversions be incorporate within the body of the infeftments used and produced by the possessor of the said lands, for his title of the same, or registered in the Clerk of Register's books; in the which case, seeing all suspicion of falsehood ceases most justly, the actions, upon the said reversions ingrossed and registered, ought to be perpetual: Excepting always, from this present act, all actions of warrandice, which shall not prescribe from the date of the bond, or infeftment, whereupon the warrandice is sought, but only from the date of the distress, which shall prescribe, it not being pursued within forty years, as said is. And sicklike it is declared, that in the course of the said forty years' prescription, the years of minority and less-age shall no ways be counted, but only the years during the which the parties, against whom the prescription is used and objected, were majors and past twenty-one years of age. And his Majesty, being careful that no person, who hath any just claim, be prejudged of their actions by the prescription of forty years already run and expired before the date of this present act, hath, with advice foresaid, granted full liberty and power to them to intent their said actions, within the space of thirteen years, next following the date hereof; which shall be as effectual as if the same had been intended within the said space of forty years prescribed by this present act; after the expiring of the which thirteen years this present act shall have full force and effect, after the tenor thereof in all points. And nevertheless it is declared that the persons, at whose instance the foresaid actions shall be moved and intended within the said space of thirteen years, shall not be compelled to insist in the said actions, at the desire of their parties, upon the first summons and citation thereof only, except that the said first summons be called and continued, and the defenders of new summoned thereby; in which case and no otherwise, it is declared that they may be compelled to insist at the instance of the party having interest."

It may be convenient at once to quote section 34 of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), which winds up the series of prescriptive legislation.

"Any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate register of sasines shall be sufficient foundation for prescription, and possession following on such recorded title for the space of twenty years continually and together, and that peaceably, without any lawful interruption made during the said space of twenty years, shall, for all the purposes of the Act of the Parliament of Scotland, 1617, c. 12, "Anent prescription of heritable rights," be equivalent to possession for forty years by virtue of heritable infeftments for which charters and instruments of sasine or other sufficient titles are shown and produced, according to the provisions of the said Act; and if such possession as aforesaid following on an *ex facie* valid irredeemable title recorded as aforesaid shall have continued for the space of thirty years no deduction or allowance shall be made on account of the years of minority or less-age of those against whom the prescription is used and objected, or of any period during which any person against whom prescription is used or objected was under legal disability. This enactment shall have no application to, and shall not be construed so as to alter or affect, the existing law relating to the character or period of the possession, use, or enjoyment necessary to constitute or prove the existence of any servitude or of any public right of way or other public right, [and shall not be pleadable to any effect in any action in dependence at the commencement of this Act, or which shall be commenced prior to the first day of January, one thousand eight hundred and seventy-nine:] Provided always that the possession for any space of time prior to the first day of January, one thousand eight hundred and seventy-nine, shall not have effect for the purposes of this section unless such space of time immediately preceded and was continuous up to the said first day of January."

It will be observed that the Act 1617, c. 12, consists of two portions, the one defending from challenge a certain species of title clothed with forty years' possession, the other following up the Acts 1469, c. 28, and 1474, c. 54, and enacting that all actions upon heritable bonds, etc., be pursued within forty years. The two branches of the statute are quite distinct, and it has been usual to speak of the first as establishing the *positive*, of the

second as establishing the *negative*, prescription. This terminology has sometimes led to confusion; but it is convenient, and has struck root too deeply to be overturned. In employing it, however, it is imperative to have constant reference to the terms of the statute.

1. *The Positive Prescription.*—The functions of the positive prescription have been well said to consist (1) in securing the progress of titles to an estate against anyone alleging a better title; (2) in determining the extent of an estate the title to which is not questioned; (3) in merging a title of property in the higher title of superiority, and thus effecting prescriptive Consolidation (*q.v.*) (Rankine on *Landownership*, 3rd ed., p. 28). The essential conditions upon which a due performance of these functions depends are (1) title, and (2) possession. These conditions must co-exist, or there is no room for prescription. Thus the mere use and practice of fishing in a private stream for forty years will not establish a right in the public at large or in the members of a neighbouring community to fish for trout therein, even though they have a right of passage along the banks (*Fergusson*, 1844, 6 D. 1363; *Grant*, 1894, 21 R. 358; cf. *Montgomery*, 1861, 23 D. 635; and *Copland*, 1871, 9 M. H. L. 1). Where one rival party can point to infeftment without possession, and the other to possession not referable to any infeftment, prescription cannot operate, and the competing titles must be weighed one against another (*Andersons*, 1863, 2 M. 100; see also *Leck*, 1857, 21 D. 408). But given the two essentials, viz. the statutory title and possession for the statutory period referable thereto, the right of the party assailed is invulnerable, except on the ground of intrinsic nullity and forgery, even as against the Crown (*Dundas*, 1830, 8 S. 735; 1831, 5 W. & S. 723). All inquiry into the history and origin of such a title, fortified by such possession, is excluded (*Millers*, 1766, Mor. 10937; *Forbes*, 1827, 6 S. 167; 1 W. & S. 657). "It is the great purpose of prescription to support bad titles. Good titles stand in no need of prescription" (*Scott*, 1779, Mor. 13519; 3 Ross, *L. C.* 334, per Ld. Braxfield).

The purpose of prescription, it has been observed, is "to exclude all inquiry as to whether titles habile in their form upon which prescriptive possession has followed were in their original nature good or bad, and specially inquiry whether the author from whom they have proceeded had power to grant them or not" (*Graham*, 1844, 7 D. 183, per Ld. Moncreiff, 205). No inquiry into the *initium possessionis* is necessary or competent. A party is not bound to support his statutory title clothed with possession by producing any older titles; and even if such older titles are produced, his position cannot be varied for the worse by the production (*Auld*, 1880, 7 R. 663). The objection that the grant founded on proceeded *a non habente potestatem* is the "very objection which it is the object and especial virtue of the long prescription to exclude" (*Glen*, 1881, 9 R. 317). This principle has been given effect to in a long series of cases, of which the following are the most important: *Gedd*, 1760, Mor. 10789; *Munro*, May 19, 1812, F. C.; *Duke of Buccleuch*, 1826, 5 S. 53; *Forbes*, 1827, 6 S. 167; 1 W. & S. 657; *Young*, 1887, 14 R. H. L. 53; and finally, *Fraser*, 1898, 35 S. L. R. 471. In that case the pursuer attacked the defender's title to the lands of Lovat on the ground that it proceeded *a non habente potestatem*. The defender's answer to that attack, in the words of Ld. Pres. Robertson, was "rested on a compact body of authority which it is impossible to dislodge. It is enough for the defender to say that he and his father have possessed for the prescriptive period in virtue of their infeftments. All inquiry into the validity of the prior title is excluded, even although the prior title is narrated *in gremio* of the titles on which possession is pleaded. It is not necessary

for the defender to produce his charter [he had produced two decrees of special service in favour of his father and himself], but if the charter, being produced, were found to be good for nothing and null and void, this would be of no consequence, and would not deprive the defender of his prescriptive title. The positive prescription operates by excluding all inquiry beyond the prescriptive period into the previous titles and rights to the lands, so that it is not competent to inquire, and consequently cannot be known legally, whether lands possessed for forty years on good *ex facie* titles were ever forfeited or not" (per Ld. Pres. Robertson, at p. 479).

Such being the effect of the positive prescription, it is now necessary to examine more closely the nature of the title and possession required by statute.

(1) Title.—Two titles are specified by the Act 1617, c. 12, as habile for prescription, one available to singular successors, the other to heirs.

The former is described as "a charter of the said lands, . . . with the instrument of sasine following thereupon." A charter unaccompanied by sasine is worthless (*Ochterlony*, 1825, 1 W. & S. 533), and the warrant for the sasine must be produced (*Fraser*, 1679, Mor. 10784). But, subject to the necessity for infeftment as the foundation of prescription (which cases like *Heriot's Hospital*, 1697, Mor. 10787, or *Aytoun*, 1833, 11 S. 676, do not seriously impugn), the word "charter" has been so liberally construed as to include practically any deed whose form of expression is held to be legally dispositive (*Heriot's Hospital*, 1697, Mor. 10787; *Ker*, 1705, Mor. 10813; *Glassford*, 1829, 7 S. 423; Stair, ii. 12. 20). Ld. Stair, indeed, goes so far as to lay down the proposition that an obligation to infeft, combined with instrument of sasine, will form a good prescriptive title; and the opinion has been expressed that an invalidly executed disposition of heritage, ratified by the heir-apparent (the ratification containing no words of conveyance), satisfied the requirements of the statute (*Glen*, 1881, 9 R. 317, per Ld. Young).

The alternative title required by the Act 1617, c. 12, is the *ex facie* sasine of an heir. The statute here follows the previous Act, 1594, c. 218, which had dispensed with the production of retours or of precepts of *clare constat*. The sasine of an heir is held to prove its own narrative without production of the dispositive writ of the granter; and this construction has been consistently upheld. (See *Earl of Argyll*, 1671, Mor. 10791; *Purdie*, 1739, Mor. 10796; and *Munro*, May 19, 1812, F. C.; see also *Ker*, 1705, Mor. 10813.) Even if the original charter upon which infeftment proceeded be "extant," the heir is not bound to produce it.

The statutory production, whether it be that prescribed for heirs or for singular successors, must be free from intrinsic nullity. No lapse of time and no length of possession can cure any flaw appearing on the face of it. *Tempus ex suapte naturâ vim nullam effectricem habet.* Thus the want of the symbol in delivery of sasine appearing in the instrument vitiates it as a title; and similarly, the absence of subscription, or the fact that a deed has been tested by one witness only, constitutes an objection which no lapse of time can purge away. On the other hand, the objection that sasine had not been given on the lands was held to be extrinsic, and therefore of no force after the prescriptive period expired. It seems, however, to be essential that the sasine which is founded on as a prescriptive title should have been recorded (*Crawford*, 1729, 2 Ross, *L. C.* 112; *Kibbles*, 1830, 9 S. 233). "Falsehood," which is expressly excepted by the statute from the grounds on which a proprietor may not be troubled after forty years' possession, has always been taken to mean forgery (*Duke of Buccleuch*, 1826, 5 S. 53).

The salient feature of the legislative changes which have taken place in our conveyancing system during the last fifty years is the substitution of registration for infeftment; and the enactment of the Conveyancing Act, 1874, s. 34, to the effect that "any *ex facie* valid irredeemable title to an estate in land, recorded in the appropriate register of sasines, shall be sufficient foundation for prescription," is designed to accommodate the law of prescription to this alteration. "Estate in land" is defined in the Act as "any interest in land, whether in fee, liferent, or security, and whether beneficial or in trust, or any real burden on land," and as including an estate of superiority. A right of salmon-fishing has recently been held to be an estate in land within the meaning of the statute (*Ogston*, 1893, 21 R. 282; 1896, 23 R. H. L. 16). The word "title" is broadly construed, and is taken to embrace all deeds by virtue of which one holds a legal right. The qualification "irredeemable" is sufficient to exclude from the operation of the statute a decree of adjudication, which is no better than a *pignus prætorium*, so that the necessary period of possession on such a title is still forty years (*Hinton*, 1883, 10 R. 1110).

Adjudication (*q.v.*) and sasine, followed in due course by decree of declarator of expiry of the legal, constitutes a good prescriptive title; nay, although the mere expiry of the legal without declarator will not convert what is essentially a right in security into a right of property (*Campbell*, 1794, Mor. 321; *Ormiston*, Feb. 7, 1809, F. C.; *Stewart*, 1811, 1 Bell, *Com.* 744), forty years' possession from the date of the expiry of the legal following upon adjudication and sasine, though without declarator of expiry, is sufficient to establish an unassailable right to heritage (*Caitcheon*, 1791, Mor. 10810; *Johnston*, 1745, Mor. 10789; *Robertson*, 1808, Hume, *Dec.* 463; 1815, 3 Dow. 108; 1 Ross, *L. C.* 208). In the language of Ld. Hermand, the maxim "*Nemo mutare potest causam possessionis suæ* is good Roman law, but very bad Scots law." It is to be noted, however, that prescription begins to run only from the date of the expiry of the legal, and not from that of the infeftment upon the adjudication,—at all events, in a question between the adjudger and the debtor or his heir (*Cutler*, 1762, 5 Bro. Supp. 893; 1 Ross, *L. C.* 204; *M'Kenzie*, 1827, 5 S. 648).

(2) Possession.—The second requisite of a good prescriptive right is possession. Without possession, no special privilege is conferred upon charter and sasine in a competition of titles by the Act 1617, c. 12. By means of possession, a superior can actually prescribe against his vassal a subject previously granted to the latter (*Fergusson*, 1832, 3 Ross, *L. C.* 370; *Aytoun*, 1833, 11. S. 676). On the other hand, unless the possession averred be referable to a valid title, it has no peculiar efficacy (*Earl of Haddington*, 1830, 8 S. 367; *Agnew*, 1822, 2 S. 36; *Ross*, 1843, 5 D. 648; *Duke of Buccleuch*, 1843, 5 D. 846; *Milne's Trs.*, 1873, 11 M. 966; *Edmonstone*, 1886, 13 R. 1038). "Forty years' possession does much, but it does not do everything" (per Ld. Cockburn in *Fergusson*, 1844, 6 D. 1363).

While possession must be distinctly referable to the infeftment produced and founded upon, possession for the statutory period of a subject not mentioned in the title may set up a prescriptive right thereto, provided the subject has been possessed as Part and Pertinent (*q.v.*) of another subject expressly conveyed in the title. The *onus* of proving that the lands to which a right is so claimed have been possessed, not merely along with but as part and pertinent of the principal lands, lies upon the party asserting the right (*Hunt*, 1867, 5 M. H. L. 1; *Scott*, 1869, 7 M. H. L. 35). But once that fact is established, possession upon a clause of parts and pertinents will prevail in a competition against an express feudal title to the subjects

in dispute upon which no possession has followed (*Magistrates of Perth*, 1829, 8 S. 82; *Earl of Fife's Trs.*, 1830, 8 S. 326; *Countess of Moray*, 1675, Mor. 9636; *Grant*, 1677, Mor. 10876).

Where the competing parties produce titles equally habile for prescription, the true measure of their right will be determined by the state of possession (*Carnegie*, 1844, 6 D. 1381; *Duke of Montrose*, 1840, 2 D. 1186). The examples of the effect of possession in explaining and interpreting a grant are very numerous. Where a cornice and a signboard had for forty years projected beyond the centre of the joists between the ground floor and the first floor of a tenement, it was held that the proprietor of the upper floor was not entitled to call upon the proprietor of the ground floor to remove them, they having been possessed by the latter for the prescriptive period as part and pertinent of his property on the ground floor (*M'Arly*, 1883, 10 R. 574). Again, in the case of a garden in the middle of a square in a town, it was decided that the past possession and administration thereof must be the criterion of the feuars' rights in the garden which were not explicitly defined in their titles (*Cormack*, 1883, 11 R. 320). But the most familiar class of illustrations of the principle in question is that which includes rights of fishing. A grant of lands from the Crown *cum piscationibus*, clothed with forty years' uninterrupted possession of salmon-fishings, will establish a right to these salmon-fishings (*Earl of Southesk*, 1667, Mor. 10842; *Fullerton*, 1672, Mor. 10843; *Ramsay*, 1848, 10 D. 661; *Fraser*, 1866, 4 M. 596; *Stuart*, 1867, 5 M. 753; 1868, 6 M. H. L. 123. Cf. *Braid*, 1800, Mor. *voce* "Property," App. i. 2; and *Earl of Moray*, 1677, Mor. 10903). So, too, infeftment in a barony, *plus* possession of salmon-fishings for the prescriptive period, constitutes an unassailable title to these fishings even against the Crown (*Nicol*, 1868, 6 M. 972; *M'Donall*, 1875, 2 R. H. L. 49; *M'Culloch*, 1874, 2 R. 27; *Lord Lovat*, 1880, 7 R. H. L. 122). Similarly, an exclusive right to mussel-scalps between high and low water mark may be prescribed on a Crown title to a barony if exclusive possession have followed thereupon (*Duchess of Sutherland*, 1868, 6 M. 199); just as barony titles with no express grant of foreshore are sufficient foundation, when clothed with possession, for a prescriptive right of property in the foreshore (*Lord Blantyre*, 1879, 6 R. H. L. 72); or as a right to ferry over a navigable river may be established by possession following upon a charter of barony (*Duke of Montrose*, 1848, 10 D. 896). A base right to salmon-fishings, or even to fishings, will probably be raised by possession into a prescriptive right to salmon-fishings (*Sinclair*, 1865, 3 M. 981; 1867, 5 M. H. L. 97; *Earl of Zetland*, 1868, 6 M. 292). The foreshore of a navigable tidal river may be acquired by prescriptive possession upon a disposition of lands and shore-ground, though not confirmed by the Crown (*Buchanan*, 1882, 9 R. 1218; cf. *Young*, 1887, 14 R. H. L. 53); and, in general, a Crown charter by progress, or even a charter from a subject, is a good title upon which to erect by possession a prescriptive right to *regalia* (*Hebden*, 1868, 6 M. 489). In all these cases, however, it must be observed that the extent of the right is strictly limited by the extent of possession (*Catheart*, 1871, 9 M. 744). See FISHINGS.

Possession is also the measure of many rights enjoyed by the magistrates and inhabitants of royal burghs and burghs of barony, *e.g.* the right to levy harbour dues, petty customs, tolls, etc. (*Macpherson*, 1881, 8 R. 706; *Greig*, 1851, 13 D. 375; *Hill*, 1830, 8 S. 449; *Galbreath*, 1845, 7 D. 482; *Maxwell*, 1866, 4 M. 764). The use, moreover, to which property vested in the magistrates of a burgh has been put for the prescriptive period by the members of the community will so qualify the right of property as to

prohibit the devotion of the lands to any other purpose inconsistent with that use. This principle has been repeatedly given effect to, *e.g.* in the cases of *Kilmarnock*, 1776, 5 Bro. Supp. 406; *St. Andrews*, 1824, 2 S. 629; *Auchtermuchty*, 1827, 5 S. 690; *Burntisland*, 1812, noted in 9 D. 293; *Eyemouth* (*Home*, 1846, 9 D. 286); and *Dundee*, 1886, 14 R. 191. In the most recent case on this branch of the law it was held that the right of the magistrates of a burgh to a market muir was qualified by the immemorial use of the muir by the inhabitants for purposes of recreation, but that such use for a period less than forty years would not be effectual to qualify the right (*Mays. of Forfar*, 1893, 20 R. 908). But the case in which the whole question was most fully discussed was that of *Sanderson*, 1859, 21 D. 1011, 22 D. 24, where a burgess of Musselburgh (a royal burgh) succeeded in interdicting the magistrates from feuing a portion of the links over which the inhabitants had been in use to play golf from time immemorial. The title to the solum of the links in the magistrates was there held to be explained by the possession which had taken place as being a title of property to certain effects in the members of the community. "The legitimate effect of usage following upon the grants to the corporation is to explain their import, and the nature and extent of the grants thereby made to the burgesses and the inhabitants" (per Ld. Curriehill). With the case of *Sanderson* may be compared the more recent decisions in *Paterson*, 1879, 7 R. 712; 1881, 8 R. H. L. 117; and *Graham*, 1879, 6 R. 1066; 1881, 8 R. 395; 1882, 9 R. H. L. 91.

While possession thus serves to explain and illustrate the meaning and to define the scope of a grant, it can never be founded upon in order to establish a right manifestly inconsistent with or contradictory of the grant to which it is referred. A vassal, for example, cannot exclude his superior from the *dominium directum* by possession upon the charter proceeding from that superior. The continued misapplication of a fund or non-fulfilment of a trust will afford no defence to an action for enforcing the proper execution of the trust (*Thain*, 1891, 18 R. 1196, per Ld. Kinnear, 1201. See *Presbytery of Dundee*, 1858, 20 D. 849; *University of Aberdeen*, 1876, 3 R. 1087). A claim to a right to work quarries in the park of Holyrood House as part and pertinent of the feudal grant of the rangership and keepership of the park was rejected on the ground that such a right was not only not a part and pertinent of the office, but absolutely inconsistent with the duty it involved of preserving the park from dilapidation (*E. of Haddington*, 1830, 8 S. 867; 5 W. & S. 570; see also *Ross*, 1843, 5 D. 648).

Possession of minerals upon a disposition of the lands which appeared *ex facie* of the deed of conveyance as a whole to be merely a conveyance of the superiority, would probably not set up a good prescriptive right of property in the minerals (*Fleeming*, 1868, 6 M. 782, approved in *Orr*, 1893, 20 R. H. L. 27). The most familiar illustration of the principle that possession must square with the title is that afforded by the effect of possession upon a Bounding Charter (*q.v.*). No amount of possession will enable the proprietor of lands to prescribe an inch of property beyond the limit of the boundaries specified in his title (*D. of Buccleuch*, June 16, 1882 F. C.; *Mays. of St. Monans*, 1845, 7 D. 582; *Gordon*, 1850, 13 D. 1; *Stewart*, 1866, 4 M. 283. See also *Reid*, 1879, 7 R. 84). In the most recent case, the title held to be a bounding title was a conveyance of certain lands, excepting "those parts and portions thereof sold and disponed by me to A. and B., all as specified and described in the disposition thereof by me in their favour, dated" so and so. That disposition referred to an annexed plan of the ground conveyed, and described it by measurement. It was held that none of the

subjects so excepted from the grant could be acquired by the grantee by prescription (*Hutton*, 1896, 23 R. 522). While possession of lands beyond the specified boundary is of no avail, it should be noted that incorporeal rights, such as a right to salmon-fishings (*E. of Zetland*, 1873, 11 M. 469) or servitudes, may be prescriptively acquired beyond the limits of a bounding charter (*Liston*, 1835, 14 S. 97; *Beaumont*, 1843, 5 D. 1337).

Possession, to be effectual to establish a prescriptive right, must be fully, unequivocally, and specifically applied to the subject claimed. Thus, while in the case of an express title to minerals, possession of the surface is enough to complete a prescriptive right (*Crawfurd*, 1821, 1 S. 110), where the minerals are claimed as part and pertinent of the lands in which he is infeft, the claimant, in order to prevail, must prove possession not merely of the surface, but of the minerals themselves; and further, such possession by working the coal as ought reasonably to have kept up in the minds of the competing parties, during the whole of the prescriptive period, the impression that the coal was in possession of the party who founds upon his possession as explaining his title (*Forbes*, 1827, 6 S. 167, where it was also held that possession of the coal in each separate parcel of the lands must also be proved). The sufficiency of the possession alleged or proved must in all cases be judged of *secundum subjectam materiam*. Thus possession by net and coble used to be held essential, in all cases where practicable, to the constitution of a prescriptive right to salmon-fishings (*Duke of Sutherland*, 1836, 14 S. 960; *Milne*, 1850, 13 D. 112; *Duke of Richmond*, 1870, 8 M. 530; *Sinclair*, 1890, 17 R. 507. For exceptions to the general rule, where fishing by such means was impracticable, see *Stuart*, 1867, 5 M. 753; 1868, 6 M. H. L. 123; *Earl of Dalhousie*, 1865, 3 M. 1168). But though occasional angling will not be sufficient, and though the use of the rod will be of no avail when practised in competition with net and coble fishing, it is thought that at the present time proof of fishing by rod and line, if regular and effective, whether practised by the party claiming the right himself or by his fishing tenant, would be held to be such possession as would suffice not only to construe an express grant to salmon-fishings, but also to convert a general grant of fishing into a right to fish for salmon (*Warrand's Trs.*, 1890, 17 R. H. L. 13, per Ld. Watson, 23). Proof of prescriptive possession by a cairn-net has been held to establish a right to salmon-fishings *ex adverso* of another's lands in one who was infeft on a Crown charter *cum piscationibus* (*Ramsay*, 1848, 10 D. 661); but although an illegal mode of possession may be strong evidence of the existence of a legal right (*Lord Lovat*, 1880, 7 R. H. L. 122, 166), no possession had in a manner which violates the law will avail to constitute a right, or to interpret a title (*Mackenzie*, 1840, 2 D. 1078).

Possession must, further, be continuous, peaceable, uninterrupted, and exclusive (*Earl of Fife's Trs.*, 1849, 12 D. 223). The fact of possession may be continuous, though the several acts of possession may be separated by a greater or less interval of time. *Probatis extremis, præsumuntur media*, "if the distance be not great" (Stair, iv. 40. 20). How many acts of possession will infer the fact is a question of proof and presumption to be determined in each individual case (*Macdonnell*, 1828, 6 S. 600). It is essential that possession should be exclusive (*Duke of Portland*, 1832, 11 S. 14); and the word "exclusive" must qualify possession in an issue sent to a jury (*Lindsay*, 1867, 6 M. 889). But in some cases a less exacting standard of exclusiveness is applied than in others. Where, for example, the subject in dispute is a piece of ground, such as a foreshore, to which the general public have necessarily ready access, and in regard to which it is practically

impossible to prevent occasional encroachments, it is enough that the party seeking to establish a prescriptive right of property should have had all the beneficial uses of the subject which a direct grantee of the Crown would naturally have enjoyed (*Young*, 1887, 14 R. H. L. 53). At the same time, concurrent acts of possession by the public "tend to derogate from the possession of the proprietor," and if repeated sufficiently often, and carried far enough, may ultimately deprive his possession of its exclusive character (*Young, ut supra*; cf. *Lindsay*, 1867, 6 M. 889).

Possession may be either natural or civil, *i.e.* either in the person of the proprietor or in the person of another for his behoof. Wherever one possesses in the right of another, his possession profits not himself, but the person in whose right he possesses. Thus the possession of the reverser in a wadset, upon a back-tack from the wadsetter, was held to be that of the latter (*Murray*, 1713, Mor. 10934); and the possession of an adjudger was held to be that of the proprietor who had redeemed the lands, either before declarator of expiry of the legal or before the expiry of prescription (*Burgy*, 1667, Mor. 1305). The most familiar example of civil possession is the possession of a tenant. So long as the tenant possesses on his tack, he can prescribe no right against his landlord from whom his title to possess the lands flows. But he can acquire a prescriptive right to the lands, good against the original landlord and against third parties, if he procures a grant of the lands *a non domino*, and possesses thereon for the statutory period without paying rent (*Grant*, 1677, Mor. 10876). Similarly, the possession of a vassal is the possession of the superior (*M'Culloch*, 1874, 2 R. 27; contrast *Hall*, 1873, 11 M. 967). Failure to exact feu-duties or casualties will not imply an interruption of the superior's possession through the vassal. So long as the possession of the latter is referable to the superior's grant, and that alone, so long is it accounted the possession of the superior (*Campbell*, 1754, 5 Bro. Supp. 812). The feudal relationship can only be extinguished if the vassal, besides failing to pay his feu-duty, obtains a charter from some other person, and possesses thereon for the prescriptive period (*Macdonald*, 1853, 1 Macq. 790; *Hamilton*, 1807, Hume, *Dec.* 461). On the same general principle, the possession of the life-renter is the possession of the fiar (*Campbell*, 1770, 5 Bro. Supp. 543: *Younger*, 1665, Mor. 10925; *Nielson*, 1823, 2 S. 216: *French*, 1835, 13 S. 743). But it is otherwise in the case of a liferenter by reservation (*Marquis of Clydesdale*, 1726, Mor. 1262).

Where the party pleading prescription can connect his own possession with an investiture in the person of another, his own possession may be joined to his author's so as to make up the prescriptive period. A striking illustration of this rule is afforded by the case of *The Earl of Eglinton*, 1861, 23 D. 1369, where one who completed the years of possession on an infeftment following on a general conveyance from another who was infeft, and had possessed for the earlier portion of the prescriptive period as institute under an invalid deed of entail, was held to have instructed, by conjoining his own possession with his author's, a good prescriptive title against trustees who had executed the invalid deed of entail, and sought to reduce the same in order to execute a valid one. There are numerous cases in which the Court, running counter to Mr. Erskine's doctrine (*Inst.* iii. 7. 5), have taken the view that where the possession founded on is ascribed to charter and sasine, it is enough for an heir or singular successor to prove possession for forty years by persons with whom, on the one hand, he can connect himself, and who, on the other, can connect themselves with that original title, no matter whether by deeds clothed with infeftment, or merely

personal, or even by apparency (*Middleton*, 1774, Mor. 10944; *Earl of Marchmont*, 1724, Mor. 10797; *Caitcheon*, 1791, Mor. 10810. See also *Crawford*, 20 Dec. 1822, F. C., where the Court allowed a party to feudalise a personal right *pendente lite*). But where the title produced and founded upon is the second of the alternative titles sanctioned by the Statute 1617, c. 12, viz. bare sasines proceeding upon retours, or precepts of *clare constat*, the link between the heir infeft on that sasine and his successor (whether an heir or a singular successor) must be feudalised in order to prescription, unless the former have completed the requisite period of possession in his own person (*Earl of Argyll*, 1671, Mor. 10791; *Purdie*, 1739, Mor. 10796; *Millers*, 1666, Mor. 10937; *Nielson*, 1823, 2 S. 216; *M'Neill*, 1858, 20 D. 735). The abolition, however, of possession on apparency, by sec. 9 of the Conveyancing Act, 1874, renders this point of less practical importance than formerly attached to it.

Possession must be for the whole of the statutory period, *i.e.* for forty years in all actions begun prior to 1 January 1879, and for twenty years in all actions commenced subsequently to that date. Nothing short of the statutory period of possession will suffice even to explain a grant of lands (*Fraser*, 1866, 4 M. 596), and the interruption of possession on the last day of the period will wipe out all the possession that went before. Where, however, possession for the requisite period has been proved, it will be presumed to connect with a habile title of an earlier date than the beginning of the period (*Sinclair*, 1865, 3 M. 981; 1867, 5 M. H. L. 97; *M'Culloch*, 1874, 2 R. 27). The language of sec. 34 of the Act of 1874, whereby the period of twenty years is substituted for the forty years required by the earlier statute, has been liberally construed (*Buchanan and Geils*, 1882, 9 R. 1218; *Ogston*, 1896, 23 R. H. L. 16; contrast *Hinton*, 1883, 10 R. 1110).

The first portion of the Act 1617, c. 12, although in terms applicable only to feudal rights completed by infeftment, has in practice been extended by analogy to other rights, such, for example, as a long lease (*Mure*, 1746, Mor. 10820; *Carlyle*, 1869, 41 Sc. Jur. 342). Indeed, one of the fullest discussions of the characteristic and instructive doctrine of prescription on Double Title (*q.v.*) will be found in the Panmure leases case (*Maule*, 1829, 7 S. 527, and Appendix). Prescription is also applied to teinds, which, where they have never been feudalised, are effectually carried by a merely personal title (*Gordon*, 1758, Mor. 10825; *Irvine*, 1764, Mor. 10830; *Budge*, 1797, Hume, *Dec.* 455). It is probable, however, in spite of the apparent authority of the case of *Learmonth*, 1829, Shaw, *Teind Ca.* 192, that, in competition with a feudal title to teinds, a personal title could not in any circumstances prevail (*Earl of Fife*, 1831, Shaw, *Teind Ca.* 254). It may be observed that some of the decisions with regard to teinds afford very striking illustrations of the general rules of the positive prescription as explained above. Thus the necessity for a habile title is shown in *Straton*, 1756, Mor. 10824; *Speir*, 1858, 20 D. 525; *Learmonth*, 1859, 21 D. 890; *Cheape*, 1871, 9 M. 377; and *Mackintosh*, 1877, 4 R. 1069; the unassailable character of a good title clothed with possession is exemplified in *Maderty*, July 9, 1817, F. C.; *Baird*, 1832, 10 S. 752; *Bain*, 1858, 20 D. 1006; *Balfour*, 1860, 23 D. 147; and *Colquhoun*, 1873, 11 M. 919; while the effect of possession in interpreting an equivocal title, as well as the impossibility of acquiring a right by possession in the teeth of the title, is illustrated in *Macleod*, 1869, 7 M. 614; 1873, 11 M. H. L. 62. It may also be noted that a designation to a glebe by a presbytery, followed by possession, is a sufficient title to the glebe to exclude other persons (*Halkett*, 1860, 22 D. 1357). The application

of prescription to a right of patronage has lost almost all practical importance since the Patronage Act, 1874 (37 & 38 Vict. c. 82), came into operation. The following cases may, however, be referred to without further comment: *Macdonell*, 1828, 6 S. 600; *Lord Dundas*, 1830, 8 S. 755; 1831, 5 W. & S. 723; *Earl of Mansfield*, 1830, 8 S. 765; *Graham*, 1844, 7 D. 183.

Positive SERVITUDES (*q.v.*) may be constituted not only by express grant, but also by prescriptive possession upon a good title; and the only person who can thus acquire such a right is the duly infeft proprietor of the dominant tenement. Servitudes constituted by infeftment and possession are extinguished when the dominant and servient tenements come into the same hands, unless they continue to be held on separate titles, nor is the servitude revived if the tenements come to be again separated (*Forbes*, 1839, 1 D. 449; *Baird*, 1861, 4 Macq. 127; *Gow's Trs.*, 1875, 2 R. 729). The necessity of infeftment in a dominant tenement as the foundation of a prescriptive right to a servitude, is well illustrated in the cases which deal with the rights of burghs of barony and royal burghs to such servitudes as pasturage, drawing water, and the like (*Jaffray*, 1755, Mor. 2340; *Sinclair*, 1779, Mor. 14519; *Murray*, Dec. 8, 1808, F. C.; *Brand*, 1841, 4 D. 292; *Mackenzie*, 1849, 12 D. 132; *Henderson*, 1860, 22 D. 1126. Cf. also *Cameron*, 1848, 10 D. 446; *Marquis of Breadalbane*, 1846, 9 D. 210; rev. 7 Bell's App. 43). The term of possession is still forty years, and the maxim *Tantum præscriptum quantum possessum* is strictly applied. (See, however, *Gairlton*, 1677, Mor. 14535, and *Forbes*, 1724, Mor. 14505.) But though certain exceptional and innominate rights, as, *e.g.*, the right and privilege "of one tide's fishing of salmon yearly," are susceptible of the positive prescription (*Murray*, 1880, 7 R. 804), no amount of possession will establish a right to a servitude which is not recognised as such in the law of Scotland, *e.g.* a *jus spatiandi* (*Dyce*, 1849, 11 D. 1266, 1 Macq. 305), or the exclusive use of a common subject (*Leck*, 1859, 21 D. 408). The servitude of thirlage, as a rule, must be constituted by writing (*Harris*, 1863, 1 M. 833), but mills belonging to the Crown or to church lands may acquire a right to the servitude by possession alone (*Kinnaird*, 1675, Mor. 10862), and the grant of a barony mill with multures or with pertinents will be a good title for prescription (*E. of Hopetoun*, 1753, Mor. 16029; *Bruce*, 1769, Mor. 16061).

2. *THE NEGATIVE PRESCRIPTION.*—What is called the negative prescription (which depends upon the second portion of the Act 1617, c. 12, and two earlier statutes) is "the loss or forfeiture of a right by the proprietor neglecting to exercise or prosecute it during that whole period [viz. forty years] which the law hath declared to infer the loss of it" (Ersk. *Inst.* iii. 7. 8). Its effect is not merely to change the *onus* of proof or to limit its mode, but wholly to extinguish the right to which it applies (*Napier*, 1703, Mor. 10656; *Campbell*, 1747, Mor. 11634, 1 Pat. App. 427; *Kermack*, 1874, 2 R. 156). It is a peremptory plea (*Munro*, 1829, 7 S. 648), and may be pleaded against the Crown (*Deans of Chapel Royal*, 1867, 5 M. 414).

Though the terms of the general clause of the Act 1617, c. 12, are wide in their scope, it is well established that a right of property can never be lost *non utendo* (*D. of Buccleuch*, June 16, 1812, F. C.; *Presbytery of Perth*, 1728, Mor. 10723). This simple principle has given rise to some confusion. While it has never been seriously doubted that where a party is in a position to plead the positive prescription, he is also entitled to plead the negative (*Officers of Ordinance*, 1859, 22 D. 219; 1862, 24 D. H. L. 3), the proposition has sometimes been maintained that no man can avail himself of the negative prescription unless his own titles are fortified by the positive (*M'Culloch*, 1828, 6 S. 1059; *Stewart*, 1823, 2 S. 263;

Macdonnell, 1828, 6 S. 600, per Ld. J.-C. Boyle). The true view, that the validity of the plea depends not upon the rights of the party relying on it, but upon the questions whether the right against which prescription is pleaded falls within the terms of the statute, and whether it has been asserted within forty years, was there luminously expressed by Ld. Corehouse in *Cubbison*, 1837, 16 S. 112: "The negative prescription is not of use in being objected directly against a heritable right of ownership, but in trying the validity of the competing progresses, and in getting rid of various objections which might otherwise have been competent." Hence the right to call for the production of an alleged disposition of lands may be lost by failure to exercise it for the prescriptive period (*Paterson*, 1859, 21 D. 322), though the right to raise a direct declarator of property can never be so lost. So the opinion has been expressed that the right of adjudging in implement upon a general disposition may be lost *non utendo* (*Chisholm*, 1864, 3 M. 202, per Ld. Deas), and possibly the right to expede and record a notarial instrument upon such a conveyance may be lost in the same manner. Without entering further into detail, it may be said by way of summary that the distinction between rights of property and rights of action in relation to the negative prescription has as a rule been carefully observed (*Rochcid*, 1800, Mor. *voce* "Prescription," App. i. Nos. 4 and 7; 1805, 5 Pat. App. 35; *Paul*, Feb. 8, 1814, F. C.; *Paterson*, *ut supra*; *Chisholm*, *ut supra*; *E. of Dundonald*, 1836, 14 S. 737); and that the only qualification attaching to the right to plead the negative prescription is that the party pleading it must have a legal interest in his own person to enable him to do so (*Wauchope*, 1781, Mor. 10706; 2 Pat. App. 595).

Rights of which the exercise is regarded as *res meræ facultatis* cannot be lost *non utendo*, any more than rights of property. Thus a superior will not forfeit his right to feu-duties and casualties by failure to exact them (*Duke of Buccleuch*, 1768, Mor. 10711), nor will the process of declarator of non-entry be excluded by the fact that the lands have lain in non-entry for more than forty years (*Falconer*, 1863, 1 M. 1164). Among the rights which have been held to be *res meræ facultatis* are the following: A vassal's right to enter with an over-superior (*Cheyne*, 1832, 10 S. 622), a right to redeem a burden (*Reid's Trs.*, 1881, 8 R. 509), the right to surrender teinds (*Chisholm-Batten*, 1873, 11 M. 292; *Earl of Minto*, 1873, 1 R. 156), the right of the seller of part of a heritable estate to be relieved of the proportion of the burdens effeiring to the part sold (*Mill*, 1794, Mor. 10715), the right of one who holds a decree of sale of teinds, with power to intromit with his own teinds, to call upon the titular to denude (*Lady Cardross*, 1710, Mor. 10657), and the contractual right of the proprietor of the ground-flat of a tenement to open and use a door in the common stair (*Gellatly*, 1863, 1 M. 592; see *Smith*, 1884, 11 R. 921). The failure of the titular to enforce the obligation to pay parsonage teinds will not extinguish that obligation; but a right to vicarage teinds, which mere usage is sufficient to establish, may be lost by the neglect to exercise it.

Servitudes are not rights of property, and are consequently liable to be extinguished *non utendo*, even where they are constituted by writing (*Graham*, 1735, Mor. 10745). It is the same with public rights of way (*M'Farlane*, 1865, 4 M. 259; *Magistrates of Elgin*, 1862, 24 D. 301), and with many other public or quasi-public rights (*Kelso*, 1755, Mor. 10737; rev. 1757, H. L.; *Hamilton*, 1726, Mor. 10777; *Renfrew*, 1854, 16 D. 348; *Linlithgow*, 1822, 1 S. 476; *Dundee Harbour Trustees*, 1848, 11 D. 6. Contrast *Scott*, 1836, 14 S. 922). The toleration by the grantee of a right of

open and habitual defiance thereof is taken to infer an abandonment of his privilege.

Among the numerous rights which have been held to be struck at by the statutes may be enumerated: a claim by a legatee (*Jamieson*, 1872, 10 M. 399), a right under a trust deed (*Pollock*, 1778, Mor. 10702; 1779, 2 Pat. App. 495), a beneficiary's right, if not to a general accounting, at least to challenge as *ultra vires* a transaction entered into by the trustees more than forty years previously (*Barns*, 1857, 19 D. 626, where, however, see Ld. Ivory's opinion), a right to have an obligation made a heritable burden (*Pearson*, 1892, 20 R. 167), an obligation to entail (*Baillie*, 1855, 17 D. 659; 1857, 19 D. H. L. 14; *Earl of Eglinton*, 1861, 23 D. 1369), and a decree of valuation of teinds by the sub-commissioners (*Colquhoun*, 1873, 11 M. 919, per Ld.-Pres. Inglis, 927). But decrees of valuation by the High Court, or decrees of approbation of sub-valuations, are not lost by dereliction, and cannot be challenged and reduced on extrinsic grounds after forty years (*Colquhoun, ut supra*; *Speir*, 1891, 18 R. 407). Other illustrations of the scope of the enactments will be found in *Baird*, 1862, 24 D. 447; 1863, 1 M. H. L. 6; *M'Innes*, 1844, 6 D. 512; *Duke of Buccleuch*, 1768, Mor. 10711, Napier, p. 559; and *Leslie*, 1827, 5 S. 284, with which compare *Stewart*, June 3, 1813, F. C.

Obligations which cannot be enforced at once, such as bonds of annuity, do not prescribe through failure to enforce them, though their arrears are extinguished by the lapse of forty years, the amount due each year running a separate course of prescription (*Lockhart*, 1730, Mor. 10736; *Burt*, 1858, 20 D. 402). But a bond, which is a single obligation, may be extinguished by no demand being made for payment of the interest thereon for forty years. A defence competent to a defender in an action is not lost *non utendo* unless it consists in some counter-claim against the pursuer which itself would found an action, *e.g.* compensation (*Carmichael*, 1719, Mor. 2677), otherwise, the maxim *Temporalia ad agendum sunt perpetua ad excipiendum* will be held to apply, and a receipt, for example, will hold good as an answer to a claim for ever, it being impossible to use it until the claim which it is designed to meet shall have been made.

As regards the rights of heritors *inter se* at common law, the negative prescription begins to run on an over-paying heritor's claim to relief from an under-paying heritor when each over-payment is made. But where payments of stipend are made under an *interim* decree of locality, there is held to be an implied judicial contract among all parties that the final decree when pronounced shall adjust the conflicting interests as from the beginning of the process, and consequently prescription does not begin to run till the date of the final decree (*Marquis of Tweeddale*, 1833, 12 S. 1). Where, however, the over-payments are due to the act of the over-paying heritor in failing to produce a decree of valuation, prescription will take effect (*Earl of Fife*, 1887, 15 R. 238), and where an under-paying heritor has sold his lands and left the parish more than forty years before an action of repetition is raised against him, he is entitled to plead prescription (*Sinclair*, 1877, 4 R. 1126; rev. 1878, 5 R. H. L. 119).

Reversions are expressly subjected by the statute to the operation of prescription, except those "incorporated with the infeftment" or registered in the Clerk of Register's books. To enjoy the benefit of this exception, a reversion need not be engrossed *verbatim* in the sasine. A general reference to reversions inserted in previous titles will not suffice (*Munro*, May 19, 1812, F. C.); but such a clear expression of the nature of the right as will put people on their guard is enough (*Nicolson*, 1810, Hume,

Dec. 470; *Geddes*, May 28, 1819, F. C.). The exemption will not extend to any other class of rights than reversions (*Stuart*, 1711, Mor. 10722), and it has been held that a right of reversion limited to seven years and appearing *ex gremio* of the grant, was lost *non utendo* although there had been no declarator of expiry, and that the title was irredeemable, the right to redeem not having been exercised within forty years of the date when it became void (*Pollock*, 1738, Mor. 7216). Although registered reversions are expressly excluded by the Act from prescription, it is decided that, in a competition with the feudal clause of the statute, the general clause must give way, and that no reversion not acted upon within forty years can qualify a good prescriptive title clothed with possession (*Scott*, 1779, Mor. 13519, 3 Ross, *L. C.* 464). A registered reversion is therefore in no better case than a registered bond.

The negative prescription runs *de die in diem*, and begins its course from the date at which the right of action against which it is pleaded emerges. The date of the bond containing the obligation which is specified by the statute as the starting-point has been held to mean the date when the fulfilment of the obligation becomes due (*Butler*, 1665, Mor. 11183; *Lutefoot*, 1780, Mor. 11187; *Cooke*, 1850, 13 D. 157). The Conveyancing Act of 1874 has made no alteration on the length of the prescriptive period (*Brodie*, 1884, 11 R. 925). The statute of 1617 specially provides that prescription shall run on "all actions of warrandice" from the date of distress only. It seems doubtful whether a right of action upon a clause of WARRANDICE (*q.v.*) is altogether lost *non utendo*, or only lost as regards the particular subjects evicted. The latter view was taken in *Horne*, 1835, 13 S. 296; rev. on another ground, 1 Bell's App. 1, at pp. 36 and 58. (See also *Breadalbane's Trs.*, 1838, 16 S. 815; *Lennox*, 1843, 5 D. 1357; *Sinclair*, 1844, 6 D. 378.)

REPLIES TO THE PLEA OF PRESCRIPTION.—(1) *Contra non valentem agere non currit præscriptio* is a maxim which seems to lie at the very foundation of prescription. But the existence in some person of an adverse right capable of being asserted is not necessary to the running of the positive prescription (*Campbell*, 1765, 5 Bro. Supp. 926; *Millers*, 1766, Mor. 10937; *M'Neill*, 1858, 20 D. 735), except in the case of DOUBLE TITLE (*q.v.*). It has never, on the other hand, been doubted that *non valens agere* is an absolute answer to the plea of the negative prescription; though, if the legal inability be due to the conduct of the party himself who pleads it, his plea will be repelled (*Earl of Fife*, 1887, 15 R. 238). By *valentia agendi* is meant not a physical but a legal incapacity to sue. A mere difficulty in the way of suing, or even complete ignorance of one's rights, will not be enough (*Graham*, 1843, 5 D. 1368). Even forfeiture by an established government has been held to be no answer to prescription (*Campbell*, 1765, 5 Bro. Supp. 915, 926). It has never been decided whether mental incapacity is a valid reply to the statutory plea, though Mr. Bell holds that it falls within *non valentia* (*Prin.* s. 627).

(2) The statute itself expressly excludes the years of minority from the reckoning of the prescriptive period. Minority acts merely as a suspension of the course of prescription, and does not rob any preceding term of possession of its prescriptive quality. But it is available as a plea only to individuals, and not to institutions like hospitals for the education of children (*Heriot's Hospital*, 1695, Mor. 11149), or to a body of creditors one of whom happens to be a minor (*Allan*, 1839, 1 D. 678; 1842, 1 Bell's App. 167). The right to suspend prescription on a plea of minority is, moreover, confined to those who have a present, and not merely a contingent, right to claim possession, and only the minority of the party claiming as *verus*

dominus can be deducted (*Gordon*, 1784, Mor. 10968; *Grant*, 1792, Mor. 10971; *Maclellan*, 1756, Mor. 11160; *Macdougal*, 1739, Mor. 10947; *Ayton*, 1756, Mor. 10956; *Maule*, 1829, 7 S. 527; *Buchanan*, 1849, 9 D. 686; *Black*, 1881, 8 R. 497. See also the *Bargany* case, 3 Ross, *L. C.* 484). The years of his minority also fall to be deducted by the defender in a declarator of public right of way (*Craufurd*, 1849, 11 D. 1127). But what occurred during the minority of the grantee's representative is not to be thrown out of account when usage is founded on as explaining a grant (*Baird*, 1861, 23 D. 1080). It would seem that the period during which a child is *in utero* is to be deducted as well as the twenty-one years subsequent to its birth (*Campbell*, 1765, 5 Bro. Supp. 915, at 917). By sec. 34 of the Conveyancing Act, 1874, where thirty years' possession has followed on an *ex facie* valid irredeemable title, no deduction is to be made on account of the minority of the party against whom prescription is pleaded, or of any period during which he was under legal disability.

(3) *Ex facie nullity* is a conclusive answer to the attempt to set up a good prescriptive title to property, or to protect a deed, on the ground of lapse of time, from challenge (*Shepherd*, 1844, 6 D. 464, 6 Bell's App. 153, 3 Ross, *L. C.* 336; *Kinloch*, 1867, 5 M. 360; *Speir*, 1891, 18 R. 407).

(4) Falsehood, *i.e.* forgery, is an equally valid answer to the plea of prescription, and, indeed, is specially mentioned in that connection in the Act 1617, c. 12.

(5) Interruption of the course of prescription cancels that portion of the prescriptive period which has already elapsed, and a new period of prescription begins to run from the date of the interruption. Interruption may take place at the last moment of the period; but the later it is postponed, the greater the necessity for its being explicit and unequivocal.

The positive prescription may be interrupted either judicially or extra-judicially. Citation is a good judicial interruption, though its efficacy only lasts for seven years (Act 1669, c. 10). An action actually brought into Court, on the other hand, operates as an interruption for forty years (*Wallace*, 1830, 8 S. 1018). Extra-judicial interruption is effected by obtaining upon demand, or *de facto* assuming, possession; or by means of a notarial protest, upon which an instrument must be extended and recorded in the General Register of Sasines to make it effectual against singular successors (31 & 32 Vict. c. 64, s. 15).

Judicial interruption of the negative prescription may be effected by—(1) Citation, which prescribes in seven years, unless followed by such acts as constitute a process, *e.g.* appearance of parties, when it affords a plea of interruption for forty years (*Wilson*, 1705, Mor. 10974). (2) Action. The summons must be called, though, if the execution be prior to the expiry of the forty years, the calling need not be. The debt in question must be sued for, and the party debtor must be sued, though claims in a multiplepoinding, a sequestration, or a ranking and sale, constitute a valid interruption (Ersk. *Inst.* iii. 7. 41). An action in which the defender is assoilzied cannot be founded upon as an interruption (*Montgomery*, 1795, Bell's Folio Ca. 203). (3) Diligence. The diligence must be formal, and must distinctly intimate to the debtor that the creditor means to prosecute his claim (*Johnston*, 1672, Mor. 11237; *Earl of Hopetoun*, 1784, Mor. 11285). A threatened charge is not a valid interruption (*Wright*, 1717, Mor. 11268); nor is an intimation to the debtor of the assignation of his debt by the creditor to a third party.

An act of the debtor's implying an acknowledgment of his obligation will be effectual as an extra-judicial interruption of the negative prescription. Thus, payment of interest on a bond (*Kermack*, 1874, 2 R. 156), an

admission by a trustee that a legacy is due (*Briggs*, 1854, 16 D. 385), a submission of the particular debt (*Vans*, June 14, 1816, F. C.), and a bond of corroboration with a letter asking for indulgence on a demand for payment (*Aitken*, 1766, Hailes, 148), will all interrupt the running of prescription. But a general submission of all debts (*Garden*, 1743, Mor. 11274), or mere communings about a claim, and a request for time to investigate it (*Pitmedden*, 1705, Mor. 11261), will not.

Whether the interruption be judicial or extra-judicial, the important points are (1) that the action or acknowledgment which constitutes the interruption must be raised against, or granted by, the proper debtor; (2) that they must deal with the particular obligation; and (3) that a proper right or claim to that obligation must be founded upon in the one, or referred to by the other (*Hay*, 1756, Mor. 11276; rev. 1758, H. L. 272; Napier, p. 665, 2 Pat. App. 272). Where, however, a putative creditor has done what, if done by the true creditor, would have sufficed to interrupt, the latter afterwards becomes entitled to the benefit of that interruption (*Campbell*, 1746, Mor. 6554); and the acknowledgment of a debt by the debtor, in a transaction with a putative creditor, will probably afford a plea of interruption to the true creditor in a question with the debtor (*Morrison*, 1849, Napier, p. 676; see, however, *Robertson*, 1776, Mor. *voce* "Prescr." App. 2). But an action raised by a creditor on a wrong title will not serve to interrupt the course of prescription (*Blair*, 1735, Mor. 11270).

Where a right is held *pro indiviso* by several creditors, interruption by one will benefit all (Napier, p. 698); and diligence used against one of several principal co-debtors interrupts the running of prescription in favour of all the co-obligants (*Earl of Marchmont*, 1714, Mor. 11154; *Nicolson*, 1667, Mor. 11233). So, too, diligence used against a cautioner is effectual as an interruption against the principal debtor (Ersk. iii. 7. 46). But a debt may be so divided by assignation that interruption of prescription as to one part will not prevent prescription running on the rest (*Cuming*, 1790, Mor. 11170). Annual rents are from this point of view indivisible obligations (*Balmerino*, 1671, Mor. 11234); but not so adjudications (*Robertson*, 1770, Mor. 10694).

International Law.—A few words must be said, in conclusion, on prescription in relation to international law. As regards the positive prescription, there is no difficulty, for the prescription of heritable property must necessarily be regulated by the *lex rei sitæ*.

With regard to the class of prescriptions which absolutely extinguish a right of action, and the claim on which that action might be founded (*e.g.* the negative prescription), the practice appears to be unsettled. But the better view appears to be that if a party has resided in the *locus contractus* for a period which, according to the system of law there prevailing, would suffice to extinguish the obligation, it will not be revived by his removal to another country where no such prescription exists (*Shelby*, 11 Wheat. 361, 371, 372; *Huber*, 1837, 2 S. & M'L. 682; Story, *Conflict of Laws*, s. 582; Burge, *Com.* iii. 883). On the other hand, a party's removal from the *locus contractus* to a country where prescription exists, and his residence there for a time sufficient, according to its laws, to destroy the obligation, will always be liable to be pursued in the Courts of the *locus contractus*, and will be able to avail himself only of such defences as the law of that *locus* recognises (*Richardson*, 6 March 1821, F. C.; 1824, 2 Sh. App. 406; cf. *Smith*, 1800, 1 East, 6).

As regards the class of prescriptions (*e.g.* the triennial) which affect a litigant's remedy by imposing a certain limited mode of proof after the lapse

of a certain period, the law seems to be settled by the case of *Don*, 1836, 14 S. 241; rev. 1837, 2 S. & M'L. 682, 723, 728, to the effect that the operation of such prescriptions or limitations is governed by the law of the forum in which redress is sought (see also *Drummond*, 1830, 10 Barn. & Cress. 903, 1 Ross, *L. C.* (Com.) 841; *Williams*, 1811, 13 East, 439; *Farrar*, 1839, 1 D. 936; *Robertson*, 1843, 6 D. 17; *Strathern*, 1850, 12 D. 1087). What is to be said on the other side will be found in Guthrie *apud* Savigny, p. 267, Note B.

As regards the class of prescriptions which enter into and form part of the contract (*e.g.* the septennial prescription of cautionary obligations), the rule is that their application is governed by the *lex loci contractus*. Thus the limitation will be given effect to when a Scotch cautionary obligation is sued on in a foreign Court, but will not be given effect to in a Scotch Court when a foreign obligation is sued upon (*Alexander*, 1843, 6 D. 322; *Scott*, 1831, 5 W. & S. 436). On the whole of this branch of the subject, see Dickson on *Evidence*, ss. 529–542 (523–537), and Story, *Conflict of Laws*, ss. 576–583.

For the various short prescriptions, see ARRESTMENTS; BILLS, SEXENNIAL PRESCRIPTION OF; CAUTIONARY OBLIGATIONS, SEPTENNIAL PRESCRIPTION OF; CITATION; POSSESSIO DECENNALIS ET TRIENNALIS; QUINQUENNIAL PRESCRIPTION; TRIENNIAL PRESCRIPTION; TUTOR; VICENNIAL PRESCRIPTION.

[*Authorities.*—Stair, ii. 12. 1–27, and More *apud* Stair, A.A.; Ersk. *Inst.* iii. 7. 1–15; Ersk. *Prin.* iii. 7. 1–4, 12–21; Bell, *Prin.* ss. 605–627, 2002–2025; Rankine on *Landownership*, 3rd ed., pp. 24–65; Napier on *Prescription*, pp. 34–199, 289–705; Millar on *Prescription*, pp. 1–46, 61–70, 79–114.]

Prescription of Crimes.—It is remarkable that there is no definite rule as to whether a prosecutor's right to prosecute is barred by length of time. (Alison, however, states the rule absolutely, ii. 97.) In regard to particular offences, statutory limitations have been enacted; but for crimes at common law there is no such provision. Where the cause of delay is the absconding of the accused, the defence of lapse of time is not good (Hume, ii. 136); but where this is not the case, Hume is of opinion that the various considerations "plead powerfully in support of that equitable rule of the Roman law (recommended also by the general practice of nations in modern times) which gives the accused his *quietus* at the end of twenty years" (*ib.*). In the case of an indictment for murder raised twenty-six years after the alleged crime, where there had been no fugitation, the defence of lapse of time (in bar of trial) was sustained, and the indictment dismissed (*Macgregor*, Hume, *ib.*).

[Macdonald, 279; Alison, ii. 97.]

Presentation, Bond of.—See BOND OF PRESENTATION; IMPRISONMENT FOR DEBT.

Supplemental Notes.

Agreement of Solicitor to receive share of proceeds of action void, — Page 105 —

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