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

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Presenter of Signatures.—Although no record exists of the origin in the Scottish Court of Exchequer, of the office of Presenter of Signatures, it is probable that it was established soon after the union of the Crowns of England and Scotland. The office was recognised, and continued as then existing, by the Act reconstituting the Court of Exchequer, after the Treaty of Union (6 Anne, c. 26, s. 19). It was abolished by sec. 51 of the Conveyancing Act, 1874, by which the duties of the presenter, so far as these still existed, were transferred to the Sheriff of Chancery.

Duties in Connection with Crown Charters.—The principal duties of the presenter of signatures related to the granting of charters from the Crown. Before the Crown Charters Act, 1847 (10 & 11 Vict. c. 51), came into operation, a party who had acquired right to lands held of the Crown, whether by a voluntary conveyance or by the use of diligence, and desired to complete his title by entry with the superior, lodged a writ, known as a signature, and containing the clauses of the charter desired, with the presenter of signatures. Writers to the signet were alone privileged to prepare such a writ. It was known as a signature of confirmation, of resignation, of adjudication in implement, or *contra hereditatem jacentem*, according to the nature of the title upon which it was founded. The signature was revised by one of the Barons of Exchequer, who compared the description of the lands and the duties payable with those expressed in the previous charter. It was then signed by the baron on every page but the last, which was signed by all the barons, and by the presenter of signatures, and given to the King's Remembrancer for registration in Exchequer Records. Finally, it was stamped with the cachet, a facsimile of the royal signature. The signature then formed a warrant for a precept, which was a warrant to the Director of Chancery to prepare the charter. The charter was written and registered in Chancery, sealed by the Keeper of the Great Seal, and given to the applicant. In a competition between Crown vassals, the date of sealing the charter, and not the date of presenting the signature, was the criterion of preference (*Miln*, 1678, Mor. 3028). Where a signature inferred a new grant from the Crown, it required the royal superscription (Ersk. i. 3. 32).

Minor Duties.—It was also the duty of the presenter of signatures to examine into the regularity of pension warrants, presentations to Crown livings, and letters of legitimation; and in all these cases fees were payable to him.

Crown Charters Act, 1847.—The forms of obtaining Crown charters as above detailed were abolished by the Crown Charters Act, 1847, the provisions of which were substantially re-enacted by the Titles to Land Act, 1858, and the Consolidation Act, 1868. Under these statutes the applicant for a Crown charter lodged a draft with the presenter of signatures, with a note praying that a charter in these terms might be granted (1847 Act, ss. 1, 2; 1868 Act, s. 64). The draft was then revised by the presenter, together with the agent for the party, and, when docqueted by the presenter as approved, formed a warrant for the preparation of the charter (1847 Act, ss. 3, 9; 1868 Act, ss. 65, 72). When the party applying for the charter was dissatisfied with the draft as revised by the presenter of signatures, or with the amount of duty claimed, it was competent for him to appeal to the Lord Ordinary in Exchequer Causes by lodging a note of objections with the presenter of signatures (1847 Act, ss. 11, 12; 1868 Act, s. 74). The same mode of review was competent if the presenter of signatures refused to revise the draft, on the ground that the applicant had not set forth a title sufficient to show that he had a right to obtain the charter required (1847 Act, s. 14; 1868 Act, s. 77).

Precept of Clare constat.—The Crown Charters Act imposed upon the presenter of signatures new duties in connection with the completion of titles of heirs of Crown vassals by precept of *clare constat* from the Crown. To obtain such a precept, the heir, after service special or general, lodged with the presenter the retour of the service, with a draft of the precept, and a note praying for a precept in terms of the draft. The draft was then revised by the presenter, along with the agent, and, when docqueted by the presenter, formed a warrant to the Director of Chancery to issue the precept. This form of completing the title of an heir is still competent, and is regulated by the Consolidation Act, 1868 (ss. 84–86), but is never used in practice, because an heir may more simply complete his title by recording a decree of special service, where the ancestor died infeft, or by expeding and recording a notarial instrument on a decree of general service, where the ancestor died uninfeft.

As sec. 4 of the Conveyancing Act, 1874, rendered charters or writs from superiors unnecessary and incompetent, the duties of the presenter of signatures, transferred on the abolition of the office to the Sheriff of Chancery, were few in number. In addition to the precept or writs of *clare constat* already referred to, they related to the preparation of original grants from the Crown, including charters of bastardy, charters of *ultima hæres*, charters on forfeitures, and charters of mines and minerals under the Act 15th June 1592. Should any such charters be now desired, the procedure above described is still appropriate, with the substitution of the Sheriff of Chancery for the presenter of signatures.

[Menzies, *Conveyancing*, pp. 825 *seq.*; *Jurid. Styles*, 2nd ed., p. 420; Begg, *Conveyancing Code*, pp. 145 *seq.*; Clerk and Scrope, *Court of Exchequer*, p. 286; Sixth Report of Commission on Courts of Scotland, appointed in 1819.]

See Crown Charters; Clare constat; Exchequer.

Presumption of Life.—See Life (Presumption of).

Presumptions; Presumptive Evidence.—Indirect evidence is either conclusive or presumptive. It is conclusive when the connection between the *factum probandum* and the *factum probans* is a

necessary consequence of the laws of nature. It is presumptive when that connection rests on a greater or less degree of probability. There is nothing exceptional in the character of the process of reasoning employed. It is our previous knowledge and experience of the connection, which is generally found to subsist between this set of facts and that, that justifies us in inferring from the existence of the one set the existence of the other (EVIDENCE).

Presumptions may be divided according to their degrees of probative force into *presumptiones juris et de jure*, *presumptiones juris tantum*, and *presumptiones hominis vel judicis* (Stair, iv. 45. 12; Ersk. iv. 2. 35). Of these, the first are not so much presumptions as rules of law "established from expediency, upon an unchallengeable assumption of facts, which may be, and often are, different from the true facts of the case" (Tait, *Evidence*, 447; see Best, *Evidence*, s. 309; FICTIO JURIS). They are "inferences which the law makes so peremptorily that it will not allow them to be overturned by any proof, however strong" (Best, *Evidence*, s. 306). To this head are to be referred the presumption of the loss or forfeiture of a right from the proprietor's neglect to exercise or prosecute it during forty years (Ersk. iii. 7. 8); the presumption of a pupil's lack of reason sufficient to enable him to contract a civil obligation (Stair, i. 10. 13 (1); as to marriage, see 1 Fraser, *H. & W.* 51; in the case of *Johnston*, 1770, Mor. 8931, the rule of the canon law *malitia supplet ætatem* was rejected. A child under seven years of age cannot (1 Hume, 35; 1 Alison, 666), but a pupil can (*Fulton*, 1841, 2 Sw. 564), commit a criminal act (see also Taylor, *Evidence*, s. 104)); and the presumption that everyone is acquainted with the general law of the land (Stair, iv. 45. 17 (20); Ersk. i. 1. 21; iii. 3. 54; 1 Hume, 26; see *Cooper*, L. R. 2 E. & Ir. App. 149, per Ld. Westbury; Best, *Evidence*, ss. 336 *et seq.*; Taylor, *Evidence*, s. 80), whether he be a native or a foreigner (*Cloup*, 1831, 9 S. 448; *R.* v. *Esop*, 7 C. & P. 456). So, too, the statutory crime of concealment of pregnancy rests upon the irrebuttable presumption that a pregnant woman who conceals her state during the whole period, and does not call for aid at the birth, is criminally indifferent to the fate of her child (Dickson, s. 113; CONCEALMENT OF PREGNANCY). See also Taylor, *Evidence*, ss. 70–108; Best, *Evidence*, ss. 306–308.

As to conclusive presumptions recognised by the law of nations, see Best, *Evidence*, ss. 416 *et seq.*; Taylor, *Evidence*, s. 107.

Presumptiones hominis vel judicis arise from the circumstances of specific cases; and form matter of consideration for the jury or the judge *quâ* judge of fact.

A *presumptio juris tantum* has been defined as "*presumptio . . . . quæ ex legibus introducta est, ac pro veritate habetur, donec probatione aut presumptione contrariâ fortiore enervata fuerit*" (Voet, *ad Pand.* lib. 22, tit. 3, *n.* 15). It differs from a *presumptio hominis vel judicis* in this only, that it is established either by enactment, or decision, or custom. A "*presumptio juris* may be introduced either by statute or custom; it may have its origin in some strong natural probability assented to by the general voice of mankind, or in some usage of trade, drawing uniformly the same inference from a certain fact or combination of facts; but before it can have the authority of a proper *presumptio juris*, it must be recognised and take its place as part of the system to which it belongs. Till it has been so recognised it is fact and not law" (*Miller*, 1860, 22 D. 833, 844 *per curiam*).

Various attempts have been made to classify presumptions of fact according to their degree of probative force. Thus they have been divided into violent, probable, and light or temporary (see Coke, *Litt.* 6 *b*,

quoted by Best, *Evidence*, s. 317, and the example of the classification given in sec. 318). A division of more practical utility is obtained by considering them in reference to their effect upon the incidence of proof. Thus those are regarded as strong which shift the *onus*; those are regarded as weak which, when taken singly, do not shift it (Best, *Evidence*, s. 321; see AFFIRMANTI INCUMBIT PROBATIO).

A rebuttable presumption may be overcome not only by direct evidence but by a presumption of the like, or any other kind (see Voet, *ut supra*). Accordingly, a conflict of presumptions may arise; and the nature of each must determine to which precedence is to be given. Of the rules laid down by the civilians on this subject, two may be noted for general guidance. In the first place, special presumptions take precedence of general presumptions (cf. *Millar*, 1860, 22 D. 833, 847, per Ld. Neaves). Thus the general presumption in favour of innocence (see (6) below) may be overcome by a special presumption arising on the proof of certain facts indicative of guilt. In the second place, presumptions derived from the course of nature are stronger than casual presumptions. Thus the presumption arising from the fact that a log is too heavy for ten men to lift would scarcely be overcome by any evidence, presumptive or direct, to the effect that a child carried it off (see Best, *Evidence*, ss. 328–334; and *R.* v. *Inhabitants of Twyning*, 2 B. & Ald. 386; *R.* v. *Inhabitants of Harborne*, 2 A. & E. 540, there cited. See also Taylor, *Evidence*, s. 114).

It is to be observed that when a presumption can be negatived only by the writ or oath of the person founding on it, it is not removed by the circumstance that he has lost his right to insist on the proof being limited (*Simpson*, 1875, 2 R. 673). Further, when a party, upon whom the *onus* of rebutting a legal presumption rests, does not cross-examine with the view of rebutting it, the presumption remains in full force (*De Thoren*, 1876, 3 R. (H. L.), 28, 32, per Ld. Ch. Cairns).

The following presumptions of law and fact are those most usually met with in practice:—

(1) *Presumptions derived from the Course of Nature.*—It is presumed that nature has followed its ordinary course as to the duration of the period of gestation (AFFILIATION; PATER EST, ETC.), or as to the continuance of life (LIFE (PRESUMPTION OF)). So, too, a man is presumed to be sane (*Lindsay*, 1843, 5 D. 1194; see Bell, *Prin.* s. 2103), and capable of understanding the nature and results of his actions (see Macdonald, *Crimes*, pp. 1, 2; *In re Cooper*, L. R. 20 Ch. D. 611, 629, per Jessel, M. R.; see also ADMISSIONS AND CONFESSIONS (*h*); BAR, PERSONAL; CONTRIBUTORY NEGLIGENCE), in the absence of proof of his facility (*White*, 1823, 1 Sh. App. 472; *Laidlaw*, 1870, 8 M. 882) or subjection to a dominant influence (see DONATION, PRESUMPTION AGAINST; Taylor, *Evidence*, s. 151). Again, a man is presumed to be capable of begetting, a woman of bearing, children within the usual ages (as to the presumption as to child-bearing beyond those limits, see *Louson's Trs.*, 1886, 13 R. 1003; *Urquhart's Trs.*, 1886, 14 R. 112; *Anderson*, 1890, 17 R. 337; *Beattie's Trs.*, 1898, 35 S. L. R. 580; Best, *Evidence*, s. 338 (*a*); Taylor, *Evidence*, s. 105).

(2) *Presumptions derived from the Ordinary Conduct of Mankind, the Habits of Society, and the Usages of Trade.*—Under this head fall the presumptions against donation (DONATION, PRESUMPTION AGAINST), against gratuitous services (*Anderson*, 1847, 9 D. 1222; *Thomson*, 1889, 16 R. 333; cf. *Jones' Tr.*, 1888, 15 R. 328; *Dawson*, 1888, 15 R. 891), against gratuitous agency (*Manson*, 1855, 2 Macq. 80; cf. *Taylor*, 1853, 24 D. 19, note; *Moscrip*, 1880, 8 R. 36), that a man who has signed a blank

sheet stamped with 6d. does not thereby authorise the holder to fill in an obligation binding him as cautioner (*Wylie & Lochhead*, 1889, 16 R. 907), against illegitimacy (*Campbell*, 1866, 4 M. 867; 1867, 5 M. (H. L.) 115), against suicide (*Macdonald*, 1890, 17 R. 955), that a man pays a tavern bill when he contracts it (*Barnet*, 1840, 2 D. 337), that he has access to his property (*M'Laren*, 1878, 5 R. 1042, 1048), that a house is built in accordance with the titles and plans (*Sutherland*, 1887, 15 R. 62), that expenditure of a liferenter on the subject liferented is for his own benefit as liferenter (*Morrisons*, 1886, 13 R. 1156), that the occupant of another's subject occupies as tenant (*Glen*, 1882, 10 R. 239), that a promise to perform an act—*e.g.* to marry (*Davis*, 6 H. & N. 245; see *Currie*, 1874, 12 S. L. R. 75; *Cattenach*, 1864, 2 M. 839) or to discharge a cargo (*Postlethwaite*, L. R. 5 App. Ca. 599)—is a promise to perform it within a reasonable time (see Taylor, *Evidence*, s. 177 A), that a borrower who returns the article borrowed in a damaged condition has not taken reasonable care of it (*Bain*, 1888, 16 R. 186), that a landlord by accepting his tenant's renunciation has discharged all claims against him (*Lyons*, 1886, 13 R. 1020), and that a law agent employed to lend out his client's money has a duty to advise him as to the sufficiency of the security (*Oastler*, 1886, 14 R. 12). Such, too, is the derivation of the presumption as to marriage, where there has been illicit intercourse between the parties (*Fleming*, 1859, 21 D. 1034), as to the destruction of documents *animo revocandi* (CANCELLATION), as to payment (PAYMENT), as to loan (*Fraser*, 1857, 20 D. 115; *M'Keen*, 1864, 2 M. 392; *Haldane* (*Speirs' Factor*), 1872, 10 M. 537; LOAN), and as to the delivery of documents (DELIVERY AND ACCEPTANCE OF DEEDS). As to written alterations of printed documents, see *Muir*, 1876, 3 R. (H. L.) 1.

As to presumptions arising from personal conduct in questions of knowledge, malice, and intention, see ADMISSIONS AND CONFESSIONS, EVIDENCE, I. (1), and (7) below.

Several presumptions arise from the course of business in a public office. Thus it has been held in England that a post-mark is *primâ facie* evidence that the letter bearing it was in the post at the time and place specified therein; that proof that a letter was properly addressed and posted raises a presumption that it reached its destination at the regular time, and was delivered to the addressee (see Taylor, *Evidence*, s. 179). So, too, where a department prescribes certain formalities as a condition precedent to the doing of an act, it is presumed from the fact that the act has been done that the formalities have been complied with (see Taylor, *ib.* s. 180 A). Similarly, it is presumed that business books, if regularly kept, are accurate (Ersk. iv. 2. 4; BOOKS), that money has been paid into bank when the customer's bank-book contains an entry, initialed by a bank official, to that effect (*Couper's Trs.*, 1889, 16 R. 412), and that the general practice of a house of business in the despatch of its letters (*Robertson*, 1835, 14 S. 139; *Mackenzie*, 1861, 23 D. 1310; Taylor, *Evidence*, s. 182; Best, *Evidence*, s. 403; CONTRACT; DELIVERY AND ACCEPTANCE OF DEEDS; OFFER; and see *Smith*, 1857, 2 Irv. 641), or in a question of accounting (Tait, *Evidence*, 466; Dickson, s. 28), has been followed in a particular instance.

At one time physicians' fees were regarded as honoraries (Stair, i. 12. 5; i. 13. 2; see HONORARIUM). But the presumption that they have been paid does not apply to attendance during deathbed sickness (*Johnston*, 1716, Mor. 11418: *Russell*, 1717, Mor. 11419; *Malcolm*, 1744, Elch. "Presumption," No. 15; *Park*, 1755, Mor. 11421; *Hamilton*, 1781, Mor. 11422; *Sanders*, 1822, 1 S. 333), or where there is a contract (*Johnstone*,

ut supra; *Mackenzie*, 1728, Mor. 11421), or a local custom (*Flint*, 1795, Mor. 11422; *Melville*, 1795, Mor. 11422) to the opposite effect (Bell, *Prin.* s. 568; Dickson, ss. 187, 188).

Many other presumptions may be classed under this head. See APOCHA TRIUM ANNORUM; BILLS OF EXCHANGE; CHIROGRAPHUM APUD DEBITOREM REPERTUM; CHIROGRAPHUM NON EXTANS; HONORARIUM; MASTER AND SERVANT; PARTNERSHIP; SALE; TUTOR. See Taylor, *Evidence*, ss. 181 *et seq.*

(3) *Presumption in Favour of the Validity of Acts.*—On the hypothesis that certain acts are connected *inter se* as members in a series, three presumptions may arise. Given the earlier, the later acts may be presumed; or, given the later, the earlier acts may be presumed; or, given the earliest and latest, the intermediate acts may be presumed. Of these, the second is much stronger than the first presumption, for the obvious reason that performance is better evidence than mere intention to perform (3 Bentham, *Jud. Evidence*, 213 *et seq.*; Best, *Evidence*, s. 354; Dickson, s. 114 (3)). It finds illustration in Ld. Curriehill's observation that "possession which has existed from time immemorial, and of the commencement of which we have no trace, is presumed to go backwards so as to connect with the titles of a more remote date" (*Ld. Adv.* v. *Sinclair*, 1865, 3 M. 981, 994). As to the presumption arising from carnal intercourse subsequent to the date of conception in a question of paternity, see *Lawson*, 1861, 23 D. 876; *Ross*, 1863, 1 M. 783; *M'Donald*, 1883, 11 R. 57; *Scott*, 1884, 11 R. 518; AFFILIATION; LEGITIMACY. The third presumption—*probatis extremis presumuntur media*—is exemplified in prescriptions and possessory judgments (Stair, iv. 40. 20; iv. 45. 17 (22); Best, *Evidence*, s. 354).

The same principle finds expression in the brocard, *Omnia presumuntur rite et solemniter esse acta* (see Best, *Evidence*, ss. 353 *et seq.*). Thus "when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with" (Stephen, *Digest*, s. 101); and, accordingly, it is a general principle with respect to official appointments, that if a person act in a public capacity, he is presumed to have been duly authorised so to do (Best, *Evidence*, ss. 356, 357; Taylor, *Evidence*, s. 171; Dickson, ss. 114 (4), 679, 1235, 1250; *M'Leod*, 1856, 3 Irv. 79; *Smith and Milne*, 1859, 3 Irv. 506; *Borthwick*, 1862, 1 M. 94; *M'Arthur*, 1864, 2 M. 659; *Marr*, 1881, 8 R. (J. C.) 21; *Hill*, 1883, 10 R. (J. C.) 66; see also Income Tax Act, 1842, s. 182; the Customs Consolidation Act, 1876, s. 261; and the Inland Revenue Regulation Act, 1890, s. 24). The presumption also applies to records, judicial (Dickson, s. 1116; RECORDS OF COURTS OF LAW) or quasi-judicial (*D. of Athole*, 1880, 7 R. 583); and it received effect in the case of a marriage ceremony of ancient date, solemnised in good faith, and recognised as valid by the relations of the parties (see *Lauderdale Peerage*, L. R. 10 App. Ca. 692). So, too, it is presumed that a presbytery in assigning a glebe, observed the legal order of designation (*Ogston*, 1896, 23 R. (H. L.) 16); on the same grounds, holograph testamentary writings (37 & 38 Vict. c. 94, s. 40), a holograph acknowledgment by a debtor of intimation of an assignation (Bell, *Prin.* s. 1465; Dickson, s. 775), and writings *in re mercatoriâ* (see 1 Bell, *Com.* 325; Dickson, ss. 794, 814; IN RE MERCATORIA), are presumed to be executed of the dates they bear; and the presumption is that an *ex facie* probative deed was executed as law requires (see *Brown*, 1888, 15 R. 511; *Geddes*, 1891, 18 R. 1186; DEEDS, EXECUTION OF; ERASURES. As to the case of holograph writings, see HOLOGRAPH WRITINGS,

and *Cranston*, 1890, 17 R. 410). As to the importance of proving, in an action of proving of the tenor, the terms of the testing clause and that the deed was stamped, see PROVING OF THE TENOR; STAMPS (7). As to the presumptions in regard to stamps, see STAMPS (7). See also Taylor, *Evidence*, ss. 128, 152.

(4) *Presumptions arising from Possession.*—"Such is the natural connection between property and possession, that in moveables, even where they have had a former owner, the law presumes the property to be in the possessor, so that till positive evidence be brought that he is not the right owner, he will be accounted such by the bare effect of his possession. . . . Nay, it will not avail one who claims moveables against a possessor, though he should prove that he had once been the owner, unless he also prove *quo modo desiit possidere* . . ." (Ersk. ii. 1. 24; see Stair, ii. 1. 42; iii. 2. 7; iv. 30. 9; More, *Notes*, 150; *Anderson*, 1848, 11 D. 270, commented on in *Orr's Tr.*, 1870, 8 M. 936, per Ld. Deas; Dickson, ss. 149–151). But this presumption falls on proof that the possession rests on a title other than that of ownership (see *Robertson*, 1896, 24 R. 120, and Dickson, ss. 152, 153, where the cases bearing upon the doctrine of reputed ownership are collected. See also POSSESSION). As to the presumption arising from the possession of corporation rights, see *Wrights of Glasgow*, 1765, Mor. 1961; *Begbie*, 1776, Mor. 7709; *Skirving*, 1803, Mor. 10921; *University of Glasgow*, 1835, 2 S. & M'L. 275; 1840, 1 Rob. 397.

In the case of heritage, the maxim *In pari casu melior est conditio possidentis* applies. Thus a churchman's right to his benefice is presumed from thirteen years' possession, although he produce no written title (Ersk. iii. 7. 33; see also A. S., 16 December 1612, and *Cochrane*, 1859, 22 D. 252; *Traill*, 1870, 8 M. 579). Seven years' possession upon a written title raises a presumption entitling the possessor to continue possession until the Court sets his title aside (Stair, iv. 26. 2, 3; Ersk. iv. 1. 50; Mackay, *Manual*, 75); and, on the same grounds, seven years' lawful possession of a road as a public road entitles the possessor to continue possession until the rights of parties are legally determined (*Calder*, 1870, 8 M. 645; *M'Kerron*, 1876, 3 R. 429). The public is presumed to have a right of way along the track from one public place to another, which it has used as matter of right and not of tolerance, for a definite and intelligible purpose, and without effectual interruption. If such use endure throughout the prescriptive period, the presumption becomes conclusive (see Rankine, *Landownership*, 3rd ed., pp. 294 *et seq.*; Dickson, s. 155; PRESCRIPTION). Where, however, the ground traversed is waste and unenclosed, there is a strong presumption against the existence of a right of public passage; and this presumption is strengthened if the public, in the erroneous belief that the ground is a public common, stray over the whole of it, pasturing it, bleaching on it, or quarrying in it (*Mackintosh*, 1871, 9 M. 574; see Rankine, *ubi cit.*, and (1) above).

The weight to be attached to the fact that a man is found in possession of stolen goods depends upon the circumstances of the particular case, *e.g.* the condition and occupation of the possessor, the nature of the goods, the length of time which has elapsed since the theft, and the like (Dickson, s. 157; Best, *Evidence*, ss. 211–214, 318; 1 Hume, 111; *Hannah and Higgins*, 1835, 1 Sw. 239).

(5) *Presumption of the Continuance of Things in the State in which they have once existed.*—Under this head fall the presumptions in favour of life (LIFE (PRESUMPTION OF)), of the subsistence of a general mandate (see 1 Bell, *Com.* 488 *et seq.*), of the continuance of the relation of debtor and

creditor, in the absence of facts establishing payment, or from which it may be inferred (PAYMENT), and of the insanity of a person who has been cognosced (Ersk. i. 7. 50, note 241; Bell, *Prin.* s. 2103). See also Best, *Evidence*, ss. 405 *et seq.*

(6) *Presumption in Favour of Innocence and against Misconduct.*—A man is presumed to be innocent until he is proved to be guilty (Best, *Evidence*, ss. 334, 346; Taylor, *Evidence*, ss. 112 *et seq.*). Akin to this presumption is the principle *odiosa et inhonesta non sunt in lege presumenda* (Best, *ib.* s. 349). Accordingly, the legal presumption is against neglect of duty (see *M'Lure, Naismith, Brodie, & Macfarlane*, 1887, 15 R. (H. L.) 1; cf. *M'Lean & Hope*, 1871, 9 M. (H. L.) 38, and *Horsley*, 1894, 21 R. 410, with *Smith & Co.*, 1895, 23 R. (H. L.) 1). So the fact that an accident, of which the cause is unascertained, happened to a workman, does not raise a presumption that it was caused by a defect in the machinery or plant for which the master was responsible (*Macfarlane*, 1884, 12 R. 232; cf. *Milne*, 1892, 19 R. 830; *Davison*, 1895, 22 R. 448). Similarly, the presumption is against fraud (*Campbell*, 1841, 3 D. 1010), or culpable omission (*Condie*, 1834, 13 S. 61), or irregularity (*Grindlay*, 1830, 8 S. 642; *M'Phersons*, 1831, 9 S. 797), and illegitimacy (see AFFILIATION; PATER EST, ETC.); and in favour of marriage, in questions as to the character of cohabitation (see *Campbell*, 1866, 4 M. 867; 1867, 5 M. (H. L.) 115; *Wall*, 1874, 1 R. 1036; 1876, 3 R. (H. L.) 28).

(7) *Omnia presumuntur contra spoliatorem.*—This principle was applied where a defender caused the pursuer, who claimed the family estates, to be kidnapped, and afterwards to be falsely accused of murder (*Annesley*, 17 How. St. Tr. 1430. See also *Armory*, 1 Stra. 505; 1 Sm. *L. C.* 385). This presumption holds good in cases of the suppression (see CONCEALMENT OF PREGNANCY; OATH ON REFERENCE), fabrication (*Byres*, 1835, 13 S. 950; Dickson, ss. 73, 94), vitiation (*Douglas*, 1864, 2 M. 1389; Dickson, s. 27), or destruction of evidence (Dickson, s. 94). See WITNESS; Best, *Evidence*, ss. 411–415; Taylor, *Evidence*, ss. 116, 117.

(8) *Presumptions in International Private Law.*—See DOMICILE.

(9) *Presumptions in Maritime Law.* — See INSURANCE (MARINE); SHIP; etc.

(10) *Presumptions in Case of Boundaries.*—See *Ewing*, 1828, 6 S. 417; *Lumsden*, 1870, 42 Sc. Jur. 530; *Waugh*, 1885, 23 S. L. R. 152; *Dalhousie's Tutors*, 1890, 17 R. 1060; Rankine, *Landownership*, 3rd ed., pp. 95 *et seq.*; BOUNDING CHARTER.

(11) *Presumptions in the Law of Tenement.*—See Rankine, *ubi cit.* pp. 577 *et seq.*; COMMON INTEREST.

(12) *Presumptions in Questions of Vesting.*—See MARRIAGE CONTRACT; VESTING.

(13) *Presumption in Favour of Substitution in Conveyance of Heritage.*—"There is one distinction in conveyances of moveables and of heritage; in the case of moveables the presumption is always in favour of conditional institution only, not of substitution; in the case of heritage the presumption is the other way, in favour of substitution" (*Watson*, 1884, 11 R. 444, 450, per Ld. Pres. Inglis; see *Greig*, 1833, 6 W. & S. 406; SUBSTITUTION).

(14) *Presumption of Peerage Law.*—Where the patent of the peerage does not appear, the presumption is in favour of heirs-male (*Herries Peerage*, 1858, 3 Macq. 585).

[See AFFIRMANTI INCUMBIT PROBATIO; EVIDENCE; PAROLE EVIDENCE; Dickson, ss. 109–194; Taylor, *Evidence*, ss. 70–216; Best, *Evidence*, ss. 296–471; Stephen, *Digest*, art. 1, 85–101, note 1.]

Presumptive Heir—See Heir-Apparent.

Pretium affectionis—This expression means the rate at which the affection of the owner estimates a thing (Stair, i. 9. 4), or the imaginary value put on it by the owner in contrast to its intrinsic value, or the value put on it by other people (Ersk. iii. 1. 14). It is stated by the authorities cited to be the measure of damages applicable in a case where the injury complained of has been due to fraud or malice. Erskine would also include under it special cases, such as destruction of trees adorning a gentleman's policy, apparently irrespective of the motive of the destroyer. It is inapplicable in cases of breach of contract, where the damage would be considered too remote.

The idea underlying *pretium affectionis* is, to some extent, given effect to in the case of sale of lands under compulsory powers conferred by Parliament. When property is taken in this way it is intended that the owner shall be compensated for the loss which he sustains, and his loss is tested by what is the value of the thing to him, not by what will be its value to the person acquiring it (*Stebbing*, 1870, L. R. 6 Q. B. 37; see also Deas on *Railways*, Part IV. chs. i. and ii.).

Prevarication.—See Perjury; Contempt of Court (vol. iii. p. 253).

Prevention of Crimes Acts are statutes designed to check crime by placing known criminals under surveillance, and conferring special powers upon the police. They consist of the Prevention of Crimes Acts, 1871, 1876, 1879, and 1885 (34 & 35 Vict. c. 112; 39 & 40 Vict. c. 23; 42 & 43 Vict. c. 55; and 48 & 49 Vict. c. 75), amended by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69).

(1) *Crime.*—The expression "crime" in these Acts, and in this article, is held to mean: murder, robbery, rape, wilful fire-raising, theft (only if punishable with penal servitude in respect of aggravations or the value of the thing stolen), forgery, uttering of a forged writing, falsehood fraud and wilful imposition, uttering base coin, and possession of base coin with intent to utter the same (34 & 35 Vict. c. 112, s. 20).

(2) *Convicts on Licence.*—A convict at large, holding a licence under the Penal Servitude Acts, must notify the place of his residence and all changes of his residence, and (if a male) report himself once a month, to the chief constable of the district in which he resides (34 & 35 Vict. c. 112, s. 5). If he intends to remove from one police district to another, he must notify his intention to the chief constable of the former, and his place of residence on arrival to the chief constable of the latter (54 & 55 Vict. c. 69, s. 4). *Notification* is effected by his personally presenting himself at the prescribed police station, and declaring his residence to the constable in charge; *report* is made by the convict personally or by letter, as the chief constable directs (*ib.*; 42 & 43 Vict. c. 55, s. 2). A convict who fails to comply with these requirements, and who cannot show that he has done his best to act in conformity with the law, is liable either to forfeiture of his licence, or to one year's imprisonment with or without hard labour (54 & 55 Vict. c. 69, s. 4). Failure to notify or report is proved *primâ facie* by the police records (42 & 43 Vict. c. 55, s. 2). A licence-holder who appears to be getting his

livelihood by dishonest means, may be apprehended without warrant by a constable having written authority from his chief constable to do so; and if it appears to the Court before whom he is summarily brought, that there are reasonable grounds for believing that he is obtaining his living dishonestly, he is deemed guilty of an offence against the Act, and his licence is forfeited (34 & 35 Vict. c. 112, s. 3). A person may be convicted of this offence although he was brought before the Court on some other charge (54 & 55 Vict. c. 69, s. 2). A constable may also without warrant take into custody a licence-holder whom he reasonably suspects of having committed any crime or offence (*ib.*). The Secretary of State may remit any of the requirements as to notification and report (*ib.* s. 4). See PENAL SERVITUDE.

(3) *Police Supervision.*—When a person is convicted on indictment of a crime as defined in par. (1), and a previous conviction of such a crime is proved against him, the Court may, in addition to other punishment, direct that he is to be subject to the supervision of the police for a period of seven years or less, beginning after the expiration of the sentence awarded (34 & 35 Vict. c. 112, s. 8). Such person while under supervision must notify his residence and changes of residence, and (if a male) report himself, to the chief constable in the same manner as a convict on licence (*ib.*). He is also, like a licence-holder, liable to be taken into custody without warrant by any constable who reasonably suspects him of having committed an offence (54 & 55 Vict. c. 69, s. 2).

(4) *Register of Criminals.*—With a view to facilitating the identification of criminals, registers are kept of such classes of prisoners in the United Kingdom as the Home Secretary may by order prescribe (34 & 35 Vict. c. 112, s. 6; 39 & 40 Vict. c. 23, s. 2). The governor of each prison is bound under a penalty of £20 to make correct returns of prisoners coming into his custody (*ib.*). The Secretary for Scotland may also make regulations as to measuring and photographing all prisoners who may for the time being be confined in any Scottish prison, such regulations being laid before Parliament (*ib.*; 54 & 55 Vict. c. 69, ss. 8 and 9). They are as binding as if made under the Prisons Acts, and prisoners refusing to obey them are guilty of an offence against the prison rules (*ib.*). These regulations do not apply to convict, military, or naval prisons (*ib.*).

(5) *Suspects.*—A person who is convicted on indictment of a crime as defined in par. (1), and against whom a previous conviction of such a crime is proved, is, during a limited period (*i.e.* the second sentence being a term of *imprisonment*, at any time within seven years after its expiration; or the second sentence being a term of *penal servitude*, while at large on licence under that sentence, and also at any time within seven years after its expiration), liable to a year's imprisonment with or without hard labour under the following circumstances: (1) If, when charged summarily with getting his livelihood by dishonest means, it appears to the Court that there are reasonable grounds for holding that he is so doing; (2) if, when charged with an offence punishable on indictment or summary conviction, and being required by the Court to give his name and address, he refuses, or answers falsely; (3) if he is found in any place, public or private, under such circumstances as to satisfy the Court that he was about to commit, or to aid in committing, an offence punishable on indictment or summary conviction, or was waiting for an opportunity to do so; or (4) if he is found in a dwelling-house, yard or premises of a dwelling-house, shop, warehouse, or other place of business, garden, orchard, pleasure-ground or nursery, or building in a garden, etc., without being able to account to the

satisfaction of the Court for his being found there (34 & 35 Vict. c. 112, s. 7; 54 & 55 Vict. c. 69, s. 6). The offender may be apprehended without warrant (*a*) in the first case, by a constable authorised to do so by the chief constable; (*b*) in the third case, by any constable; and (*c*) in the fourth case, by any constable, or by the owner or occupier of the subjects, or his servants (*ib.*).

(6) *Harbouring Thieves.*—A person who occupies a lodging-house, public-house, or place of public entertainment, and who knowingly lodges or harbours thieves, or reputed thieves, is liable to a penalty of £10, and also in certain circumstances to be put under caution, or even to forfeit his licence (34 & 35 Vict. c. 112, s. 10). When brought before the Court he must produce his licence, and, if forfeited, deliver it up, under an additional penalty of £5 (*ib.*). A brothel-keeper harbouring thieves is liable to a like penalty (*ib.* s. 11). See *Marshall*, 1871, L. R. 6 Q. B. 370.

(7) *Female Convicts.*—When a woman is convicted of a crime as defined in par. (1), aggravated by a previous conviction of such a crime, her children under fourteen, if they have no visible means of subsistence, or are without proper guardianship, may be dealt with under the Industrial Schools Act, 1866 (34 & 35 Vict. c. 112, s. 14).

(8) *Rogues and Vagabonds.*—The provisions of the fourth section of the English Act, 5 Geo. IV. c. 83, are amended and extended to Scotland (34 & 35 Vict. c. 112, s. 15; 54 & 55 Vict. c. 69, s. 7; *M'Lean*, 1882, 5 Coup. 193). That statute declares any person to be a rogue and vagabond, and liable to three months' imprisonment with hard labour, who (1) pretends to tell fortunes with intent to deceive (*Smith*, 1896, 3 S. L. T. No. 499); (2) leads a wandering life without visible means of subsistence, and without the ability to give a good account of himself; (3) exposes to view an obscene picture or indecent exhibition; (4) exposes his person indecently; (5) begs alms by exposure of deformities or under false pretences; (6) deserts his wife or children; (7) possesses housebreaking implements with intent to commit theft by housebreaking, or offensive weapons with intent to commit a crime; (8) enters premises for an unlawful purpose; or, (9) being a suspected person or a reputed thief, frequents or loiters about or in a public place with intent to commit felony. It is sufficient for a conviction under the last head if the Court is satisfied that the prisoner's intent was to commit a felony, *i.e.* murder, robbery, rape, wilful fire-raising, theft (if punishable with penal servitude), forgery, or uttering of a forged writing (34 & 35 Vict. c. 112, s. 15; 54 & 55 Vict. c. 69, s. 7). The statute itself must be referred to for details of those offences.

(9) *Protection of Constables.*—A person who assaults, resists, or wilfully obstructs a constable or peace officer when in the execution of his duty, is liable to the following punishment: (1) in case of *assault*, either to a penalty of £20, or, without the option of a fine, to imprisonment for six months, or (if convicted of a similar assault within two years) nine months, with or without hard labour; (2) in case of *resistance* or *wilful obstruction*, a penalty of £5 (34 & 35 Vict. c. 112, s. 12; 48 & 49 Vict. c. 75, s. 2). It is not necessary to set forth in the complaint that the accused person was aware that the constable was in the discharge of his duty, or to specify the particular duty (*O'Brien*, 1880, 4 Coup. 375).

(10) *Resetters.*—A dealer in old, scrap, or broken metal, who buys less than a hundredweight of lead, or a half-hundredweight of copper, brass, tin, pewter, German silver, or spelter, or any composite of which one of these substances is the principal ingredient, is liable to a penalty of £5 (34 & 35 Vict. c. 112, ss. 13, 17 (7), and Sched.). In a charge of reset, or of

the possession of stolen property, the prosecutor may prove that there was found in the possession of the accused other property stolen within the preceding period of twelve months (*ib.* s. 19). If the person accused in such charge has been within five years convicted of the dishonest appropriation of property, that previous conviction may be proved as an adminicle of guilty knowledge without mention in the indictment, provided the prosecutor has given seven days' notice in writing to the accused (*ib.*). The presiding judge may admit this proof so soon as he is satisfied that there is sufficient evidence to go to the jury of the resetted goods having been found at some time in the possession, actual or constructive, of the prisoner (*Watson*, 1894, 1 Adam, 355). See *Carter*, 1884, L. R. 12 Q. B. D. 522.

(11) *Search for Stolen Goods.*—A chief constable may give written authority to a constable to enter without warrant and search a house, shop, warehouse, yard or other premises for stolen property, and to seize and secure any property therein which the constable may believe to have been stolen; but this authority can only be given when (1) the premises are, or within twelve months preceding have been, in the occupation of a person convicted of receiving stolen property or harbouring thieves; or (2) the premises are in the occupation of a person who has been convicted of an offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment (34 & 35 Vict. c. 112, s. 16). The chief constable need not specify any particular property (*ib.*). Where property is seized in this manner, the person on whose premises it was, or the person from whom it was taken, may be either charged with reset, or cited before a Court of summary jurisdiction to account for his possession of it (*ib.*).

(12) *Procedure.*—Summary proceedings by virtue of these Acts are instituted under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, before the Sheriff, two or more Justices of the Peace, or a Burgh Magistrate (34 & 35 Vict. c. 112, s. 17). An offence is sufficiently specified if described in the words of the Acts (*ib.*). Exceptions, exemptions, etc., need not be specified or negatived in the complaint (*ib.*). When an offence involves forfeiture of a convict's licence, the Court may commit him to any prison until he can be removed to a convict prison (*ib.*). The accused person may be remanded from time to time (*ib.*). In default of payment of penalties, imprisonment may be awarded (*ib.*). The term of such imprisonment is regulated by the Summary Jurisdiction (Scotland) Act, 1881, s. 6 (*M'Leod*, 1892, 3 White, 339). The practice of the Scottish Courts with regard to proving previous convictions is not affected by the 9th section of the Act of 1871, which applies to England only (*Cox*, 1872, 2 Coup. 229; *Davidson & Others*, 1872, *Ib.* 278; *Kelly*, 1872, *Ib.* 310). That practice is mainly governed by the Criminal Procedure (Scotland) Act, 1887. See CONVICTION (PREVIOUS).

[Dewar, *Prevention of Crimes Acts*, 1895.]

Previous Conviction.—See CONVICTION (PREVIOUS).

Previous Question.—In proceedings at public meetings the motion "that the main question be *not* now put" is called the "previous question." It is so named the motion temporarily, and prevents the main question from being put to the vote by propounding a distinct question requiring previous decision, viz. whether the main question shall now be

put. It is thus distinguished from the "closure," which is a motion "that the main question be now put." If the previous question be carried, the main question cannot be put on that day. (Blackwell, *Law of Meetings*, 18.)

Price.—See Sale; Barter; Excambion.

Primogeniture.—In succession *ab intestato* it is a rule of law that the eldest son succeeds to the heritage left by his deceased parent, to the entire exclusion of younger sons. This right of primogeniture only applies strictly in the case of males: females of the same degree succeed equally as Heirs-portioners (*q.v.*), but the eldest sister is entitled to certain minor rights and privileges. The rule applies even where succession is in virtue of the right of representation, that is, where the descendant takes the estate to which his ancestor would have succeeded had he survived the deceased. Thus in the case of succession opening to heirs-portioners, if any of the sisters have predeceased leaving issue, the eldest son takes the share to which his mother would have succeeded had she survived. The rule has no application in succession to moveables (Ersk. iii. 8. 6; Stair, iii. 4. 22). See Succession; Heir.

Principal and Accessary.—See Accessary.

Principal and Agent.—*Note.*—The present article is merely supplementary to those appearing in other places in this Encyclopædia. The general rules regulating the relation of principal and agent will be found under Agency; particular forms of agency are treated under their respective headings, such as Auctioneer; Bank Agent; Broker; Factor; Jobber; Law Agent; Mandate; Præpositura; Stockbroker; while the position of agents in reference to special contracts is dealt with in the appropriate articles, *e.g.* Bills of Exchange; Gaming and Betting; Life Insurance; etc.

Constitution.

There is no form to which the constitution of agency is limited; the necessary authority may be conferred by writing, formal or informal, or by parole, or it may be implied from circumstances, and an act done as agent without warrant may be subsequently ratified in accordance with the maxim *Ratihabitio retrotrahitur et mandato priori æquiparatur.* For some purposes the authority either is required to be given in writing or cannot conceivably be proved otherwise (see Mandatary, Judicial; Proxy). Subject to this exception, parole proof is always competent (*Davison*, 1815, 3 Dow, 218; *Ross*, 1888, 16 R. 224). But it is not competent to prove by parole that a written mandate conferring general powers was in reality limited to a special purpose (*Thomson*, 1871, 10 M. 178). An agent is not a trustee; and even when authority is given to take a title in name of the principal or in name of the agent as such, and the agent, contrary to directions, takes the title in his own name as an individual, proof is not limited to writ or oath under the Act 1696, c. 25 (*Home*, 1877, 4 R. 977; *Pant Mawr Quarry Co.*, 1883, 10 R. 457; *Forrester*, 1875, 2 R. 755). The cases in which a grant of

authority is deduced from circumstances are to be found chiefly in the dealings of merchants and commission agents; but whenever one person, by so acting as to make it appear that another has power to contract on his behalf, has induced a third person to enter into a contract with him, he will be liable on the ground of "holding out" (*Mortimer*, 1868, 7 M. 158; *Spooner*, [1898] 1 Q. B. 528). When one suffers another repeatedly to act for him in a certain course of business, he is barred from denying a grant of authority in a question with a third party with whom the alleged agent has transacted within the scope of such business. So a practice on the part of a principal of recognising and homologating the acts of an agent in drawing bills *per procurationem* will imply power in the agent to do so (*Swinburne & Co.*, 1856, 18 D. 1025). But an agent authorised to receive orders, which his principal may execute or not as he pleases, has no implied authority to bind his constituent; and the fact that the principal has on a number of occasions executed orders so received, cannot be construed as a "holding out" of the agent by the principal as authorised to bind him (*Spooner, supra*). When a railway company authorises a stationmaster, on the occasion of an accident, to engage a doctor's services for one visit, the company cannot, on the ground of implied authority, be made liable for his subsequent services during a lengthened illness following on the accident (*Montgomery*, 1878, 5 R. 796). Possession of a deposit receipt in favour of a client, and not indorsed by him, does not imply power to uplift the money (*Forbes' Exrs.*, 1854, 16 D. 807). But authority to subscribe marine policies was in one case held to imply power to settle losses (*Fraser*, 9 June 1809, F. C.). Ratification of an act done as agent for another without antecedent authority does not require to be express; it may be implied from the conduct of the principal in the knowledge of the act (*Brown*, 1711, Mor. 6018). And, provided the principal could at the time have done the act himself, and no rights of the third person are injuriously affected by the ratification, it may be done at any time. Thus the effecting of a policy of marine insurance by an agent may be ratified by the principal after a loss, and in the knowledge thereof (*Williams*, 1876, 1 C. P. D. 757). But the principal must be in existence at the time of the act, as, although it is done *factorio nomine*, there can be no agent without an existent principal (*Tinnevelly Sugar Co. Ltd.*, 1894, 21 R. 1009). On the whole doctrine of ratification, see M'Laren, Bell's *Com.* i. 510, note 5. The question whether two persons stand at any time in the relation of principal and agent is always one of fact (*Mackessack & Son*, 1886, 13 R. 445; *Maffett*, 1887, 14 R. 506; *Stewart, Brown, & Co.*, 1893, 21 R. 293). While an effectual assignation of farm stock which divests the assignor, although there is no ostensible change of ownership, may constitute the assignor the agent of the assignee in the management of the farm (*Macphail & Son*, 1887, 15 R. 47), an assignation of stock to a creditor in security of advances will not (*Newcastle Chemical Manure Co.*, 1881, 9 R. 110). If the effect of a transaction between a debtor and his creditor is to give the creditor control of his debtor's business, he will be liable to those from whom the debtor orders goods for carrying on the business (*Ford & Sons*, 1888, 16 R. 24); but if it is really of the nature of a security, he will not (*Eaglesham & Co.*, 1875, 2 R. 960; *Miller*, 1876, 3 R. 548).

Rights and Duties as between Agent and Principal.

The agent's first duty is to carry out the instructions which he receives from his constituent. If a particular manner of carrying them out is specified, that must be adhered to. But "if a principal gives an order to

an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised, because he meant the order to be read in the other sense of which it is equally capable" (per Ld. Chelmsford in *Ireland*, 1872, L. R. 5 E. & I. App. 395, at 416). If the agent's instructions are contained in a power of attorney, they will be more strictly construed than when they are implied from the nature of the transactions intrusted to him (*Bryant Powis & Bryant Ltd.*, [1893] App. Cas. 170). If no instructions are given by the principal as to carrying out the powers conferred, the usage of trade or the regular custom prevailing between the parties must be adhered to. The construction of commercial commissions is dependent on the usage of trade (Bell, *Com.* i. 517). Only necessity will excuse compliance with actual or implied instructions. The agent must act with the care and diligence of a man of ordinary prudence in the line of employment (Bell, *Prin.* s. 221). A person who received a horse for the purpose of training it was held not to have discharged the onus upon him, and consequently to be liable for damages, when the horse was trained in the neighbourhood of a place where blasting operations were being carried on, and it was startled by an explosion, ran off, and was injured (*Laing*, 1850, 12 D. 1279). And an agent to procure orders, which he transmitted to his principal, who might execute them or not as he pleased, was held liable for a loss when he failed to inform the principal of a circumstance of material importance in deciding whether he would accept the order (*Wright*, 1868, 6 S. L. R. 95). When an agent receives goods from his principal for sale, it is his duty to notify at once if they are of inferior quality, and will not fetch market price (*Simpson*, 1849, 11 D. 1097). It is an agent's duty to make an effectual contract; but he does not, unless appointed on a *del credere* commission, guarantee the solvency of those with whom he contracts (see DEL CREDERE).

An agent is responsible not only *pro his quæ gessit sed etiam pro his quæ gerenda susceþit*. A bill was sent for presentation. It was presented after business hours and returned as dishonoured. In consequence, the holder of the bill sequestrated his debtor's stock, and damages were recovered from him on the ground of wrongous sequestration. In an action against the agent he was held bound to relieve his principal of these, and not merely to make good the amount of the bill (*Houldsworth*, 1850, 13 D. 376). When an agency is undertaken requiring special skill for its performance, the agent *spondet peritiam artis, et imperitia culpæ annumeratur*. But this does not import a guarantee of absolute immunity from risk of failure. The skill required is the ordinary skill of persons in that profession or trade. An agent who does not act according to his instructions renders himself liable in damages to his principal, these being the loss actually caused by his disobedience. The loss must be directly traceable to the agent's failure, although that need not be the proximate cause of loss. When an agent effected a contract between his principal and a third party, but did not fellow his instructions, and the principal refused implement, the agent was found not liable for the loss so caused. It was the principal's duty to fulfil the contract, although he had a good claim of damages against his agent (*Barkley & Sons*, 1897, 24 R. 346). If it can be shown that adherence to instructions would have made no difference, there will be no resultant loss to make good. An agent appointed for a special purpose in a contract between the principal and a third party has no authority, after accepting the agency, to alter the contract (*Lindsay & Son*, 1897, 24 R. 530). An agent whose duty is to collect money cannot, without authority or a usage

of trade sanctioning it, compromise a debt, or give delay or a rebate to the debtor, or take bills in his own name. If he does so he will be liable to make good the debts to his principal (*Douglas*, 1797, 4 Pat. App. 4; *Cameron*, 1871, 8 S. L. R. 322; *Broadhead*, 1871, 9 M. 921). But if usage of trade sanction it, an agent may take payment by bill, or sign bills *per procurationem* of his principal (*Anderson*, 1841, 3 D. 975). When an agent has authority to receive money for his principal, his duty is to accept it only in cash unless there is usage to the contrary. It is the duty of a person paying his creditor's agent to pay in such form that the principal will be likely to receive it. But "if an agent is merely to collect money, taking a cheque from a person having a banking account is not a departure from his authority" (per Lindley, L. J., in *Papé*, [1894] 1 Q. B. 272, at 278). Payment by cheque which is paid is equivalent to payment in cash (*Bridges*, 1870, L. R. 5 C. P. 451). Crediting the agent with the sum in a settlement of accounts between him and the debtor is no payment to the principal (*Pearson*, 1878, 9 Ch. D. 198).

It is also the duty of an agent to keep accounts (*Simpson*, 1849, 11 D. 1097), and to inform his principal of the names of the customers to whom he sells his principal's goods, failing which he will be held personally liable for the price (*Brydon*, 1869, 7 M. 536; *Russell's Trs.*, 1885, 13 R. 331). He must give his principal the full benefit of the contract he makes. Thus, if he is authorised to sell at a certain figure, he cannot be himself the purchaser at that figure and sell at an excess, retaining the balance (*De Bussche*, 1878, 8 Ch. D. 286). Conversely, an agent authorised to procure goods with a limit of price must endeavour to get them as cheaply as possible, notwithstanding the limit, and his principal will get the benefit (per Blackburn, J., in *Ireland*, *supra*, at 407). Moreover, everything in the nature of a douceur, profit, advantage, bribe, or commission, received by an agent in addition to the remuneration he earns from his principal, is received on the latter's behalf, and must be communicated to him (*Mayor, etc., of Salford*, [1891] 1 Q. B. 168). This is a rule applicable to all cases in which one acts in a fiduciary capacity, whether as trustee, partner, servant, or agent, and whether the services are gratuitous or not (*Pender*, 1864, 2 M. 1428; *Huntington Copper Co.*, 1877, 4 R. 294; *Ronaldson*, 1881, 8 R. 956). It has been applied, *e.g.*, to rebates received from brokers by a ship's husband (*Robertson*, 1865, 3 M. 829; *Manners*, 1884, 11 R. 899), and to shipbrokers taking payment from both parties to the contract (*Pender*, *supra*). But it is necessary, in order to claim the benefit of the advantage received, to show that it was received in respect of a transaction in which the person receiving it was acting as agent for the person claiming the benefit (per Ld. Thurlow in *Douglas*, 1797, 4 Pat. App. 4; *Neilson*, 1890, 17 R. 1243).

For the purpose of fulfilling the duties of the agency, the maxim *Delegatus non potest delegare* must be read merely as an exception to the general rule. "As a general rule, no doubt, the maxim *Delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analysed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the

purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as on the one hand to enable the agent to appoint what has been termed a sub-agent or substitute . . . and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise, which impose upon the agent the necessity of employing a substitute; and that when such authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him as if he had been appointed agent by the principal himself" (per Thesiger, L. J., delivering the judgment of the Court in *De Bussche*, 1878, 8 Ch. D. 286, at 310). Therefore an agent cannot authorise a sub-agent, duly appointed by him, to alter his position to that of a purchaser from him (*De Bussche, supra*). The above rule as to the appointment of a sub-agent follows from the rule that a mandate includes power to make it effectual. On this ground a commission to take the necessary steps to have the principal served heir was held to include authority to raise an action of reduction against another person already served (*Gifford*, 1834, 12 S. 421). What constitutes authority necessary to carry out the general powers is always a question of fact (*Morrison*, 1885, 12 R. 1152). Ld. Young has stated the rule thus: "Where you have a particular agent employed by a principal to perform a particular piece of business for him, he must act within the instructions given for the particular occasion, and does not bind his principal if he acts otherwise. If you have a general agent employed generally in his master's or his principal's affairs, or in a particular department, he is assumed to have all the authority which is necessary to enable him to serve his master as such general agent, or general agent in a particular department" (*Morrison, supra*). An architect has been held entitled to employ a surveyor, to whom the principal is liable (*Black*, 1879, 6 R. 581); but a railway station agent has no authority on behalf of the railway company to engage the services of a doctor for a lengthened period for another servant of the company who had been injured (*Montgomery*, 1878, 5 R. 796).

The rights of the agent against his principal are (1) remuneration for services, either as commission or brokerage, salary, or a *quantum meruit*; (2) reimbursement of necessary expenses; (3) indemnity from all responsibilities and liabilities come under towards third parties; and (4) a right of retention over goods in his hands belonging to the principal, in order to make good his claims. At the termination of a factory the principal is bound to give a discharge, or state specific objections to the factor's accounts. He is entitled to a reasonable time for an examination of the accounts, but cannot keep matters in suspense indefinitely (*Miln*, 1879, 6 R. 800). Remuneration is presumed to be due in all mercantile agencies, and whenever the agent makes such duties as he has undertaken the trade or profession by which he gains a livelihood. The rate of brokerage is settled by stipulation or usage. When a person is not a professional broker, but does broker's work so as to entitle him to brokerage, his commission is a *quantum meruit* depending on circumstances (*Robb*, 1825,

4 S. 108; *Brown's Trs.*, 1830, 4 W. & S. 28; *Kennedy*, 1890, 17 R. 1085). It is generally due only when the agent's duty is completely fulfilled. Prevention by accident or otherwise, for which the principal is not to blame, from fulfilling the agreement puts an end to a claim for commission. Of course this has no application when the agent is paid by a fixed salary. When commission is to be earned only in the case of effecting the sale which is the object of the agent's appointment, it is earned by an agreement to sell being entered into. After a minute of agreement for sale was entered into, it was agreed between seller and purchaser that the purchaser should deposit a sum, which was to be forfeited in the event of the price not being paid at the time when delivery was to take place. The price was not paid, and the deposit was accordingly forfeited, but it was held that commission had been earned (*Menzies, Bruce-Low, & Thomson*, 1895, 22 R. 299). A contract, in respect of which commission was payable to an agent who had negotiated it, was prevented from being carried out by the outbreak of war. After the termination of the war, the parties entered into another contract substantially the same. The Court held that this was not a new contract, but a continuation of the old one, and that commission was due in respect of work done under it (*Baines & Tait*, 1879, 7 R. 132). There is a custom of trade among shipbrokers, which is so well established that it is treated as matter of law, that the broker who introduces parties is entitled to a commission, provided a contract follows. The commission is due not necessarily to the person who first in order of time introduces the parties, but to the one owing to whose mediation the contract is effected (*Jacobs & Co.*, 1894, 21 R. 623). The contract must follow from the introduction; in other words, the act of the broker in bringing parties together must be the *causa causans* of the business subsequently done (*Moss*, 1875, 2 R. 657; *White*, 1876, 3 R. 1011). It is not necessary that the contract should be negotiated by the broker, or that he should be concerned either as a party to it or in discussing preliminaries. It is enough that parties were brought together by his mediation, and that but for this the contract would not have been made (*Walker, Donald, & Co.*, 1883, 11 R. 369). A similar custom prevails in other professions, and may be proved as matter of fact.

The agent is entitled to be reimbursed his discharges, so far as proper and *à propos* of the agency; and, accordingly, he may set off his expenses against what comes into his hands on behalf of the principal. Interest on disbursements is due when that is according to the custom of trade or course of dealing between the parties. The principal must also take the burden of all liabilities and obligations which the agent has necessarily assumed in order to discharge his duties towards his constituent. Thus when a principal instructed his agent to sell certain shares, but concealed a fact of material importance to the agent in doing so, and the agent, in consequence, incurred an exceptional liability and expense, the principal was held bound to relieve him (*Mackenzie*, 1879, 6 R. 1329). Whenever a principal by refusing to implement a contract duly entered into by an agent on his behalf, renders the agent liable to a claim of damages, or when an agent, in consequence thereof, voluntarily undertakes to make good expenses caused thereby to the third party, the principal is bound to relieve him (*Glassford*, 1830, 9 S. 105; *M'Braire*, 1826, 2 W. & S. 66; *Stevenson & Sons*, 1842, 5 D. 167).

When goods of a principal come into his agent's hands, the latter is entitled to retain them until he is indemnified or reimbursed his expenses in connection therewith. Although he holds them on behalf of his principal, he cannot be compelled to deliver them up, since the principal cannot claim

fulfilment of the agent's part of the contract unless he is ready to implement the duties owed on his part. A mercantile factor has also a lien over such goods for a general balance due him by the principal (*Sibbald*, 1852, 15 D. 217; *Gairdner*, 1858, 20 D. 565; see FACTOR). An agent into whose hand the principal gives writs, books, or documents, for the purpose of carrying out the obligations devolved upon him, is entitled to retain these until he is paid what is due to him for his services. This right, well known when it takes the form of a law agent's lien (see LAW AGENT), has been held to be of general application; and, in particular, it has been enforced in regard to books and documents delivered to accountants to enable them to collect accounts (*Meikle & Wilson*, 1880, 8 R. 69), and to title deeds, writs, etc., in the hands of a factor applicable to the estate of which he was factor (*Robertson*, 1887, 15 R. 67). But in another case the Court refused to allow a right of retention of books, the property of the principal, after the agency had terminated, on the ground that the principal had the greater interest in the books, and required them for carrying on the business (*Murray*, 1869, 6 S. L. R. 230). A lien is lost by loss of possession of the goods (*Callum*, 1825, 1 W. & S. 399; *Levitt*, 1823, 2 S. 163; *Miller*, 1852, 14 D. 955). But when an agent insures his principal's goods through an insurance broker, he has a lien over the policy and policy moneys in the broker's possession, such possession being considered as held for the agent (*Wilmot*, 1841, 3 D. 815; *Gairdner, supra*). Although an agent may retain moneys coming into his hands as such agent for what is due to him for his services (*Sibbald, supra*; *Gairdner, supra*), he cannot, after his principal's bankruptcy, collect accounts due to his principal, and claim a right of retention over such money (*Dickson*, 1855, 17 D. 1011). The principal may set off a claim of damages for loss, caused through the agent's fault, against the agent's claim for reimbursement. And the agent's right to retain his claim for remuneration out of the principal's money is lost by agreeing to payment being made to the principal direct, instead of through himself (*Miller, supra*).

RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT TOWARDS THIRD PARTIES.

So long as an agent acts within his authority and in the character of agent for a disclosed principal, provided he gives no personal guarantee, he incurs no personal liability on the contracts he may make (*Ellis*, [1893] 1 Q. B. 350; *Owen & Co.*, [1895] 1 Q. B. 265; but see SHIPMASTER). And an action raised on the contract against him as agent is incompetent (*King*, 1827, 5 S. 231; *Russel & Aitken*, 1837, 15 S. 989). If he exceeds his powers, he does not, as a rule, bind his principal (*Wylie & Lochhead Ltd.*, 1889, 16 R. 907), but he incurs a personal liability towards the third party (*Morrison*, 1885, 12 R. 1152). This liability is not that of a party to the contract, but is one of damages. The case of an unauthorised person professing to contract as agent for a principal may happen either (1) when the supposed agent is fraudulently misrepresenting his position with an intention to deceive, or (2) when the supposed agent makes the contract while he is aware that he has no authority, or (3) in the *bonâ fide* belief that he is authorised to act (*Smout*, 1842, 10 M. & W. 1). Apart from any question of ratification, the person put forward as principal is, as stated, not bound; but the third party must have a remedy against the person who contracted with him. Contracting as agent, he cannot, unless he has so agreed, be liable on the contract. In the first two cases mentioned the agent is to be considered "as guaranteeing the consequences

arising from any want of such authority"; in the third case, although the culpability is less, the consequences to the other contracting party are the same, and the supposed agent's liability rests on the same principle (per Alderson, B., in *Smout, supra*, p. 9). He is therefore liable in damages, on the ground that he has failed to make an effectual contract (*Collen*, 1857, 8 El. & Bl. 647; *Dickson*, 1877, 3 C. P. D. 1). But the damages recoverable are not the same as would be recoverable from an actual principal who had failed to perform a valid contract. An agent may be liable, even when he has contracted for a disclosed principal, when that principal is resident abroad. "It is now settled that it is not in ordinary course for the foreign merchant to authorise the English merchant to bind him to the English contract" (per Brett, J., afterwards Lord Esher in *Hutton*, 1874, L. R. 9 Q. B. 572, at p. 576). The question is really one of fact—On whose credit did the third party contract?—To whom did he look for performance? (*Miller*, 1860, 22 D. 833). There is a presumption that a foreign principal does not, as a rule, give a commission agent in this country authority to pledge his credit to those with whom he contracts (*Armstrong*, 1872, L. R. 7 Q. B. 598; and see *Ireland*, 1872, L. R. 5 E. & I. App. 395, per Blackburn, J., p. 408); but it will be rebutted by showing, *e.g.*, that the agent was not merely a commission agent acting on the special orders of his principal, but was the established agent in this country of the foreign principal, and well known to the other contracting parties to be such. A contract appointing an agent in this country for a term of five years, with defined powers, was held sufficient to make the principal liable on all contracts made in this country on his behalf (*Bennett*, 1891, 18 R. 975). Havannah merchants employed shipping agents there to consign a cargo. This they did in their own names, acting as commission agents, and they employed London merchants to insure the goods. The London merchants were aware that the consigners were acting for an undisclosed principal; and it was held that privity of contract was established between the Havannah merchants and the London merchants, and that the former were entitled to sue the latter for the policy moneys (*Mildred Goyeneche & Co.*, 1883, L. R. 8 App. Ca. 874). The rule of Scotland in this matter is probably the same as that which prevails in England (*Girvin, Roper, & Co.*, 1895, 23 R. 129; *Burgess*, 1829, 7 S. 824).

When an agent contracts as principal, or as agent for an undisclosed principal, the other contracting party is entitled to look to him for performance (*Thomson*, 1829, 9 B. & C. 78, 2 Smith's *L. Cas.* 368; *Cooke*, 1856, 1 C. B. N. S. 153). The principal may at any time thereafter disclose himself, and the agent may at any time disclose the fact of his agency. When the third party becomes aware who is the principal, it is his duty to make his election which he will hold liable. He cannot be compelled to elect immediately; but when his election is made, the other is exempt from liability to him (*Paterson*, 1812, 15 East, 62, 2 Smith's *L. Cas.* 355; *Addison*, 1812, 4 Taun. 574, 2 Smith's *L. Cas.* 361; *Thomson, supra*; *Hood*, 16 Jan. 1816, F. C.; *Scarf*, 1882, L. R. 7 App. Ca. 345; *Priestley*, 1865, 3 H. & C. 977). What constitutes election is in general a question of fact (*Ferrier*, 1865, 3 M. 561; *Curtis*, 1874, L. R. 10 Q. B. 57). "The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum, or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that

choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act,—I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way,—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election" (per Ld. Blackburn in *Scarf*, 1882, L. R. 7 App. Ca. 345, at p. 360). If an agent is sued to judgment on the contract, there is an election of him as debtor, and the principal cannot afterwards be made liable (*Priestley*, 1865, 34 L. J. Ex. 172). But "suing to judgment" means to successful judgment—converting the debt into a judgment debt. The fact of having brought an action against the agent which is dismissed on a technical plea does not amount to election so as to bar the creditor from afterwards suing the principal (*Curtis*, 1874, L. R. 10 Q. B. 57; *Meier & Co.*, 1881, 8 R. 642). Recourse against the principal is not destroyed by any private agreement between the principal and agent that the agent will be alone liable, or by the principal having put the agent in funds to implement the contract (*Stewart*, 1813, 2 Dow, 29; *Kymer*, 1807, 1 Camp. 109; *Williams & Co.*, 1860, 23 D. 1355), or by the agent becoming bankrupt with a large balance due to his principal (Bell, *Com.* i. 536). But if, after the right of election has accrued to the third party, he neglects to act so that the state of accounts is altered between the principal and the agent so that the former would be prejudiced by being bound to give implement, *e.g.* if he *bonâ fide* has paid the agent, the third party cannot come against the principal for the price (*Armstrong*, 1872, L. R. 7 Q. B. 598; *Young*, 1831, 10 S. 130; *Carswell*, 1839, 1 D. 1215). "A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is no more affected by the state of accounts between the two than I should be, were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if in that case the price of the goods has been paid to the broker, on account of this deception, the principal shall be discharged" (per Ld. Ellenborough in *Kymer*, 1807, 1 Camp. 109). When the third party, in the knowledge of the principal, took the agent's bills, and thus induced the principal to put the agent in funds to meet them, he was barred, on the agent failing to pay, from recovering the price from the principal (*Smyth*, 1849, 7 C. B. 21).

The agent is also liable to answer to third parties for his own negligence, misrepresentation or fraud, or other wrongful act, whether his principal is also bound or not, and whether or not the wrongful act was authorised by his principal. But he is not liable for the negligence of a sub-agent duly appointed by him (*M'Lean*, 1850, 12 D. 887; *Taylor*, 1888, 15 R. 608).

When a contract is made by an agent for a disclosed principal, the title to sue on the contract is in the principal alone. But when in such a contract it was stipulated that the agent should not be liable for the price, but in the event of the contract not being completed by a certain date, a sum in name of damages was to be paid to him, the agent was found entitled to sue for the damages (*Levy & Co.*, 1883, 10 R. 1134; *Bonar*, 1841, 3 D. 830). And an agent was held entitled to sue an action of reduction of a contract on the ground of fraud after his principal had been declared liable on it, and had recovered damages against the agent for

exceeding his mandate. He sued not as agent for the principal, but on his own behalf and for his own interest (*Milne*, 1882, 10 R. 365). And a foreign shipmaster who was also part owner has been found entitled to sue as representing the ownership of the vessel (*Larsen*, 1892, 20 R. 228).

An agent binds his principal by all his acts within the scope of his authority (*Paterson's Trs.*, 1885, 13 R. 369). But the principal may be bound by what his agent does even beyond or in actual disobedience to his instructions. When a written authority is known to exist, it is the duty of persons dealing with the agent to make themselves aware of its terms; and if he contracts otherwise than in accordance with them, or, in the case of an agent appointed for a definite period, after its termination, the principal will not be held liable. When a bank, in the knowledge that an agency had terminated, discounted bills signed by the agent *per procurationem* for the principal, they were held to have done so at their own risk, and the principal was not liable on them (*North of Scotland Banking Co.*, 1881, 8 R. 423). When the agent's mandate is not known to be in writing, he will bind the principal "within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter" (per Ld. Ellenborough in *Pickering*, 1812, 15 East, 38, at p. 43). "So far as the agent . . . is in any case held out to the public at large or to third persons dealing with him as competent to contract for and to bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions and orders" (Story, *Agency*, s. 133). This rule holds although the agent acts not as agent, but as principal (*Edmunds*, 1865, L. R. 1 Q. B. 97; *Watteau*, [1892] 1 Q. B. 346). So when a principal has allowed his agent to do certain acts, *e.g.* allowing a stockbroker to take certificates of stock in his own name, he is bound by what the agent does within the apparent scope of his authority, *e.g.* pledging these as securities for advances. But if an agent pledges the goods of his principal, and the pledgee has not been induced by the principal's acts to believe they were the agent's own goods, the rule applies that the pledgee takes them *tantum et tale* as they were in the hands of the agent, and after the advance is repaid they cannot be retained in a question of settling accounts with the agent (*National Bank of Scotland*, 1895, 22 R. 740). When an agent has entered into a contract on behalf of his principal which he had no authority to conclude, and it has been communicated to the principal, and the third party has acted upon it, the principal cannot after a lapse of time repudiate it as unauthorised. He is held, by not rejecting it at the time, to have accepted it (*Ballantine*, 1881, 8 R. 959; cf. *Dowling*, 1890, 17 R. 921).

The principal is liable for any wrong done by his agent which he has authorised or otherwise identified himself with (*Scorgie*, 1872, 9 S. L. R. 292; *Allen*, 1845, 7 Ad. & El. 960), or for any fraud of which he has received the benefit (*Clydesdale Bank*, 1877, 4 R. 626); but a principal is also liable in respect of the negligence, misrepresentation or concealment, fraud, or other wrongful act on the part of the agent in carrying out the transactions whose conduct is intrusted to him.

When a duty is laid upon one person towards another, delegation of its performance will not relieve from liability therefor (*Bank of Scotland*, 1891, 18 R. H. L. 21; [1891] App. Ca. 592; *Hardaker*, [1896] 1 Q. B. 335, where previous cases are reviewed). The duty in *Hardaker* was to take proper precautions for the safety of the plaintiff's property during the construction of certain works which the defendants were carrying

out under statutory powers. It was held that the defendants did not escape liability by the fact that the work was carried out by contractors, to whose negligence the damage complained of was due. "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed, by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it" (per Ld. Blackburn in *Dalton*, 1881, L. R. 6 App. Ca. 740, at p. 829). But the principal is not responsible for what has been termed the "collateral negligence" of the contractor or agent; by which is meant "negligence other than the imperfect or improper performance of the work which the contractor is employed to do" (per Rigby, L. J., in *Hardaker*, *supra*, at p. 352). An example of such "collateral negligence" was a case in which the contractor's workmen, while building a bridge, allowed a stone to fall upon a person passing underneath. The principal whose contractor was building the bridge was not liable for the injury (*Reedie*, 1849, 4 Ex. 244; *M'Lean*, 1850, 12 D. 887; but see *Penny*, [1898] 2 Q. B. 212).

When a contract is impeachable on the ground of misrepresentation or fraud against the agent, it is impeachable against the principal also. But the principal is also responsible for any injury the third party suffers through the misrepresentation or fraud or other wrong of his agent. "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong" (per Willes, J., in *Barwick*, 1867, L. R. 2 Ex. 259, at p. 265). The ground of the liability on the principal is thus stated: "It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in" (per Willes, J., *ib.* at p. 266). And the rule is "equally applicable whether the agency is for a corporation, in a matter within the scope of corporate powers, or for an individual" (per Ld. Selborne in *Houldsworth*, 1879, 6 R. 1164; 1880, 7 R. H. L. 53, and see cases there cited). The cases where the principal is liable for the wrong of his agent are referable to two principles: (1) when of two persons, equally innocent, one must suffer, the injury should fall on him who put it in the power of the wrong-doer to do the injury (*Union Bank of Scotland*, 1873, 11 M. 499; *Brocklesby*, [1895] App. Ca. 173); and (2) when an agent in the course of the agency commits a wrong, if the principal is benefited thereby he is liable to the extent to which he is benefited (*Clydesdale Banking Co.*, 1877, 4 R. 626; *Gibbs*, 1875, 4 R. 630).

Knowledge of or notice to the agent is accounted knowledge of or notice to the principal (*North of Scotland Banking Co.*, 1881, 8 R. 423; *Blackburn Low & Co.*, 1888, 21 Q. B. D. 144). Thus when contractors undertake to carry out work at the sight of some person appointed by the employer, and are paid for the work as certified by such person, the employer cannot, in the absence of fraud on the part of the contractors, after the work is done and paid for, sue for damages for breach of contract, since the knowledge of their agent is imputed to them (*Pringle*, 1882, 9 R. 915; *Ayr Road Trs.*, 1883, 11 R. 326). And when notice that a stair was in disrepair had been given to a house factor, the owner was held liable for an accident which afterwards happened (*M'Martin*, 1872, 10 M. 411). In a mercantile

contract the knowledge of a buyer's agent that the goods are not the property of the factor who sells them, but of a principal for whom he acts, is accounted the knowledge of the buyer, and destroys any right of set-off that might otherwise be pleaded (*Dresser*, 1864, 34 L. J. C. P. 48).

When an agent acts not as agent but as principal, and does not have the essential character of a mere agent, *e.g.* a broker, the person with whom he contracts, if in fact unaware that he is an agent, is entitled, in a question with the principal, to all the rights he would otherwise have against the agent, assuming him to be principal, including the right of set-off (*Fish*, 1849, 7 C. B. 687; *Montagu*, [1893] 2 Q. B. 350). And he is not bound to inquire whether the person with whom he deals is in reality a principal or an agent (*Lavaggi*, 1872, 10 M. 312). The same rule is sometimes stated thus: In order that the third party may set off a debt due to the principal against one due by his agent, it is necessary that the principal should have so acted as to induce, and, as matter of fact, should have induced him to believe that the agent was really a principal (*George*, 1797, 7 T. R. 359, 2 Smith's *L. Cas.* 135; *Cooke*, 1887, 12 App. Ca. 271; *Attwood*, 1832, 10 S. 817; *National Bank of Scotland*, 1895, 22 R. 740). Set-off is competent in respect of a debt due by a factor when such factor sells goods of his constituent as his own, and the third party believes him to be the owner. It is the act of the principal in doing what induces the third party to trust the factor as owner, viz. giving possession of his goods, which renders him liable (*Purcell*, 1841, 1 A. & E. 197; *Johnstone*, 14 Nov. 1818, F. C.; cf. *Smith*, 1847, 9 D. 702). But the broker, apart from the fact that he has no possession of the goods, is presumed always to act for a principal (*Baring*, 1818, 2 Barn. & Ald. 137; *Semenza*, 1865, 34 L. J. C. P. 161; *Matthews*, 1874, 1 R. 1224). When a third party has reason to believe that a person offering him goods in pledge or sale has only a limited title, he is put on his inquiry as to the actual title of such person, and cannot, by abstaining from inquiry, acquire a greater right in the goods than he would have if he was aware of the extent of such person's authority (*E. of Sheffield*, 1888, 13 App. Ca. 333). But this does not affect the rule that a person acquiring *in bonâ fide* and for value a negotiable instrument, takes it with an unencumbered title (*London Joint Stock Bank*, [1892] App. Ca. 201). An agent, in the character of agent, sold goods which were rejected as disconform to contract. He then returned the invoice price to the purchasers, who sold the goods with the agent's consent. The purchasers then claimed to set off the price so obtained against their claim of damages for non-implement of the contract; but it was held that this money was covered by the factor's lien for advances made on behalf of the principal, and they were compelled to pay it over to the agent (*Scott & Neill*, 1883, 11 R. 316). If goods of a principal are sold by an agent, the price is due to the principal, although undisclosed, and cannot be arrested in the hands of the purchaser by a creditor of the agent (*North-Western Bank Ltd.*, 1894, 22 R. H. L. 1; [1895] App. Ca. 56).

Termination.

The contract of agency is brought to an end, in the case of a devolution of authority for a special object, by the accomplishment of such purpose. Moreover, the fact that it is a consensual contract entitles the principal, if no term is marked for its duration, to terminate it at will on paying the agent's remuneration, and giving him the indemnity to which he is entitled (*Walker*, 1837, 16 S. 217). But this does not entitle the principal to revoke at such a time as to prejudice the agent. And when the authority is derived

from "holding out" on the part of the principal, knowledge of its termination must be brought home to third parties, to put them *in malâ fide* in continuing to deal with the agent (*Ferguson & Lillie*, 1864, 2 M. 804.). The agent also may renounce the contract at any time, but not *re infecta*. The appointment of another agent will in general, although not necessarily, put an end to a prior appointment (*Patten*, 1770, 2 Pat. App. 238). And insanity of the agent, or bankruptcy of agent or principal, ends the relation between them. Insanity of the principal is in a different position. If of a short temporary character, the agent's power is not interrupted (*Wink*, 1849, 11 D. 995); even if it is of a serious or prolonged character, the fact is not public, as is death or bankruptcy, and third parties must be certiorated of the fact in order to void the contracts they make with the agent (*Pollock*, 10 Dec. 1811, F. C.). Death, of course, ends every consensual contract (*Life Association of Scotland*, 1886, 13 R. 910); but so long as the agent continues to act *in bonâ fide* after the death of the principal, not having received authentic information thereof, his acts are good against his principal's estate (*Campbell*, 1829, 3 W. & S. 384; *Smout*, 1842, 10 M. & W. 1). An authority coupled with an interest cannot be revoked. When brokers agreed to take shares in a ship on condition of being appointed sole chartering brokers, it was held that it was not terminable at will, but only on showing reasonable cause (*Galbraith & Moorhead*, 1896, 23 R. 1011). And an authority to a creditor to uplift debts due to his principal, out of which he is *primo loco* to pay his own debt, cannot be revoked. There may be a stipulation in the contract that the principal will continue to carry on business during the term for which the relation is to subsist, and this may be expressed or implied from the nature of the agreement. There is no necessary breach of an agreement to employ a person as agent for five years if, after one year, the principal finds it impossible, physically or in a mercantile sense, to carry on the business (*Rhodes*, 1876, L. R. 1 App. Ca. 256; *Patmore & Co.*, 1892, 19 R. 1004). So, on the other hand, when the agent found it necessary to cease to carry on business before the agreement came into force, the Court refused to read into the contract an undertaking to continue in business during its term (*S.S. State of California Co. Ltd.*, 1895, 22 R. 562). Each case must depend on the reciprocal duties undertaken by the parties to the contract. If a duty is from its nature dependent on the continued existence of a certain state of things, a change of circumstances, without fault, will absolve from the duty. But if the contract discloses an undertaking to continue to employ or serve for a term independently of such change of circumstances, failure to continue the employment or service will infer a breach of contract (*Turner*, [1891] 1 Q. B. 544; *in re English, etc., Insurance Co.*, 1870, L. R. 5 Ch. 737).

Principality of Scotland. — The principality of Scotland consists of a dukedom and certain earldoms and lordships, etc., of which the fee is in the sovereign and the usufruct is an appanage of the sovereign's eldest son.

These territories are partly the patrimonial lands of the Bruces, Earls of Carrick, and of the High Stewards of Scotland, and partly of the forfeited lands of the Lords Boyd and the Lords of the Isles. In a charter of 10 Dec. 1404 (not on record, but see MS. "State of Principality in H.M. Exchequer Office," pr. in Abstract from Records, etc., concerning Stewartry, etc., Edinburgh, 1824) of a liferent of the Stewartry granted by Robert III. in favour of his eldest son James, Steward of Scotland, the Stewartry lands

are: the baronies of Renfrew, Cunningham, and Kyle Stewart (Kyle Senescalli), in the sheriffdom of Ayr; the baronies of Ratho and Innerwick, in the sheriffdom of Edinburgh; the islands of Bute, Arran, and the Cumbraes; the lands of Cowall and Knapdale; the lands of the earldom of Carrick; and the lands of Kyle Regis. The first creation of a permanent principality was by an Act of Parliament of 27 November 1469 (c. 3, Scot. Acts of Par. ii. 186), by which James III., with consent of Parliament, united, incorporated, and annexed, in favour of the eldest sons of the kings of Scotland, the lordship of Bute with the castle of Rothesay, the lordship of Cowall with the castle of Dunoon, the earldom of Carrick, the lands of Dundonald with its castle, the barony of Renfrew with its lands and tenandries, the lordship of Stewarton, the lordship of Kilmarnock with its castle, the lordship of Dalry, the lands of Noddisdale, Kilbyd, Narristoun, and Caverton, and of Frarynzan Drumcoll, and Trebauch with its fortalice, along with that land of Teilling and annualrent of Brechin which previously belonged to Thomas, eldest son of Robert Lord Boyd. From time to time portions of the principality have been dissolved from it with the sanction of Parliament. Thus, in 1621, the lands and earldom of Arran; in 1633, the lands and barony of Beill, in the sheriffdom of Edinburgh, the barony of Gogosyde, and lands of Largs, etc., in the bailiary of Cunningham; in 1641, Kilbirnie, Easter Greenock, Fairlie, Crevoche, Wester Greenock Shaw, Johnstone, Drumelling, Spangs Cunyngham, Bonyngton, Lochtulloche, Deans, Boighall, Starlaw, etc.; in 1645, the earldom of Cassilis, baronies of Leswalt and Dunure, the heritable offices of the bailiary of Carrick and of keeper of the castle of Lochdone, the pennylands extending to a five-pound land, and the patronage of the provostry and prebendary of Maybole, with the superiority of all lands and tenements belonging thereto. All the remaining lands of the principality have been feued, and its revenues now consist of feu-duties and casualties. When there is a prince who is the eldest son of the sovereign, all charters in favour of the vassals of the principality run in his name, as Prince and Steward of Scotland, etc. etc. When there is no such prince, the principality, though not merged in the sovereignty, remains with the sovereign, who grants charters to its vassals as Prince and Steward of Scotland, and not as sovereign. In all cases the principality charters pass the Great Seal, and are recorded in the Great Seal Register along with ordinary Crown charters.

The principality passes to the son and heir of the sovereign on his birth, but by the terms of its original institution, and the analogy of the appanages of Cornwall, etc., it apparently does not descend to the grandson of the sovereign on the predecease of the son. The tenure of the principality confers on the prince the titles of Prince of Scotland, Duke of Rothesay, Earl of Carrick, Baron of Renfrew, and Lord of the Isles. He is a peer of Scotland, and is entitled to vote at elections of Representative Peers. ("Memorial to show that the eldest son of the king has right to the Principality," 1791. "Abstract from the Records concerning the Stewartry," etc., 1824.)

Printer.—Authorised parliamentary printers are protected by 3 & 4 Vict. c. 9. Civil and criminal proceedings commenced in respect of a parliamentary paper, or of a copy of an authenticated report, are put an end to by this Act; and the printer may give evidence that an abstract or extract of such a paper was published *bonâ fide* and without malice. By 31 & 32 Vict. c. 37, and 45 & 46 Vict. c. 9, s. 3, a penalty is enforceable for printing a proclamation, order, or regulation purporting to be printed by a Government

printer. The Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), repeals former enactments relating to printers, with the exception of the following provisions enumerated in Sched. 2: Printers are required to keep a copy of every paper they print for profit, and to write thereon the name and abode of their employer, to be shown to any justice of the peace within six months, under a penalty of £20 (39 Geo. III. c. 79, s. 29); but this does not extend to impressions of engravings, or the printing of names and addresses. Prosecutions are to be commenced within three months after the penalty is incurred. Printers and publishers are also required to print their name and residence on every paper or book. Failing this, the printers cannot sue for the price of printing, and both printer and publisher are liable to a fine of £5 for each copy published (2 & 3 Vict. c. 12; *Bensley*, 1825, 5 B. & Ald. 335; *Merchant*, 1818, 8 Taunt. 142). From these regulations are excepted papers printed by authority of, or for the use of, Parliament, bank-notes, bills, receipts, advertisements, and the like; papers printed by authority of any public Board or any public officer, and legal documents (39 Geo. III. c. 78, ss. 28–31; 51 Geo. III. c. 65, s. 3). Proceedings for fines can only be commenced by the Lord Advocate.

A printer cannot recover from a publisher the price agreed on for printing a work of grossly immoral or libellous character (*Poplett*, 1825, 2 C. & P. 198); and if a printer, after printing part of a work, discovers that it contains such matter, he is entitled to refuse to complete the printing, and recover for what he has already completed (*Clay*, 1856, 25 L. J. Ex. 237). A printer cannot recover for printing or assisting to circulate a periodical of which he falsely makes affidavit that he is sole proprietor (*Stephens*, 1832, 2 C. & J. 209); nor can a newspaper proprietor recover for non-performance of a contract for printing such paper before filing the requisite affidavit (*Houston*, 1834, 1 Macl. & R. 325). The time for payment for printing is usually a matter of agreement between parties. By usage of trade a printer was held bound to complete and deliver the whole of a work before being paid for printing it (*Gillet*, 1808, 1 Taunt. 137); and where the bulk of an impression was destroyed by fire while in the printer's custody, he failed to recover anything, although a large number of copies had been actually delivered (*Adlard*, 1835, 7 C. & P. 108). A printer has no right to publish a work not yet published, although he may have a lien over it (1 Bell, *Com.* 113; and see *Davis*, 1855, 17 D. 116). But he has a lien on the unprinted sheets of a book for the price of his labour, and on the last sheets undelivered for the price of the whole. It appears that in England a lien subsists over subsequent volumes for the price of those already printed and delivered (2 Bell, *Com.* 100), it having been so held where the numbers were not consecutive (*Blake*, 1814, 3 M. & S. 167). A printer, however, has no lien over stereotypes given to him to print from (*Brown*, 1844, 6 D. 1267).

Prior tempore potior jure ("the earlier in date is preferable in right").—Among competing titles that which has been earliest made complete is preferred to those completed later in date. In applying this maxim, the date which rules is that of the completion of the legal solemnities constituting the title. Thus heritable titles rank according to the dates on which they have been entered in the public registers, registration being now essential to the completion of the title; whereas, in early times, the title was completed by the actual giving of sasine, and in those days the date of sasine ruled. Competing assignations of personal rights

rank according to the dates of their respective completion by intimation. Arrestments rank by the dates of the respective decrees of furthcoming.

The rule suffers wide exception under 1661, c. 62, by which all effectual apprisings and adjudications within year and day of the first completed diligence are to be ranked *pari passu* with the latter. By 19 & 20 Vict. c. 79, s. 12, arrestments and poindings within sixty days of bankruptcy are also ranked *pari passu*, and indeed the principal object of the bankruptcy laws is to override the common law rule of ranking laid down under the maxim here treated of.

[Stair, iv. 35. 6 *et* ff.; Ersk. *Inst.* iii. 6. 18; 1661, c. 62; 19 & 20 Vict. c. 79, s. 12; Trayner's *Latin Maxims.*]

Prisons.—In former times it was the duty of the magistrates to erect and maintain buildings as prisons for the safe-keeping of persons charged with or convicted of offences against the law. Under the designation "magistrates," in this connection, were included sheriff stewards, bailies of royal burghs and burghs of regality.

The earliest authentic notice of prisons in the records of the Scottish Parliament is the Act of 1487, c. 101, passed in the reign of King James III., intituled, "Of the keeping of arreisted Trespassoures." From this Act, which is one of a series of statutes relating to the criminal law, it appears that there were at that time "castels" for the reception of prisoners. There were also coroners, whose duty it was to arrest persons charged with offences, and either require them to find bail for their appearance at the justice aire, or commit them to some "castel" for trial. The "castels" were supported at the expense of the Crown, and in an Act passed in the reign of King James V., 1528, c. 5, they are described as the "Kingis castels."

Provision seems only to have been made as to prisoners before trial there being no regular provision for the custody of prisoners after conviction, which may have arisen from the fact that the usual sentences, upon conviction, were fine, or, more frequently, corporal punishment. By the Act 1579, c. 74, passed in the reign of King James VI., "For punischment of strang and idle beggars, and reliefe of the pure and impotent," it appears that the use of the king's "castels" for prisoners had ceased, and that common prisons had been provided. How these were provided or maintained does not appear; but they were still only for prisoners before trial, the chief punishment, as in this Act, being corporal.

The first regular provision made by the Scottish Legislature for the erection and maintenance of prisons was by an Act passed in the reign of King James VI. (1597, c. 277), ordaining that "prison-houses suld be bigged within all Burrows." This Act continued to be the foundation of the general law and practice of Scotland, relative to the providing of prisons, down to the Act 2 & 3 Vict. c. 42. It will be observed that the obligation to provide prisons was by this Act entirely thrown upon the burghs. Sir George Mackenzie accounts for this by the fact of their "having great freedoms and privileges from the king." He says that the obligations of the Act applied to the magistrates of burghs of regality as well as of burghs royal, but not to bailies of burghs of barony nor to bishops' bailies; and his opinion appears to have been confirmed by subsequent practice, although the law does not seem to have been altogether settled with respect to burghs of regality and barony. Besides the obligations which the law thus imposed on burghs with respect to providing the fabrics of prisons and maintaining certain prisoners, a very heavy burden fell on them as to the

proper and secure custody of debtors, whom they were bound to receive and detain, and for whose proper and safe custody the magistrates were held liable up to this time. "The footing on which the law was thus established with respect to prison and prisoners may, with some varieties in practice, be generally stated to have been as follows: (1) That the burghs were bound to provide prisons for the whole kingdom, in which they were obliged to receive and detain in custody all civil and criminal prisoners; (2) that the burghs were further bound to be at the expense of providing aliment to criminal prisoners after conviction; (3) that the burghs were further liable for the proper and safe custody of debtors, and in event of the improper custody or escape of such debtors, became liable for the debts for which they were imprisoned; (4) that the counties were liable for the expense of providing aliment to criminal prisoners previous to trial; and (5) that civil debtors were bound to support themselves, and when unable to do so were entitled to receive aliment from the incarcerating creditors." This state of matters was felt to be so unjust that several of the counties voluntarily contributed assistance to the burgh prisons.

The first step which led to an alteration of the law was taken by the Convention of Royal Burghs assembled in the year 1816, which remitted to a committee the consideration of the subject of burgh gaols, with the view to obtain some relief to the burghs. This resulted in the appointment of a committee of Parliament, which reported that they believed that counties, if they had the power of assessment which the counties of England had by the Act 24 Geo. III. c. 54, would contribute to the prisons; and they recommended that a Bill should be introduced empowering the Commissioners of Supply, on application being made by one or more of the royal burghs situate within them for aid to improve or rebuild gaols, to take the said application into consideration, and to grant such sums as they might deem necessary for that purpose, and to assess the county for the same. The Act of 59 Geo. III. c. 61 was passed accordingly, enabling Commissioners of Supply of the different counties to give aid in improving prisons. This Act was not compulsory on the counties, but merely gave permission to afford aid to the burghs in improving, enlarging, or rebuilding prisons, and was acted on only in a very few instances. Further inquiries were held by committees of Parliament, and reports obtained, with the result that in 1839 the Act 2 & 3 Vict. c. 42, to improve prisons and prison discipline in Scotland, was passed. This Act provided that the general superintendence and direction of all prisons in Scotland should be committed to a General Board. County Boards were established under that Act which took the immediate superintendence and management of all the prisons in Scotland, except the General Prison at Perth. Powers of assessment were conferred on the counties for the provision and maintenance of prisons, and they were "charged with the well ordering of their several prisons." In burghs the levying of the prison assessment was committed to the magistrates and council. This Act was amended in several respects by the Acts 7 & 8 Vict. c. 34, and 14 & 15 Vict. c. 27, but the General Board continued to administer, with the assistance of the County Boards, down to 1860. By that time, the General Board having accomplished the purposes for which it was established, the Act of 1860, 24 & 25 Vict. c. 105, was passed, putting an end to that Board. By this Act, instead of the General Board four managers were appointed—the Sheriff of Perth, the Inspector of Prisons for Scotland, the Crown Agent, and a nominee of the Crown, the first being the secretary of the late General Board. County Boards had thereafter to report to the Secretary of State, who was advised on all matters relating to prisons by the

managers of the General Prison at Perth, which was administered by the managers as representing the Secretary of State. The controlling power of the old General Board still continued through the Secretary of State, the rules and regulations made by the General Board being amended from time to time, and were continued in force throughout all the prisons in Scotland.

This Act of 1860 was likewise repealed by the Act of 1877, 40 & 41 Vict. c. 53, intituled an Act to amend the law relating to prisons in Scotland. By that Act the whole prisons in Scotland were transferred to the Secretary of State. The change may be shortly stated thus: Prior to 1878 Scottish local prisons were administered by local Boards, under the control of the Government—first, from 1839 to 1860, through the General Board of Directors of Prisons, who also administered the General Prison at Perth as a Government establishment; and latterly, from 1860 to 1878, through the Secretary of State, who was advised by the managers of the General Prison at Perth, created by the Act of 1860 to carry on the General Prison.

The Act of 1877 reversed the former order of things. The local Boards became, through the Prison Visiting Commissioners, the inspectors of the administration of the Government, whereas before 1877 the Government inspected, and the local Boards administered. The leading provisions of the Act are:—By sec. 4 of the Prisons Act, 1877, it is provided that prisons and prisoners are to be maintained out of the public funds. By sec. 5 prisons are vested in the Secretary of State, as well as the appointment of prison officers, and the control and safe custody of prisoners. By subsecs. 7–13 provision is made for the appointment by the Crown of a body of Prison Commissioners, not exceeding three, of whom two may be salaried. The Sheriff of Perthshire and the Crown Agent for Scotland are also to be Commissioners *ex officio*. The Commissioners are a body corporate, and are intrusted with the general superintendence of prisons, but are subject to the control of the Secretary of State; various inspectors, officers, and servants are appointed to assist them. The Prison Commissioners must lay an annual report, which refers to every prison within their jurisdiction, before both Houses of Parliament; and it is stipulated that this report shall contain particulars as to the various manufacturing processes carried on in each of the prisons. An annual return must also be sent in to Parliament of all punishments inflicted within each prison. Subsecs. 14–16 provide for the yearly appointment of a Visiting Committee for each prison. These consist of Commissioners of Supply, Justices of the Peace of Counties, and Magistrates of Burghs, whose duty it is to report on any abuses, necessary repairs, etc. The Sheriff, or any justice of the peace having jurisdiction in the county in which the prison is situated, may enter the prison for the sake of examining the condition of the prisoners (unless such be under sentence of death), and make notes of his observations in a visitors' book to be kept by the governor. Sec. 17 has entirely freed local bodies from the obligation to maintain prisons. Secs. 27–32 set forth in detail instructions as to the classification and commitment of prisoners; other points, such as when a prisoner may be discharged, and power to use cells for certain purposes, are also taken up in these sections. Subsecs. 34–36 permit the providing discharged prisoners with the means of returning home, money, etc., but the latter must not exceed £2.

Magistrates of burghs have still their ancient rights and powers with regard to prisoners under sentence of death (s. 38). By sec. 44 the Secretary of State is authorised to make regulations as to carrying out

sentences of hard labour, and by sec. 45 he is directed to make special rules as to the treatment of persons unconvicted. By this section rules are laid down which permit (1) the retention by a prisoner of books or papers, if not required for the purposes of justice; (2) communications between a prisoner, his solicitor, and friends, as unrestricted and private as may be possible, consistently with due precaution against tampering with evidence, or plans for escape; and (3) arrangements whereby prisoners may provide themselves with articles of diet, or be furnished with sufficient wholesome food, and may be protected from performing unaccustomed tasks or offices. Secs. 49–52 prescribe the duties of the medical officers and governor respectively. In the event of a prisoner dying within the prison, the procurator-fiscal is bound to make an investigation (s. 53). Secs. 72–75 of the Prisons Act of 1860 (23 & 24 Vict. c. 105) are excepted from the general repeal of that Act. These sections provide for the removal to hospitals of prisoners diseased or in danger of life; the making of rules as to prisoners sentenced to hard labour; the punishment of male juvenile offenders by private whipping; the penalties for introducing prohibited articles into prison. All powers and duties vested in or imposed on the Secretary of State under these enactments are transferred to the Secretary for Scotland, under and in virtue of the Secretary for Scotland Act, 1885, 48 & 49 Vict. c. 61, and the Secretary for Scotland Act, 1887, 50 & 51 Vict. c. 52.

By sec. 10 of the Debtors Act, 1880 (43 & 44 Vict. c. 34), a periodical report is to be made by the governor of every prison to the Sheriff of the county in which the prison is situated with regard to civil prisoners, setting forth the ground and warrant of imprisonment and the period for which they have been detained.

By the Act 49 & 50 Vict. c. 49, the Prison Commissioners are authorised to employ convict labour in the execution of harbour works at Peterhead, and to make rules with reference thereto; and by the Act 31 & 32 Vict. c. 24, "The Capital Punishment Amendment Act, 1868," sentences of death are to be carried out within the prison in which the offender is confined at the time of execution.

The 25 & 26 Vict. c. 24, and the 34 & 35 Vict. c. 55, regulate the law relating to criminal and dangerous lunatics in Scotland. Provision is made for the superannuation of prison officers by the Act 41 & 42 Vict. c. 62, which was amended by the Acts 49 & 50 Vict. c. 9, and 50 & 51 Vict. c. 60, and 50 & 51 Vict. c. 67.

Prison-breaking.—If a prisoner who is confined in a public gaol, *lawfully and on warrant*, escape, he is guilty of the crime of prison-breaking. If the prisoner be merely placed in gaol by a constable for security, and he escape therefrom, this does not amount to prison-breaking (Hume, i. 403); nor is the crime committed if the warrant on which he is confined is palpably informal, or is not applicable to him (Hume, i. 403). If the warrant be in itself formal, irregularity in the proceedings of which it is the result are of no consequence. The gaol must be a proper public gaol, and not merely a lock-up or temporary place of detention (Hume, i. 404). Escape from any part of the precincts of the gaol (*e.g.* from the exercise-yard—*Otto*, 1833, Bell, *Notes*, 104) is equally prison-breaking; but it is not prison-breaking to force a passage from one part of the prison to another. The mode in which the escape is effected is of no consequence (Hume, i. 401, 402; *Gordon* or *Bryan and Others*, 1841, 2 Swin. 545; *Hutton*, 1837, 1 Swin. 497; *M'Queen*, 1840, Bell, *Notes*, 181).

The modus in the libel is: "You, being lawfully confined in the prison of . . . . . , did . . . . . [*here describe what was done*], and did escape from said prison."

The punishment is either imprisonment or penal servitude.

[Hume, i. 401 *et seq.*; Alison, i. 555 *et seq.*; More, ii. 401; Macdonald, 224.]

The *attempt* to break prison is of itself an offence (*Gallie*, 1832, 5 Deas & And. 242; *Smith*, 1863, 4 Irv. 434; Crim. Proc. Act, 1887, 50 & 51 Vict. c. 35, s. 61).

It is a crime, punishable with imprisonment or penal servitude, to break into prison for the purpose of rescuing prisoners (Hume, i. 404; *Urquhart*, 1844, 2 Bro. Supp. 13; Macdonald, 225).

Prisoner of War.—See WAR. Actions in this country against a prisoner of war are stayed while he is in the hands of the enemy, and until his return to this country. This rule does not extend to execution by letters of horning (see also Bell, *Com.* i. 564). It is a statutory offence for any person knowingly and wilfully to aid an alien enemy, being a prisoner of war, to escape from his place of confinement, or, if on parole, to escape from the royal dominions, or of that part of them where he is on parole (52 Geo. III. c. 156). The offender is liable to penal servitude for life or for fourteen or seven years (*ib.*, and 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47). Anyone giving aid upon the high seas to a prisoner who is escaping, is liable to the same penalty. These Acts are also criminal at common law (Hume, i. 527; 52 Geo. III. c. 156, s. 4; Macdonald, 240).

Private Act of Parliament.—The private Acts of the Parliament of Scotland are not, properly speaking, laws. They are merely grants by Parliament, or parliamentary ratifications of grants made by the Crown in favour of particular persons or corporations.

In 1567, in answer to a representation made by the judges of the Court of Session, that in causes before them such Acts had been founded on as giving an indefeasible title to the lands, Parliament declared by the Act, c. 22, of that year (1567, c. 18 in 12mo. ed.), that the Court of Session could competently reduce all infeftments, notwithstanding any confirmation or grant of Parliament.

By the Act 1592, c. 38, it was declared that ratifications granted in Parliament should not prejudice the rights of other parties; and although by the Act 1594, c. 25, such ratifications were declared to be *salvo jure cujus libet* except where parties have been specially called, by the Act 1606, c. 68, all such ratifications without exception were declared to be *salvo jure cujus libet.*

An Act to the same effect as that of 1606 was thereafter passed at the end of each session of Parliament, and the meaning of the reservation of the rights of third parties and of the jurisdiction of the Court of Session is explicitly given in that one of the series passed in 1633, c. 31.

[Ersk. *Inst.* i. 1. 39.]

Private Bill.—Private as distinguished from public parliamentary bills are those which concern a particular interest as distinct from the general interest of the community. In the House of Lords they are classified as local or personal. Of these, local bills form much the larger and

more important class. Under Standing Order 1 of both Houses, local bills are further subdivided into two detailed classes, according to the subjects to which they relate, the second class including those more especially involving the construction of works. Personal bills consist of estate, divorce, naturalisation, and name bills, and all others not specified as local bills (S. O. 149 H. L.). While the general distinction between public and private bills is sufficiently clear, it is often difficult to determine in particular cases whether the interest to be affected is particular or general, private or public. It depends partly upon the extent of the measure and partly on its objects. Thus a bill for the benefit of three counties was held to be a private bill, while a bill affecting only four harbours, but involving matters of general legislation, has been held to be a public bill (Erskine May, 634, 639). The result of the difficulty is that parliamentary practice has not been quite consistent—bills, for example, affecting the metropolis having been sometimes treated in one way and sometimes in the other. One of the most recent dicta is that "it is always a question of degree whether the quantity of matter bearing upon public Acts is such as to make it necessary to bring in the bill as a public bill" (Mr. Speaker Gully, 1896, *Parl. Deb.* vol. 38, p. 335). Where a bill introduced as public affects private interests, it may, after the second reading, be referred to a committee for inquiry like an ordinary private bill. Bills of this nature are termed "hybrid bills." Bills for the confirmation of provisional orders, and Government bills for carrying out national works, or affecting Crown property, are always treated in this way; and London County Council bills containing power to raise money must be similarly treated, unless they comply with certain conditions (S. O. 194 H. C., 69 H. L.). The reverse process, namely, to introduce a bill as private, and carry it through as a public measure, is not competent (Erskine May, 642).

The cardinal distinction between the way in which Parliament treats public and private bills is that in the case of the former its functions are purely legislative, while in the case of the latter they are partly legislative and partly judicial. Hence results a radical distinction both in procedure and in the principles by which the decision of Parliament is governed. As regards procedure, all private bills are brought in on petition; persons whose private interests are affected appear as promoters or opponents, and may, if their actings are in breach of an obligation, be restrained by the Court from doing so; preliminary conditions must be observed; fees paid; and proof led in support of the preamble; while if the promoters abandon the case, the bill necessarily falls, however valuable it may be. On the merits, Parliament has not only to consider and protect the public interest, but has to adjudicate between the claims of promoters seeking statutory powers on the one hand, and opposing interests, public or private, on the other (Erskine May, 646; Opinion of Ld. (then Justice) Blackburn in *Duke of Buccleuch*, L. R. 5 Ex. 221).

The various stages of the procedure necessary to carry a private bill through Parliament may now be shortly described.

Preparation of the Bill.

The Clauses Acts.—The preliminary notices which require to be given before the introduction of the bill must sufficiently allude to all its provisions; and the bill should therefore be fully drafted before anything else is done. In doing so the Clauses Consolidation Acts passed in 1845 and 1847, and subsequent amending Acts, must be kept in view. These Acts consist of provisions which had been usually inserted in special Acts

for any of the commoner objects of private bill legislation, and were passed for the purpose of being wholly or partially incorporated in special Acts, and thereby at once avoiding the necessity of repeating similar provisions in each special Act, and ensuring greater uniformity in the provisions themselves. Those applicable to Scotland are—

The Companies Clauses Acts (8 & 9 Vict. c. 17, and 26 & 27 Vict. c. 118, as amended by 32 & 33 Vict. c. 48).

The Lands Clauses Acts (8 & 9 Vict. c. 19, as amended by 23 & 24 Vict. c. 106).

The Railways Clauses Acts (8 & 9 Vict. c. 33, as amended by 26 & 27 Vict. c. 92).

The Markets and Fairs Clauses Act (10 & 11 Vict. c. 14).

The Gas Works Clauses Acts (10 & 11 Vict. c. 15, as amended by 34 & 35 Vict. c. 41).

The Commissioners Clauses Act (10 & 11 Vict. c. 16).

The Water Works Clauses Acts (10 & 11 Vict. c. 17, as amended by 26 & 27 Vict. c. 93).

The Harbours, Docks, and Piers Clauses Act (10 & 11 Vict. c. 27).

Analogous to these, though it is not termed a Clauses Act, is the Tramways Act, 1870 (33 & 34 Vict. c. 70).

The three principal Acts of 1845, the Companies Clauses, Lands Clauses, and Railways Clauses Acts, and Parts II. and III. of the Tramways Act, provide that they shall be incorporated with each special Act, and shall apply thereto so far as applicable, except in so far as their provisions may be specially varied or excepted therein. On the other hand, the five principal Acts of 1847 only apply to the special Act if—and that only to the extent to which they may be—expressly incorporated therewith; and the same rule applies generally to the later amending Acts.

The Standing Orders.—The Standing Orders of both Houses also contain many provisions which must be kept in view in preparing the bill. In some cases complete clauses are given and directed to be inserted. Thus Standing Order 158 H. C. (114–116 H. L.) provides a set of clauses applicable to railway, tramway, and subway bills, limiting the time for completion of the line, and, in case of failure, imposing a penalty, and applying such penalty, or the preliminary deposit, to compensate those injured by such failure. Other clauses are given applicable to similar bills (S. O. 166 A, 169 H. C.; 123 A, 130, 132 H. L.), and also a clause applicable to patent bills (S. O. 137 H. L.). In other cases rules are simply laid down to which bills must conform, or from which a dispensation can only be obtained on a special report from the committee in charge of the bill. A considerable number of these also refer to railway, tramway, and subway bills, and deal with such matters as bridges and level crossings; fixing of rates and charges; payment of interest; limitation of mortgages; acquisition of canals, docks, and powers of steam navigation; terms of lease, purchase or amalgamation; conditions under which local authorities may construct or work tramways, etc. (S. O. 153–171 H. C.; 112–133 D H. L.). Others refer to borrowing powers of local authorities, to agreements, patents, enclosure and drainage bills, and burial-grounds and gasworks (S. O. 172–183, 188 H. C.; 134–140 A H. L.). Other regulations are applicable to various kinds of bills. Thus in bills of the second class the time for executing the proposed works must be limited (S. O. 107 H. L.); and wherever more than a certain number of labouring class houses are compulsorily taken, a scheme for providing new dwellings must be approved (S. O. 183 A H. C.; 111 H. L.).

Model Bills and Clauses.—Most of these regulations are embodied in the model bills and clauses which are annually prepared by the parliamentary officials in order to assist in the drafting of bills. These consist of a model railway bill, with forms of special clauses relating to capital and borrowing powers, to the taking of lands, to plans, and to the construction of works, to penalty if the line is not opened within the period fixed, to abandonment of line and compensation in respect thereof, to agreements with other companies, to priority of mortgages, to payment of interest during construction, to tramway bills, to electric powers, to hydraulic bills, to confirmation of agreements, to loans by Public Works Loan Commissioners, and to the taking of labouring class houses; also of a model gas bill, and sets of clauses applicable to corporation stock and to improvement bills.

Preliminary Procedure.

The preliminary procedure consists in procuring certain consents, and giving certain notices by advertisement and service, and in the deposit of plans, documents, and money. These matters are carefully regulated by the Standing Orders, which are now practically the same in both Houses both as regards substance and numbering (S. O. 3–66).

Wharncliffe Meetings (S. O. 62–66).—If the promoters are a company, the consent of a certain majority of the members must be obtained for the bill in a meeting called for the purpose. It is sufficient if the meeting is held before the second reading; but it will be well to have it before much expense is incurred. The Standing Orders apply to all companies, whether statutory, incorporated under the Companies Acts, or otherwise. When the bill specially affects a separate class of members, separate meetings must be held, and separate approval obtained from the company generally, and from the special class so affected. Provision is also made for the case where a bill has been materially altered before leaving the other House, and where a company, though not themselves the promoters, are authorised to subscribe towards the undertaking.

Notices by Advertisement (S. O. 3–10).—During the months of October and November, and not later than the 27th November, preceding the application for the bill, publication must be made by advertisement in the *Gazette* and local papers, describing the undertaking and stating various other particulars. Where the surface of a street or road is to be disturbed under the powers in a tramway railway or subway bill, notices must also be posted in such street or road.

Notices and Applications to Owners, etc. (S. O. 11–22).—In the case of bills for power to take lands and houses compulsorily, or for an extension of time for that purpose, or to impose an improvement charge on lands, application must be made on or before 15th December to the owners, lessees, and occupiers of all such lands or houses, inquiring whether they assent, dissent, or are neuter with respect to the scheme; and a list must be made up in accordance with the replies. Special notices must also be given in the case of tramway bills, water bills, gas and sewage works bills, and abandonment bills. Before 21st December, notice must likewise be given to those affected by proposed railway running powers, or by the proposed repeal of any statutory protective provision. In the case of tramway bills the promoters must further obtain the consent of the local authority and—if it be distinct—of the road authority through whose district the line is to pass.

Documents required to be Deposited (S. O. 23–39).—These include the petition for the bill, plans, books of reference, sections, maps, copies of the bill and of the *Gazette* notice, estimates, declarations, lists, and statements.

The deposit is made either at some local public office, or with a Government department or other public office, or at the Private Bill Office for the House of Commons, and the office of the clerk of the Parliaments for the House of Lords.

The deposits on or before 30th November consist of plans, sections, books of reference, and maps, and are applicable to all bills of the second class, and to bills of the first class under which lands may be taken compulsorily, or which are liable to an improvement charge. The deposits are made in the office of the sheriff clerk of each county concerned, in the parliamentary offices, and with the clerk of the parish council, or the town clerk of each parish or royal burgh concerned. In certain cases copies must also be deposited with Government departments and public bodies, such as river conservators.

The deposits on or before 21st December consist of the petition for the bill, accompanied by a declaration and a printed copy of the bill annexed, which must be lodged in the Private Bill Office. The petition, which is addressed to the House of Commons and must be signed by some of the parties who are suitors for the bill (S. O. 193 H. C.), sets forth the circumstances of the application, avers compliance with the Standing Orders, and prays for leave to bring in the bill. The declaration, which must be signed by the agent for the bill, must state to which class the bill belongs, and what powers are given by the bill. In the House of Lords a printed copy of the bill only is necessary, and it must be lodged by the 17th December. On or before the 21st December printed copies of all bills must also be lodged at the office of the Treasury and at the General Post Office; and in particular cases, with Government departments and public offices concerned.

The deposits on or before 31st December consist of lists of owners, etc., required to be made out on the answers received to the preliminary applications, estimates of the expense of the undertaking required to be made out under S. O. 56 in the case of bills of the second class, and certain declarations which are necessary where a money deposit is to be dispensed with. These must be lodged at the Parliamentary offices. Where a bill proposes to take more than a certain number of labouring class houses, a statement of particulars of these must within the same time be deposited at the Parliamentary offices and at the office of the Secretary for Scotland.

Form of Plans, Books of Reference and Sections (S. O. 40–55).—The plans must describe the lands which may be taken compulsorily, or on which an improvement rate may be charged; and in case of bills of the second class, must describe the line or situation of the whole of the work. Various other particulars are also prescribed. The book of reference contains the names of the owners, etc., concerned, with a description of the lands. The sections must show the surface of the ground, the level of the proposed work, a datum horizontal line from which the levels and gradients may be measured, height of embankments, depth of cuttings, etc.

Deposits of Money (S. O. 56–59).—In the case of railway, tramway, or subway bills which comply with certain conditions, no money deposit is required. If they do not comply with these conditions, a sum equal to not less than 5 per cent. of the estimated expense of the undertaking must, previous to 15th January, if the work is to be done in Scotland, be deposited with the Queen's Remembrancer. In the case of all other bills a deposit of 4 per cent. of the estimated cost is required, unless in two exceptional cases, where declarations setting forth the special circumstances must be lodged.

Deposits in Connection with Bills brought from the other House (S. O. 60, 61).—In the case of various classes of bills brought from the other

House, a copy of the bill must be deposited with a particular Government department within two days after the bill is read a first time in the second House. Further, whenever, in the progress of a bill of the second class through the first House, any alteration has been made in the work authorised by the bill, public notice must be given by advertisement, and private application must be made to owners, etc., affected by the alterations; and plans, books of reference, and sections of the alterations must be deposited in the Parliamentary and local public offices, as in the case of a new bill.

London County Council bills are subject to a special set of provisions (S. O. 194 B).

Proof of Compliance with Standing Orders.

Procedure before the Examiners.—Bills when deposited in the Private Bill Office are entered in a register, and on or after 22nd December a list is made up, in which the petitions are numbered consecutively, facilities being given to petitioners to obtain an early or late place, as they desire. In the order in which they stand in this list, subject only to a preference being given to those which are unopposed, the bills then come before the examiners for proof of compliance with Standing Orders. Two examiners are appointed jointly by both Houses for this purpose, and the examination begins on 18th January (S. O. 69 H. C.; 70 H. L.). Parties wishing to be heard may lodge memorials complaining of non-compliance with Standing Orders (S. O. 74 H. C.; 73 H. L.).

Before one of the examiners formal proof of compliance with Standing Orders is led by the promoters by means of affidavits, and if the examiner requires it, by other evidence; and the memorialists are then heard on their allegations of insufficient compliance. The promoters may object to the memorial on the ground of informality, want of specification, etc. The examiner then either (*a*) certifies compliance by indorsement on the petition, forwarding a certificate to the same effect to the House of Lords, or (*b*) certifies non-compliance, and reports the grounds of his decision, or (*c*) if he is doubtful of the construction of the Standing Order or its application to a particular case, he may, without giving any decision, simply make a special report of the facts (S. O. 71, 78 H. C.; 76, 78 H. L.).

Introduction of Bill to the House.—Meanwhile, under S. O. 79 H. C., the Chairman of Ways and Means has, in conference with the Chairman of Committees, determined in which House of Parliament the bill should be first considered. "Bills relating to the metropolis, to the release of parliamentary deposits forfeited to the Crown, and to police and sanitary regulations, ordinarily originate in the House of Commons; and, on the other hand, it has been the custom that bills involving complicated questions of capital, or dealing with the constitution of insurance companies, or with alterations of the memorandum of association of a limited company, or with patents, should be first considered in the House of Lords" (Erskine May, 793). If the bill is to originate in the House of Commons, the petition must, within three days after the examiner's indorsation, be presented to the House by a member. If it originates in the House of Lords—in which case a petition for leave to bring in the bill is likewise necessary there—the examiner's certificate is laid on the table not later than one day after its deposit in the office of the clerk of the Parliaments (S. O. 195 H. C.; 79, 86 H. L.). If the Standing Orders have been complied with, the bill is at once ordered to be brought in. If they have not been complied with, the petition and report are referred to the Standing Orders Committee.

Procedure before Standing Orders Committee.—In the House of Commons the Standing Orders Committee consists of eleven members, of whom five are a quorum; and in the House of Lords of forty members besides the Chairman of Committees,—of whom three are a quorum,—nominated at the beginning of each session. In the ordinary case, where the Standing Orders have not been complied with, the committee report whether compliance with the Standing Orders ought or ought not to be dispensed with, and in the former case upon what terms. Petitions may be presented to the House for or against dispensation being allowed; and these stand referred to the committee. If the examiner has made a special report as to the construction of a Standing Order, the committee first determine whether it has been complied with, and if not, they then consider the question of dispensation (S. O. 91–95, 200 H. C.; 80–84 H. L.). Parties may submit statements (S. O. 85 H. L.), but the committee seldom hear agents or witnesses.

If the committee's report is favourable, a member moves that the report be read, and that leave be given to bring in a bill. If unfavourable, it is merely ordered to lie on the table. The report is generally acquiesced in; but occasionally the House has referred the case back to the committee to be reconsidered. Without seeking to disturb the decision of the committee, the promoters may, if they are willing to abandon a portion of the bill, or if there are other special circumstances, adopt the expedient of depositing a petition praying for leave to deposit a new petition for a bill.

Petition for Additional Provision.—If after a bill has been introduced it is desired to add a provision to it, a petition for such additional provision is presented to the House, with a copy of the proposed clauses annexed. The petition is referred to the examiners, and memorials may be deposited, and the procedure is the same as in the ordinary case (S. O. 72, 73, 198 H. C.; 71, 72, 94 H. L.). Instead of proceeding in this way, the promoters may, in the case of an alteration in any work authorised by a bill of the second class, make the deposits specified by S. O. 61, and prove compliance before the examiners when the bill comes before the other House.

Reference to Examiners between First and Second Reading. — Various classes of bills go before the examiners between the first and second reading. Hybrid bills and provisional order bills are referred to them at this stage (S. O. 72, 200 A H. C.). At this stage, also, compliance must be proved with the Wharncliffe Orders (S. O. 62–66), where these are applicable; and, in the case of bills brought from the other House, compliance with such Standing Orders as were not previously inquired into.

Procedure in the House of Commons up to Reference to Committee.

First Reading.—Within one day after leave has been given to bring in the bill, it must be presented to the House by being deposited in the Private Bill Office, and is laid on the table for first reading (S. O. 196, 197 H. C.). The form of the bill, which must be printed and backed by the names of not less than two, and not more than six, members, is regulated by S. O. 201–203 H. C.). It is then read a first time.

Second Reading.—The second reading must take place not less than three, and not more than seven, days after the first reading, unless the bill has been referred to the examiners, in which case it must be read a second time within seven days after the report of the examiners of the Standing Orders Committee (S. O. 204 H. C.). Before the second reading, the bill is examined by the clerks of the Private Bill Office as to its conformity with the Rules and Standing Orders of the House (S. O. 234 H. C.). If the bill

is not in proper form, the order for the second reading is discharged, the bill is withdrawn, and leave may be applied for to present another, which, after being read a first time, is referred to the examiners, and thereafter proceeds in the ordinary way (S. O. 72, 73 H. C.). The second reading is the first occasion on which the bill comes before the House otherwise than *pro forma*; and if the principle of it is objected to, it will be opposed at this stage. In the event of opposition, the bill is postponed till the next sitting (S. O. 207 H. C.), or the postponement may be moved to a more distant day.

Reference to General Committee.—In accepting the second reading the House only affirms the principle of the measure conditionally upon its expediency—which is a matter of fact—being afterwards established; and accordingly the bill, after being read a second time, stands referred to a committee for inquiry. If it is neither a railway, canal, nor divorce bill, it stands referred to the Committee of Selection; if a railway or canal bill, to the General Committee on Railway and Canal Bills; if a divorce bill, to the Select Committee on Divorce Bills (S. O. 208 H. C.). The Committee of Selection consists of the chairman of the Standing Orders Committee, who is *ex officio* chairman, and of seven other members, who are nominated at the commencement of each session (S. O. 98 H. C.). The General Committee on Railway and Canal Bills consists of about eight members, who are nominated by the Committee of Selection. The duty of both these committees is to classify the bills referred to them, to nominate the chairmen and members of committees on such bills, and to arrange the times of their sitting and the bills to be considered by them (S. O. 103, 105, 106, 108 H. C.). In the case of railway and canal bills, in order to secure uniformity in the decisions, the chairman of each committee is a member of the General Committee (S. O. 101 H. C.).

Instructions to Committees.—After the bill is read a second time, instructions may be given by the House to the committee on the bill for its direction. Such instructions may be either mandatory or permissive, and may either require the committee to insert or prevent the insertion of certain provisions in a bill, or direct or empower the committee to inquire into and report on matters not strictly within the ordinary course of proceeding. The instructions must not, however, deal with matters of public policy, and they must be relevant to the provisions of the bill (Erskine May, 713). Instructions may also be given to the Committee of Selection as to the grouping of a bill, the committee which is to consider it, and the time of sitting of such committee.

Hybrid bills, or bills of exceptional importance, are sometimes referred to specially constituted committees.

Supervision by Officials of the House and Public Department—Amendments—Filled-up Bill.—Before the bill comes before the committee, provision is made for its being scrutinised by the officials of both Houses and by Public Departments concerned. Under S. O. 80 H. C., a copy of the bill must be laid before the chairman of Ways and Means, and before the Speaker's counsel, within one day after the petition is indorsed by the examiner; and it is their duty to examine the bill, and to call the attention of the House, and also of the chairman of the committee on the bill, to all points which appear to require it. Copies of the bill, whatever be the House in which it originates, are also laid before the chairman of committees in the House of Lords and his counsel, who likewise examine it. The Government departments, with whom, under S. O. 33 H. C., copies of certain classes of bills must be deposited, may also make representations or

reports; and all reports laid by such a department before the House stand referred to the committee on the bill (S. O. 212 H. C.). With the view of giving effect to such suggestions, or of averting opposition, the promoters may find it necessary to make certain amendments. These are embodied in the filled-up bill, which, under S. O. 237 H. C., must be deposited in the Private Bill Office two days before the meeting of the committee on the bill. Copies must also be laid before the Chairman of Ways and Means and the Speaker's counsel (S. O. 82 H. C.).

Procedure before the Committee on the Bill.

Constitution of Committee.—The constitution of the committee varies according as the bill is opposed or unopposed. No bill is treated as opposed unless within ten days after the first reading a petition has been presented against it, or unless the chairman of the Committee of Ways and Means has reported that it should be so treated (S. O. 107 H. C.). The Committee on opposed bills consists of a chairman, three members, and a referee, or of a chairman and three members not locally or otherwise interested in the bill (S. O. 108, 116, 117 H. C.). In the case of an unopposed railway or canal bill, the General Committee on Railway and Canal Bills may refer the same to the chairman of the Committee of Ways and Means, together with two other members not locally or otherwise interested, or one such member and a referee (S. O. 104 H. C.). In the case of other unopposed bills, except road bills, the Committee of Selection refer them to the chairman of the Committee of Ways and Means, together with one of the members ordered to prepare and bring in the same, and one other member not locally interested therein, or a referee (S. O. 109 H. C.). All road bills, whether opposed or unopposed, are referred to a committee consisting of a chairman and three other members not interested therein (S. O. 110 H. C.). In special circumstances, as in the case of hybrid bills or bills of exceptional importance, the House gives special instructions to refer the bill to a specially constituted committee, as is invariably the case with bills promoted by local authorities and relating to police or sanitary regulations, for the consideration of which two committees are specially appointed every session (Erskine May, 721).

Petitions against the Bill and Objections thereto—Locus standi—*Court of Referees.*—As already noticed, if parties wish to be heard against a bill they must, within ten days from the first reading, deposit a petition in the Private Bill Office praying to be heard. The petition then stands referred to the committee on the bill (S. O. 210 H. C.). The petition must be prepared and signed in strict conformity with the rules and orders of the House; and it must distinctly specify the grounds upon which the petitioners object to any of the provisions thereof (S. O. 128, 129 H. C.). The petition may pray to be heard against the preamble and clauses of the bill, *i.e.* against the principle of the measure; or against certain clauses only; or it may simply pray for the insertion of protective clauses. If objection is to be taken by the promoters, either to the formality of the petition or to the *locus standi* of the petitioners, the promoters must, under the rules framed by the chairman of Ways and Means in virtue of S. O. 88 H. C., give notice of their intention, and of the grounds of their objection, within eight days after the petition has been deposited in the Private Bill Office. The question of the right of the petitioners to be heard upon their petition is then decided by the Court of Referees (see *Locus standi*; *Referees*). In the House of Lords there is no such special Court; but questions of *locus standi* are disposed of as they arise in course of proof of the preamble, the

promoters raising the question when the counsel for the petitioners first rises to cross-examine.

Meeting of Committee.—Except in the case of name bills, naturalisation bills, and estate bills, there must be six clear days between the second reading of the bill and the sitting of the committee thereupon (S. O. 211 H. C.). Subject to this rule, the Committee of Selection, and General Committee on Railway and Canal Bills respectively, fix the time for holding the first sitting of every committee on a private bill, and if the bills are in groups, these committees respectively name the bill or bills which shall be taken into consideration on the first day of the meeting of the committee on such group (S. O. 105, 106 H. C.). Where bills are grouped, the committee in each group, who are directed as above pointed out what bills they must first take into consideration, must from time to time appoint the day on which they will consider each of the remaining bills.

Duties of Committee apart from Inquiry on the Merits.—Apart from their inquiry on the merits of the application, and whether the bill be opposed or unopposed, there are various duties which devolve on the committee under the Standing Orders and otherwise. As already pointed out in the notes relative to the preparation of the bill, the Standing Orders in some cases provide complete clauses, and in others prescribe conditions to which all bills or certain classes of bills must conform, and it is the duty of the committee to see that these are complied with. In this they will of course be aided by communications from the officials of both Houses, and from the Government departments with whom certain classes of bills must be deposited.

Other Standing Orders prescribe special duties to the committee in various circumstances. Thus, in the case of railway bills, they must fix the charges for passenger and merchandise traffic (S. O. 159, 166 A H. C.). In many cases they have a special duty to investigate and report upon certain matters. Whenever a recommendation is made in the report of a Government department referred to them, they must notice such recommendation in their report, and if they dissent from it, must give their reasons (S. O. 150 H. C.). S. O. 157 H. C. enjoins a special report in the case of railway bills. So by S. O. 173 A, where a bill is promoted by, or confers powers on, a local authority, the committee are directed to consider the clauses in reference to various matters affecting local government, and specially report thereon to the House. Again, in water bills, where compensation water is given, the committee must report upon the expediency of giving the same in a continuous flow (S. O. 184 H. C.).

The committee may also have special duties prescribed to them by special instructions from the House, given as above pointed out. They are also occasionally directed by the House to inquire into compliance with Standing Orders which had been previously neglected (S. O. 141, 142 H. C.).

Procedure in Unopposed Bill.—In unopposed applications the promoters have simply to prove the preamble by such evidence and explanations as will satisfy the committee of its general expediency, and thereafter to show that the particular clauses are in accordance with the Standing Orders. If, on consideration, the chairman thinks that, notwithstanding the absence of opposition, the application is one that should be treated as an opposed bill, he reports his opinion to the House, which refers it to the Committee of Selection or General Committee, to be treated accordingly (S. O. 83 H. C.). If, on the other hand, in the case of an opposed bill, the petitioners fail to appear or withdraw their opposition before the evidence for the promoters is begun, the committee refer the bill back to

the Committee of Selection or General Committee, who deal with it as unopposed accordingly (S. O. 136 H. C.).

Procedure in Opposed Bill.—Three form a quorum of the committee, and the voting is by a majority, the chairman having a casting vote in case of equality. To ensure despatch, the committee are required to report to the House the cause of any adjournment over a day on which the House sits (S. O. 127 H. C.). The committee-room is an open Court, except when the committee are about to deliberate. Witnesses are examined on oath in virtue of the Parliamentary Witnesses Oaths Act, 1871 (34 & 35 Vict. c. 83); but witnesses cannot be compelled to attend without the intervention of the House itself. The examination must be conducted either by parties themselves, by counsel, or by persons enrolled as parliamentary agents.

Procedure in Proof of Preamble.—A copy of the bill, signed by the agent, having been laid before each member of the committee, the parties are called in, the petitions against the bill are read by the clerk, and appearances are entered on each petition with which the parties intend to proceed. Counsel for the bill then opens the case for the promoters, dealing particularly with the general expediency of the measure, and calls witnesses to prove the allegations in the preamble, and to satisfy the committee on points which they require to report to the House. The witnesses are cross-examined by the petitioners who oppose the preamble. On the case for the promoters being closed, counsel for the petitioners may either open their case or reserve his speech till after the evidence. Evidence for the petitioners is then led. This must not travel beyond the statements in the petition. Counsel for the bill having then replied on the whole case, the room is cleared, and the question put "that the preamble has been proved," which is decided in the affirmative or negative, as the case may be. Occasionally, however, where there are competing bills, or where the subject-matter of several bills in the same group is partly the same, the committee reserve their decision till the conclusion of the last case. Alterations may be made in the preamble, provided they are not inconsistent with the order of leave or with the Standing Orders applicable to the bill. When the committee has found the preamble not proved, it cannot reconsider its decision; but where circumstances alter, as by opposition being subsequently withdrawn, or a compromise being effected, the bill, after being reported, may be recommitted to them, and they may then do so (Erskine May, 778–780).

Procedure on Clauses.—If the preamble is proved, the bill is then gone over clause by clause, and petitioners are heard in support of their objections or proposed amendments to existing clauses. After all the clauses have been disposed of, new clauses may be offered either by members of committee or by the parties. New clauses and amendments must be within the order of leave, and must be authorised by a previous compliance with the Standing Orders applicable to them. If they are not, and if the committee are, nevertheless, in favour of them, they may postpone consideration of the bill, in order that the parties may petition the House for additional provisions. Officers of public departments sometimes also appear at this stage to secure the insertion of clauses to protect the interests of the Crown or of the public. But their right to appear, except on petition, is somewhat doubtful. Promoters may abandon the bill at any time, and have done so even after the preamble has been proved, rather than consent to a clause insisted on by the committee (Erskine May, 776, 778).

Costs.—Costs can only be recovered where litigation has been, in the

opinion of the committee, unreasonable or vexatious. By sec. 1 of the Act 28 Vict. c. 27, when the committee decide that the preamble is not proved, or insert, strike out, or alter any provision for the protection of a petitioner, and unanimously report that such petitioner has been unreasonably or vexatiously subjected to expense in defending his rights, the petitioner is entitled to recover his costs from the promoters, or such portion thereof as the committee think fit. By sec. 2, when the committee find that the preamble is proved, and, further, unanimously report that the promoters have been vexatiously subjected to expense by the opposition thereto, the promoters are similarly entitled to recover costs from the petitioners. But no landowner who *bonâ fide* at his own charge opposes a bill which proposes to take part of his property, can be made liable in expenses. Costs are, however, seldom awarded.

Report of Committee.—The committee then report the bill to the House. The general duties of the chairman in reporting are set forth in S. O. 147–149 H. C. He must report that the allegations of the bill have been examined, whether the committee have or have not agreed to the preamble, and whether any alterations have been made thereon, or whether the promoters have dropped the bill. He must likewise sign all plans and books of reference produced in evidence, and must also sign an amended copy of the bill, and initial all clauses added in committee (S. O. 146, 147 H. C.). The report must also deal with the recommendations of any Government department, and other matters prescribed by the Standing Orders above mentioned. The House may also give instructions for a special report, or to report the minutes of evidence; and the chairman may ask the leave of the House to make a special report when the committee think it desirable.

Procedure up to Third Reading—Amendments, etc.

Report laid on Table.—Upon the report being made out, the amended or "committee bill" is delivered into the Private Bill Office, and the report is then laid upon the table of the House. If the bill has not been amended in committee, and is not a railway or a tramway bill, it is at once ordered to be read a third time. Otherwise it is ordered to lie on the table, with a view to its being considered. Three days must elapse between the report and the consideration (S. O. 213–215 H. C.). The bill is printed, and copies are laid before the Chairman of Ways and Means and the Speaker's counsel, and deposited with various Government departments; and no consideration of the bill can take place unless the Chairman of Ways and Means has informed the House whether the bill contains the provisions required by the Standing Orders (S. O. 84, 215 H. C.).

Clauses and Amendments.—When it is proposed to bring forward any new clause or amendment on the consideration of the bill, or any verbal amendment on the third reading, these must be printed and submitted to the Chairman of Ways and Means, who informs the House whether they should be entertained without being referred to the Standing Orders Committee (S. O. 216, 217, 242 H. C.). The committee may report either that the clause or amendment should be adopted or not adopted, or—if it is offered at consideration—that the bill should be recommitted (S. O. 97, 218 H. C.).

Consideration of the Bill and Third Reading.—On the consideration of the bill the House deals with proposed new clauses and amendments. If these are opposed, the consideration is adjourned till next meeting, or the House may recommit the bill or make a fresh order for consideration on a future day. Otherwise an order for the third reading will be taken. At the third

reading verbal amendments only may be proposed. If the third reading is passed, a fair copy of the bill is printed and certified by the clerks of the Private Bill Office for the purpose of being sent to the Lords.

Procedure in the House of Lords.

The procedure in the next House is much simplified by the practice already mentioned, of the officials of both Houses at once examining the bill, whatever be the House in which it originates. The result of this is that all the official suggestions and the alterations necessitated thereby are made in the first House before which the bill comes. The procedure in the two Houses is very much the same.

After the first reading, the bill is referred to the examiners, to prove compliance with such Standing Orders as have not yet been inquired into. These consist of the deposits required by S. O. 60, 60 A, and, in the event of an alteration having been made on the bill in the first House, S. O. 61; and the bill is not read a second time until the examiner has certified whether any further Standing Orders are applicable, and if so, whether they have been complied with (S. O. 87 H. L.). All petitions against the bill must be deposited in the Private Bill Office within seven days after the first reading. (In the case of bills originating in the House of Lords, these must be deposited within a similar time after the second reading (S. O. 92, 93 H. L.).)

After the second reading, the bill stands referred, if unopposed, to the Chairman of Committees and "such lords as think fit to attend," which means practically the chairman and his counsel; and if opposed, to a select committee of five, which is nominated by the Committee of Selection. The Committee of Selection consists of the Chairman of Committees and four other lords named by the House (S. O. 96, 97 H. L.). The procedure before the Lords' committee is practically the same as that in the House of Commons, except that the committee also deal with questions of *locus standi*.

If amended, the bill must be reprinted and copies deposited at certain Government offices (S. O. 143, 143 A, 145 H. L.). No amendment can be moved at the third reading unless it has been submitted to the Chairman of Committees (S. O. 144 H. L.). On being read a third time, the bill is either returned to the House of Commons with amendments, or a message is sent to inform the Commons that the bill has been agreed to without amendments.

Consideration of Lords' Amendments in the House of Commons.

If the bill is returned to the House of Commons with amendments, a copy of them must be laid by the agent before the Chairman of Ways and Means and the Speaker's counsel; they must be printed and circulated with the votes; and due notice given of the date fixed for their consideration. If any amendments are to be proposed to the Lords' amendments, the same procedure must be followed.

Personal Bills.

Personal bills consist of estate, divorce, naturalisation, and name bills, and all bills not specified in the orders as local bills (S. O. 149 H. L.), such as bills for restitution of honours or in blood. Estate bills, as the name implies, are applications to enable estates held under trust or other fetters, such as entails, to be dealt with otherwise than would be legally competent. Naturalisation is now generally secured by certificate from a Secretary of State under 7 & 8 Vict. c. 66, and 33 Vict. c. 14; and is applied for by bill

only in very exceptional cases. Applications for divorce acts only come from Ireland, where the law does not permit such a dissolution of marriage as will enable the parties to marry again. The peculiarity attaching to all personal bills is that they are invariably introduced in the House of Lords, where there is a distinct set of Standing Orders regulating the procedure (S. O. 149–181 H. L.).

Peerage Bills.—These Standing Orders do not, however, apply to bills for reversing attainders, for the restoration of honours and lands, and for restitution in blood. These are first signed by the Sovereign and are then by her command presented to the House, where they are treated as public bills. In the House of Commons they are committed, after the second reading, to several members specially nominated, along with all privy councillors and gentlemen of the long robe who are members of the House (Erskine May, 810).

General Procedure applicable to other Personal Bills.—All other personal bills must, as in the case of local bills, be brought in on petition, which must be signed by one of the parties principally concerned, and delivered prior to the second reading to every person concerned in it (S. O. 150–152 H. L.). In the case of naturalisation bills, a certificate of conduct from one of the Secretaries of State must be produced, and the consent of the Crown must be signified, prior to the second reading (S. O. 179, 180 H. L.). In the case of divorce bills, a clause must be inserted prohibiting the offending parties from marrying; a copy of the previous judicial proceedings, with a report thereon by the presiding judge, must be laid on the table; and the petitioner must, at the second reading, appear for examination at the bar of the House (S. O. 175–178 H. L.). At this stage, both in divorce and peerage bills, counsel are heard and witnesses examined at the bar in support of the bill. Divorce bills are, like public bills, referred to a committee of the whole House. In the case of estate bills, the procedure is more strictly judicial. Immediately on presentation, the petition, if the bill is from Scotland, is referred to two judges of the Court of Session, who must examine the parties, take proof, and report; and a copy of the report must be laid before the Chairman of Committees before the first reading (S. O. 154, 156 H. L.). Petitions are to be presented against the bill according to the directions of the Chairman of Committees in each particular case; and the committee must not sit for ten days after the second reading (S. O. 158, 159 H. L.). Before the committee, or, if the petitioners prefer it, before the judges who make the preliminary report (S. O. 172 H. L.), consent to the bill must be proved by all who are interested therein, special provision being made for the case of an entailed estate; and trustees appointed by the bill must signify their acceptance (S. O. 162, 163, 168, 171 H. L.). Where a settled estate is to be exchanged or sold, the schedules of values must be appended (S. O. 161 H. L.).

Procedure in House of Commons.—On the bill going to the House of Commons, it is, after the first reading, referred to the examiners, and passes through the other stages in the usual way. Divorce bills are, however, referred to a special committee, termed the "Select Committee on Divorce Bills," who must take certain evidence, and before whom the petitioner must appear, if he has attended the second reading in the House of Lords.

Fees.

In both Houses fees are payable at the various stages of each bill, both by promoters and opponents. The amount of these, which is considerable, varies according to the money to be raised or expended under the

authority of the bill. In the House of Commons, half fees only are charged on estate, divorce, naturalisation, and name bills. In the House of Lords no fees are charged on an indemnity or restoration bill. The promoters of provisional orders or certificates are exempt from fees. Those on hybrid bills are usually remitted (Erskine May, 818).

PUBLIC AND PRIVATE ACTS.

Upon receiving the royal assent, private bills fall into three different classes, which are distinguished in the statute book as (1) Local and Personal Acts declared public, and to be judicially noticed. (2) Private Acts, printed by the Queen's printer, and whereof the printed copies may be given in evidence; and (3) Private Acts not printed. The first class, which includes all but a comparatively few each session, are public in virtue of the Act 13 Viet. c. 21, s. 7, which declares that every Act shall be "deemed and taken to be a Public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act." The second class consists almost entirely of enclosure and estate Acts. They contain a clause declaring that "the Act shall not be deemed a public Act," but also declaring that a copy thereof, printed by the Queen's printers, "shall be admitted as evidence thereof"; and as the Act 8 & 9 Viet. c. 113, s. 3, further provides that all copies of private Acts, "if purporting to be printed by the Queen's printers," "shall be admitted as evidence thereof," without any proof being given that such copies were so printed, no proof is necessary beyond production of the printed Act. The third class consists of name, naturalisation, divorce, and other strictly personal Acts. To prove them an authenticated copy is produced from the Statute Rolls in the Parliament Office (Dickson on *Evidence*, s. 1105).

[Erskine May, *Parliamentary Practice*, c. 15 *et seq.*; Dodd and Wilberforce, *Private Bill Procedure*; Clifford, *History of Private Bill Legislation*; Macassey, *Private Bill Legislation*, pt. i.; *Standing Orders of Parliament*; Report of Select Committee on Private Bill Legislation, 1888.]

See PROVISIONAL ORDER; LOCUS STANDI; REFEREES.

Privateers; Privateering.—Privateers are private ships which in time of war are fitted out by the owners at their own expense and commissioned by the Admiralty, for the purpose of preying on the commerce of the enemy. Between such belligerent Powers as were, or have since become, parties to the Treaty of Paris of 1856, privateering is abolished. Spain, the United States, and Mexico are not parties to the Treaty. See PRIZE LAW.

Privilege (of Speech).—See DEFAMATION (vol. iv. p. 149).

Privileged Debts.—There are certain debts to which "humanity hath given the privilege to be preferred to other debts" (Stair, iv. 35. 3). Such are DEATHBED EXPENSES (*q.v.*); FUNERAL EXPENSES (*q.v.*); reasonable mournings for the widow and the children who are present at the funeral (*Sheddan*, Mor. 11855); a year's rent of the house occupied by the deceased (*Dunipace*, 1750, Mor. 11852; but see Goudy on *Bankruptcy*, p. 539); and the

wages of domestic or farm servants for the year or term current at the time of the death (cf. *Ridley*, 1789, Mor. 11854. See HIRING (vol. vi. 212)). There is no preference amongst the privileged debts (see *Peter*, 1749, Mor. 11852).

There is also a preference in respect of Crown taxes (43 Geo. III. c. 150, s. 33; 43 & 44 Vict. c. 19, s. 88); and poor-rates take precedence of private debts (8 & 9 Vict. c. 83, s. 88).

[Bell, *Prin.* s. 1403; Goudy, *Bankruptcy*, p. 539.]

See also FRIENDLY SOCIETIES (vol. vi. 78); PREFERENTIAL PAYMENTS IN BANKRUPTCY ACT, 1888; EXECUTOR (vol. v. 144).

Privileged Summons.—See SUMMONS.

Privileged Writings.—It is the privilege of certain writings that they do not require the statutory solemnities, in general essential to the execution of deeds. To this exceptional class belong (1) deeds not of great importance, (2) holograph writings, (3) testamentary writings, (4) certain discharges, (5) quasi-judicial writings, (6) writings *in re mercatoriâ*, (7) docqueted accounts, (8) bills and promissory notes, (9) deeds by companies under the Companies Acts, (10) deeds subject to special statutory relaxations, (11) Crown writs, and (12) certain foreign deeds. These writings are treated of under the headings ACCOUNTS; BILLS OF EXCHANGE; BOOKS; DEEDS, EXECUTION OF; HOLOGRAPH WRITINGS; IN RE MERCATORIA WRITINGS; WILL; see also *Paterson*, 1897, 25 R. 144, as to the requirements of the law in regard to writings used *in modum probationis*. With regard to writings (4) and (5) the following observations may be made. Receipts for rent if signed by the landlord or his factor are sustained without witnesses (Stair, iv. 42. 6; Ersk. iii. 2. 23; *Boyd*, 1674, Mor. 12456, 16968); and the same privilege extends to receipts for sums not greater than £100 Scots (£8, 6s. 8d. sterling), and, in practice, to receipts for feuduties (Dickson, s. 785), and other periodical payments (*ib.* s. 788). As to a receipt by a military officer neither holograph nor tested, see *Sempil*, 1732, Rob. App. 282, and cf. *Montgomery*, 1712, Mor. 16976. Writings executed by arbiters in the course of the proceedings—*e.g.* interlocutory orders on the parties, prorogations and devolutions—are quasi-judicial acts, and, as such, are regarded as probative without the statutory solemnities (Dickson, s. 791; *Stewart*, 1804, Mor. 16911; *Kirkcaldy*, 16 June 1809, F. C.; *Gordon*, 10 December 1812, F. C.; see *Frederick*, 1865, 3 M. 1069); and the same principle applies to the decree of a judicial referee (Dickson, s. 792), and to an opinion of counsel returned on a joint memorial (*Fraser*, 1850, 7 Bell's App. 171). As to the authentication of an award in an informal submission, see *Dykes*, 1869, 7 M. 357; cf. *Otto*, 1871, 9 M. 660; *Nivison*, 1883, 11 R. 182; in a formal submission, see *E. of Hopetoun*, 1856, 18 D. 739; 1 M. Bell, *Conveyancing*, 101; ARBITRATION.

Privy Council.—*History.*—For the history and development of the Privy Council and other Councils of the Crown, see Anson, *Law and Custom of the Constitution*, vol. ii. pp. 85–143.

Present Constitution.—As a Council proper of the Crown the Privy Council no longer exists. It retains, however, several of its earlier functions,

which it exercises through the medium of committees, and it still meets as a body for the purpose of making orders, issuing proclamations, or attending at formal acts of state. The Sovereign has been always, and is still, personally present at meetings of the Council. Privy Councillors are nominated by the Queen, and their appointment is confirmed by their taking the oath of office and allegiance and kissing the Queen's hand. They bear the title of "Right Honourable." They may be dismissed by the Sovereign without formality, by the simple striking of the name from the list. The whole Council is dissolved six months after the demise of the Crown, unless they be meantime reappointed by the new Sovereign. Members of the Cabinet are always Privy Councillors—the Cabinet (as a perusal of the history will show) being that section of the Privy Council which now carries out the duties formerly pertaining to the whole Council. The holders of certain great offices unconnected with politics are also Privy Councillors, and the distinction is also conferred upon a variety of men prominent in the service of their country either at home or in the colonies. A king's son is a Privy Councillor from birth, and does not require to be sworn (Greville, *Memoirs*, iv. 274).

The President of the Council is a Minister of Cabinet rank, and is appointed by a declaration made in Council by the Sovereign. He takes the first place at the Council table on the Sovereign's right hand. There is also a clerk to the Council, who signs its orders, etc.

Executive Functions.—The Council still retains certain functions in its corporate capacity. It is still a medium of expressing the royal pleasure, and this it does either by orders or by proclamation. When matters have simply to receive the approval of the Sovereign, an order is made. When the action of the Council is intended to be made known to the public at large, this is done by proclamation. Proclamations are now rarely used except for the purpose of summoning, proroguing, or dissolving Parliament; for declaring war, peace, or neutrality, or for other matters concerning the nation at large. Orders in Council, on the other hand, relate to matters of endless variety. They follow powers conferred upon the Council by statute, and are of too multifarious a nature to be enumerated here. They are the instruments of Government for Crown colonies and newly settled countries; they sanction or veto the Acts of colonial legislatures; they ratify treaties, grant charters, and regulate in various ways the business of departments.

Functions in Committee.—As has been remarked, the Council no longer exists as a consultative body. Its former function, however, as adviser of the Crown, is now carried out in various departments by committees of the Privy Council. Former committees of the Council have now become separate departments (*e.g.* the Board of Trade), and these are dealt with in their proper place. The two remaining committees are the Committee of Council on Education and the Judicial Committee.

The Committee of Council on Education.—This is a department of Government with the parliamentary chiefs at its head. Although it is nominally a committee of Council, with the duty of advising the Sovereign, it is no longer so in reality. It is directly responsible to Parliament, and exercises control over the education of the country. In constitution, however, it has remained a committee of the Council. Its head is the Lord-President of the Council, who is prepared to take responsibility for its actions as its official chief, though the Vice-President, who is the Minister of Education and represents it in the House of Commons, is in reality its responsible head.

Judicial Committee.—This is by far the most important committee of the Privy Council, and its functions are naturally of most moment here. Originally the Council had extensive rights of jurisdiction, but it was deprived of these by the Long Parliament, and forbidden to deal with matters cognisable by the Courts of common law. But the King in Council was still the resort of the suitor who could not find a Court to try his case in any of the dependencies of his Crown, and the Council for a long time exercised judicial functions not only for the "plantations," but even for the adjacent islands. Appeals from Jersey were granted in the reign of Henry VIII., and thenceforth the Channel Islands used the Council freely as a Court of doleance or error. A standing committee was appointed in 1661 to hear appeals and doleances from the Channel Islands, and in 1667 this duty was assigned, together with that of hearing appeals from the plantations, to the Committee for Trade and Plantations. In 1687 it was made an open committee of the whole Council, and in 1696 an order was made that appeals were to be heard by a committee of all the lords, or any three of them (Anson, ii. 466).

This arrangement seems to have continued down to the year 1833. Besides the appeals mentioned, the Council in committee determined matters relating to the person and property of lunatics, and in 1832 the jurisdiction of the Court of delegates in ecclesiastical and admiralty appeals was transferred to it.

It was in 1833 that the Judicial Committee of the Privy Council was constituted (3 & 4 Will. IV. c. 41).

Jurisdiction.—To it were referred:—(1) All appeals, or complaints in the nature of appeals, made to the Crown in Council (s. 3).

(2) All matters which, arising in the Admiralty or Vice-Admiralty Courts in the dominions of the Crown, might heretofore have been taken by way of appeal to the Court of Admiralty (s. 2).

It is to be noted that the Judicature Acts (which merged the English and Irish Courts of Admiralty in the Supreme Courts of the two countries) and the Appellate Jurisdiction Act transferred Admiralty appeals to the House of Lords. The Vice-Admiralty Courts, however, were not thus affected. They are now attached to the Courts of the various colonies, whence appeals go straight to the Crown in Council.

(3) Any such other matter as the Crown may choose to refer to the Judicial Committee for hearing or consideration (s. 4). This clause ensures a very extensive remedy to the subject who may be suffering from some miscarriage of justice which the other Courts are unable to rectify. Under it the case of *Hart*, L. R. 4 P. C. 439, was decided. This was an appeal from the Supreme Court of China and Japan, created under the Treaty of Tientsin. The Judicial Committee is thus able to dispose of appeals against the judgments of Courts exercising jurisdiction in a foreign country by virtue of a treaty. Under this provision, too, the Queen has authority to review the judgments of all colonial Courts, unless her authority has been parted with. Thus *The Falkland Islands* v. *The Queen*, 1 Moore, P. C. N. S. 299 (1863), and *R.* v. *Bertrand*, L. R. 1 P. C. 520 (1867), were decided by the Privy Council. The former was an appeal against the decision of a police magistrate in the Falkland Islands, the latter an appeal against a judgment of the Supreme Court of New South Wales granting a new trial in a case of felony. Even where an Act had been passed by a colonial legislature making final the decision of a colonial Court in matters of insolvency, the prerogative of allowing an appeal to the Privy Council as a matter of grace was held not to be overcome (*Cushing*,

5 App. Ca. 409 (1880)); and further, the case of Bishop Colenso establishes the principle that appeal may be made to declare the nullity of an assumed jurisdiction when a subject asserts that he has been wronged thereby (*In re the Bishop of Natal*, 3 Moore, P. C. N. S. 115 (1864)). Appeals from the Charity Commission, in the case of an educational endowment, are taken to the Judicial Committee (*St. Leonard, Shoreditch, Parochial Schools*, 10 App. Ca. (P. C.) 304). The statute confers upon the Judicial Committee all the powers as to the taking of evidence, subpœnaing of witnesses, etc., necessary to give it the full powers of a Court, and its procedure is regulated by Orders in Council passed from time to time.

Composition of Judicial Committee.—This has been altered from time to time. The Judicial Committee is now made up of the Lord-President of the Council, such members of the Privy Council as hold or have held "high judicial office" (50 & 51 Viet. c. 70, s. 3), the Lords-Justices of Appeal (44 & 45 Viet. c. 4), and two other Privy Councillors whom the Queen may appoint by sign manual warrant (3 & 4 Will. IV. c. 41, s. 1). In addition, there may be two salaried members who have been judges in the East Indies under the Act of William IV.; these were assessors merely, but they are now made for all purposes members of the committee (50 & 51 Viet. c. 70, s. 4). It was originally provided (3 & 4 Viet c. 86, s. 15), that in ecclesiastical appeals under the Discipline Act such archbishops and bishops as were Privy Councillors should sit on the committee, but these have been reduced to the position of assessors by the Appellate Jurisdiction Act (39 & 40 Viet. c. 59, s. 14). Four members must be present to constitute a quorum, and no member may attend unsummoned.

Judgments of the Judicial Committee.—A judgment of the Judicial Committee takes the form of "humbly advising the Queen" to adopt their decision. It must set forth in full the reasons for so advising (3 & 4 Will. IV. c. 41, s. 3), though these reasons do not enter the report to the Sovereign, which report merely sets forth the conclusion come to and the proposed remedy. After it has been submitted to the Sovereign and approved in Council, an Order in Council is made embodying the report and adopting it as the judgment of the Sovereign in Council. In advising the Sovereign, the committee must be unanimous, *i.e.* it is bound not to record dissentient opinion. This is a matter of policy, and it rests upon an ancient Order made in 1627 and reaffirmed in 1878. The Order runs thus: "In voting of any cause, the lowest Councillor in place is to begin and speak first, and so it is to be carried by most voices, because every Councillor hath equal vote there; and when the business is carried recording the most voices, no publication is afterwards to be made by any man how the particular voices and opinions went."

Unlike the House of Lords, the Privy Council does not consider itself bound by its own decisions, but reserves to itself the right of advising the Sovereign to reverse a judgment previously given (*Cushing*, 5 App. Ca. 409, which reviews and practically overrules *Cuvillier*, 2 Knapp. 72).

In cases of difficulty the House of Lords may ask the assistance of the judges of the High Court, but none may attend the meetings of the Judicial Committee unless he be a Privy Councillor.

Privy Seal.—See SEALS.

Prize Law.—An enemy's property taken on land is called *booty*, but if taken on the seas is called *prize*. Prize is the property of the Crown, and any title of a party claiming prize is in all cases an act of the Crown (Wheaton, *International Law*, p. 490). Prize proper is made by the Royal Navy alone. The commander of one of Her Majesty's cruisers has in time of war *inter alia* the power of detention for the purpose of making lawful prize. He may exercise this power in any waters except the territorial waters of a neutral State (Holland, *Naval Prize Law*, p. 1).

Vessels Liable to Detention—An enemy's vessel; British vessels trading with or in the service of the enemy; neutral vessels engaged in the carriage of contrabrand, the service of the enemy, or in breach of blockade. Vessels are also liable to detention, irrespective of nationality, where there is resistance to search or visit; where sailing under a neutral convoy which resists; where sailing under an enemy's convoy. A vessel is also liable to detention where there is a deficiency in the ship's papers (Holland, *Naval Prize Law*, p. 5). It is to be noted that a commander detaining a vessel without probable cause is liable for damages (Holland, *Naval Prize Law*, p. 5; *The Anna Maria*, 2 Wheaton, 327).

As the property of belligerents is so often mixed up with that of neutrals, it is the universal practice for the captor to bring his prize before a competent Court, in order to have the question decided whether the captured vessel and its cargo are in fact the property of the enemy (Hall, *International Law*, p. 574). The Court before which this question is determined is called a *Prize Court*, and is established by positive municipal law. Jurisdiction as regards prizes is now exercised solely by the English Court of Admiralty (Naval Prize Act, 1864, s. 3; Mackay, *Practice*, 67, note c; Bell, *Prin.* 1295). From this Court there is an appeal to the Judicial Committee of the Privy Council (s. 5).

[As to former Admiralty Courts which dealt with prize, see Act 1609, c. 15; 1681, c. 16; 5 Anne, c. 85, ss. 19, 29; Balfour, *Practicks*, 629; Stair, ii. 2. 5, and iv. 1. 3. 7; Ersk. i. 3. 33; Bell, *Com.* i. 497.]

Procedure in Prize Courts.—Every ship taken as prize, and brought into port within the jurisdiction of a Prize Court, must be handed over to the Marshal of the Court, whom failing, the principal officer of Customs at the port (Naval Prize Act, 1864, s. 16). The captured ship's papers must be put into Court, and their identity sworn to (s. 17). Anyone claiming an interest in the ship may do so before final decree (s. 23). The Court may direct that the captured ship be appraised, and sold after appraisement (ss. 24, 26). The above provisions do not apply to vessels of war taken as prize (s. 22).

Prizes in Neutral Port.—The Court of Admiralty has in practice dealt with and condemned prizes lying in neutral ports (Wheaton, *International Law*, p. 515; Hall, *International Law*, p. 643).

Prizes taken by Ships other than Ships of War.—Prizes taken by ships other than ships of war, upon condemnation, become *droits* of Admiralty (Naval Prize Act, 1864, s. 39). Since the partial abolition of privateering by the Declaration of Paris, 16th April 1856, privateers are no longer authorised to make prizes.

Illegal Prize.—Where belligerents illegally make prize within our neutral waters, the Court of Admiralty may order the restoration of the prize (The Foreign Enlistment Act, s. 14, 33 & 34 Vict. c. 90).

[*Authorities.*—Holland, *Manual of Naval Prize Law* (issued by authority); Wheaton, *International Law*; Hall, *International Law*; Wildman, *Law of Search, Capture, and Prize*; Calvo, *Le Droit International theorique et*

pratique; Phillimore, *Commentaries on International Law*; Halleck, *International Law*; Lorimer, *Institutes of the Law of Nations*; Stair, b. ii. tit. 2; More, *Notes*, clii.; Bankt. i. 520–523; Bell, *Prin.* 1295; Brown, *Synopsis*, pp. 1 and 483.]

Pro indiviso.—When two or more persons hold joint or common rights in the same subject, that subject is held by them *pro indiviso*, that is, *as undivided*. There is no common right where several parts of the same subject belong absolutely to different proprietors, as in runridge lands (Bell, *Prin.* 1098; see RUNRIG). Under a common or *pro indiviso* right each proprietor has a proportional right to every part of the subject, but an absolute right to none of it (Stair ii. 1. 28; Ersk. ii. 6. 53). The term *pro indiviso* is commonly applied to common or joint rights, property subject to such rights, and holders of such rights. A *pro indiviso* right may be that of ownership or any lower right. Both the right of ownership *pro indiviso* and the subjects so owned are called common property. Examples of lower *pro indiviso* rights are joint liferent (Bell, *Prin.* 1067), commonty, which is a peculiar form of servitude (Bell, *Prin.* 1087), and joint tenancy (Bell, *Prin.* 1219). Common rights arise from the acquisition of a right by persons acting jointly (Bell, *Com.* i. 62), from the conveyance of a right to two or more persons jointly (Bell, *Com. ib.*; Stair ii. 3. 41; Ersk. iii. 8. 35), or, in the case of heirs-portioners, by intestate succession (Bell, *Com.* i. 61; Stair, iii. 5. 11; Ersk. iii. 8. 13; Bell, *Prin.* 1083, 1219). The case of heirs-portioners has several specialties, and has been said not to be an example of joint ownership (*Cargill*, 1837, 15 S. 408), but it is not very clear in what respect their rights to such subjects as they hold in common differ from those of other *pro indiviso* proprietors. Service to her terce gives a widow a *pro indiviso* right of property along with the heir to lands affected by the terce (Bell, *Prin.* 1601–4). For the particular rights and liabilities of parties holding *pro indiviso* rights, see COMMON GABLE; COMMON PASTURAGE; COMMON PROPERTY; COMMONTY; CONJUNCT RIGHTS; HEIRS-PORTIONERS; LIFERENT AND FEE; TERCE.

Probable Cause—This consideration arises in cases of privilege. A person acting in the discharge of a public duty is not liable in damages merely because he may have made a mistake. He must be shown to have acted maliciously, and, in certain cases, also without probable cause (*Sheppeard*, 1849, 11 D. 446). An official, for instance, who has reason to believe that a certain person has committed a crime, and accuses him or causes his apprehension, will not be liable though the accused turns out to be innocent, and though the official is shown to have had a personal animus against him. Nor, on the other hand, will an official be liable though he had no probable cause, if the accusation has been made through mistake or carelessly, *e.g.* without malice (*Craig*, 1876, 3 R. 441; *Young*, 1891, 18 R. 825). But although the two things are different in kind, evidence of malice may be supplied by showing that there was no probable cause. If a person injure another without occasion, he is naturally presumed to be acting not innocently but maliciously (see *Brown*, [1891] 2 Q. B. 718; *Allen*, [1897] App. Ca. 1, 94).

Probable cause may raise questions of fact or of law, and will be for the jury or the judge accordingly. In the latter case the Court may be able

to dispose of the matter on the facts set forth, and if these show that there was probable cause the action will be dismissed (*Craig, supra*; *Urquhart*, 1865, 3 M. 932).

What constitutes probable cause varies with the facts of each case, and can scarcely be expressed in a general proposition of practical value. It may be said, however, to be something *primâ facie* satisfactory to the mind. An informer may place reliance, in identifying a person as a criminal, on his eyesight and memory, and he does not require to go beyond these before taking action, and to institute inquiries to confirm an honest belief (*Lightbody*, 1882, 9 R. 934, 939; *Hassan*, 1885, 12 R. 1164; *Ferguson*, 1862, 24 D. 1428). An officer making an apprehension may plead information received (*Malcolm*, 1897, 24 R. 747, 756).

Want of probable cause must, in the cases which raise the question, be averred and also go in the issue (*Arbuckle*, 1815, 3 Dow's App. 160; *Young*, 1891, 18 R. 825). But, being a negative, it can scarcely be set out specifically. An averment will be relevant which contains the general statement that the defender acted without probable cause, and does not contain any facts inconsistent with that general statement (*Craig, supra*: *Douglas*, 1893, 20 R. 793; *Hill*, 1892, 19 R. 377; *Urquhart*, 1886, 14 R. 18).

The cases in which want of probable cause is an element may be divided into two classes, *e.g.* those of injury to property by use of diligence, and those of injury to personal rights by criminal prosecution or defamation.

In the former the condition requires to be inserted in the issue where the diligence complained of has been within the ordinary legal rights of the party using it, and is not required where a party has obtained a warrant *periculo petentis*. (See CIVIL PROCESS, ABUSE OF.)

In the latter it was at one time considered that want of probable cause did not require to be averred in any cases except those of malicious prosecution, or information to the criminal authorities (*Gibb*, 1859, 21 D. 1099; *Marianskie*, 1841, 3 D. 1036), or statements made by officials (*M'Murchy*, 1887, 14 R. 725), but its application has since been extended to other cases of privilege, arising from the discharge of a public duty (see *Milne*, 1892, 20 R. 95, 100). It has been said that "the sort of privilege which entitles a defender to have these words inserted in issue depends a good deal upon the character in which the defender was acting when the conduct complained of took place." Where the defender, being minister of a parish in which certain children were boarded out by a Parochial Board, complained to it and to the Board of Supervision about the maltreatment of the children by the pursuer, it was held that "without probable cause," as well as maliciously, should go in the issue (*Croucher*, 1889, 16 R. 774). The same form of issue was adjusted where the master of a ship, in the alleged discharge of his statutory duty, inserted in the log-book a charge of wilful disobedience on the part of the chief officer (*Hill*, 1892, 19 R. 377). Still more recently it has been held that the same burden is on a pursuer who complains of a judicial slander (*Hay*, 1898, 6 S. L. T. 67).

A defender who wishes to prove that he had probable cause may do so without taking a counter issue. Probable cause is not a defence to an action for slander, where the defender is not privileged (*Holehouse*, 1853, 15 D. 665).

[Glegg on *Reparation*; Cooper on *Defamation*.] See DEFAMATION; PROSECUTION, MALICIOUS.

Probabilis causa.—See POOR'S ROLL.

Probation.—See Evidence.

Procedure Roll—This Outer House roll was instituted by A. S., 10th March 1870, s. 1 (3). To it are sent all cases in which parties are at variance as to whether there shall be proof, or as to what proof ought to be allowed, or in which they or any of them maintain that one or more of the pleas stated on record should be disposed of before determining on the matter of proof (s. 1 (3)). In addition, it includes cases in which parties have renounced probation, or which raise no question of disputed fact. These latter were formerly sent to the Debate Roll (*q.v.*). Eight cases are put out for hearing each week, and it is competent to put out additional cases, provided they appear in the roll two days before they are called (A. S., 15th July 1865, s. 7). If after a case has been sent to the Procedure Roll, the parties come to be agreed that it should be disposed of by proof, or jury trial, they may enrol it in the Motion Roll, in order that the matter may be brought under the consideration of the Lord Ordinary, and such interlocutor be pronounced as he shall think right in the circumstances (A. S., 10th Mar. 1870, s. 1 (4)). Within four days of the date of the interlocutor closing the record, the agent for the pursuer or other party appointed to print, must lodge in process two copies of the record as finally adjusted. In the event of his failing to do so, the case is deleted from the roll. It can, however, be restored on the motion of any party who lodges the necessary copies. If this is not done within twenty-one days, the Lord Ordinary must pronounce an interlocutor dismissing the action, and finding neither party entitled to expenses. This interlocutor can only be recalled on a reclaiming note to the Inner House (A. S., 2nd November 1872, s. 5). The rules contained in A. S., 15th July 1865, as to the hearing of causes in the Debate Roll, were made applicable to cases in the Procedure Roll by A. S., 10th March 1870. These rules were altered and modified by A. S., 2nd November 1872. If, when the case is called, neither party appears and no valid excuse is offered, the action is dismissed, and the interlocutor dismissing it can only be recalled by reclaiming note to the Inner House (s. 1). If only one party appear, and no valid excuse is forthcoming for the non-appearance of the other, he may move for decree by default; and if he does not do so, the action is dismissed (s. 2). A decree by default will not be recalled as a matter of course by the Inner House, even with consent of both parties (*Ferguson*, 1878, 5 R. 1016).

Process; Procedure.—The wide subject of procedure or process is dealt with in various articles throughout this work. These must be consulted as required. The principal articles on *Civil* process are: Actions (Ordinary Procedure in); Summons; Appeal; Reclaiming; Jury Trial; Expenses; Productions; Caption (Process); Session, Court of; Sheriff; etc. On *Criminal* procedure: Criminal Prosecution; Bail; Indictment; Justiciary, Court of; Clerk of Justiciary; Appeal to High Court of Justiciary; Appeal to Circuit Court; Suspension.

Procurator, in Roman law, was the general term for agent. Though the term is used to denote almost every kind of agent, it is especially applied to the factors who managed town properties or agricultural estates on behalf of the owner. In Roman law, however, the recognition of agency, *i.e.* the representation of one person by another freely

chosen by the former, was much more limited than in modern law. Thus, for example, a *procurator* could not conclude a sale for his principal (*dominus negotii*), but must conclude it, in the first instance, for himself. The term was also commonly used to denote a law agent, who represented one of the parties in an action. In this sense it was nearly synonymous with *cognitor*. In the time of Gaius the distinction between the terms was that the *cognitor* was formally appointed in presence of the other party to the action, whereas the *procurator* was appointed informally, and without notice to the other party. In the political sense, the term *procurator* was used to denote the State officials who, under the empire, were appointed, as representatives of the emperor, to perform the lesser administrative duties in the provinces.

In the transfer of an obligation in Roman law, the creditor or cedent, who was making the transfer, could only do so by giving the assignee a mandate to raise an action on the obligation, and retain what was recovered for his own benefit. The assignee, accordingly, was called *procurator in rem suam*, and was liable to all exceptions which would have been competent to the debtor against the cedent, and also to all exceptions personal to himself.

Similarly, in the older Scots law, assignations were regarded rather as procuratories than as proper conveyances, the assignee being a *procurator in rem suam*. The original view of an assignation as being a mandate or procuratory is still useful in throwing light on the legal relations of the parties (*Lyon*, 1874, 1 R. 512, per Ld.-Pres. Inglis). Similarly, in *British Linen Co. Bank* (1883, 10 R. 923) Ld.-Pres. Inglis observed: "A cheque is a bare procuratory when it is granted gratuitously; but when it is granted for value, it is a procuratory *in rem suam*, which is just one of the definitions of an assignation." It is not in the power of the mandant, or his trustee in bankruptcy, to revoke the mandate of a procurator *in rem suam* without indemnifying the latter (*Broughton*, 17 Dec. 1814, F. C.; *Struthers*, 1842, 4 D. 460; *Corter*, 1869, 24 D. 925).

Procurator-fiscal signifies literally "the agent for the public revenue." The term is derived from the Latin *procurator*, an advocate or agent who acts for another, and *fiscalis*, pertaining to the fisk, *i.e.* the public revenue. It is applied in modern practice to the public prosecutors in the inferior Scottish Courts, particularly that of the Sheriff.

I. Sheriff Court.

1. *Official Position.*—The procurator-fiscal is, within his district, the chief executive officer in matters criminal of the Sheriff, the Lord Advocate, and the Queen's and Lord Treasurer's Remembrancer. He investigates criminal charges, prosecutes before the Sheriff Court both on indictment and summary complaint, initiates prosecution in cases indicted before the High Court of Justiciary, makes inquiry regarding sudden, suspicious, and accidental deaths, and collects for Exchequer the fines, forfeitures, and penalties imposed in the proceedings instituted by him. These official duties he discharges under the supervision and direction of the Sheriff and the Lord Advocate,—an arrangement which works admirably in practice, whatever objections there may be in theory to a dual headship.

2. *History.*—The office of procurator-fiscal is not peculiar to Scotland. The Romans had officers bearing the titles of *Procurator Fisci* and *Prætor Fiscalis*, but their duties related purely to finance (Smith, *Dict. Class. Ant. voce* "Procurator"). In the Middle Ages the terms *Procurator Fiscalis* and

Fiscalis were commonly used to denote prosecuting officers, without special reference to fiscal or money matters (*Ducange Glossary*, in 1678, *verb. cit.*). Cotgrave's *French Dictionary* (1611) defines "*Procureur Fiscal*" as "a Lord High Justicier's ordinarie attorney, who pleads and prosecutes within his circuit all causes wherein the publicke, or his Lord's inheritance, or both, be interessed"; adding that the *Moyen Justicier* had no fiscal because he had no "fisque," but possessed instead an official of a similar kind, termed *Procureur d' Office*.

It is a perplexing circumstance that, in Scotland, no detailed account of the office seems to have been written until long after the officer is mentioned in history. The Sheriff Court Books of Linlithgowshire, preserved at the Register House, contain the following entry in 1595: "The schiref deput continewit the election or deposing of fiscal." Besides this significant reference, there are to be found, scattered over the Scottish records, many allusions to individual fiscals,—sometimes pursuing a civil action, sometimes prosecuting for their lord's fisk, and sometimes indicting criminals in the public interest, *e.g.* the Procurator-Fiscal of Edinburgh, which was a corporate Sheriff, as mentioned in Skene's *Treatise on Crimes*, etc., at end of *Regiam Majestatem*, p. 176, par. 10, in 1562 and 1584 (*Burgh Records*); of the Bailiary of Cunningham in 1687 (Mor. 12251); of Perth in 1724; of Edinburgh in 1730; and of Caithness in 1735 (Hume, ii. 65, 66). Yet the office itself is not named in the Scots Laws and Acts of Parliament from Malcolm II. to James VI., as may be seen by examining the *Regiam Majestatem* and the Index to vol. ii. of Murray of Glendook's edition of the Scots Acts; while Skene and Balfour, writing at the close of the sixteenth century, have nothing to say on the subject (Skene, *De Verb. Sig.* and *Treatise on Crimes* at end of *Reg. Maj.*; Balfour, *Practicks*). In the following century the fiscal's position began to be recognised by Scottish writers; but before referring to these later authorities, we must explain the circumstances under which we conceive that the office took its origin.

Strange as it seems to modern ideas, the Sheriff in former times was public prosecutor as well as judge in his own Court (M'Laurin, *Forms of Process*, i. 64; Ld.-Pres. M'Neill in *Rose*, 1853, 15 D. 908). How long this state of matters continued we cannot tell; but the Sheriff is believed to have at an early date delegated the duty of prosecution, partly from a sense of inconsistency, partly from self-interest, and partly from the lack of legal skill. It has been said that public prosecution at the Lord Advocate's instance was introduced to secure for the Crown the forfeitures and fines which were lost to it by private arrangement between parties (Omond's *Lord Advocates*, i. 47, 48). In like manner, we may conjecture that the Sheriff, not being in those days himself skilled in the law, but having a personal interest in the fines and forfeitures imposed in his Court, had found it to his advantage to appoint a qualified person to recover and account for them. Such an officer would naturally be called the *procurator-fiscal*, or agent for the fisk. In many instances, however, the Sheriff pronounced sentence of death, banishment, or other punishment without a fine, and as forfeiture of the moveable goods of a reiver or thief would not swell his exchequer, his fisk had no interest in such proceedings. There must thus have arisen a system of prosecution in the *public interest* as supplementary to prosecution *on behalf of the fisk*. If such prosecution were, as is most likely, conducted by the procurator-fiscal, his duties would have closely resembled those of the *Procureur Fiscal* as defined by Cotgrave.

In law books published since 1650 the procurator-fiscal is more fully recognised. Sir George Mackenzie of Rosehaugh, in his *Discourses upon the*

Laws and Customs of Scotland in Matters Criminal, written in 1674 (Part II. tit. 19, No. 2), tells us that in his time malefactors might equally be pursued by summons before the Sheriff at the instance of a particular accuser, or at the instance of the procurator-fiscal by way of indictment. The Act 1701, c. 6, alludes to the Lord Advocate and procurator-fiscal, without further definition, as the officials responsible for criminal procedure, the position of both being apparently well understood by that date. Perhaps the best contemporary account of the office is that given by Mr. Andrew M'Douall in his *Institutes* (1752). "The inferior Courts," he says, "have a procurator-fiscal, who supplies the place of the King's Advocate before them in prosecutions of crimes" (M'Douall, ii. 492). In another passage he states that the criminal jurisdiction of the Sheriff was of two sorts: the one class composed of petty delinquencies, prosecuted at the instance of the procurator-fiscal of Court alone, or of the private party injured with concourse of the fiscal for the interest of the public; the other composed of crimes of a high nature inferring loss of life or demembration. "In those the procedure is in the same manner as before the Court of Justiciary, the procurator-fiscal of Court supplying the place of His Majesty's Advocate" (*ib.* 556). The fact that in the eighteenth century the procurator-fiscal was generally acknowledged as the official prosecutor in the Sheriff Court, both for the public interest and for the fisk, is further evidenced by the *Regulations* framed in 1752 by the sheriffs and stewards for the conduct of criminal cases in their Courts (App. to Spottiswood's *Stiles*, 5th ed., or App. to Louthian's *Forms of Process*, 2nd ed.); by the form of presentment annexed to the rules to be observed in taking precognitions, etc., revised by Lord Hailes in 1765 (App. to Hume on *Crimes*, 1st ed.); and by the statements of Hume published in 1797 (*Crimes*, ii. 67).

Although he had thus obtained a recognised position in the Sheriff Court, analogous to that of the Lord Advocate in the High Court of Justiciary, the procurator-fiscal was still the official of the Sheriff alone. Indeed, his whole authority rested on the theory that he was the right hand of the Sheriff, and the medium through which the latter exercised his criminal jurisdiction. But changes were impending. In 1746 the heritable jurisdictions in Scotland were extinguished by 20 Geo. II. c. 43. This affected the fiscals in many ways, and in particular extended their duties by throwing upon them the prosecution of numerous crimes hitherto tried before the abolished jurisdictions, and placed them in communication with the Crown by requiring all fines, forfeitures, and penalties to be paid over to Exchequer. In 1766 the Barons of Exchequer made an order regarding the expenses of criminal prosecutions, which led to the adoption of a practice of transmitting to the Lord Advocate the papers in all cases which the Sheriff thought should be tried at the expense of the Crown (*Journal of Jurisprudence*, xxi. 249). For many years the Sheriffs-Substitute and Sheriff Clerks kept in their own hands the precognition of witnesses; but in course of time they gradually slipped this burden off their shoulders, and left it in the hands of the fiscal. This proved to be no disadvantage to the latter, for the taking and reporting of precognitions brought him more closely into touch with the Crown authorities. The link thus created has been strengthened by subsequent events; namely, by the fiscals being placed on fixed salaries; by their being restricted in most recent appointments as regards private practice; by the requirement in 1877 of the Secretary of State's approval before they can be appointed or removed; and by the introduction in 1887 of the Lord Advocate's instance in all Sheriff Court indictments, in consequence of which prosecution in that form is

now instituted on a remit by Crown counsel. And so it has come to pass that the procurator-fiscal is at this day the executive officer both of the Sheriff and of the Lord Advocate.

3. *Qualification and Appointment.* — The procurator-fiscal is usually, but not necessarily, an enrolled law agent. He is entitled to conduct criminal proceedings in the Court for which he holds a commission without having been admitted as an agent in a civil Court (*Ward*, 1847, Ark. 272; *M'Lean*, 1845, 2 Broun, 657; *Jardine*, 1823, Shaw, 94). When restricted from private practice as a law agent, he has not to obtain a stamped certificate. His appointment is made by the Sheriff in a commission (unstamped), with the approval of the Secretary for Scotland indorsed thereon (40 & 41 Vict. c. 50, s. 6). It does not fall by reason of the Sheriff ceasing to hold office by death, resignation, or otherwise (*ib.*). After the statutory oaths of allegiance and *de fideli* have been administered in open Court, the commission is recorded in the Sheriff Court Books. The fiscal is never permitted to act as a political agent, or as agent for a person accused in another jurisdiction; or to allow himself to be nominated as a candidate at the election of county councillors. He must reside within his district, which he cannot leave for more than a brief period without the sanction of the Sheriff Principal, duly reported to the Crown agent. The expression "brief period" is not precisely defined, but probably covers a term not exceeding three days.

4. *Removal.*—A procurator-fiscal is not removeable from office except by the Secretary for Scotland, for inability or misbehaviour, upon a report by the Lord-President of the Court of Session and the Lord Justice-Clerk (40 & 41 Vict. c. 50, s. 5).

5. *Depute Procurator-Fiscal.* — The procurator-fiscal appoints by a formal deputation (unstamped), with the leave of the Sheriff and Lord Advocate expressed thereon in writing, a depute for whom he is responsible (40 & 41 Vict. c. 50, s. 7). Except in large districts only one depute is sanctioned. The power of the Sheriff to appoint deputes is abolished (*ib.*). In the event of a vacancy, the depute has the powers and privileges, and discharges the duties, of the office of procurator-fiscal until it is filled up (*ib.*). The deputation is usually for one year only, and may be recalled at the pleasure of the Sheriff or fiscal. It is recorded in the Sheriff Court Books, after administration of the usual oaths. Its form is regulated by the code after-mentioned.

6. *Interim Procurator-Fiscal.*—In an emergency, such as the illness or unavoidable absence of both the procurator-fiscal and his depute at a diet of Court, it is the duty of the presiding Sheriff to forthwith issue a commission to a qualified prosecutor to act *ad interim* (*Maerae*, 1882, 4 Coup. 561; *Hill*, 1883, 5 Coup. 284). The statute does not expressly take away the power inherent to every Court to make such an appointment (40 & 41 Vict. c. 50, s. 7).

7. *Emoluments.*—Procurators-fiscal are, with a few exceptions, paid by salary. Formerly they were all paid by fees. The scale of fees fixed by Exchequer in 1812 is printed in the *Journal of Jurisprudence*, xxi. 486. About 1850 the Treasury began to make proposals for the substitution of fixed salaries, which were gradually accepted by the fiscals. In addition, the fiscal receives a small fee (usually 2s. 6d.) for each concurrence, and the county council has to remunerate him either by fees or salary for criminal proceedings and investigations chargeable to the "Rogue Money" levied under 11 Geo. I. c. 26, s. 12, and other work payable by the county. The older appointments are not restricted. In those made during the last

twenty years, however, it has become a rule that wherever the duties of the office warrant a fair salary, the terms of the commission debar the fiscal from engaging in private practice as a solicitor, conveyancer, law agent, or factor, but permit him to hold such offices of a public nature as the Sheriff shall from time to time approve.

8. *Responsibility.*—So long as the procurator-fiscal discharges his duties with an impartial and judicial mind, exercising due care and avoiding malice, he is not liable to make reparation for his acts. In the ordinary case, a claim for damages against him cannot be relevantly stated unless malice on his part coincides with a want of probable cause. The degree of malice and lack of probability will vary, but there must be enough to satisfy any reasonable man that the fiscal had no ground for proceeding, except a wish to gratify his malicious feelings (*Journal of Jurisprudence*, xxii. 25).

9. *Duties.*—The procurator-fiscal is guided in his official duties by the code of *Regulations to be observed in Criminal and other Investigations* issued in 1896 from the Crown Office. While he may freely avail himself of the assistance of the police, he must discharge these duties *personally* or, where that is *impossible*, by his depute. Our space will not admit of an exhaustive statement of his duties, but the following subsections contain the principal points.

(1) *Criminal Investigations.*—The procurator-fiscal generally receives information of a criminal or suspicious occurrence through the medium of a police report. He must give the matter immediate attention. If it is of a grave character,—a murder, for example,—he forthwith informs the Sheriff-Substitute, and with him repairs to the *locus*. In other cases he carefully considers whether the evidence and whole circumstances warrant proceedings in the public interest, and, if so, whether these proceedings are to be solemn or summary. The principles by which he is guided in his decision, and the course of subsequent procedure, will be found in the articles on Criminal Prosecution; Apprehension; Declaration; Bail; etc. Some points of practice may be here noted. Where much depends on the state of the person injured or accused (*e.g.* in alleged rape or child-murder), he has to arrange for an immediate examination of that person by a qualified medical man. Injuries resulting in death are discussed in subsec. (3) *infra*. Where death has not immediately followed injuries, he must preserve evidence of the treatment of the injured person. If the injuries are likely to be fatal, and if the patient is sensible and fit to be examined, a dying deposition should be taken. See *Scot. Law Review*, i. 181; and Deposition by Deceased Person. When a prisoner is liberated on bail, the fiscal sends to the Crown Agent a certified copy of the bail bond; and if Crown counsel order liberation, he must carry the order into effect without unnecessary delay. On the completion of a precognition, he transmits to the Crown Agent the signed statements of witnesses, documentary productions, and other papers conform to inventory, along with a short letter and a schedule containing the name of the accused, crime, dates of committals, declarations, etc. The precognition, police information, and all communications from Crown counsel are *strictly confidential* (*Hastings*, 1890, 18 R. 244; *Campbell*, 1893, 1 S. L. T. No. 165; *Arthur*, 1895, 22 R. 417). He has to notify the Crown Office of all cases in which a prisoner has been left in prison untried for 60 days, giving the date when 110 days from committal, in terms of 50 & 51 Vict. c. 35, s. 43, will expire. Within two days after a trial under indictment, he sends a return, stating the result, to the governor of the prison to which the prisoner is first sent, if convicted, or in which he was last confined, if acquitted.

(2) *Concourse.*—If consideration of the information satisfies the procurator-fiscal that the case does not call for prosecution in the public interest, or if he is applied to by the complainers in certain statutory or quasi-criminal charges, he may give his concurrence to procedure at the instance of a private party (see CONCOURSE OF PUBLIC PROSECUTOR).

(3) *Sudden Deaths.*—The procurator-fiscal performs in Scotland the functions of coroner with respect to sudden, suspicious, or accidental deaths. As regards the last class, reference is made to FATAL ACCIDENTS INQUIRIES. No hard-and-fast rule can be laid down as to what are in this respect *sudden* deaths. Many diseases, especially some of those affecting the heart, kidneys, and brain, lead to a sudden termination of life, and although deaths from these may be properly called sudden, they do not in the ordinary case, where the deceased has been under medical treatment, come within the cognisance of the fiscal. Every case of death where the cause is open to reasonable suspicion of violence or negligence, and every case where no doctor is able from previous knowledge to certify the cause as natural, should form the subject of a more or less formal inquiry, and report to Crown counsel. Where a dead body has been discovered, or where the fiscal deems it necessary for the due consideration of any case, he instructs a qualified medical practitioner to make an *external* examination of the body, and to report in writing; but wherever the extrinsic circumstances raise a suspicion of criminality or negligence, he should obtain from the Sheriff a warrant for dissection of the body, and have a full medico-legal examination or autopsy made and reported. Such a *post-mortem* examination ought not to be ordered unless there are reasonable grounds for holding that it is necessary in the public interest. It should never be made at the public expense merely to furnish a statement of the cause of death in language scientifically accurate, and there need be no dissection when the extraneous evidence and *post-mortem* appearances of the body are consistent with death from natural causes, suicide, or pure accident. The fee allowed for dissection is £2, 2s., and the doctor's account has to be forwarded with the papers for the approval of the advocate-depute. In all such examinations the authorities and medical men are to be guided by the suggestions appended to the Code of Regulations. If an analysis is required, the instructions of Crown counsel have to be obtained in the first instance, unless there is danger of losing valuable evidence; and in every case the directions of the code must be carefully followed. A schedule for the Registrar of Deaths is transmitted to the Crown Office with the other papers, and after revisal by Crown counsel is returned to the fiscal, who sends it to the registrar of the district in which the death occurred, or if that is not known (as in some instances of drowning), to the registrar of the district in which the body was found (17 & 18 Vict. c. 80, s. 40). In the case of a death either on a railway, or as the result of injuries sustained on one, a return has to be made to the Secretary for Scotland within seven days after the inquiry and report (36 & 37 Vict. c. 76, s. 5).

(4) *Infant Life Protection.*—The procurator-fiscal also takes the place of the coroner under the Infant Life Protection Act, 1897 (60 & 61 Vict. c. 57, s. 16). The person having the care of an infant respecting whom notice is required by the Act, must within twenty-four hours after its death give intimation to the procurator-fiscal, who makes an inquiry unless a sufficient medical certificate is produced (*ib.* s. 8). He ought to make an investigation, notwithstanding such certificate, whenever there are suspicious circumstances which may not have come to the doctor's knowledge.

(5) *Deaths in Prisons, Poor-Houses, Asylums, etc.*—The procurator-fiscal must obtain a medical report and make the necessary inquiry in all cases of suicide or sudden death of a prisoner (40 & 41 Vict. c. 53, s. 53). He also receives immediate intimation of sudden, suspicious, or accidental deaths occurring in asylums, poor-houses, parochial lodging-houses, etc., which he must deal with at once in accordance with the regulations.

(6) *Deaths in Mines, Factories, etc.*—H.M. inspectors and the procurator-fiscal should work together, and inform each other by telegraph of all serious accidents (see FATAL ACCIDENTS INQUIRIES).

(7) *Fires.*—The procurator-fiscal investigates and reports to Crown counsel with reference to every fire outside a burgh, as regards which he or local opinion entertains a suspicion of fire-raising, or where there has been extensive destruction of property or danger to life. If a death has resulted, he proceeds as explained in subsec. (3). As to fires within burghs, see Part III. *Burgh Court, infra.*

(8) *Explosions.*—Every case of serious personal injury, whether fatal or not, caused by explosives, or of serious explosion, whether causing personal injury or not, is intimated to the Crown Agent by the procurator-fiscal immediately on its coming to his knowledge (see FATAL ACCIDENTS INQUIRIES).

(9) *Dangerous Buildings, etc.*—In the event of any building becoming, through dilapidation, a source of danger to the lieges, the procurator-fiscal, after due notice to the owner or person responsible, may present a petition to the Sheriff craving a remit to a man of skill to examine and report, and to have steps taken to prevent injury to life or limb. The Sheriff orders intimation to the responsible party, and after inquiry makes such orders as are necessary.

(10) *Dogs.*—If a person has a dog which is dangerous and not kept under proper control, the procurator-fiscal may warn him, and thereafter take proceedings under the Dogs Act, 1871 (34 & 35 Vict. c. 56).

(11) *Lotteries.*—When the procurator-fiscal is informed of a lottery, he first inquires as to whether it is one which is calculated to prejudice public morals, or which constitutes a fraud upon the public. If satisfied that it falls into one of those classes, he warns the parties engaged in it that it is illegal, and if they persist, reports the case to Crown counsel, who may order proceedings in Exchequer (*Lamb*, 1892, 3 White, 261). See LOTTERY.

(12) *Lunatics.*—The procurator-fiscal has duties in regard to dangerous lunatics under 25 & 26 Vict. c. 54, s. 15 (see LUNACY ACTS). In place of incurring the expense of committal of a person as a dangerous lunatic under that section, it is usual for the inspector of poor to intervene and obtain committal as an ordinary lunatic under sec. 14; but such intervention is not permitted when Crown counsel have seen fit to direct that a lunatic charged with serious crime shall be dealt with under sec. 15. When no such charge has been made, the procurator-fiscal, before making application under sec. 15, gives notice to the inspector of poor, who may be present in Court; but on the inspector proposing a committal under sec. 14, the fiscal may move the Sheriff to make it a condition that the lunatic shall not be discharged under 29 & 30 Vict. c. 51, s. 9, without ten days' previous notice in writing to him.

(13) *Statutory Duties.*—The procurator-fiscal has duties to discharge under many Acts of Parliament which it would be useless to enumerate here. Reference must be made to the statutes.

(14) *Exchequer Business.*—The procurator-fiscal represents the Queen's and Lord Treasurer's Remembrancer in matters within his district which

affect the interests of the Crown, as, for example, treasure-trove and estates falling to Her Majesty as *ultima hæres*. For such work he is usually paid by fees.

(15) *Returns and Accounts.*—The procurator-fiscal, in addition to those already mentioned, has to make returns and render accounts as under:—

(*a*) Return to Sheriff Principal (monthly or weekly) of informations and complaints made to the procurator-fiscal, and of cases reported to Crown counsel or disposed of before the Sheriff Court summarily.

(*b*) Return to Crown Agent, on last day of February, June, and October, of cases remitted by Crown counsel for trial, showing their disposal.

(*c*) Return to Crown Agent respecting a convict on licence, or person previously sentenced to penal servitude, recommitted to prison by the Sheriff (see PENAL SERVITUDE).

(*d*) Report to Home Office of result of every mining prosecution instituted by the procurator-fiscal.

(*e*) Return to district fishery officer of all prosecutions under Herring Fishery Acts and Fishery Board Bye-Laws (illegal trawling, etc.), and contraventions of lettering, numbering, etc., regulations.

(*f*) Account of fines, etc., recovered for Exchequer in Sheriff Court in quarters ending (A) 30th June, (B) 30th September, (C) 31st December, and (D) 31st March.

(*g*) Accounts of outlays incurred on behalf of Exchequer in reported and unreported cases in the same quarters.

(*h*) Account of fines recovered and outlays incurred on behalf of the county or district during the year.

II. JUSTICE OF PEACE COURT.

The justices of the peace in quarter sessions are required to appoint a sufficient collector for uplifting the fines and penalties which they have power to impose, taking caution of him that he will make due account (1661, c. 38). This official is now usually an enrolled law agent, and is called the *fiscal of the peace*. He is not required to find caution. The conditions of the office rest upon general practice. Even when appointed *ad vitam aut culpam* the fiscal's appointment is truly during the pleasure of the justices, and may be recalled by them in quarter sessions,—indeed, an opinion has been expressed that it falls on a new commission of the peace being issued (*Rose*, 1853, 15 D. 908). His salary is fixed and paid by the county council, to whom he accounts for fines and penalties recovered, so far as the application of these is not regulated by special statutes (52 & 53 Vict. c. 50, s. 89). His duties are to institute or concur in all proceedings for the prosecution of petty offences, or for the recovery of fines and penalties, competent before justices of the peace. In terms of the Licensing Acts, he receives from the chief constable written reports of the names of persons licensed to sell exciseable liquors by retail, from whose premises persons in a state of intoxication have been frequently seen to issue, and also of the manner in which special permissions under the Acts have been exercised. These reports he intimates to the licence-holders, and brings under the notice of the justices at the Licensing Courts (25 & 26 Vict. c. 35, s. 14). He may further at such Courts, without notice, state objections to the granting or renewing of a certificate for a licence (*ib.* s. 12).

III. BURGH COURT.

The prosecuting officer in a Burgh Court under the Burgh Police (Scotland) Act, 1892, is called the *burgh prosecutor* (55 & 56 Vict. c. 55, s. 461).

He may be a law agent, but is frequently the chief officer of police (s. 78). He is appointed by the commissioners in writing, and holds office during their pleasure (s. 461). An accused person cannot object to the validity of such appointment, if the prosecutor exercises the office and is recognised by the magistrate as holder of it (*Ward*, 1847, Ark. 272; *Hill*, 1883, 5 Coup. 284). The burgh prosecutor has all the powers and privileges, within the burgh, of a procurator-fiscal, and all prosecutions and proceedings in the Burgh Court are at his instance (ss. 461, 462, 477). On the first Monday of every month he must intimate to the collector the amount of fines, etc., imposed and recovered in the previous month (s. 497). His salary is fixed and paid by the commissioners (s. 461). If bound to devote his whole time to the duties of the office, he cannot be removed or have his salary diminished by the commissioners unless with the approbation of the chief magistrate of the burgh and the Sheriff, or in the case of their differing in opinion, the Secretary for Scotland (ss. 461 and 78). Where there are in the burgh more Police Courts than one, the commissioners may appoint one or more depute burgh prosecutors (s. 461). The presiding magistrate may, in the absence of the burgh prosecutor, appoint an interim burgh prosecutor; but the former is not responsible for the acts of the latter (s. 462). He is protected to a certain extent against actions of damages (s. 506). In the event of an appeal being taken from a conviction obtained by him, or if an action is raised against him, he reports the facts to the commissioners, who may resolve to defend him at the expense of the burgh (s. 507). No provision is made for the cost of an appeal taken at his instance. The jurisdiction of the Sheriff's procurator-fiscal is reserved (s. 508). The burgh prosecutor or his depute takes a precognition as to the origin of every fire within the burgh (s. 296). Should a charge of fire-raising emerge, the case is sent to the Sheriff's procurator-fiscal (s. 459). In the Dean of Guild Court the burgh prosecutor institutes proceedings (s. 205); and he can present a petition to the Sheriff for the sale of ruinous buildings (s. 195).

Procurators in Glasgow. — In early times the term procurator was applied in Scotland to anyone, patron or friend, to whom a litigant committed the management of an action; but with the rise of professional pleaders it came to be used as synonymous with advocate. In modern times its application has been restricted to practitioners in the inferior Courts. As early as the year 1668 the procurators in the Commissary Courts of Glasgow, Hamilton, and Campsie formed a society or faculty, and by usage they were allowed to practise in all the other Courts of Glasgow. Gradually they assumed the privilege of examining and admitting practitioners in those Courts, and excluding from practice all but the sons or apprentices of members. On 6th June 1796 they obtained a royal charter incorporating them under the name of "The Faculty of Procurators in Glasgow," confirming their exclusive privileges, prescribing the qualifications and mode of admission of candidates, and conferring the power to enact bye-laws. The provisions of this charter came, however, to be in great measure superseded by the passing of the Law Agents Act of 1873, which abolished the exclusive privileges referred to, and allowed the Faculty to admit any enrolled law agent on such terms as they saw fit. (See LAW AGENT.) This led to the Faculty obtaining, on 20th August 1897, a supplementary royal charter, under which, and under bye-laws passed in virtue thereof, the affairs of the Faculty are now regulated.

All enrolled law agents and advocates are eligible for admission, as are also English, Irish, and Colonial barristers and solicitors, including those who have voluntarily retired from practice, and also such persons of distinction connected with the legal profession as the Faculty may think fit to admit. When the first charter was obtained in 1796, there were 91 members; there are now 312. The office-bearers are: a president (called Dean of Faculty), five councillors, a person holding the combined offices of clerk, treasurer, and fiscal, an auditor of accounts (after mentioned), a librarian, and an officer and keeper of the hall. Two general meetings of the Faculty are held in each year, viz. on the third Fridays of May and November, 11 members being a quorum. The election of office-bearers and committees takes place at the May meeting, at which also the treasurer's accounts are submitted for approval. Special general meetings are held as occasion requires. The library committee meet on the second Monday of each month except May, August, and September, in which three months no meeting is held. Stated meetings of the committee on parliamentary bills are held during the parliamentary session on the first and third Mondays of each month until April inclusive, and thereafter on the first Monday of each month.

The charter of 1897 authorises the Faculty from time to time, in conjunction with the Society of Writers to the Signet, the Society of Solicitors in the Supreme Courts of Scotland, and the Incorporated Society of Law Agents in Scotland, to fix a scale of fees for conveyancing and general business. It also empowers the Faculty to appoint auditors for the taxation of the professional accounts of members at the request of any person interested in such accounts.

The Faculty elect representatives to the governing bodies of various public institutions in Glasgow. The Dean and six other members elected by the Faculty, together with five persons elected by other public bodies, act as governors of Baillie's Institution, founded by the late George Baillie, a member of the Faculty, to aid the self-culture of the operative classes in Glasgow.

The Faculty have a valuable library, consisting of about 9000 volumes of legal literature and 11,000 volumes of general literature. The library funds have been amalgamated with the general funds of the Faculty since 1875.

A fund for the support of widows and children of members was formed soon after the date of the first royal charter; but a private Act of Parliament was obtained in 1875, declaring that no new contributor to the fund should be admitted, and making provisions for the final winding up of the fund.

The funds of the Faculty after paying all necessary charges, including those connected with the library and an annual sum of £105 towards the salary of the Professor of Conveyancing in Glasgow University, whose chair was originally endowed by the Faculty, are appropriated to the relief of indigent members or their families, or to such other purposes as may be directed by the Faculty. The total value of the funds and property is at present (1898) upwards of £50,000, including £33,000 as the estimated value of the Faculty's buildings, which comprehend a large hall in which most public sales of heritable property take place, a library hall, committee rooms, etc.

Members are admitted by ballot. The fees payable on admission amount to £50 in full, but may be paid in eleven annual subscriptions, beginning with £10, 10s. for the first year, and £5, 5s. thereafter.

Procuratory of Resignation.—See CONFIRMATION BY A SUPERIOR.

Productions.—I. IN CIVIL JUDICIAL PROCEEDINGS.—Under the Judicature Act (6 Geo. IV. c. 120, ss. 3, 8; A. S., 11th July 1828, s. 54) it was incompetent to lodge documents, in the possession of the party founding on them, after the record was closed, except where a document was *res noviter veniens ad notitiam*, or was necessary to rebut documents produced by the opposite party after the record was closed, or where the Court ordered production (Mackay, *Practice*, i. 499, *Manual*, 231). Now, by the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 99), although it is still proper to produce writings founded on in the summons and defences along with these pleadings, or at least before the record is closed, it is no longer "competent to object to the production of any document after a record has been closed, on the ground that it was in the possession or under the control of the party producing it at the time when the record was closed; provided that the Court or the Lord Ordinary may attach such conditions, as to expenses or otherwise, to the receiving of such documents as to them or him shall seem proper." See also ACTIONS, ORDINARY PROCEDURE IN (vol. i. 78); REDUCTION.

For the rules regulating the production of documents, etc., in *trials by jury*, see JURY TRIAL (vol. vii. 238).

Where the Lord Ordinary tries issues by consent, the proceedings are conducted as far as possible in the same way as in an ordinary jury trial, and the rule as to lodging productions in cases tried by jury applies. In the case of a trial before the Lord Ordinary under the Evidence Act, 1866, or under the Court of Session Act, 1868, there is no imperative rule, and productions may be produced for the first time at the trial (Mackay, *Manual*, 231). If surprise is apprehended, or it is necessary for the opposite party to see documents not produced, in order to prepare his proof, his course is to apply for a diligence to recover them. It is matter for the discretion of the Court whether they will allow a document to be produced and put in evidence by a party after he has closed his proof (*Liquidator of Universal Stock Exchange Co. Ltd.*, 1891, 19 R. 128).

See ACTIONS, ORDINARY PROCEDURE IN; JURY TRIAL; REDUCTION; EVIDENCE; BORROWING PROCESS; CAPTION (PROCESS).

As to *inventorics*, see A. S., 7th July 1858, s. 1.

In *the Sheriff Court*, at or before the closing of the record, each party must produce all documents specially mentioned in his pleading, and which are in his hands. Any other documents, whether in his hands or not, may be produced by him during the proof, but without prejudice to the power of the Sheriff to order their production at any stage of the cause (39 & 40 Vict. c. 70, s. 22). The Sheriff may order or allow a party, at any time before judgment, to produce any document which he failed to produce timeously, upon such terms as to payment of expenses, and allowing further proof to the other party, as to the Sheriff shall seem just (*ib.*).

[Dove Wilson, *Sher. Court Pract.*, 4th ed., 155].

II. IN CRIMINAL TRIALS.

Labelling, etc. — At the preliminary investigation all the articles connected with a crime are, when taken possession of by the authorities, labelled. The label is attached by a cord, sealed to the article, and the label is signed by all persons to whom the article is shown at the preliminary investigation. Documents are not labelled, but the signatures

of those to whom they are shown are put upon the documents. In both cases the purpose is to aid the witnesses in identifying the productions at the trial. These steps are usual in practice; but it is to be noted that "they are not indispensable, nor are the statements written on labels or articles binding upon the prosecutor" (Macdonald, 288; *Allan or Mulholland*, 1844, 2 Br. 172.—Hume, ii. 83; Alison, ii. 588).

Libelling.—Productions to be used against an accused person must be libelled. A list of productions, including the declaration of the panel and the extracts of previous convictions, is appended to the libel or INDICTMENT (*q.v.*). A copy of this list must be lodged, on or before the date of service of the indictment, with the sheriff clerk of the district in which the Court of the second diet is situated; and where the indictment is for fugitation, the list must be lodged in the Justiciary Office (Crim. Pro. Act, 1887, s. 27). In the list the articles should be described briefly, all that is necessary being that the information given should be sufficient to enable the accused person to know what to look for in the clerk's hands. For the rules regarding the libelling of previous convictions, see CONVICTIONS (PREVIOUS).

Lodging.—The accused is entitled to see the Crown productions, "according to the existing law and practice," in the office of the sheriff clerk of the district of the second diet, or, where the second diet is to be in the High Court in Edinburgh, in the Justiciary Office (Crim. Pro. Act, 1887, s. 37). The productions must be lodged "in due time" in these offices, respectively (Hume, ii. 388; Alison, ii. 593; Macdonald, 422). The criterion in determining what constitutes "in due time" would appear to be whether the panel has been prejudiced by failure to lodge a production (*Kerr and Others*, 1857, 2 Irv. 608; *Aimers*, 1857, 2 Irv. 725; *Watt*, 1859, 3 Irv. 389; Macdonald, *ib.*), no precise limit having been affixed to the word "due." In the Sheriff Court, the day before the trial has been fixed as the latest period for lodging (Act of Adjournal, 17th March 1827). Actual personal possession of the article by the clerk is not essential (*Clarkson*, 1829, and *Kerr*, 1833, Bell, *Notes*, 275), provided the accused is informed as to where the article may be found, and is allowed to examine it (*Dow and Dick*, 1829, Bell, *Notes*, 275; *Macpherson or Dempster*, 1862, 4 Irv. 143). Where the accused is liberated on bail, the bond, or a certified copy thereof, ought to be produced (*Lawrence*, 1872, 2 Coup. 168). A witness at a trial may pull an article out of his pocket in order to explain his evidence, and put it back again, without that article becoming a production in the case and requiring to be noted (*Collison*, 1897, 34 S. L. R. 528, 4 S. L. T. No. 473).

Productions for Defence.— An accused person who proposes to produce articles at the trial must give notice of such productions to the procurator-fiscal of the district of the second diet where the case is to be tried in the Sheriff Court, or to the Crown Agent where the case is to be tried in the High Court of Justiciary, *at least three clear days before the day on which the jury is sworn* to try the case against him, unless he show, *before a jury is sworn*, that he was unable to do this (Crim. Pro. Act, 1887, s. 36).

Productions, of course, do not constitute evidence unless authenticated by the testimony of witnesses.

Profanity.—In modern criminal practice, profanity by cursing and swearing is not prosecuted as such, but only as constituting, or helping to constitute, disorderly conduct. See BREACH OF THE PEACE; SABBATH-BREAKING. See also BLASPHEMY; ATHEISM; CURSING OF PARENTS.

Profits, Violent.—See VIOLENT PROFITS.

Progress of Titles.—A progress of titles is a continuous series of writs deducing the title of a proprietor of heritage. A purchaser of heritage is entitled, in the absence of express stipulation to the contrary, to demand from the seller an unexceptionable progress extending over the period of prescription, which is now twenty years (37 & 38 Vict. c. 94, s. 34). Possession for twenty years continually and together, peaceably, and without lawful interruption (Ersk. iii. 7. 39 *et seq.*), following on an *ex facie* valid irredeemable title to lands, gives a good title by prescription to the lands, notwithstanding any irregularity in the title prior to that period (Act 1617, c. 12; 37 & 38 Vict. c. 94, s. 34). A prescriptive progress must show that the seller has come to be in place of the proprietor under the last writ, regular on the face of it, which has been validated by prescription. No interruption of prescription is effective against singular successors unless notice of it appears in the Register of Sasines, so as to be disclosed by a search (Bell, *Prin.* 2007; 31 & 32 Vict. c. 64, s. 15; see SEARCH). At common law prescriptive possession is of no avail while the person against whom it is running is under age (Bell, *Prin.* 2022); but under the Conveyancing Act of 1874 no deduction is to be made on account of the minority of those against whom prescription is to be used if possession has endured for thirty years (37 & 38 Vict. c. 94, s. 34). It would seem that purchasers, to secure the benefit of this provision, should be entitled to demand a thirty years' progress. Even a stipulation to take a title as it stands does not bind a purchaser to accept a title which is neither marketable nor capable of being made so (*Carter*, 1890, 18 R. 353). As the title must be unexceptionable, the seller is liable to bear the expense of having the decision of the Court taken on any objection which is not frivolous, even if the title be found sufficient (*Howard*, 1890, 17 R. 990; see PRESCRIPTION; SALE).

Promise.—A promise, as distinguished from an offer, is a unilateral obligation to which acceptance is presumed. The obligation is created at once, and is free from any condition of acceptance; whereas an offer is always and *in terminis* conditional, raised into an obligation only by acceptance (Bell, *Prin.* ss. 9, 73; Stair, i. 10, s. 4; Ersk. iii. 3, s. 88). See OFFER AND ACCEPTANCE; OBLIGATION. In Scots law it is not essential that there should be any preceding consideration for a promise. A promise may be either absolute or conditional (Bell, *Prin.* ss. 8, 64; Stair, *ib.*; Ersk. *ib.*). It may be discharged by rejection, express or implied; or, if conditional, by failure of the condition (*Allan*, 1664, Mor. 9428). A promise is proved by writing; by oath (*Deuchar*, 1672, Mor. 12386; *Harvie*, 1732, Mor. 12388); or by witnesses when followed by REI INTERVENTUS (*q.v.*), or when it relates to moveables (*Grant*, 1827, 5 S. 317).

Promise of Marriage.—See BREACH OF PROMISE OF MARRIAGE.

Promissory Notes had their origin in the "Goldsmiths' Notes," and were an invention of the goldsmiths in Lombard Street. They were not in use until long after bills of exchange, and were not at first entitled

to the special privileges of bills. Promissory notes without named writer and witnesses were at one time adjudged to be null (*Arbuthnot*, 29 Jan. 1708). By the Act 12 Geo. III. c. 72, s. 36, made perpetual by 23 Geo. III. c. 18, s. 55, it was enacted that "the same diligence and execution shall be competent and shall proceed upon promissory notes, whether holograph or not, as is provided to pass upon bills of exchange and inland bills by the law of Scotland; and that promissory notes shall bear interest as bills, and shall pass by indorsation; and that indorsees of promissory notes shall have the same privileges as indorsees of bills in all points." Hence at present, although distinct in form, promissory notes are in their essentials bills of exchange, and may be described as bills in which the drawer and acceptor are the same person.

The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, part iv. ss. 83–89 inclusive), contains the statutory provisions with regard to promissory notes; but in construing these sections, what has already been stated with regard to bills and cheques will be kept in view. The numbers following in black type in the text refer to the sections of the Act of 1882, those in ordinary type to the corresponding subsections.

Definition.—A promissory note is thus defined in the Act:—

83 (1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer. (2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker. (3) A note is not invalid by reason only that it contains also a pledge of collateral security, with authority to sell or dispose thereof. (4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

A document is not invalid as a promissory note by reason only that it does not contain the name of the person to whom the amount is to be paid, or the words "to bearer," if in fact the document contain a promise to pay, and it is handed by one person to another (*Daun & Vallentin*, 1895, 11 T. L. R. 211). The mere fact that a promissory note contains a statement of facts, not necessary to its validity as such, does not make it any the less a promissory note (*Fancourt*, 9 Q. B. 312, 15 L. J. (Q. B.) 344). But if the document contain something more than is here referred to, it will not be valid as a promissory note, although it may still be valid as an agreement (*Kirkwood*, W. N. 1896, 46 (16)). Hence a document, described as a promissory note, which provided for payment of certain money by instalments, the whole to become due on default in payment of any one instalment, and which contained the following clause, "No time given to, or security taken from, or composition or arrangements entered into with either party hereto, shall prejudice the rights of the holder to proceed against any other party," was held not to be a promissory note, and could not be sued on as such (*Kirkwood*, [1896] 1 Q. B. 582).

Essentials.—The essentials of a promissory note are: (1) It must be in writing (see BILLS OF EXCHANGE, *Definition and Essentials*). (2) The document must contain a promise. The word "promise" is not necessary, nor need a promise be actually expressed, if it be unequivocally implied. In whatever way the document is made out, so long as it contains the essential requirement of a note, it will receive effect. For examples of what have been held to be or not to be promissory notes, see Thorburn on *Bills*, p. 190, and Wallace and M'Neil's *Banking Law*, p. 171.

Delivery necessary.—**84** A promissory note is inchoate and incomplete until delivery thereof (actual or constructive) to the payee or bearer. (As to what constitutes delivery, see Bills of Exchange Act, s. 21; *Martini & Co.*, 1878, 6 R. 342.)

Joint and Several Notes.—**85** (1) A promissory note may be made by two or more makers, and they may be liable thereon jointly or jointly and severally, according to its tenour. (2) Where a note runs, "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note. On the other hand, where a promissory note runs, "We promise to pay," and is signed by two or more persons, it is held to be their joint note, unless the words "jointly and severally" are added (Chalmers on *Bills*, 5th ed., p. 267). See also CO-OBLIGANT in the present work.

86 (1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented, the indorser is discharged. (2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case. It has been decided that a promissory note payable on demand is at maturity immediately upon its being made (*in re George*, 44 Ch. D. 627. See also opinion of Kekewich, J., in *Edwards*, 1896, L. R. 2 Ch. at p. 162). (3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue (*Glassock*, 1889, 24 Q. B. D., 13 C. A.)

Presentment of Note for Payment to charge Maker.—**87** (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable. It has been decided that presentment of a promissory note, payable at a particular place, on the day when payment is due, is not necessary in order to render the maker liable, and that presentment on a subsequent day is sufficient (*Gordon*, 1898, 25 R. 570).

To charge Indorser.—(2) Presentment for payment is necessary in order to render the indorser of a note liable. (3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable; but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice. The rules for the due presentation of notes, and excuses for non-presentment and delay, are the same as those applicable to bills (see ss. 45, 46, and 89).

Liability of Maker.—**88** The maker of a promissory note by making it: (1) Engages that he will pay it according to its tenour. (2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. The position of the first indorser of a note corresponds to that of the drawer of an accepted bill payable to drawer's order. The Bills of Exchange Act does not authorise the admission of parole evidence of an extrinsic agreement between the granter and payee of a promissory note that the note should be renewed, subject to payment of interest from time to time, until the granter should be in a position to repay the principal sum, the effect of such evidence being to

contradict the written obligation expressed in the note (*Gibson's Trs.*, 1896, 23 R. 414).

Application of Part II. to Promissory Notes.—89 (1) Subject to the provisions in this part (*i.e.* Part IV.), and except as by this section provided, the provisions of the Act relating to bills of exchange apply, with the necessary modifications, to promissory notes. (2) In applying those provisions the maker of a note is deemed to correspond with the acceptor of a bill, and the first indorser of a note is deemed to correspond with the drawer of an accepted bill payable to drawer's order. (3) The following provisions as to bills do not apply to notes, viz.: provisions relating to (*a*) presentment for acceptance, (*b*) acceptance, (*c*) acceptance *supra* protest, (*d*) bills in a set. (4) Where a foreign note is dishonoured, protest thereof is unnecessary.

Stamp Duty.—The definition of a promissory note, for revenue purposes, is: "For the purposes of this Act the expression 'promissory notes' includes any document or writing (except a bank note) containing a promise to pay any sum of money; (2) a note promising the payment of any sum out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money" (Stamp Act, 1891, 54 & 55 Vict. c. 39, s. 33). It will be seen that the definition here given is more comprehensive than that given in the Bills of Exchange Act, or than the common law notion of a promissory note. The reason is obvious; for otherwise it might well be that a document which, in truth and substance, was a promissory note, might, by the insertion of an unimportant condition, be taken out of the category of promissory notes, with the view of evading the payment of stamp duty (*Thomson*, 1894, 22 R. 16). In order that a document may be a promissory note within the meaning of the Stamp Act, it must substantially contain a promise to pay a definite sum of money, and nothing more. A document to pay money as part of a contract containing other stipulations, would not be a promissory note within the meaning of the Act (*Mortgage Insurance Corporation*, 1888, L. R. 21 Q. B. D. 352). Accordingly, a document in these terms, "In consideration of your advancing to M. & H. £250 on their joint and several note, I undertake to pay £250 on demand should their note not be met at maturity," was held not to be a promissory note within the meaning of the statute (*Dickinson*, 1897, 14 T. L. R. 146). Notwithstanding the provisions of the Stamp Act (s. 14 (4)) that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever," an insufficiently stamped promissory note was allowed to be handed to a witness for the purpose of refreshing his memory, and obtaining from him an admission of a loan (*Birchall*, [1896] L. R. 1 Q. B. 325).

Duty Payable.—A promissory note must be stamped with *ad valorem* duty, and, unlike a bill of exchange, the duty is *ad valorem* whether the promissory note is payable on demand or at a determinable future period (Stamp Act, 1891, Bills of Exchange. See BILLS OF EXCHANGE). A promissory note must be stamped before execution (*Welsh's Trs.*, 1885, 12 R. 851), except (1) where it is made abroad, or (2) where it bears an impressed stamp of sufficient value but wrong denomination, in either of which cases it may be competently after-stamped upon payment of the duty and a penalty of 40s. if the note be not then payable according to its tenour, or of £10 if the same be so payable. A note which is not stamped is subject to the same disabilities as an unstamped bill of exchange.

See BILLS OF EXCHANGE; CHEQUES; CO-OBLIGANT; STAMPS.

Promulgation.—See STATUTE.

Pro mutuum.—See CONDICTIO INDEBITI.

Proof.—Where an action cannot be decided on preliminary pleas, or where it cannot be disposed of on admissions or on probative documents, a proof is allowed. The stages at which a proof is ordered are, in an ordinary action, either at the closing of the record or in the procedure roll. By the Inner House, however, proof may be ordered at any stage (and the interlocutor appointing it prescribes the mode in which it is to be taken). Proof before the Lord Ordinary, under the Evidence Act (29 & 30 Vict. c. 112), is now the general mode of proof. For the cases in which *jury trial* or proof *by commisson* is competent or necessary, see JURY TRIAL; COMMISSION (PROOF BY). A proof before the Lord Ordinary may be granted *before answer* when questions of relevancy are reserved (see BEFORE ANSWER), or it may be limited to any part of the case which the Lord Ordinary thinks proper for proof. The usual proof granted, however, is a proof to each party of his averments, and to the pursuer a conjunct probation (*Magistrates of Edinburgh*, 1862, 1 M. 13). The defender must lead his proof in answer to the pursuer's proof along with his own evidence—a proof in replication being granted rarely, and only in very special circumstances (Mackay, *Manual*, 333). The pursuer generally leads his whole proof at once, and does not avail himself of the allowance of a conjunct probation. The proof is taken at a diet fixed by the Lord Ordinary, and, in practice, always in Edinburgh, though it might be competent to fix the proof to be taken elsewhere (Mackay, *Manual*, 334). The proof must be taken continuously, and no adjournment can be allowed except on special cause stated in an interlocutor (31 & 32 Vict. c. 100, s. 32; *Birrel*, 1868, 6 M. 421). The diet may be either in session or vacation; and it is provided by sec. 33 of the Court of Session Act, 1868, that all cases ready for trial by proof before any of the Lords Ordinary at the end of the summer and winter sessions respectively shall be tried during the ensuing vacation; but this provision is seldom acted on.

The conduct of the proof is similar to that in jury trials (*Steuart*, 1870, 8 M. 821), and is generally subject to the rules of the Jury Trial Acts of Sederunt. See JURY TRIAL. As to *onus*, see AFFIRMANTI INCUMBIT PROBATIO; PRESUMPTIONS. There is, however, no opening statement, unless this is required by the judge. The witnesses are put on oath, and are examined and cross-examined. The evidence (1) is taken either wholly and directly by a shorthand writer (who is put on oath), (2) is dictated to a shorthand writer by the judge, or (3) is taken by the judge himself. The first of these is the common method, although particular passages are occasionally dictated to the shorthand writer by the judge. As to productions, see PRODUCTIONS.

[Mackay, *Manual*, 322 *et seq.*, 333 *et seq.*]

See also ACTIONS (ORDINARY PROCEDURE IN); ACTIONS IN SHERIFF COURT (ORDINARY PROCEDURE IN); EVIDENCE; OATH ON REFERENCE.

Proof before Answer.—See BEFORE ANSWER.

Proof by Commission.—See COMMISSION, PROOF BY.

Property is the right of using and disposing of a subject as one's own, except in so far as restrained by law or paction (Ersk. *Inst.* ii. 1. 1). Where two or more persons are owners *pro indiviso* of the same subject, it is termed common property (Bell, *Prin.* 1072). See COMMON PROPERTY; COMMON INTEREST; COMMONTY. Certain subjects are incapable of appropriation, *e.g.* air, light, running water, navigable rivers, highways, harbours, bridges, etc. (Ersk. *Inst.* ii. 1. 5). See the article on RES. Property may be acquired by occupation, accession, or transference (Bell, *Prin.* 1286 *et seq.*). See OCCUPANCY; ACCESSION; SPECIFICATION; COMMIXTION; DELIVERY; SALE. But no right of lands can be acquired by occupation without a written title (Ersk. *Inst.* ii. 1. 11). See PRESCRIPTION. A proprietor's right is exclusive and absolute *a cœlo usque ad centrum*, subject to such limitations as may be imposed by statute or otherwise in the public interest, or by agreement, express or implied (Bell, *Prin.* 939 *et seq.*). For example, a proprietor must allow access to extinguish a fire, to pursue a criminal, or to destroy dangerous animals. The laws for straightening marches, for the compulsory acquisition of land for railways and other public purposes, are all examples of restraints on the exclusive use of land. See SERVITUDE; ACQUIESCENCE; REI INTERVENTUS. A proprietor's absolute right to do what he pleases with his own is further limited by the law of neighbourhood and the law of nuisance. The principle of the restriction imposed by neighbourhood is that "one is not, by the faulty or careless use of his property, to occasion any real or actual damage to the property of another" (Bell, *Prin.* 964 *et seq.*). For example, a proprietor may dig or build on the very verge of his land, even though he should thereby block all his neighbour's lights (see LIGHT); but he is not entitled, by his operations, to deprive the neighbouring property of either lateral or vertical support (see SUPPORT). Nor can he project his walls or roof beyond the boundary-line (Ersk. *Inst.* ii. 9. 9). See EAVESDROP. The proprietor of lower ground cannot object to receiving the ordinary drainage from higher ground, and he is not entitled to impede water so as to throw it back on higher ground (Bell, *Prin.* 968). See RIVER. A proprietor must not exercise his right of property in mere spite or malice, or, as it is called, *in æmulationem vicini* (Bell, *Prin.* 964); but this statement must be read as qualified by the opinion of Ld. Watson in *Magistrates, etc., of Bradford*, [1895] App. Ca. 587, at 597. See ÆMULATIO VICINI. The limitations imposed on the right of property by the law of nuisance have their sanction partly in the common law and partly in a series of statutes. See NUISANCE.

[Stair, ii. 1. 28; Rankine, *Landownership*; Holland, *Jurisprudence.*]

See JUS IN RE; POSSESSION.

Property and Income Tax.—See INCOME TAX.

Prorogation of Jurisdiction.—See JURISDICTION (vol. vii. p. 229).

Prosecution (Criminal).—See CRIMINAL PROSECUTION.

Prosecution (Malicious)—This wrong consists in instituting, maliciously and without probable cause, criminal proceedings against a

person for a crime which he has not committed. If the accused is convicted, there is, of course, no action, but if a prosecution fails or is abandoned, or a conviction is reduced, an action may lie (*Kennedy*, 1890, 17 R. 1036; *Maclellan*, 1832, 11 S. 187; *Gilchrist*, 1838, 1 D. 37; *Barnet*, 1849, 11 D. 666). The person sought to be held liable may be either a private individual who gives information to a person in authority, or the person in authority who takes the proceedings complained of. In either case the defender is privileged, and must be shown to have acted maliciously and without probable cause, since the prosecution of crime is a public duty, and he is not liable merely for a mistake. Considerations of public policy excuse the perpetration of a legal wrong, such as false imprisonment, by a person acting honestly in the discharge of some duty which the law recognises (per Ld. Watson, *Allen*, [1898] App. Ca. 1, 93).

Actual imprisonment or apprehension is not necessary in order to found an action against the authorities (*Wilson*, 1846, 9 D. 7; Pollock on *Tort*, 211), and an action against the person giving information to the authorities will lie although no proceedings have been taken thereupon; such action is really one of damages for slander, but, being subject to the rules applicable to malicious prosecution, is included here.

Public Prosecutor.—In an action against a public prosecutor, malice and want of probable cause must be specifically averred on record (*Craig*, 1876, 3 R. 441), and put in issue (*Young*, 1891, 18 R. 825). Probable cause may be a matter either of fact or of law, the question being, whether certain acts were done, or whether admitted acts constituted a crime. In the former case there must be inquiry (*Mains*, 1861, 23 D. 1258); in the latter the Court must decide upon the nature of the legal error committed, in considering the relevancy (*Fraser*, 1853, 1 Pat. App. Ca. 232, 235; *Craig*, 1876, 3 R. 441, 444, 447; *Urquhart*, 1865, 3 M. 932).

Irregularity in Proceedings.—The protection which a prosecutor enjoys in making mistakes is intended to apply to regular proceedings. In these, although a complaint is bad either on the merits or relevancy (*Rae*, 1875, 2 R. 669), or although the prosecutor has taken unnecessarily severe measures, such as apprehending instead of citing the accused, privilege protects him (*Macpherson*, 1887, 14 R. 1063). An example of irregularity which displaces privilege is found in an illegal warrant. In that case neither the police executing it (*Pringle*, 1867, 5 M. (H. L.) 55), nor the magistrate granting it (*Strachan*, 1828, 7 S. 4), nor the procurator-fiscal applying for it, are protected (*Bell*, 1865, 3 M. 1026). Examples of illegality displacing privilege occurred in the case of a warrant to search the repositories of a person who did not lie under a criminal charge (Bell, *supra*), of one which had the effect of turning a civil into a criminal proceeding (*Gibson*, 18 June 1817, F. C.), and of one to apprehend for a crime committed outwith the limits of the procurator-fiscal's jurisdiction (*M'Crone*, 1835, 13 S. 443). If a warrant has been obtained, but not used, an action will not lie for malicious prosecution, but may for slander (*Nelson*, 1866, 4 M. 328).

Whether an arrest made by a policeman without a warrant is illegal, is very much a question of circumstances. A warrant may be dispensed with where a policeman sees the crime committed, or if the suspect is of a class reputedly criminal, or has no place of abode or known means of livelihood, if the arrest is followed up timeously by getting a warrant to detain. But if the suspect is a law-abiding subject, and there is no reason to suspect that he intends immediate flight, a warrant should be obtained (*Peggie*, 1868, 7 M. 89; *Lundie*, 1894, 21 R. 1085, 1090; *Leask*, 1893, 21 R. 32). The police were held to be privileged, where, without a warrant, they took a

woman accused of reset of theft to the police office, where, after a short examination, she was discharged (*Malcolm*, 1897, 24 R. 747). And if no magistrate can be obtained at the time, they may keep a person in custody a reasonable time until one can be obtained (*Evans*, 1861, 21 D. 532; rev. 4 Macq. 89). A police officer, also, has large powers in taking measures to prevent disturbances, and may be privileged in using threats, and even physical force, to attain his end (*Brown*, 1874, 1 R. 776). Cases of non-privileged apprehension occurred where the police, having a warrant to search a man's house for certain materials, ransacked his house for letters, and, in consequence of what they found, took him to the police office (*Pringle*, 1867, 5 M. (H. L.) 55); where a superintendent, without a warrant, sent a person in custody into another jurisdiction (*Hollands*, 1843, 5 D. 1352); where a constable, six months after the alleged commission of a petty crime, apprehended, without a warrant, a sailor accused of the offence, when on board the ship where he had been continuously employed throughout the intervening period (*Leask*, 1893, 21 R. 32). Where, also, the defender caused a constable to arrest the pursuer, but did not accuse him of any crime, the defender was held not entitled to have "maliciously and without probable cause" inserted in the issue (*Peffers*, 1894, 22 R. 84).

Statutory Protection.—In addition to the common law safeguards attaching to one acting in the exercise of a duty, various statutory protections have been enacted for the benefit of public officials. Chief among these is sec. 30 of the Summary Procedure Act of 1864, which provides that no party prosecuting for the public interest under an Act shall be liable in more than £5 of damages, unless malice and want of probable cause are proved; that he may defend himself by proving that the pursuer was guilty of the offence charged, and suffered no greater penalty than the law allows; and that he may put an end to the action (except in so far as founded on malice and want of probable cause) by tendering £5 and expenses, along with the amount of any penalty exacted from the pursuer. This section is understood to apply only to proceedings by way of summary complaint (Moncreiff, *Review in Criminal Cases*, 112), and to public officials, such as fiscals and School Board compulsory officers (*Macaulay*, 1887, 15 R. 99), but not to persons protecting their private interests by prosecutions under the Poaching Acts. Its application is also confined to prosecutions in reality, and not merely *ex facie*, by way of complaint under an Act, but it is not confined to proceedings regularly conducted. It is intended to protect irregularities (see *Russell*, 1845, 7 D. 919), unless these are so great as, for instance, to deprive the prosecution of the character of a judicial proceeding (*Ferguson*, 1885, 12 R. 1083; *Murray*, 1872, 11 M. 147, 151). It has been held that neither a defective instance (*Lundie*, 1894, 21 R. 1085), nor a conclusion for a penalty which has been abolished, places the prosecutor outwith the protection (*Hastings*, 1890, 17 R. 1130). By sec. 35 of the same Act it is provided that an action brought against any judge, clerk of court, procurator-fiscal, or other person on account of any proceeding under the Act must be raised within two months of the occurrence of the cause of action (unless a shorter period is fixed by a special Act). Cause of action refers to an overt act directly affecting the pursuer—the execution and not the issuing of a warrant (*Hill*, 1857, 19 D. 955), the service and not the signeting of a summons (*Ashley*, 1873, 11 M. 708; *Swan*, 1867, 5 M. 599). The two months are to be counted from the day after the act complained of was committed (*Ashley, supra*). A defender must be competently called within the two months, and a summons cannot be amended so as to make it competent outwith the two months (*Mitchell* 1838, 16 S. 409).

Other Acts conferring protection are: the Day Trespass Act (2 & 3 Will. IV. c. 68, s. 17), requiring an action to be brought within six months, and notice to be given a month before raising it; the Twopenny Acts (43 Geo. III. c. 141, ss. 1 and 2; 9 Geo. IV. c. 29, s. 26; 11 Geo. IV. and 1 Will. IV. c. 37, s. 13), applying to justices and inferior magistrates, but not Clerks of Court (*M'Kellar*, 1841, 4 D. 291), and limiting the damages recoverable to twopence, unless malice and want of probable cause are shown (*M'Kellar, supra*; *Hay*, 1837, 15 S. 481). In some of the older cases under these Acts irregularity was held to place the justices outwith the protection, but these decisions may be doubted (*Richardson*, 1832, 10 S. 607). In the Police Acts of various burghs a clause occurs designed to protect officials in the execution of their duty under the Act. It has been held that the words "done in the execution of the Act" are sufficient to protect officials in a bad execution of the Act (*Mitchell*, 1838, 16 S. 409; see also Public Health Act, 1867, s. 188; and *Edwards*, 1891, 18 R. 867). The protection of persons acting in an official capacity, or in the execution of a public duty, is provided for by the Public Authorities Protection Act, 1893, but it does not apply in cases in which there is already a statutory limitation of action.

Information given to Authorities.—An informer also is not liable unless he has acted maliciously and without probable cause (*Rae*, 1875, 2 R. 667; *Green*, 1888, 6 R. 318), since the repression of crime is a public duty, or at least a right (*Lightbody*, 1882, 9 R. 934). An informer making a regular charge (*Sheppard*, 1849, 11 D. 446), and stating what he believes to be facts (*Lightbody, supra*, p. 939), enjoys this protection. It will be lost where a person alleges that a crime was committed, when the facts clearly do not amount to a crime at all (*Denholm*, 1880, 8 R. 31; *M'Donald*, 1853, 15 D. 545).

The information should be given to the proper authority (*Henderson*, 1855, 17 D. 348), and a subsequent repetition to members of the public is not privileged (*Walker*, 1868, 6 M. 318). Departing from a charge after it has been made is not evidence of malice and want of probable cause (*Smith*, 1853, 15 D. 549); but to allow proceedings to go on after knowledge that the charge is unfounded, is sufficient to involve liability (*Richmond*, 1838, 16 S. 995).

Privilege attaches also to information given to authorities, other than police, concerning matters within their charge. Information to the Board of Supervision with reference to the treatment of pauper children was held to fall within the general rule (*Croucher*, 1889, 16 R. 774). But it has been held, in cases prior to that last cited, that Church Courts, whether established (*Rankine*, 1873, 1 R. 225), or dissenting (*Gibb*, 1859, 21 D. 1099), are not in the same position, and as against the informer to th only malice requires to be proved. It has been said that an informer for a penalty is not privileged (*Barnet*, 1840, 11 D. 666).

Confinement in Lunatic Asylum.—Confinement in an asylum is regulated by the Lunacy Acts (which see), and compliance with the procedure therein provided protects absolutely a superintendent of an asylum, or other person entitled to receive lunatics (sec. 99 of 8 & 9 Vict. c. 100; see *Mackintosh*, 1865, 2 M. 389, 1261, 2 Pat. App. Ca. 1292; *Mackintosh*, 1859; *Lonie*, 1887, L. R. 12 App. Ca. 206). But the protection derived from regularity of procedure does not attach to a person instructing the confinement: he must show that the confined person was insane (*Fletcher*, 1859, 28 L. J. Q. B. 134). Anyone is entitled to confine a dangerous lunatic until a warrant can be obtained.

[Glegg, *Reparation*, 147-160.]

Protection of Infant Life.—The Infant Life Protection Act, 1897 (60 & 61 Vict. c. 57), came into force on 1st January 1898. It repealed the Infant Life Protection Act, 1872. It is enacted that any person retaining or receiving for hire or reward in that behalf more than one infant under the age of five years, for the purpose of nursing or maintaining such infants apart from their parents, for a longer period than forty-eight hours, shall within the said forty-eight hours give notice thereof to the Parish Council (s. 1 (1)). The notice must truly state the name, age, and sex of such infants; the name of the person receiving the infants, and the dwelling within which the infants are being kept; and the name and address of the person or persons from whom the infants have been received (s. 1 (2)). If any such infant is removed from the care of the person who has received the infant for the purpose aforesaid, such person must forthwith give notice to the Parish Council of the removal, and of the name and address of the person to whose care the infant has been transferred (s. 1 (3)). If any person who has retained or received any infant as aforesaid omits to give the said notices, or any of them, or knowingly or wilfully makes, or causes or procures any other person to make, any false statement in any such notice, he is guilty of an offence against the Act (s. 1 (4)), and liable to a penalty not exceeding £5, or to imprisonment for not more than six months, as a Court of summary jurisdiction may award (s. 9). The Parish Council is to fix the number of infants under the age of five which may be retained or received in any dwelling in respect of which notice has been received under the Act; and any person retaining or receiving any infant in excess of the number so fixed is guilty of an offence against the Act, and punishable as above stated (s. 4). Any person retaining or receiving an infant under the age of two years on consideration of a sum of money not exceeding £20 paid down, and without any agreement for further payment, as value for the care and bringing up of the infant until it is reclaimed or of an age to provide for itself, must within forty-eight hours from the time of receiving the infant give notice of the fact to the Parish Council (s. 5). Failure to give this notice renders the defaulter liable to forfeit the amount so received, or such less sum as the Court deems just; and the Court will give directions as to how the sum forfeited is to be applied for the benefit of the infant, and must, if necessary, cause the infant to be removed to a poorhouse or "place of safety" (*i.e.* "any suitable place the occupier of which is willing temporarily to receive such infant" (s. 15)); and the master of the poorhouse must receive the infant, which must be maintained in the poorhouse or place of safety until it can otherwise be lawfully disposed of (*ib.*). Should any infant, in respect of which notice is required to be given under the Act, be kept in any house or premises which are so unfit or so overcrowded as to endanger its health; or be retained or received by any person who, by reason of negligence, ignorance, or other cause, is so unfit to have its care and maintenance as to endanger its health; any inspector of poor or other person appointed for the purposes of the Act may apply to the Parish Council for an order in writing directing him to remove such infant to a poorhouse or "place of safety" (see *supra*), until it can be restored to its relatives or guardians, or be otherwise lawfully disposed of (s. 7 (1)). Any person who refuses to comply with an order under this section (7) upon the same being produced and read over to him, or who obstructs the inspector of poor or other authorised person in the execution thereof, is guilty of an offence under the Act, and punishable as above stated; and the inspector of poor may apply to the Sheriff for an order directing

the removal of the child, which may be enforced by a police constable (s. 7 (2)). No infant may be retained or received for hire or reward by any person from whose care any infant has been removed under sec. 7 of the Act, or by any person convicted of any offence under the Prevention of Cruelty to and Protection of Children Acts, unless with the sanction in writing of the Parish Council; and any such person retaining or receiving any infant is liable to the punishment above stated (s. 7 (4)). In the case of the death of any infant respecting whom notice is required under the Act, the person having the care of the child must within twenty-four hours give notice to the procurator-fiscal of the district; and the procurator-fiscal must make inquiry into the cause of death, unless a certificate under the hand of a registered medical practitioner is produced to him, certifying that the medical practitioner has personally attended or examined such infant, and specifying the cause of its death, and the procurator-fiscal shall be satisfied by such certificate that there is no ground for his making inquiry (s. 8). Failure to give this notice constitutes an offence against the Act, punishable as above stated (*ib.*). Notices to the Parish Council required by the Act must be in writing; and they must be sent by post as a registered letter to the clerk of the Parish Council, or such other person as the Parish Council may appoint; or be delivered at the office of the Parish Council (s. 13). The provisions of the Act do not extend to the relatives (*i.e.* the parents, grandparents, and uncles and aunts by consanguinity or affinity, and, in the case of illegitimate infants, the persons who would be so related if the infant were legitimate (s. 15)) or guardians of any infant; or to any person receiving any infant for the purpose of nursing or maintaining such infant under the provisions of any Act for the relief of the poor, or of any order of the Local Government Board for Scotland made under such Act; or to hospitals, convalescent homes, or institutions established for the protection and care of infants, and conducted in good faith for religious or charitable purposes (s. 15). Every Parish Council must provide for the execution of the Act within its parish, and may combine with any other Parish Council for the purpose of executing the provisions of the Act, and of defraying the expenses of such execution (s. 3).

Protection Order.—See CONJUGAL RIGHTS (SCOTLAND) AMENDMENT ACT (vol. iii. p. 203).

Protestation (now regulated by 31 & 32 Vict. c. 100, s. 22) may be exercised by a defender against a pursuer who fails to call his summons in Court on the first sederunt day after the expiry of the *inducice*, or upon one of the two sederunt days following thereupon. A note is delivered to the Outer House Clerk in the following form:—

P. for not calling and insisting in summons of payment, *A. B.* [*state designation*] against *C. D.* [*state designation*].

Summons signeted on last.

Per E. F., Counsel; *G. H.*, Agent.

The name of the agent must be stated, under penalty of £1 (A. S., 13 Feb. 1787). If all the defenders are not parties to the protestation, a clause should be added stating at whose instance the protestation is made, *e.g.* "P. at the instance of" (here fill in names and designations of those

defenders who take part in the protestation). Protestation cannot be made before the expiry of the *inducicæ*. If so made, it is inept, and the pursuer may get it scored on production of the summons (*Grant*, 3 June 1809, F. C.). He cannot, however, move until the time of lodging defences has expired.

The note of protestation, after being delivered to the Clerk of Court, and marked by him with the date of presentation (a sederunt day or day of extended sittings of the Lord Ordinary—*Graham*, 1852, 15 D. 19) and with the office mark, is returned to the defender's agent, and delivered by him to the keeper of the minute-book, who enters it therein of the date on which he received it. This date is the date of the protestation. It benefits the defenders who have authorised it, and them alone (*Scales*, 1839, 1 D. 465). Should the delay in calling be due to the fault of a Clerk of Court, who is Clerk in the process, or his assistant, it is his duty to grant a certificate, upon the production of which (before a warrant is issued for extract of the protestation) the keeper of the minute-book is bound to score the protestation (*Graham*, 1831, 9 S. 566). After granting such a certificate, the Clerk of Court is bound to see that the procedure is gone on with immediately and in due form. A protestation has no effect in transferring the lead in the cause from the pursuer to the defender entering protestation (A. S., 11 July 1828, s. 35).

Extract of Protestation.—Warrant for extract cannot be issued until nine free days have elapsed from the date of protestation (Beveridge, i. 272). No warrant is issued on a Monday, so that if the free days expire on Saturday and no warrant has been applied for, it can only be obtained on the Tuesday following. The extract formally decerns for £3, 3s. in lieu of expenses.

Reponing against Protestation.—A pursuer may now be reponed against a protestation for not calling if he lodge with the Clerk of Court, at any time within ten days after the protestation has been given out for extract, whether it has been extracted or not, the summons or other writ with relative documents, including a receipt by the defender's agent for the sum of £3, 3s. of protestation money, or by consigning the money itself in the hands of the Clerk for the use of the said agent (13 & 14 Vict. c. 36, s. 23).

There is no necessity for protestation if a summons has not been called within a year and a day from its date (A. S., 26 Feb. 1718; *Cumming*, 1833, 12 S. 61; Ivory, i. 169). If, however, it has been called, although not enrolled, it exists for the prescriptive period. When not enrolled, protestation was formerly competent for not enrolling. The defender has now a better remedy, by taking decree by default, under 31 & 32 Vict. c. 100, s. 26.

A summons could not be called at the instance of the Lords of the Treasury which had been raised at the instance of the Department of Woods and Forests (*Lords of Treasury*, 1836, 14 S. 657). The principle on which this decision rests is that there was a complete change in title to sue by Act of Parliament. A trustee in bankruptcy may proceed with a cause called by a pursuer who has been sequestrated, for here his divestiture of title to sue is only temporary (*Gallie*, 1842, 2 D. 445; *Barstow*, 2 D. 446, note). Where a pursuer dies between the execution of a summons and its calling, his representatives may call (Ld. Gillies in *Gallie, supra*). Protestation is no longer competent in suspensions and advocations. The procedure in lieu thereof is now regulated, in the case of suspensions, by 31 & 32 Vict. c. 100, s. 90, and in the case of appeals by A. S., 10 March 1870.

In actions with reductive conclusions, if the pursuer fails within twelve days after the calling to enrol, the defender may enrol for dismissal under A. S., 14 Oct. 1868, s. 12).

Protesting of Bills.—See BILLS OF EXCHANGE (vol. ii. p. 101).

Protocol Book.—See NOTARY PUBLIC.

Prout de jure.—A proof *prout de jure* is, strictly, a proof of facts by all competent and legal means of probation; but in practice the phrase is very frequently used to denote a proof by parole, as distinguished from a proof limited to writ or oath of party. See EVIDENCE; BEST EVIDENCE; PROOF; PAROLE EVIDENCE.

Proving of the Tenor.—Proving of the tenor is an action by which the contents of a document which has been accidentally or fraudulently lost, cancelled, destroyed, or obliterated, are restored. It is available also where any material part of the document has been thus destroyed (*Dow*, 1848, 10 D. 1465, a writing torn in pieces; *Cunningham*, 1851, 13 D. 1376, cancellation by mistake; *Winchester*, 1863, 1 M. 685, signature cancelled; *Leekie*, 1884, 11 R. 1088, wilfully burned; *Cousin*, 1862, 24 D. 758, partial obliteration by damp; *Graham*, 1847, 10 D. 45; *Ronald*, 1830, 8 S. 1008, part torn off; *D. of Athole*, 1880, 7 R. 1195, a word or figure illegible). The action is declaratory, its object being to have the deed thus restored declared to have the same effect as the original would have had if still in existence.

The action, being declaratory, was originally competent only in the Court of Session (*Balnagowan*, 1663, Mor. 15790; *Smart*, 1673, 3 Bro. Supp. 149). By the Act 1707, c. 9, in consequence of the destruction of many of the Teind records by a fire in 1700, the Court of Teinds was empowered to set up the tenor of decrees of valuation so destroyed, and the Act has been applied as giving the Court of Teinds jurisdiction to entertain actions of proving of the tenor of sub-valuations of teinds as well as valuations, and of such documents though destroyed by causes other than the fire. In these cases, concurrent jurisdiction is exercised by the Court of Session and Court of Teinds (*Alexander*, 1840, 3 D. 40, per Ld. Mackenzie, 49, and Ld. Fullerton, 50; *L. Lyncdoch*, 1841, 3 D. 1078; *E. of Wemyss*, 1883, 10 R. 1084; *D. of Athole*, 1880, 7 R. 1195). In other cases, the jurisdiction of the Court of Session is exclusive, unless indeed, as is suggested, a proving of the tenor may now be brought in the Sheriff Court in the restricted cases where actions of declarator are competent in that Court under 40 & 41 Vict. c. 50, s. 8 (*Carson*, 14 May 1811, F. C.; Dove Wilson, *Sheriff Court Practice*, 4th ed., p. 60).

TITLE TO SUE.—DEFENDERS.—A *primâ facie* interest on the face of the deed gives a title to raise the action. Some doubt has been expressed whether a contingent interest under a destroyed deed, *e.g.* a *spes successionis*, has this effect, but apparently such an interest is sufficient (*Winchester*, 1863, 1 M. 685, at pp. 690 and 692; *Browne*, 1872, 10 M. 397). If no interest can be shown, the action is dismissed (*Alexander*, 1830, 8 S. 634).

All persons having an interest should be called as defenders. In an old case, in the proving of a personal bond, the granter of which was dead, it was held necessary to call the executor as well as the heir (*Hammermen of Glasgow*, 1628, Mor. 2247). If there are no persons who can be called as having an interest, the lieges generally are called (*Mitchell*, 1852, 14 D. 932), and sometimes both are called (*e.g. Incorporation of Skinners*, 1897, 24 R. 744).

Where the Action is Competent.—A proving of the tenor is most commonly employed for the restoration of private deeds, but it is available to set up the terms of any kind of writing which may have a legal effect, including even judicial writs, and deeds recorded in public registers. By an old Act (1579, c. 94) letters of horning, executions, and indorsations thereof "cannot be proved by witnesses. Their tenor may, however, be proved by written adminicles" (Ersk. iv. 1. 58). Executions of other diligences are not subject to this restriction. Decrees of comprising (*Birnie*, 1675, Mor. 15796), a declarator of irritancy *ob non solutum canonem* (*D. of Argyle*, 1781, Mor. 15828), the verdict of a jury in a criminal case (*L. Cranston*, 1681, Mor. 15801), and pleadings forming part of a closed record (*Clyne*, 1832, 11 S. 131), may be restored by this means. By the Court of Session Act, 1868, where a summons, petition, or other original writ or pleading is lost or destroyed, a copy proved in the cause to the satisfaction of the Court before which the cause is depending, and authenticated as the Court may require, may be substituted for the purposes of the action, and is held equivalent to the original writ (31 & 32 Vict. c. 100, s. 15; cf. 39 & 40 Vict. c. 70, s. 11, for the Sheriff Court). A lost interlocutor sheet has been held not to be an original writ in the sense of this provision, and it must therefore be restored by a proving of the tenor (*Cofton*, 1875, 2 R. 599). In a proving of an unextracted interlocutor, the Court held it necessary to prove the tenor of the summons also, and sisted the process to allow a supplementary action to be brought for this purpose (*Duncan*, 1827, 5 S. 840).

A charter of erection of a royal burgh has been restored by a proving of the tenor (*Mags. of Sanquhar*, 1864, 2 M. 499). So also a deed recorded in the Register of Sasines (*Browne*, 1872, 10 M. 397).

Holograph writings may be competently set up by this action, though, on account of the difficulty of establishing the authenticity of such documents, the Court has shown considerable reluctance in entertaining provings for this purpose (*Lillies*, 1832, 11 S. 160; *Robertson*, 1833, 11 S. 775). A proving of the tenor of a bill of exchange is competent, though the Court was formerly unwilling to entertain such an action, and required proof of a specific *casus amissionis* (*q.v.*; *Carson*, 14 May 1811, F. C.; *Macfarlane*, 1826, 4 S. 509). A simpler remedy in the case of a lost bill is now provided by statute (45 & 46 Vict. c. 61, s. 69).

It is said that the tenor of an unstamped deed cannot be proved, and there is authority in England for this view (Menzies, *Conveyancing*, p. 96). The pursuer is not bound to prove that the deed was stamped, under the presumption *omne rite actum*, but slight evidence to the contrary is enough to raise a presumption on the other side (Grierson's Dickson, *Evidence*, 978).

Where the Action is Necessary.—In order to give legal effect to a document lost or cancelled, it is not in all cases necessary to set up its terms by a proving of the tenor, even for the purposes of an action. The important point to be considered is the use which it is proposed to make of the document. The general rule was thus stated in an old case: "If the writ is such, upon which a permanent right is to be set up, or on which execution is to follow, such writ cannot be supplied without a proving of the tenor. But if the writ is only such as imports the extinction or restriction of a debt, it may be supplied by adminicles, without a proving of the tenor" (*Maxwell*, 1742, Mor. 15820; cf. Shand, *Practice*, ii. 842). A more recent statement of the rule is, that a proving of the tenor is unnecessary where the deed is founded on "by way of exception and not by way of foundation of the

original suit," and where without any such deed the same matter might be proved otherwise. "Yet where there is the necessity of showing in the first instance the existence of the deed as the very fundamental principle upon which the party can alone proceed, the admission of secondary evidence is not competent," *i.e.* a proving is required (*Drummond*, 1834, 7 W. & S. 564, per Ld. Brougham, at p. 572; cf. *Gordon*, 1873, 11 S. L. R. 35, per Ld. Cowan). These rules have been generally applied (Grierson's Dickson, 1331–1336, where the cases are collected). In an action of accounting founded on an alleged contract of copartnery, where the contract formed an essential part of the title to sue, a proving was held necessary (*Shaw*, 1876, 3 R. 813; contrast *Steel*, 1895, 3 S. L. T. 302).

The distinction is well illustrated by an action for reduction of a testamentary deed and declarator that the succession was regulated by a prior deed which was not produced, where it was held that the pursuers, suing in the character of heir-at-law and next-of-kin, need not bring a proving of the tenor, while if they had sued as disponees under the lost deed, it would have been necessary further to do so (*Gilchrist*, 1891, 18 R. 599). If a document is to be used only as evidence and not as constituting a right or obligation, the Court will generally dispense with a formal proving of the tenor, and admit an incidental proof, or allow a draft or copy to be referred to (*Hutchison*, 17 May 1823, F. C.; *Wilson*, 1870, 7 S. L. R. 563). The same view is more likely to be taken if it can be shown that the party prejudiced by the deed has destroyed it (Bell, *Prin.* 883; *Ross*, 1833, 11 S. 467). So also the Court may, of consent, adopt this course (*Watson*, 1839, 1 D. 548; *Winton & Co.*, 1862, 24 D. 1094).

Summons.—The terms of the deed to be restored, with all its provisions and stipulations, must be averred (Ersk. iv. 1. 56; *Begbie*, 1822, 1 S. 391, N. E. 365). These must be set forth in the conclusions, and need not therefore be repeated in the condescendence. The writing must be stated to have been a complete and legally executed deed (*E. Stirling*, 1833, 11 S. 506).

The condescendence then sets forth (1) the *casus amissionis*, or the circumstances, so far as known, under which the writ to be set up was lost, destroyed, or obliterated; and (2) the means by which the terms of it are to be proved. If either is insufficient, the Court will dismiss the action (*Graham*, 1847, 10 D. 45; *Jenkinson*, 1850, 12 D. 854).

(1) *Casus amissionis.*—This is required because the Court refuses decree unless satisfied not only that there was once a genuine deed in the terms libelled, but that the obligation or right which it instructed has not been lawfully extinguished. "Otherwise bonds truly paid might be again demanded from the debtor, as obligations still subsisting" (Ersk. iv. 1. 54). This part of the subject has been dealt with in a special article. See Casus amissionis.

(2) *Proof of Terms of Deed.*—The usual evidence of the tenor consists of "adminicles," which are extant writings, such as drafts, scrolls, or copies which tend to show the contents of the writing. These in the general case are required, since the recollection of witnesses alone can very seldom be relied on for the actual terms of a document. It is not essential that the exact words should be proved, provided the import of the deed in the form libelled is clearly established (Stair, iv. 32. 9; *Rintoul*, 1833, 6 W. & S. 394; *Leckie* v. *Leckie*, 1884, 11 R. 1088). The evidence must suffice to show that the writing had the actual legal effect ascribed to it; and it was held insufficient for a law agent, who had once seen the deed, to depone that "in his opinion" it had such an effect (*Rannie*, 1891, 18 R. 903). If the essential clauses are proved, clauses of style may be more easily supplied

(*Incorporation of Skinners*, 1897, 24 R. 744; but see *Cousin*, 1862, 24 D. 758). The terms of the testing clause, the date and place of execution, and the names of instrumentary witnesses must, if possible, be proved, and the want of them may be fatal to the pursuer's success if there is any doubt as to the proper execution and authentication of the deed. But the rule which made these essential is now less rigorously applied where the Court is satisfied otherwise (Ersk. iv. 1. 57; *Trotter*, 1707, Mor. 15811; *Blackwood*, 1713, Mor. 15819; rev. 1719, Rob. App. Ca. 211; *Merry*, 1835, 14 S. 36—a case of notarial execution; *Mackenzie*, 1835, 14 S. 144; *Ronald*, 1852, 14 D. 357; *M'Leod*, 1865, 3 M. 840; *Incorporation of Skinners*, 1897, 24 R. 744, per. Ld. M'Laren, at p. 746). In a recent case, doubts were expressed whether the pursuer could obtain decree of proving of the tenor, "if he could not prove the exact terms either of the entire deed, or at least of so much of it as is required to make a complete legal instrument" (*Rannie*, 1891, 18 R. 903, per Ld. Kinnear, at p. 910).

For the further rules on this subject, see the article on ADMINICLES.

EFFECT OF DECREE.—The "decree of proving the tenor revives the lost deed, and has the same force given to it by law as that deed would have had were it still existing" (Ersk. iv. 1. 59). The decree contains *in gremio* the terms of the deed restored, and extract of it is probative of these terms. But the object of the action is to restore the writing, and not to determine its validity and effect, except indirectly in so far as this is the result of sustaining the proof of the *casus amissionis*. The decree, therefore, does not exclude a challenge on the ground of forgery, or of collusion or impetration (Stair, iv. 32. 11; Ersk. iv. 1. 59; Dickson, 1356; *Nory*, 1672, 1 Bro. Supp. 657; *Baillies*, 1790, Mor. 15833). The Court has sometimes thought it necessary, in holding the tenor proved, to do so under express reservation of the effect of the deed as set up (*Falconer*, 1840, 11 D. 1338; and see *Winchester*, 1863, 1 M. 685, where the question was reserved as to the competency of holding the tenor of a cancelled deed proved, but under reservation of the effect of the cancellation). In one case, where the deed had been placed in the hands of a depositary under certain conditions, the Court deemed in the proving, but reserved all rights under the deed, and ordained that only one extract should be given out, which should be "placed in the hands of the same depositary, to be held by him under the same conditions as he held the said original" (*Ferrier*, 1824, 3 S. 226 N. E., 159).

As regards actions upon deeds restored by this process, a distinction, to which certain of the older decisions lend some support, has sometimes been founded on the rules respecting the *casus amissionis*. The defender in such an action cannot plead the extinction of the right by the cancellation or withdrawal of the document, where that was a good defence to the proving on the question of *casus amissionis*. The matter is then *res judicata*, at all events where the defence was actually stated. On the other hand, where the extinction of the right is alleged on some ground which is independent of the *casus amissionis*, and could not have been pleaded in the proving, the defence is still available in the action on the restored deed (*Inglis*, 1712, Mor. 2744; *Hamilton*, 1713, Mor. 2745 and 15819; Dickson, 1356).

The successful pursuer in the proving of a tenor of a bill of exchange is entitled to sue all the parties liable on it. But if the bill was payable to bearer, either originally or by indorsation, he must, as a condition of enforcing payment, give an indemnity to the person sued against the claims of any other holder. (See Thomson on *Bills*, ed. by Dove Wilson, 206; Thorburn, *Bills of Exchange Act*, 161.)

PROCEDURE.—The summons of a proving of the tenor is first called in the Outer House, as in the ordinary case, and the adminicles should then be produced. At the first enrolment the Lord Ordinary makes "great avizandum" to the Court, and the subsequent proceedings take place in the Division (*Inch's Trs.*, 1855, 17 D. 1138). The summons is boxed, and on the case appearing in the Single Bills, defences are ordered, or if they have been already lodged in the Outer House, they are held as defences in the cause. The record is made up, and either a proof is ordered at once, or the case is sent to the Summar Roll, where the relevancy is discussed, and a statement made as to the nature of the adminicles and of the proof to be offered. If the adminicles are sufficient, an interlocutor is usually pronounced sustaining them, and allowing proof of the tenor and of the *casus amissionis*; or the Court, without pronouncing on them, may allow proof before answer (as in *Rannie*, 1891, 18 R. 903). Occasionally, if the adminicles are complete, no oral proof is required (*D. of Athole*, 1880, 7 R. 1195; *E. of Wemyss*, 1883, 10 R. 1084, in both of which there was a report from the Teind Clerk, which took the place of a proof). But a proof is usually required, even when the case is undefended. It is taken by one of the judges of the Division, or the Lord Ordinary, or by a commissioner (but see 31 & 32 Vict. c. 100, s. 62; Ersk. iv. 1. 58, note *c*, p. 1087, Nicolson's ed.). On being reported to the Court, the proof is printed and boxed, and the case on again appearing in the Single Bills is sent to the Summar Roll, where counsel are heard and decree is pronounced. According to the present practice, the Court does not usually require, as it did formerly, the Clerk of Court to propose a statement of the evidence and the procedure followed (*Christie*, 1850, 12 D. 1172). For the interlocutors, see Mackay, ii. p. 325.

[Stair, iv. 32, and More's *Notes*, 383; Ersk. iv. 1. 54–59; Bell, *Prin.* 883; Dickson, *Evidence*, ed. Grierson, 1328–1360; Shand, *Practice*, ii. 828–844; Mackay, *Practice*, ii. 318–326; Thomson, *Bills*, ed. Dove Wilson, 204–207.]

Provisional Order.—Under various Acts of Parliament the promoters of schemes which would otherwise require to be sanctioned by a private bill, may obtain the necessary powers more simply and cheaply by applying to a Government department or public authority to issue a provisional order or certificate. In such cases the department concerned, after satisfying itself that the powers craved should be granted, issues an order which becomes law, generally after subsequent confirmation by Parliament. The statutes under which these orders may be granted are numerous; and the authorities authorised to issue them include the Secretaries of State, the Board of Trade, the Local Government Board, the Board of Agriculture, the Education Department, the Railway and Canal Commission, and the county authority. In Scotland, the Secretary for Scotland, under the Act of 1885, constituting the office (48 & 49 Vict. c. 61), as amended by the Acts of 1887 (50 & 51 Vict. c. 52) and 1889 (52 & 53 Vict. c. 16), had transferred to him all powers and duties vested in any of the principal Secretaries of State, with the exception of those of the Secretary of State for War, and of those under the statutes specified in the Act of 1887, and also the powers and duties of the Board of Trade relating to provisional orders under certain Fisheries Acts. Under later Acts further powers of provisional legislation have likewise been conferred upon the Secretary for Scotland. The following is a table of the bodies empowered to issue orders in Scotland, the principal Acts authorising them, and the purposes for which they may be granted:—

Authority.	Act.	Object.
Secretary for Scotland	Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), ss. 44, 45	Alteration of number of magistrates and council. Special powers to carry out purposes of Act.
,,	Police (Scotland) Act, 1890 (53 & 54 Vict. c. 67), s. 24	Regulation of police pension fund.
,,	Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), ss. 15, 51, 91, 93	Transfer of powers to county council. Alteration of boundaries, number of councillors, etc.
,,	Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 8, 96	Carrying out improvement scheme.
,,	Alkali Works Regulation Act, 1887 (44 & 45 Vict. c. 37), s. 10	Regulation of discharge of gases.
,,	Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 23	Determination of doubtful boundaries of parliamentary divisions.
,,	Public Parks (Scotland) Act, 1878 (41 Vict. c. 8), ss. 6, 8	Enabling local authority of a burgh to acquire land for public parks.
,,	Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45, ss. 29–39, as amended by 47 & 48 Vict. c. 27)	Establishment and regulation of oyster, etc., fisheries.
Secretary of State	Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 2	Compulsory acquisition of land for military purposes.
,,	Explosives Act, 1875 (38 Vict. c. 17), s. 103	Repeal of local Acts or charters regarding explosives.
Board of Trade	Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 575–580	Constitution and regulation of pilotage authorities and districts.
,,	Electric Lighting Acts, 1882 and 1888 (45 & 46 Vict. c. 56, s. 4, as amended by 51 & 52 Vict. c. 12, ss. 2, 3)	Supply of electricity.
,,	Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 24	Revised classification of traffic and schedule of rates.
,,	Gas and Water Works Facilities Acts, 1870, 1873 (33 & 34 Vict. c. 70, as amended by 36 & 37 Vict. c. 89)	Supply of gas and water.
,,	Tramways Act, 1870 (33 & 34 Vict. c. 76, Pt. I.)	Construction of tramways.
,,	General Pier and Harbour Acts, 1861, 1862 (24 & 25 Vict. c. 47, and 25 & 26 Vict. c. 19)	Construction and regulation of piers and harbours.
,,	Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 118)	Authorising working agreements, additional capital, etc.
,,	Railway Construction Facilities Act, 1864 (27 & 28 Vict. c. 121)	Construction of railways, and works in connection therewith, when all parties interested consent.
Local Government Board for Scotland	Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 145	Compulsory acquisition of land for the purposes of the Act.
,,	Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), s. 25	Compulsory acquisition of land by parish council (on appeal from county council).
Scotch Education Department	Education (Scotland) Act, 1878 (41 & 42 Vict. c. 78), s. 31	Compulsory acquisition of land for the purposes of the Education Acts.
Railway and Canal Commission	Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 2	Construction of works on private land.

Authority.	Act.	Object.
Light Railway Commissioners	Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 7	Authorising a light railway.
Local Authority (County Council, Town Council, or Police Commissioners)	Allotments (Scotland) Act, 1892 (55 & 56 Vict. c. 54), s. 3	Compulsory acquisition of land for allotments.
County Council	Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), s. 25	Compulsory acquisition of land by parish council.

From the provisions of the above-mentioned Acts it will be seen that the general procedure under the provisional order system consists, in the first place, of a local inquiry, in some cases compulsory, in others discretionary, by the department, and subsequently an Act of confirmation by Parliament. But in the case of provisional certificates under the Railway Companies Powers Act, and the Railway Construction Facilities Act of 1864,—which are only granted in the absence of opposition,—there is no express confirmation; but the draft certificate is simply laid before Parliament for a certain time, and if neither House resolves that the certificate should not be made, a certificate may be issued in accordance with the draft. There are also various other statutes under which orders of minor importance may be issued by public departments or other bodies, and become final either by lying before Parliament for a certain time without being disapproved of, or after confirmation by an Order in Council. Thus under the Universities (Scotland) Act, 1889 (52 & 53 Vict. c. 55, s. 20), the ordinances made by the commissioners under the Act required to be laid before Parliament, and thereafter confirmed by an Order in Council, provided neither House presented an address against such approval. The same regulations apply to the ordinances which, since the expiration of the powers of the commissioners, the University Courts are now empowered to issue (s. 21). Similarly, under the Factory and Workshop Act, 1878 (41 Vict. c. 16), a Secretary of State has power to make orders regarding employment in factories and workshops, and by sec. 64 these must be laid before both Houses of Parliament, either of which may by resolution annul the same.

Even in the case of provisional orders proper, the provisions of the various statutes vary a good deal both as to the kind of authority which is empowered to issue them, the extent of the powers which the order may confer, and the nature of the confirmation required. Thus while the power of issuing orders is for the most part confined to Secretaries of State, Government departments, or bodies of experts, such as the Railway and Canal Commissioners or the Light Railway Commissioners, the Allotments Act of 1892 and the Local Government Act of 1894 introduced a new principle by authorising local authorities in burghs and counties to issue orders themselves. In the event of the county council refusing to issue an order under the Local Government Act, an appeal may be taken to the Local Government Board, who may then themselves issue an order. Again, while most of the orders issued by authorities other than the Board of Trade are for the purpose of putting in force the compulsory clauses of the Lands Clauses Act for the acquisition of land, those issued by the Board of Trade under the Acts for the construction of harbours and tramways, and the supply of gas, water, and electricity, confer no power to take private land or to invade a district already within the area of supply of a similar statutory body. Where such powers are acquired in the latter class of

applications, recourse must still, accordingly, be had to procedure by private bill. Under orders for the supply of gas, water, or electricity, the undertakers may, however, under the incorporated clauses of the Gas and Water Works Clauses Acts, break up streets. Again, while most of the orders require express confirmation by Parliament by being embodied in a provisional order confirmation bill, orders under the Telegraph Act, 1892, and the Public Health (Scotland) Act, 1897, require no confirmation, unless a memorial or petition is presented praying that the order may be laid before Parliament; while under the Local Government (Scotland) Act, 1894 (where the order is issued by the county council), and the Light Railways Act, 1896, the order is confirmed by the Local Government Board for Scotland and the Board of Trade respectively, and not by Parliament at all.

It is impossible to give an exhaustive account of the procedure necessary in carrying through a provisional order, because each statute contains its own provisions for the purpose. In addition to these, the Board of Trade have issued regulations for provisional orders in regard to piers and harbours, pilotage, and electric lighting respectively. These make full provisions for notices, deposits, etc., analogous to those required under the Standing Orders in the case of a private bill. The only standing orders of Parliament directly applicable to provisional orders are S. O. 38, 39, and 183 A H. C. (60 A H. L.). S. O. 39 requires duplicates of all plans, sections, books of reference, and maps, deposited in the case of an application for a provisional order, to be also deposited in the Private Bill Office. The others apply to bills for confirming provisional orders the same provisions for statements and clauses in regard to labouring class houses, as are applicable to private bills generally.

The application begins by a petition or memorial to the authority concerned, accompanied by a draft of the proposed order. An opportunity is afforded to those interested for making representations; and if any are made, a local inquiry may, and in many cases must, be held before the order can be issued. In the case of orders to be issued by a Government department, the inquiry is generally conducted by the Sheriff who is appointed for that purpose. All who are interested are heard, no rules of *locus standi* ever having been established or enforced. In some cases there may be a double inquiry. Thus in the event of opposition to an order under the Local Government (Scotland) Act, the Act prescribes a public inquiry—first by the county council, and afterwards by the Local Government Board. As a result of the inquiry, the order may be refused, or issued with or without amendment.

In the event of the order requiring Parliamentary confirmation, it is brought before Parliament in a confirming bill, which is treated partly as a private and partly as a public measure (see PRIVATE BILLS). The confirmation bill, which usually schedules a number of orders at once for confirmation, is introduced as a public measure by the department concerned. In order to ensure that there shall be time to deal with it in the event of opposition, S. O. 193 A provides that no provisional order bill originating in the House of Commons shall be read the first time after 1st June. After the first reading the bill is referred to the examiners (S. O. 72 H. C.; 88 H. L), before whom compliance is proved with the Standing Orders above mentioned, and also with the Wharncliffe Orders, if applicable (S. O. 62–66), and parties may appear and be heard in the same way as in the case of an ordinary private bill. In the House of Commons, after the second reading the bill stands referred to a committee, and may be opposed by

petitioners in the ordinary way (S. O. 151, 208 A; 210 H. C.); otherwise it is treated as an unopposed private bill. The committee consider and report upon all the orders included in the bill, both opposed and unopposed (Erskine May, 780). In the House of Lords the bill, if unopposed, may either pass through all its stages as a public bill, or it may be referred to the Chairman of Committees to be dealt with as an unopposed local bill. If opposed, it stands referred to a Select Committee, like an ordinary private bill. If it includes both opposed and unopposed orders, it first goes before a Select Committee in respect of the opposed orders, and is then considered in a committee of the whole House, like a public bill (S. O. 96, 102 A H. L.) (Erskine May, 808). Amendments, if within the statutory powers of the body which issues the order, are inserted in the order itself; if they are in excess of such powers, they are inserted in the bill (Erskine May, 780). By the Act 34 & 35 Vict. c. 3, committees on provisional order confirmation bills may award costs in the same way as in the cases of ordinary private bills. But under the Housing of the Working Classes Act, 1890, and the Allotments (Scotland) Act, 1892, the committee may award costs by a majority, according as they may be of opinion that opposition to the confirmation is or is not justified. Under S. O. 151 the promoters of provisional orders are exempt from the House fees which would otherwise be payable in the course of obtaining confirmation; but opponents are subject to payment of fees as in the ordinary case.

[Erskine May, *Parliamentary Practice*, c. 26; Dodd and Wilberforce, *Private Bill Procedure*, c. 10; Clifford, *History of Private Bill Legislation*, vol. ii. c. 18; Macassey, *Private Bill Legislation*, part ii.; Regulations issued by Board of Trade.]

See PRIVATE BILL.

Provisions to Children, Widows, and Husbands.—See LEGITIM; MARRIAGE CONTRACT; CONDITIO SI SINE LIBERIS; DONATION; TERCE; COURTESY; JUS RELICTÆ; JUS RELICTI; CONJUNCT RIGHTS; ENTAILS; etc.

Provost.—See BURGH (ROYAL).

Proxy is the term used to denote (1) a person appointed to represent and vote for another at a meeting or meetings; (2) the instrument by which such an appointment is made. A general right to vote by proxy is not recognised at common law (*Harben*, 1883, 23 Ch. D. 14), but in every instance such right must depend for its existence either upon statute (*e.g.* Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79, sec. 63 empowering creditors in bankruptcy proceedings to vote by mandataries), or contract (*e.g.* a limited company's articles of association), or special custom (*Robertson*, 1830, 8 Shaw, 587).

Formerly members of the House of Lords were entitled to vote on divisions by proxy, but a standing order was made on March 31, 1868, that "the practice of calling for proxies on a division shall be discontinued." In the election of the sixteen Scotch Representative Peers, votes may be given either in person or by proxy, and special rules for such votes are contained in 6 Anne, c. 23, ss. 4, 5, 6. It is chiefly, however, in connection with meetings of shareholders in companies, creditors in bankruptcy pro-

ceedings, and heritors under the Poor Law Amendment Act, 1845, 8 & 9 Vict. c. 83 (*Laurie*, 1874, 1 R. 402), that questions of law have arisen.

Form of Proxy.—As a general rule, the instrument by which a proxy is appointed does not require to be in any special form. It must, however, be signed and in writing, but need not be either holograph or tested (*Scudamore*, 1797, Mor. 8559). It may be "general" or "special," according as it authorises the appointee to vote at all, or at a particular meeting or meetings. A mandate by a public company or corporation does not require, apart from special provisions, to be under seal, but may be signed by any person acting under the express or implied authority of the company (Companies Act, 1867, 30 & 31 Vict. c. 131, s. 37). But see below as to effect of Sched. I. of Table A. of Companies Act, 1862.

There are, however, certain statutory requirements which must always, with the exceptions noted, be complied with.

By the Stamp Act, 1891, 54 & 55 Vict. c. 39, s. 80, and Schedule "Letter and Power of Attorney," it is provided that where the person or persons named in the instrument are appointed to vote at any *one* meeting or any adjournment thereof, the instrument must bear a penny stamp, which may be an adhesive one, and which must be cancelled by the person by whom the instrument is executed. It cannot be affixed after execution. In all other cases, *e.g.* where a proxy is authorised to vote at more than one meeting and any adjournment thereof, a ten shilling stamp is requisite; and if the document has been executed abroad without the stamp, it may be stamped within thirty days after it has first been received in the United Kingdom. A fifty pounds penalty attaches to anyone voting by means of an unstamped instrument, and to anyone executing such instrument, and any vote so given is void. No stamp is required in the case of proxies appointed to vote in bankruptcy proceedings (Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79, s. 184), or at meetings of a Parochial Board (Poor Law (Scotland) Act, 1845, 8 & 9 Vict. c. 83, s. 22). Every letter or power of attorney appointing a proxy to vote at a meeting, and every voting paper, charged respectively by the Act with the duty of one penny, must specify the day of the meeting, and is only available at that meeting and any adjournment thereof. As to the meaning of the word "adjournment" and the effect of an erasure in the date of meeting, see *Thompson*, 1871, 10 M. 178, 3 R. H. L. p. 1.

Under the Companies Act, 1862, First Schedule, Table A., Articles 48, 49, 50, 51, voting by proxy is expressly sanctioned, and express rules as to form are given, which are binding upon all companies to which Table A. is applicable (see sec. 15 of the Act). A form of proxy is given in Article 51. It is provided that the instrument of appointment must be in writing, under the hand of the appointor, or, if the appointor is a corporation, under the common seal, and must be attested by one or more witnesses. The instrument must be deposited at the company's registered office not less than seventy-two hours before the meeting, and no instrument appointing a proxy is valid after the expiration of twelve months from the date of its execution. A proxy paper signed by A., with the name of the proxy in blank, and handed by him to B., may be filled up by B., and will then apparently be valid (*Lancaster*, 1877, 5 Ch. D. 911). In the absence of any provision as to the necessity of lodging the instrument, the proxy's vote ought to be accepted, although he is not prepared at the meeting to prove his authority by at once producing the proxy paper (*English, Scottish, and American Bank*, [1893] 3 Ch. 385, 418). But the mandate must be produced in bankruptcy proceedings (Bankruptcy (Scotland) Act, 1856, 19 &

20 Vict. c. 79, s. 63). The expense of stamping proxy papers ought to be borne by the persons who desire to use them, and not by the company, in the absence of any stipulation to the contrary (*Studdert*, 1886, 33 Ch. D. 528).

Who may appoint and who may be appointed Proxy.—A corporation entitled to hold shares in another company has the same right of voting by proxy as any other member (*India Zoedone Co.*, 1884, 26 Ch. D. 70, 78; *R.* v. *Samuel*, [1895] 1 Q. B. 815). One partner may appoint a proxy on behalf of a private company of which he is a partner (*Turnbull*, 1828, 6 Shaw, 676). A creditor may appoint several persons as proxies for separate debts (*Clark*, 1847, 9 D. 399), or he may make a joint appointment for the same debt (*Forrest*, 1848, 11 D. 308). Where a proxy is personally interested in the result of a resolution, as by way of obtaining remuneration or a pecuniary benefit out of a bankrupt's estate otherwise than as a creditor rateably with other creditors, it is thought that, on the ordinary principles of trust, his vote would be rejected (cf. express provision English Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, Sched. I. 26). The trustee in a sequestration cannot (*Witham*, 1884, 11 R. 776), but a commissioner may, act as a proxy (Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79, s. 75). Article 49 of Table A. of the Companies Act, 1862, provides that no person shall be appointed a proxy who is not a member of the company.

Powers of the Proxy.—The powers of the appointee depend upon the terms of the instrument of appointment. As a rule, they must be strictly adhered to (*Muir*, 1876, 3 R. H. L. p. 1; Bankruptcy (Scotland) Act, 1856, s. 63). It is not competent to prove by parole evidence that a mandate was granted for a special purpose not apparent from the terms of the mandate itself (*Thompson*, 1871, 10 M. 178). A mandate to "vote and act at all meetings under the sequestration" was held not to entitle the mandatary to prosecute an appeal to the Court of Session against a deliverance of the Sheriff (*Ewing*, 1860, 22 D. 354). A mandate "to attend all meetings of the creditors, particularly any meeting which may be held for determining upon any offer of composition, and to vote and act for me thereat as you may think proper," did not entitle the mandatary to execute a deed in favour of the person proposed as cautioner for the composition, whereby the latter was practically released from any obligation (*Morrison*, 1849, 11 D. 653). On the other hand, a mandate in a sequestration empowering the mandatary "to attend, act, and vote at all meetings in the sequestration," is not restricted to meetings only, but includes all competent acts in the course of the sequestration, and therefore admits of concurrence being given to a petition for discharge, though not given at a meeting (*Buchanan*, 1882, 9 R. 621). See also *Barclay*, 1868, 7 M. 9, where a mandate in a sequestration "to act and vote at all meetings in the sequestration" was held (diss. Ld.-Pres. Inglis) sufficient, in the circumstances of the case, to entitle the mandatary to bind his principal to pay his share of the expenses of a litigation (contrast *Ewing*, above). The Bankruptcy Act, 1856, s. 4, defines "vote" as including "a consent to any offer of composition and to a discharge of the debtor, and also a dissent from such offer or discharge." A mandatary may put questions at the public examination of the bankrupt (*Smyth*, 1843, 6 D. 331).

Generally speaking, it may be said that narrow and technical objections to the votes of proxies will not be countenanced by the Court where the facts and circumstances show *bona fides*, and there can be no reasonable doubt as to the authority of the person presenting the mandate (*Turnbull*,

1828, 6 Shaw, 676; *Dyce*, 1846, 9 D. 310; *Dods*, 1847, 9 D. 1419; *Morrison*, 1849, 11 D. 653).

See Principal and Agent; Mandate; Buckley on *The Company Acts*, p. 524; Goudy on *Bankruptcy*, p. 202.

Puberty.—See Pupil; Marriage (vol. viii. p. 245); Crime (vol. iii. pp. 374–375).

Public Burdens.—The term "public burdens" includes all taxes imposed in respect of the ownership or possession of land. Such are cess or Land Tax (*q.v.*), school-rates, poor-rates, etc., which are dealt with in various articles throughout this work. The incidence of such on landlord or tenant, owner or occupier, is, apart from stipulation, generally fixed by the statute imposing them. See Lease; Heritors; Manse; County Council; Education; Poor; Roads and Bridges; Rating; Burdens.

Public Health Acts.—The various statutes relating to sanitary administration are now consolidated and amended by the Public Health (Scotland) Act, 1897, which repeals all previous Acts, with the exception of the Public Health (Scotland) Amendment Act, 1891. These, together with the Infectious Disease Notification Act, 1889, now compulsory throughout Scotland, are the statutes which fall strictly under the present title. The sanitary provisions of the Burgh Police (Scotland) Act, 1892, which apply exclusively within burghs, are too numerous and detailed to be dealt with in the present article, which is accordingly confined to the general sanitary code contained in the Public Health Acts.

I. PUBLIC HEALTH (SCOTLAND) ACT, 1897 (60 & 61 Vict. c. 38).

Definitions.—"Medical Officer of Health" means a legally qualified practitioner; and "Sanitary Inspector" means a S. I., appointed in each case by the local authority under the Burgh Police Act, 1892, or under the repealed or present Act.

"Veterinary Surgeon" means a member of the Royal College of Veterinary Surgeons.

"Parish" means a parish *quoad civilia* exclusive of any burgh or part thereof.

"Burgh" includes royal, parliamentary, and police burghs, and burghs incorporated by Act of Parliament.

"County" means county exclusive of any burgh, and does not include a county of a city.

"District" means the district of any local authority under the Act.

"District Committee" means a district committee under the Local Government Act, 1889, and subject to sec. 78 (3) thereof, as amended by the L. G. Act, 1894, s. 19 (7), where the county is not divided, includes a county council.

"Magistrate" means a magistrate having police jurisdiction under any Police Act.

"Premises" includes lands, buildings, vehicles, tents, structures, streams, lakes, seashore, drains, ditches, or places open, covered, or inclosed, whether built on or not, public or private, natural or artificial, and any ship.

"Land" includes water and any right or servitude to or over land or water.

"Ship" includes any ship not belonging to Her Majesty or any foreign Government.

"Street" includes highway, public bridge, road, lane, footway, square, court, or passage, whether a thoroughfare or not, and whether there are houses or not.

"House" includes schools, factories and other buildings where persons are employed.

"Factory" includes workshop and workplace.

"Knacker" means a person whose business it is to kill any horse, etc., not for butcher's meat.

"Slaughterer of cattle," etc., means one whose business it is to kill for butcher's meat.

"Owner" means the person entitled to receive the rents of the premises, including trustee, factor, tutor, or curator.

"Occupier" means the person having management or control of a building for himself or as agent of another; or the master or person in charge of a ship.

"Author of a nuisance" means the person through whose act or default the nuisance is caused, exists, or is continued, whether owner or occupier or both.

"Cattle" includes sheep, goats, and swine.

"Dairy" includes farm, cowshed, or any place from which milk is supplied, or where it is kept for sale.

"Burial" includes cremation.

"Day," "Daytime," mean between 9 a.m. and 6 p.m. (s. 3).

Part I.—Authorities for Execution of Act.

Central Authority.—The central authority is the Local Government Board (s 5). They may, on application of a parish council, or ten ratepayers, or on their inspector's report, inquire into the sanitary condition of any district, and may require answers and returns, and summon persons to attend; may administer oaths, and call for books, etc. (s. 6). The Board may authorise one of their members, or other commissioner, to hold a special inquiry, with all necessary powers (ss. 7, 8), and pay his expenses (s. 9). The penalty for giving false evidence, or refusing to obey the summons of the Board, is £5, and for a subsequent offence, £20 (s. 10).

Local Authorities.—These are: (1) In burghs under the Burgh Police Act, 1892, the town council or burgh commissioners; (2) in other burghs, the town council or board of police; (3) in districts where the county is divided into districts, the district committee; (4) in counties not so divided, the county council. In counties, the local authority for rating, borrowing, or acquiring land is the county council (s. 12). Where a parish or burgh is situated in more than one county, the Board may determine to which it shall belong for the purposes of the Act (s. 13). The local authority, as a body corporate, may sue and be sued and hold lands; they may appoint committees to receive and issue notices, take proceedings, and in all or certain specified respects to execute the Act,—two to be a quorum,—and may empower any person to take proceedings on their behalf. They succeed to all property and obligations of local authorities under repealed Acts (s. 14).

Appointment of Medical and other Officers.—The local authority must appoint a medical officer of health, and a sanitary inspector, who is also to

be inspector of common lodging-houses, and, subject to the approval of the Board, must regulate their duties and their relations to each other, whether appointed before or after the commencement of the Act; offices must be provided, if required by the Board, and proper salaries for all officers and clerks appointed by the local authority. The names, addresses, and salaries of the M. O. and S. I. must be reported to the Board, who may require returns and special reports from the local authority, their said officers, and registrars. A M. O. or S. I. is removeable only by or with the sanction of the Board. He must, if required by the local authority, name a qualified substitute, who, if approved by the local authority, may exercise all powers during absence of his principal; but the local authority, with consent of the Board, may withdraw their approval, and require another substitute to be named. Officers appointed under former Acts are to continue in office. The registrar must furnish to the local authority, on payment, such periodical returns of births and deaths as may be required, with approval of the Board (s. 15). (See MEDICAL OFFICER OF HEALTH.)

PART II.—SANITARY PROVISIONS.

General Nuisances.—The following are declared to be nuisances:—

(1) Any premises so constructed or in such a state as to be a nuisance or injurious or dangerous to health.

(2) Any street, ditch, cistern, privy, drain, ashpit, etc., 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 building where animals are kept in such a manner or in such numbers as to be a nuisance or injurious or dangerous to health. (See DAIRIES, COW-SHEDS, AND MILK-SHOPS.)

(5) Any accumulation or deposit (including deposit of mineral refuse) which is a nuisance or injurious or dangerous to health, or any deposit of offensive matter, refuse, offal, or manure (except farmyard, or byre, or stable manure, or spent hops) within 50 yards of a public road wherever situated, or any offensive matter, etc. (except as aforesaid), in uncovered trucks 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. (See Proviso (*a*) *infra.*)

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

(7) Any house or part thereof so overcrowded as to be injurious or dangerous to the health of the inmates. (See Proviso (*b*) *infra.*) A cottage let to a farm tenant, who put a workman and family therein, was found to be a nuisance by reason of overcrowding. Held that the landlord was not liable as author of the nuisance (*Home*, 1876, 3 Coup. 239).

(8) Any schoolhouse or factory not subject to the Factory and Workshop Acts as to cleanliness, etc., which is (i.) not kept cleanly and free from effluvia arising from drains, etc., or (ii.) not ventilated so as to render harmless, so far as practicable, any gases, dust, etc., that are a nuisance or injurious or dangerous to health, or (iii.) so overcrowded during work as to be injurious or dangerous to the health of those employed.

(9) Any fireplace or furnace within a burgh or special scavenging

district which does not, so far as practicable, consume its own smoke for working steam-engines, or in any manufacturing or trade process. A furnace may be a nuisance although well constructed, if it fails to consume its own smoke from constant misuse (*L. A. of Dumfries*, 1884, 11 R. 694).

(10) Any chimney (not of a private dwelling-house) emitting smoke in such quantity as to be a nuisance or injurious or dangerous to health.

(11) Any churchyard or cemetery so situated, or crowded, or conducted as to be offensive or injurious or dangerous to health. (See BURYING-PLACE.)

Such nuisances may be dealt with summarily as provided by the Act: Provided that (*a*) no penalty is to be imposed in respect of accumulations necessary for carrying on a manufacture, unless kept longer than necessary for the purposes of the business, and if the best available means have been taken to prevent danger to health; and (*b*) where a dwelling-house is used as a factory, or *vice versâ*, and is complained against as a nuisance by reason of overcrowding, the Court must have regard to the circumstances of such other use (s. 16).

The local authority must inspect their district from time to time for the detection and removal of nuisances, and otherwise enforce their powers relating to public health, so as to secure the sanitary condition of all premises (s. 17). If they, or the M. O. or S. I., have reasonable grounds for suspecting the existence of a nuisance, they or any of them may enter any premises, and open up and examine ground, between 9 a.m. and 6 p.m., or at any hour when suspected operations are carried on. If admission is refused, the Sheriff, etc., after notice to the owner or occupier, may require him to admit the local authority. Failure to obey such order is punishable with a fine of £5; and on such failure, warrant for forcible entry may be granted.

If no nuisance is found, the local authority must restore the premises at their own expense (s. 18).

The police are required to inform the local authority of the existence of nuisances (s. 19).

Procedure for Removal of Nuisance.—When the local authority are satisfied of the existence of a nuisance, they must serve a notice on the author of the nuisance, or, if he cannot be found, on the occupier or owner of the premises, requiring him to do what is necessary for its removal, or to prevent its recurrence, and they may specify the works to be executed (s. 20 (1) (2)). (See *L. A. of Cadder*, 1879, 6 R. 1242, and *Police Comrs. of Govan*, 1885, 22 S. L. R. 843, as to meaning of "author of a nuisance.")

In cases of structural defect, or unoccupied premises, the notice must be served on the owner; and where the author cannot be found, and the occupier or owner is not in fault, the local authority may themselves remove the nuisance (s. 20 (3)).

In case of non-compliance, or if the local authority apprehend recurrence of the nuisance, they must proceed by summary petition (s. 21).

On summary petition by the local authority, the Sheriff or other magistrate, if nuisance is proved to exist, or if removed, to be likely to recur, must decern for removal, remedy, or interdict, and may impose a fine of £5 on an owner or occupier guilty of wilful fault or culpable negligence. Applications under secs. 16 (6) and 16 (8) must be on medical certificate, or representation by parish council or ten ratepayers: these, as well as applications under subsecs. (9) and (10), must be made to the Sheriff. In

applications under subsec. (11), which must be to the Sheriff, intimation to the author of the nuisance is unnecessary, but must be made to the collector of the churchyard, or other person named by the Sheriff (s. 22).

The decree need not be restricted to the special remedy craved, but may ordain the author of the nuisance, or owner or occupier, to execute works, or to do or abstain from doing such things as are necessary, or grant interdict against recurrence. An uninhabitable house may be closed, and if subsequently made habitable, may be declared to be so (s. 23).

In case of failure to comply with the decree, the author of the nuisance, or the owner or occupier, is liable to a penalty of 10s. per day during failure, under subsecs. (1), (2), (3), (4), (5), (7), (10), (11); an owner or occupier knowingly infringing interdict, to a penalty of 20s. per day. Under subsecs. (6), (8), (9), the penalty for non-compliance is £5 for the first offence, £10 for the second, and thereafter double the preceding penalty; not exceeding £200.

Under subsec. (9) the Sheriff may suspend his determination, to allow the author of the nuisance to mitigate the same (s. 24); where structural works are necessary, he may appoint them to be executed under the direction of a person appointed by himself, and may require the local authority to furnish an estimate of the cost (s. 25).

If the decree is not complied with, warrant may be granted to enter the premises, and remove the nuisance; or if in the original application it appears that the author of the nuisance is not known or cannot be found, the decree may at once ordain the local authority to execute the necessary works, and the expenses may be recovered from the author, and failing him, from the owner (s. 26). But the author of a nuisance cannot be made liable for the expense of its removal by the local authority, unless he has had an opportunity of removing it himself (*U. K. Temperance Institution*, 1877, 4 R. (J. C.) 39; *L. A. of Cadder*, 1879, 6 R. 1242).

Articles removed by the local authority in pursuance of the Act may be sold by public roup after five days' notice; where under £2 in value, or if delay would be prejudicial to health, immediate sale or destruction may be ordered. Any surplus after paying expenses belongs to the owner; any deficit must be paid by him (s. 27).

Where a watercourse, drain, etc., along any street, or beside dwelling-houses, is so foul as to be beyond remedy, the local authority must construct a sewer; if beyond their district for outfall or distribution, only with consent of the Board. For this purpose they may enter and use premises, the damage to be assessed summarily by the Sheriff; but any person contributing to the pollution cannot recover, unless he had justifiable excuse. The cost of such works is to be met by assessment upon all owners of premises discharging anything but pure water, either in one sum or by instalments; fourteen days' notice must be given to resident owners, or, where the owner is non-resident, to the occupiers, and the sums so assessed are recoverable in the same way as the public health general assessment (s. 28). Such sums may be recovered under sec. 154; and the fact that the cost of the operations has been in the first instance defrayed out of the public health general assessment is no defence to the claim (*L. A. of Selkirk*, 1877, 4 R. (J. C.) 21).

The local authority may erect public ashpits, privies, and urinals, the privies to be cleansed daily, and they may require the owner or occupier of any schoolhouse, factory or building where persons are employed in any manufacture or business, to provide sufficient privies for the separate use of each sex. The penalty for failure to comply with such notice is £20 (s. 29).

(See also Coal Mines Regulation Act, 1887, ss. 74, 76 (10); Factory and Workshop Act, 1895, s. 35 (1).)

Any person who causes any drain, privy, etc., to be a nuisance or injurious or dangerous to health, by improper interference therewith, is liable to a penalty of £5 (s. 30).

Where a watercloset, etc., is used in common by the occupiers of two or more separate dwelling-houses, (1) any person injuring the same is liable to a penalty of 10s.; (2) where such watercloset is kept in an unclean state, the persons in default, or, where they cannot be ascertained, each person having the use thereof, is liable to a penalty of 10s., and 5s. for each day of continuance after conviction (s. 31).

Offensive Trades.—No person may establish, without sanction of the local authority, the business of blood-boiler, bone-boiler, manure manufacturer, soap-boiler, tallow-melter, knacker, tanner, tripe-boiler, gut or tripe cleaner, skinner or hide factor, slaughterer of cattle or horses, or any business declared by the local authority, with approval of the Board, to be offensive, under penalty of £50, and £25 for each day of continuance after conviction (s. 32 (1)). The sanction of the local authority is no defence to an action of interdict for nuisance at common law (*Pentland*, 1855, 17 D. 542). The local authority must give their sanction by order, but only after 14 days' notice, and hearing objections. Any person aggrieved may appeal to the Board against the granting or refusal of sanction; in a district other than a burgh, the appeal must be first to the county council (s. 32 (2)).

The local authority may make bye-laws for the conduct of such businesses, the structure of the premises, and the mode of applying for sanction, as also for businesses under sec. 37 (s. 32 (3)).

Any such bye-law may, in addition to a penalty, empower the Sheriff to deprive temporarily or permanently any person contravening the same, of the right to carry on such business, under a penalty of £25 for each day of disobedience; an order thereunder is appealable to the Lord Ordinary on the Bills, under sec. 156 (s. 32 (4)).

A fee not exceeding 40s. may be charged for a sanctioning order (s. 32 (5)).

A business is deemed to be established when it is removed to other premises, or renewed in the same premises after a year's discontinuance, or if the premises are enlarged without authority; but not where the ownership or occupancy is changed, or the premises rebuilt without extension (s. 32 (6)).

Slaughter-houses.—No premises may be used as a slaughter-house or knacker's yard without a licence from the local authority, under a penalty of £5; the fact that cattle or horses have been taken into unlicensed premises being *primâ facie* evidence of an offence (s. 33 (1)). See *Simpson*, 1896, 23 R. (J. C.) 22.

Licences endure for a year, and expire on day fixed by the local authority, who may charge a fee not exceeding 5s. In case of new licences, 21 days' notice must be given by advertisement, and objectors heard. Seven days' notice of objection to renewal must be served on the applicant; where notice has not been given, the local authority may adjourn consideration, and direct service to be made (s. 33 (2) (3) (4)).

The local authority may enter any slaughter-house or knacker's yard by day, or when business is carried on, to see if the Act or bye-laws are contravened (s. 33 (6)).

Appeal to the Board is allowed against the refusal of a licence to premises licensed at the passing of the Act, or of renewal; in a district other than a burgh the appeal must first be to the county council (s. 33 (7)).

The local authority of any landward district may provide slaughter-

houses; and two or more local authorities may combine for this purpose. They may borrow therefor on the security of the public health general assessment, the rates levied for the use of the shambles, and the ground on which they are erected, in compliance with sec. 141 (s. 34). The local authority may regulate by bye-law the construction, situation, and cleansing of pig-styes (s. 35).

The local authority, on certificate by the M. O., or representation by a parish council or ten ratepayers, may petition the Sheriff regarding any manufacture or business which is complained of as a nuisance or injurious or dangerous to health; if required by the Board, they must take proceedings; and the author of the nuisance, or, failing him, the occupier, or, failing him, the owner of the premises, is liable to a penalty of £50, unless he has used the best practicable means for removing the nuisance. Where the offender undertakes to adopt means for removing or mitigating the nuisance, the Court may suspend its determination (s. 36 (1) (2)).

Proceedings may be taken in the Court of Session, when the complaint is on the certificate of the M. O.; and the local authority may proceed against a manufactory or premises within another district, before the Sheriff in that district (s. 36 (3) (4)).

The removal of house and street refuse by the local authority or their contractor may be complained against as a business causing a nuisance under the foregoing provisions. Proceedings may be taken in a landward district by the county council, or in any district by a person authorised by the Board. Any premises used for the treatment or disposal of such refuse, as distinct from the removal thereof, which are a nuisance or injurious or dangerous to health, may be dealt with summarily as a nuisance, at the instance of the county council or such authorised person (s. 37).

Scavenging and Cleansing.—The resolution of a county council or district committee regarding the formation of a special scavenging district under sec. 44 of the L. G. Act, 1894, may be appealed to the Sheriff by any person interested, in conformity with sec. 122 (1) of this Act. In cases under sec. 44 (3) (where the proposed special district infringes a special drainage or water supply district), the county council must have first disposed of the resolution. Where the boundaries of a burgh are extended so as to include any part of a special scavenging district, the burgh commissioners supersede the district committee upon such terms as may be agreed on, and failing agreement, as the Sheriff may fix (s. 38).

Within a special scavenging district, the district committee or county council may either scavenge the highways and footpaths or contribute for that purpose out of the assessments raised under the Roads and Bridges Act, 1878. They may require the owners of premises adjoining any private street or footway to level, macadamise, pave, and channel the same to their satisfaction; and failing compliance, they may execute the necessary works, and recover the cost from the defaulting owners in proportion to their frontage and valuation. Such an order may be appealed to the Sheriff under sec. 122 (s. 39).

The local authority may give notice in writing to the owner or occupier to whitewash or cleanse any house or article therein which is in such a filthy or unwholesome condition as to endanger health; or where such cleansing would tend to prevent or check infectious disease. Failing compliance, the offender is liable to a penalty of 10s. for every day of default, and the local authority may cleanse the house, and recover the expenses from him (s. 40).

On complaint by a local authority that their district is injuriously or

dangerously affected by the foul state of any watercourse or open ditch lying near to, or dividing their district from an adjoining district, the Sheriff in that district may order the same to be cleansed, and such works as are necessary to be executed, and apportion the cost among the parties liable (s. 41).

In any special scavenging district, the local authority may give public notice for the perio lical removal of manure from mews or other premises (except cattle courts); under a penalty, without further notice, of 20s. for each day's failure to remove such accumulation (s. 42).

The sanitary inspector may give notice, to the owner of any accumulation of manure or other offensive matter, or to the occupier of the premises, to remove the same; failing removal within 48 hours, it may be sold and disposed of by the local authority; the surplus after paying expenses, if any, to be paid to such owner, or the deficit to be recovered from him, or, failing him, from the occupier or owner of the premises (s. 42).

Unsound Food.—The medical officer, sanitary inspector, or a veterinary surgeon approved by the local authority, may at all reasonable times enter any premises, or search any vehicle, parcel, etc., and examine (*a*) any animal, alive or dead, intended for the food of man, which is exposed for sale, or deposited in any place, or is in course of transmission for the purpose of sale, or of preparation for sale; (*b*) any article intended for food, and sold or exposed, or so deposited, or in course of transmission; the proof that it was not intended for sale, or for the food of man, resting with the accused; and such officer may seize any animal or article which he thinks unfit for food, in order to have it dealt with by a magistrate. In the case of a living animal, the M. O. or S. I., unless himself a veterinary surgeon, must be accompanied by one. Power of search is also given to the police (s. 43 (1)).

A complaint under this section must set forth that the article was exposed for sale or deposit, and also that it was intended for the food of man (*Phillips*, 1892, 19 R. (J. C.) 29); but need not state the cause of the unfitness (*Cairns*, 1886, 13 R. (J. C.) 83; *Gibson*, 1892, 20 R. (J. C.) 47).

Where the article is proved to be unfit for human food, the Sheriff or magistrate must order it to be destroyed or disposed of; and the owner or person in whose possession or premises it was found is liable to a penalty of £50 for each animal, or article, or parcel, unless he proves that he and the person acting on his behalf did not know, and could not with reasonable care have known, of its condition. If before a Sheriff, he may be sentenced to three months' hard labour, with expenses, if he knowingly and wilfully committed the offence. But a certificate by a veterinary surgeon that he examined at the place of slaughter and passed the animal within a reasonable time prior to the seizure, will exempt from penalty (s. 43 (2)).

A warrant to destroy a carcase need not crave a conviction, and is not appealable to the High Court (*Couper*, 1889, 17 R. (J. C.) 15). But it is competent to proceed for penalties in a subsequent petition (*Gibson*, 1892, 20 R. (J. C.) 47).

A local authority, or local authorities in combination, may appoint a place and time for the examination of animals, alive or dead, by an approved veterinary surgeon, on payment of fee by the owner. If he pass the animal, he must grant a certificate setting forth particulars; if he condemn, the local authority must destroy or dispose of it, any surplus over expenses being paid to the owner. Every carcase must be submitted whole for examination (s. 43 (3)).

Any person selling or consigning to another an animal or article for human food which is liable to be condemned, may be tried in the district

where it is seized, and is liable in the above-named penalties, unless he prove that he and his agent did not know, and could not with reasonable care have known, of its condition (s. 43 (4)).

Under a similar section in a local Act, an auctioneer to whom unsound fish were consigned, was held not liable to conviction (*Walker*, 1892, 20 R. (J. C.) 1). See also *Cairns*, 1889, 16 R. (J. C.) 81.

A veterinary surgeon granting such a certificate must forthwith send a copy thereof to the chief constable in the district of examination, and the seller must send the original certificate within seven days to the chief constable in the district of the sale; both under penalty of £20 (s. 43 (5)).

On a second conviction within twelve months of knowingly and wilfully contravening this section, the judge may order a notice of the facts to be affixed to the offender's premises, for a period not exceeding 21 days; obstructing the affixing of, or removing such notice, is punishable with a penalty of £5 (s. 43 (6)).

The occupier of a licensed slaughter-house contravening this section may on conviction be deprived of his licence (s. 43 (7)).

The offence of obstructing a medical officer, sanitary inspector, or veterinary surgeon acting under this section, if with intent to prevent discovery of an offence thereunder, or where the accused has been within twelve months convicted of obstruction, is punishable (before the Sheriff) with one month's imprisonment (s. 43 (8)).

Part III.—General Prevention and Mitigation of Disease.

(See Infectious Disease Notification Act, *infra*.)

Infectious Diseases.—Prevention.—The medical officer may, at reasonable times in the daytime, enter and inspect any house where he has reason to suspect the present or recent existence of infectious disease, and examine any person therein; if admission is refused, he may obtain judicial warrant to enter, under a penalty for obstruction of 40s. (s. 45).

The local authority may, and if required by the Board, must, provide apparatus, etc., for removal, disinfection, or destruction of infected articles, and may combine or contract with other local authorities for that purpose (s. 46).

On medical certificate, they may serve notice on the occupier (or owner if unoccupied) of an infected house, that they will disinfect the same, or disinfect or destroy any articles therein, unless the person notified undertakes to do so to the satisfaction of the medical officer or other qualified practitioner. Failing such undertaking, or fulfilment thereof, or of consent, the local authority may disinfect or destroy, and enter any premises. They may obtain warrant to remove uninfected inmates from infected premises, providing meanwhile free shelter and maintenance.

Compensation for articles destroyed or unnecessary damage by disinfection must be paid by the local authority.

The provisions of this section extend to tents, vans, and ships (s. 47).

The local authority may require delivery of any articles that have been exposed to infection, under a penalty of £10; and must return them after disinfection free of charge, paying compensation for articles destroyed or unnecessarily damaged (s. 48).

Persons earning a living by washing or mangling clothes, may be required to furnish the local authority with a list of their customers during the past six weeks, under a penalty of £5, and a daily penalty of 20s. (s. 49).

Any person who knowingly casts into any ashpit, or otherwise exposes, any infected matter, is liable to a penalty of £5, and £2 for every day of continuance after notice, which must be given to the occupier of every house which the local authority know to be infected (s. 50).

The penalty for knowingly letting a house in which infectious disease has been, without disinfection, as testified by the M. O.'s certificate, is £20: and this provision extends to inns and hotels (s. 51).

Any person letting a house who knowingly makes a false statement as to the existence of infection therein within six weeks previously, is liable to a penalty of £20, or (before the Sheriff) to a month's imprisonment with hard labour (s. 52).

Any person ceasing to occupy a house in which within six weeks there has been a case of infectious disease, who (*a*) fails to disinfect the same, as testified by the M. O.'s certificate; (*b*) fails to inform the owner or occupier; or (*c*) knowingly makes a false answer to the owner, occupier, or intending hirer as to the fact of infectious disease within six weeks previously, is liable to a penalty of £20. The local authority must notify these provisions to the occupier of any house which they know to be infected (s. 53).

A person suffering from infectious disease who is without proper accommodation or means of isolation, or is on board a ship, may, on certificate of the M. O. or other qualified practitioner, and with consent of the hospital authorities, be removed to hospital by order of the Sheriff, etc., on the application and at the cost of the local authority, and may be detained in hospital so long as infected; or the Sheriff may direct the removal of the other persons in the house, the local authority providing accommodation. An order is unnecessary in case of consent. The order may be addressed to any constable or officer of the local authority. The penalty for obstructing its execution is £10 (s. 54). (See *Mitchell*, 1893, 20 R. 253; *Sutherland*, 1894, 22 R. 95.)

A person in hospital suffering from infectious disease may be detained therein on a Sheriff's warrant at the cost of the local authority, if it appear that he would not have proper accommodation for preventing the spread of infection; and the time may be extended as often as necessary. Any officer of the local authority, or hospital, or constable, may execute the order (s. 55).

The following are offences punishable by a penalty of £5:—

The wilful exposure of an infected person without proper precautions in any street, public place, etc., (*a*) by the sufferer himself; or (*b*) by the person in charge of him. Want of proper precautions, as well as wilful exposure, must be proved (*Hunter*, 1894, 21 R. (J. C.) 22). (*c*) Knowingly giving, selling, exposing, etc., or washing in any wash-house or green used by persons other than the sufferer's family, any infected article without disinfection, as testified by the certificate of the M. O. or a qualified practitioner; (*d*) waking the body of any person who has died of infectious disease. But proceedings are not to be taken against persons transmitting with proper precautions articles for disinfection (s. 56).

No child who has suffered from infectious disease, or lived in an infected house within three months, may be sent to school without a medical certificate of disinfection. The person in charge, if knowingly or negligently, and the teacher, if knowingly, contravening, are each liable to a penalty of 40s. (s. 57).

No person suffering from infectious disease, or living in an infected house, may milk any animal, or pick fruit, or carry on business, so as to be likely to spread disease, under penalty of £10 (s. 58).

It is an offence, punishable with a penalty of £10, knowingly to convey or place in a public conveyance or ship any infected person, or for the latter to enter such conveyance. Where an infected person is so carried, the owner of the conveyance must give notice to the local authority and disinfect such conveyance, under a penalty of £5; and he may recover the cost from the person in fault.

The local authority, if required, are bound to disinfect the conveyance. But infected persons may be removed by rail or ship, if within an ambulance-waggon or other vehicle approved by the local authority (s. 59). The offence is committed by the entering, or placing, in a public conveyance, and must be prosecuted by the local authority of the district where that was done (*Kelso D. C.*, 1891, 29 S. L. R. 284).

Inspection of Dairies.—Where the M. O. has evidence of infectious disease arising from any dairy within or without the district, he must inspect and report (see MEDICAL OFFICER). The local authority may thereupon forbid the supply of milk, either within or without the district, until their order is withdrawn, which must be done when they are satisfied that there is no longer risk of infection. Such order may be appealed by any local authority or dairyman aggrieved to the Sheriff, but not to the county council. The penalty for obstructing an officer of the local authority, or supplying milk contrary to such an order, is £10, and £5 for each day's continuance. Proceedings must be taken before a Sheriff having jurisdiction in the place where the dairy is situate; and an order under this section is a defence to an action for breach of contract. The Contagious Diseases (Animals) Acts, or any Orders of the Privy Council thereunder, are not hereby affected (s. 60). (See DAIRIES, COW-SHEDS, AND MILK-SHOPS.)

The local authority, on a medical certificate that any dairy is the cause of infectious disease, may require of any dairyman, within or without their district, a list of all his customers within the district, and of the persons from whom he obtains milk, and relative accounts, etc., under a penalty of £5, and a daily penalty of 40s. A person not resident in the district may be prosecuted by the fiscal before the Sheriff of his own county (s. 61).

Hospitals and Ambulances.—The local authority may, and if required by the Board must, provide temporary or permanent hospitals for infectious diseases, and houses for convalescents. They may (*a*) build hospitals; (*b*) contract for the use of any hospital; (*c*) contract with any persons having the management of any hospital; (*d*) employ nurses for home attendance, with the Board's consent, and supply medicines and medical attendance. For all these purposes, two or more local authorities may combine, on such terms as may be agreed on or fixed by the Board. The consent of the Board must be obtained to any contract for the use of a hospital, or site and plans for its construction. The site must be within a convenient distance of the district.

Portable hospitals may be provided, with the sanction of the Board (s. 66). (See *Mags. of Edinburgh*, 1896, 23 R. 383.)

Conveyances for the removal of infected persons may be provided, and the expense of conveying to hospital paid, by the local authority (s. 67).

Mortuaries, etc.—These may be provided, and bye-laws made for their regulation (s. 68).

The Sheriff, etc., on a medical certificate, may direct to be removed to a mortuary, and buried within the time limited, (*a*) the body of a person who has died of infectious disease which is kept in a room where persons live

or sleep; or (*b*) is kept without medical certificate over forty-eight hours in a room used as a dwelling-place, sleeping-place, or workroom; (*c*) any dead body which may endanger the health of the inmates of the house, ship, or any adjoining house; (*d*) any unclaimed body which no sufficient person undertakes to bury. If necessary, immediate burial may be ordered (s. 69 (1)). The body, if not buried by the friends or relations within the time limited, must be buried by the local authority, and the expense may be recovered from the person liable.

The body of a person who has died of infectious disease may not be carried by rail or other public conveyance not being a conveyance reserved for such purpose, except on medical certificate that every precaution has been taken; and contravention hereof, or of any Sheriff's order hereunder, is punishable with a penalty of £5 (s. 69).

Buildings for *post-mortem* examinations may be provided in connection with a mortuary or otherwise, and regulations made therefor; but *post-mortem* examinations may not be made in a mortuary (s. 70). Local authorities may combine for the purposes of secs. 68–70, with approval of the Board (s. 71).

The body of a person who has died of infectious disease may not, without medical certificate, be kept over forty-eight hours in a room used as a dwelling-place, sleeping-place, or workroom, under penalty of £5 (s. 62). The body of a person who has died of infectious disease in a hospital may not be removed, except for burial, where a qualified practitioner certifies that it should not be removed for fear of infection, under a penalty of £10. But it may be removed to a mortuary (s. 63).

It is an offence, punishable with a penalty of £5, and 40s. for each day of continuance, (*a*) to use any public conveyance (except a hearse) for conveying the body of a person who has died of infectious disease, without notifying the owner or driver; (*b*) if the owner or driver fail, after intimation, to notify the local authority and disinfect the vehicle (s. 64).

The local authority may make bye-laws for securing the cleanliness and sanitary condition of public conveyances plying within their district, and for preventing overcrowding (s. 65). (See *Cairns*, 1888, 15 R. (J. C.) 51, as to application of bye-laws to hackney carriages passing through, but not licensed by the local authority of the district.)

Bye-laws as to Houses let in Lodgings.—The local authority may, and if required by the Board must, make and enforce bye-laws, for the whole or part of their district, (*a*) for fixing the number of persons who may occupy a house let in lodgings or occupied by the members of more than one family; (*b*) for registration; (*c*) for inspection; (*d*) for enforcing privy accommodation, drainage, cleansing, and ventilation of such houses and common passages; (*e*) for cleansing and limewashing; (*f*) for giving notices and taking precautions in case of infectious disease. This section applies not to common lodging-houses, but to farmed-out houses, *i.e.* those of one or two apartments leased by any person, and let furnished to several occupiers for limited periods, and to all seamen's and emigrants' boarding-houses, irrespective of charge for board (s. 72). Seamen's boarding-houses are also included under the definition of common lodging-houses (s. 3), and are further regulated by sec. 214 of the Merchant Shipping Act, 1894.

Tents and Vans.—A tent, van, shed, etc., if inhabited, in such a state as to be a nuisance or injurious or dangerous to health, or so overcrowded as to be injurious or dangerous to the health of the inmates, is a nuisance under the Act, and the local authority may make bye-laws for promoting

cleanliness and preventing infectious disease therein. The M. O. or S. I. may enter any such tent, etc., by daytime if he suspects a nuisance, or infectious disease, or contravention of a bye-law, and may obtain judicial warrant to do so. Tents, etc., used by Government are excepted (s. 73).

Underground Dwellings.—Cellars, etc., may not be occupied as dwelling-places unless they comply with certain conditions as to height, drainage, etc. The local authority must give notice regarding all cellars which do not so comply; and persons allowing such cellars to be occupied after notice are liable to a penalty of twenty shillings for each day of occupation after a first conviction (ss. 74, 75). Where two convictions of overcrowding of any house (s. 16 (7)), or illegally occupying a cellar, as above, have taken place within three months, the Sheriff may direct the premises to be closed for a time; and in the case of cellars, permanently (s. 76).

Vaccination.—The local authority may defray the cost of vaccinating or re-vaccinating such person as they may think fit (s. 77).

Part IV.—Prevention of Epidemic Diseases.

The Board may make regulations for the treatment and prevention of epidemic, endemic, or infectious disease throughout Scotland, and on the high seas within three miles; and may declare what authorities are to enforce them (s. 78).

Whenever any part of Scotland is threatened or affected by any formidable epidemic, endemic, or infectious disease, the Board may make regulations for (1) speedy interment; (2) house-to-house visitation; (3) provision of medical aid, medicine, and accommodation, cleansing, ventilation, and disinfection; (4) other precautions; and may by order apply the same to any district, or ships in port or on sea within jurisdiction of the Admiralty; and may extend or abridge the duration of the order (s. 79). (See Merchant Shipping Act, 1894, s. 324.) Such orders must be published in the *Edinburgh Gazette* (s. 80).

The local authority must execute such orders, and appoint officers, and do all things necessary for mitigating such disease (s. 81). They and their officers have power of entry on any premises for that purpose (s. 82). The Board may unite two or more local authorities under this part of the Act, and prescribe their mode of joint action, and of defraying the costs (s. 83).

When any such regulation is in force, the local authority, on the certificate of the M. O. or other sufficient evidence that a house is so overcrowded as to be dangerous to health, may bring the same under the regulations for common lodging-houses (s. 84).

The Board may provide for regulations made under this part of the Act being enforced by Customs and Coastguard officers, with reference especially to (*a*) signalling cases of disease on board ship; (*b*) questions to be answered by masters, pilots, etc., as to such disease; (*c*) detention of vessels and persons thereon; (*d*) duties of masters, etc., in case of disease on board ship.

Such regulations must be approved by the appropriate Government authorities (s. 85); and regard must be had to the expediency of uniform regulations throughout the kingdom (s. 86). The penalty for refusing to obey or carry out, or obstructing the execution of, any such regulation is £100, and £50 for each day of continuance, recoverable with expenses by the Lord Advocate, or by any local authority with the consent of the Board (s. 87).

The powers under sec. 234 of the Customs Consolidation Act, 1876, are

exercisable by the Board, and any orders of the Board apply to ships coming to any port in Scotland (s. 88). These powers have reference to precautions in the case of ships coming from a foreign port infected with yellow fever.

Part V.—Common Lodging-Houses.

Under this title, the provisions of the Act of 1867 will be found summarised, and reference may be made thereto. They are repeated in the present Act, with certain amendments and additions, which may be shortly stated.

The definition of a common lodging-house is extended to include emigrants' lodgings and seamen's boarding-houses, irrespective of the rate charged (s. 3).

Registration.—Under the present Act, the keeper of a common lodging-house must apply yearly for registration; which the local authority may refuse if they deem the house unsuitable, or if the applicant does not produce a certificate of character in such form as they may direct, and even then if they are satisfied, after inquiry, that the applicant is unsuitable (s. 89). A house ceasing to be suitable for the purpose may be removed from the register, either temporarily or permanently, on application by the local authority to the Sheriff (s. 90).

Bye-laws.—In addition to their former powers, the local authority may make bye-laws for enforcing sufficient privy accommodation and means of cleanliness in proportion to the number of lodgers, and proper drainage and ashpits. All bye-laws must be advertised and confirmed in accordance with secs. 183–187 (s. 92).

Water Supply.—The power to remove from the register on failure to provide a proper supply of water is extended to the case of insufficient privy accommodation; and appeal to the Sheriff is now competent against such removal: in a county, only after the county council have disposed of the appeal (s. 94).

Removal of Infected Persons.—The power of removal to hospital is supplemented by a provision that where removal would endanger the patient's life, no lodger shall be admitted to the house until it is certified free from infection (s. 96).

The keeper of a common lodging-house must give immediate notice of the occurrence of infectious disease to the medical officer or inspector of common lodging-houses; the former, if satisfied of the fact, must cause the patient to be removed, and the premises disinfected. Where the patient cannot be safely removed, the house must not be used as a common lodging-house, except such part as the M. O. may certify uninfected; and the local authority may provide temporary shelter and, if necessary, maintenance, at common lodging-house rates, for those excluded (s. 97). (See Common Lodging-Houses.)

Part VI.—Sewers, Drains, and Water Supply.

All sewers which are not private property, or managed by persons appointed by the Crown, or in pursuance of an Act of Parliament or Provisional Order, are, with their appliances, vested in the local authority, saving any rights under local or general police statutes (s. 101). A local authority who, by order of the Sheriff, had removed a nuisance by enclosing a stream and building cesspools, were held not to be the owners of the drain, and therefore not liable for discharging pollution (*Barony P. Board*, 1883, 10 R. 510. See also *Glasgow, Yoker, & Clydebank Rwy. Co.*,

1896, 24 R. 160, as to meaning of sewer under sec. 215 of the Burgh Police Act).

The local authority may acquire, under secs. 144, 145, the rights and powers vested in any person to make or use sewers, making compensation therefor, and also for drainage (s. 102). They may construct sewers within and, when necessary for outfall or distribution, without their district; and may carry them through, across, or under any road or street, or under any cellar beneath a foot-pavement or carriageway, and (if reported necessary by a surveyor), after notice, into, through, or under any lands; they may alter or close up sewers, provided no nuisance is caused. Any person deprived of use of a sewer must be provided with another. Sewers must be maintained so as not to be a nuisance, and necessary cleansing works may be provided. They may be emptied, subject to the Rivers Pollution Prevention Acts, either within or without the district, and sewage may be collected for sale or other purpose, provided no nuisance is caused (s. 103). Three months' notice with particulars must be given before commencing any sewage works without the district; and a copy must be served on the owners, occupiers, and tenants of the lands through which the works are to be made, and on the local authority and county council of the district (s. 104). Where objection is made by anyone affected, the work must first receive the sanction of the Board after inquiry (s. 105), which is to be held by an inspector appointed by them on the application of the local authority (s. 106). Where any railway, canal, bridge, or tunnel is affected, the sewer works are to be executed and maintained to the satisfaction of the railway engineer, and according to plans approved by him. At his option the works may be executed either by the company or the local authority; and any disputes are to be referred to an engineer appointed by the Sheriff (s. 107).

The local authority may make agreements regarding supply and distribution of sewage over land, and works to be executed for that purpose; but no contract may exceed five years' duration, except with consent of the Board, nor in any case exceed twenty-five years. Power is given to take lands, etc., compulsorily (s. 108). An owner of sewers which conveyed sewage from his property in a burgh to a sewage farm belonging to him, was held entitled to interdict the burgh commissioners from increasing the flow of sewage upon his lands (*Houldsworth*, 1887, 14 R. 920).

The local authority may enter upon lands in execution of their powers regarding sewers and drains; in case of refusal, they may obtain judicial warrant to enter by daytime, after notice to the owner or occupier (s. 109). Any person within the district liable for public health general assessment or special sewer assessment is entitled to connect his drains with the sewers of the local authority on giving twenty days' notice, and subject to the regulations and control of the local authority, provided the sewage will not damage the sewer, or cause a nuisance (s. 110). Under these conditions, the right to connection with the sewers is absolute (*Guthrie, Craig, & Co.*, 1888, 15 R. 385). (See Rivers Pollution Prevention Act, 1876, s. 7.)

Any person not liable for the said assessments, or beyond the district, may connect his drains with a sewer, if the latter be of sufficient capacity, upon such terms as may be agreed on, or fixed by the Sheriff; provided the sewage will not damage the sewers, or cause a nuisance (s. 111).

The penalty for making an unauthorised drain into a sewer is £5, and the local authority may close it up, and recover expenses from the offender (s. 112).

Before contracting for any works to be executed under Part VI., or any

sewage works, that may exceed £30, the local authority must procure from a surveyor an estimate of the cost of constructing and maintaining the same (s. 113). No building may be erected over any sewer, nor any structure or pipes laid, so as to interfere therewith, without the consent of the local authority (s. 114).

The owners of all sewers and drains must sufficiently trap and ventilate them to the satisfaction of the local authority (s. 115).

The owners of distilleries, manufactories, etc., must, where possible, make reservoirs for their refuse, so far as offensive, or injurious or dangerous to the health of those living near, or use the best practicable means for rendering it innoxious before discharge into any stream or sewer (s. 116). (See Rivers Pollution Prevention Acts.) It is an offence punishable with a penalty of £10, and a daily penalty of £1, to throw any matter into a drain or sewer which may obstruct or injure it (s. 117); or to throw into any running water, well, pool, drain, or ditch, any carcase or part thereof, under a penalty of £10 (s. 118).

The local authority, if they deem it necessary for public health, may construct works for discharging any drain below low-water mark, with the consent of the Board of Trade and the Commissioners of Woods and Forests (without prejudice to any questions as to foreshores) (s. 119).

Drainage of Houses.—The owner of any house, distillery, manufactory etc., which is without a sufficient drain, may be required by notice to make one emptying into any sewer of the local authority which the owner is entitled to use, but not farther than 100 yards from his premises; beyond that distance, then emptying into a cesspool, not under any house; failing compliance within the time specified, the local authority may do the work, and recover the expense from the owner.

If the local authority think that in the case of two or more houses it would be less expensive to construct a new sewer, they may do so, and require the houses to be drained thereinto, apportioning the expense among the owners, with appeal to the Sheriff in case of dispute (s. 120).

Two or more local authorities may, with the sanction of the Board, combine to execute or acquire an interest in, or maintain, sewage works authorised by this or any other Act (s. 121).

Special Drainage and Water Supply Districts.—These can be formed under the Act, only in landward districts: the provisions for their formation in burghs are to be found in the Burgh Police Act, 1892.

In any landward district, whether sewers or drains have been already constructed or not, or a water supply provided, the local authority may meet, after twenty-one days' notice, or on requisition by a parish council or ten ratepayers, they are bound, after like notice, to meet, and consider as to (*a*) forming part of their district into a special drainage or water supply district; (*b*) enlarging or limiting the boundaries of a special district; (*c*) combining one special district with another; (*d*) enlarging or limiting the boundaries of both or either, and combining the same or parts thereof; (*e*) dissolving a special district, or combination.

Their resolution must determine all questions regarding payment of debt affecting any district, the right to impose, and the obligation to pay, any assessments. It must be published, and intimated to the Board and county council. Any person interested may appeal within twenty-one days to the Sheriff; and he, not being a Sheriff-Substitute resident in the district, may approve, disapprove, or alter such determination. The decision of a Sheriff-Substitute may be appealed to the Sheriff: that of the Sheriff is final (ss. 122 (1), 131 (1)). It is not competent to extend a district by

including an area which will receive no benefit, in order to assess it for expenditure already incurred (*Mackenzie*, 1889, 5 S. L. Rev. 173; *Helmsdale L. A.*, 1893, 1 S. L. T. 242; see also *Fleming*, 1897, 5 S. L. T. 247). A local authority have no power to include lands lying outside a special district, even by agreement with the owner (*Wellwood*, 1894, 22 R. 56). The Sheriff's order must determine all questions regarding debts and assessments, and must be published and intimated as in subsec. (1) *supra* (ss. 122 (2), 131 (2)). Where a district committee is the local authority, there is no appeal to the county council under sec. 17 (2) (*c*) of the L. G. Act, 1889 (ss. 122 (3), 131 (3)).

In a special drainage district, the district committee may either drain the highways and footpaths therein, or contribute out of the assessments raised under the Roads and Bridges Act, 1878 (s. 122 (4)). The provisions of sec. 81 (1) (2) of the L. G. Act, 1889, as amended by sec. 44 of the L. G. Act, 1894, are not affected (ss. 122 (5), 131 (4)). These clauses place the management of a special drainage or water supply district in the hands of a sub-committee, consisting wholly of parish councillors, or partly of parish councillors and partly of district councillors; and where the special district is partly within a police burgh, together with certain representatives of the town council or commissioners. In the latter case, the district committee are the local authority over the whole special district, and the assessments are leviable by the county council (*C. C. of Dumbarton*, 1894, 22 R. 64).

The making of works of distribution and service for supplying sewage to lands for agricultural purposes is an improvement of land under the Improvement of Land Act, 1864 (s. 123).

Water Supply.—Burghs subject to the Burgh Police Act, 1892, or having a local Police Act, are not affected by this Act in regard to water supply.

In the Burgh Police Act and Lands Clauses Acts, so far as incorporated therewith, the term "land" includes water and any right or servitude to or over land or water (s. 124).

The owner of any occupied house within a landward district which is without a proper supply of wholesome water at or reasonably near the same, may be required to obtain such supply; failing compliance within twelve months after due notice, the local authority may themselves enter upon the premises and execute the necessary works, using their powers to acquire lands under the Act, and recover from the owner the whole or a reasonable part of the expenses. Where two or more owners have failed to comply, the local authority, if it would not cause greater expense, may execute joint works and apportion the expense, with appeal to the Sheriff, whose decision is final. But the local authority are not relieved from the duty of providing the district with water, where a general scheme is required, and can be carried out at a reasonable cost (s. 125).

The local authority of a landward district, if they think it expedient, may acquire and provide or arrange for a water supply for domestic, sanitary, and other purposes, and may acquire and conduct water from any lake, river, etc., may dig wells, make reservoirs, may purchase, hire, or construct waterworks, etc., and may either themselves supply, or contract with others to supply, water, with all the powers of promoters under the Lands Clauses Acts as amended by this Act; but they may not supply water within any area already supplied by any local authority or company under Act of Parliament or Provisional Order, unless they

acquire such undertaking (s. 126 (1)). The consent of the standing joint committee must be obtained (Local Government Act, 1889, s. 18 (6) (7)).

The local authority, after supplying water for domestic and sanitary purposes, may sell the surplus water for manufacturing or other purposes, public baths, etc., on such terms as may be agreed on, and may charge either special water assessment, or for the water supplied, but not both (s. 126 (2)).

They may maintain and supply gratuitously all existing pumps, wells, etc., or substitute others; and may also supply public baths or wash-houses which are not established for private profit, or supported out of any rates (s. 126 (3)).

They are entitled to protect a public well from pollution, and their operations for that purpose will not be interdicted at the instance of the owner of the ground (*Smith*, 1880, 7 R. (H. L.) 28). And they may carry water-mains within their district, with the same powers and restrictions as in the case of sewers (s. 126 (4)).

It is an offence punishable with a penalty of £50 to allow any deleterious substance from the manufacture of gas, naphtha, vitriol, paraffin, or dye stuffs to flow into any stream, etc., used for water for domestic purposes, or to wilfully foul any such stream or pond (s. 127). See *Dumfries Waterworks Commrs.*, 1874, 1 R. 975, where the proprietor of a loch, who had sold the right to take therefrom water for domestic purposes, was interdicted from washing therein sheep which had been smeared with a poisonous dip.

Such penalty may be recovered with expenses by the person injured, or failing him, by the local authority, and proceedings must be taken within six months (s. 128). Further, the offender is liable to a daily penalty of £5 for each day's continuance after twenty-four hours' notice from the person injured or the local authority, payable to the party giving such notice. All moneys recovered by the local authority under this or the preceding section, after paying the damage, are to be applied to the purposes of the Act (s. 129).

Two or more local authorities may, with the sanction of the Board, combine to execute or acquire an interest in, or maintain, waterworks authorised by this or any other Act (s. 130).

Incorporation of Waterworks Clauses Acts.—With certain limitations, the following Acts are incorporated: The Waterworks Clauses Acts, 1847 and 1863; The Railways Clauses Consolidation (Scotland) Act, 1845: provided that (*a*) the local authority are not obliged to supply any person with water for less than 5s. a year; (*b*) no person can demand a water supply unless a pipe of the local authority is within a hundred feet of his premises, or unless the local authority shall become bound by a requisition and agreement under the Act of 1847 to lay pipes within that distance; (*c*) the water supplied by the local authority need not be constantly under pressure (s. 132). (See Public Health (Scotland) Amendment Act, 1891, *infra.*)

Part VII.—Rating and Borrowing Powers.

Special Sewer and Water Assessments.—The expense of sewerage or drainage or water supply in any burgh or special drainage or water supply district, and the sums necessary for payment of money borrowed, whether before or after the Act, and interest, are to be paid out of a special sewer or water assessment levied by the local authority in the burgh or special

district, in the same manner as the public health general assessment; and no special district, under whatever Act formed, is liable for the expense of drainage works or water supply beyond that district (ss. 133, 134). See *Police Commrs. of Kirkintilloch*, 1890, 18 R. 67, and *Edmonstone*, 1882, 9 R. 917, as to assessment for works executed under the General Police Act, 1862. The local authority are not entitled to assess in any manner other than that prescribed by the Act (*Wordie*, 1895, 23 R. 168).

General Assessments in Counties.—All expenses not provided for as above are to be defrayed out of the public health general assessment, leviable upon all lands and heritages, in like manner as, but separate from, the assessment under the Roads and Bridges (Scotland) Act, 1878, or similarly levied; without prejudice to the Agricultural Rates Act, 1896 (s. 135). The rate here mentioned is levied upon occupiers and owners equally (R. and B. Act, s. 52), upon the gross rental in the valuation roll; but in the case of occupiers of agricultural land, only on three-eighths of their rental (Agricultural Rates Act, s. 1).

General Assessments in Burghs.—All expenses not provided for as above are to be defrayed out of the public health general assessment, leviable along with, but separate from, the general improvement rate under the Burgh Police Act, 1892, or similarly levied, and without limit, except as provided by sec. 137. Premises within a special drainage district are not liable to assessment for sewers outwith the district (s. 136). The general improvement rate is levied equally upon owners and occupiers (Burgh P. Act, s. 359).

The public health general assessment, which is leviable throughout the district, including special districts, must not exceed one shilling per £. The special sewer assessment and water assessment must not exceed three shillings per £: where that is insufficient, the Board may sanction an increased rate. But premises without a special district may not be assessed for expenditure within it (s. 137).

Ratepayers in burghs are not assessable for the salaries of the county medical officer or sanitary inspector; and burgh representatives in a district committee or county council take no part in proceedings relating to this Act, for which the burgh is not assessed (s. 138).

Borrowing Powers.—The local authority may borrow for the purpose of acquiring, making, enlarging, or reconstructing sewers, or of utilising sewage; or of constructing, purchasing, enlarging, or reconstructing water-works, or of entering into any contract for water supply, on the security of the special sewer or water assessments, or the public health general assessments, as the case may be: the bonds to be signed by two members and the clerk of the local authority, who are not personally liable, but such bonds constitute a lien over the assessments assigned. The money may be repaid in one sum, or by instalments, as agreed on, but within thirty years; the assessments of the intervening years being chargeable with the amount (ss. 139, 140).

The local authority may borrow, on similar conditions, for the purpose of providing offices, for providing and furnishing permanent hospitals, disinfecting premises, houses of reception, or mortuaries, on the security of the public health general assessments (s. 141).

In counties the county council alone has power to borrow, and in the case of capital works (which includes all the purposes above mentioned) they must obtain the consent of the standing joint committee (L. G. Act, 1889, ss. 18, 67).

The Public Works Loan Commissioners may, on recommendation of the

Board, make loans to a local authority in conformity with the Act, at such rate of interest as the Treasury may determine, regard being had, in fixing the date of repayment, to the probable duration and continuing utility of the works; but not for the purpose of enforcing the performance of, or performing, the duty of a defaulting local authority (s. 142).

The accounts of the local authority under the Act are to be made up and audited in the same manner as their other accounts (s. 143), *i.e.* under secs. 68–70 of the Local Government Act, 1889, or secs. 68–70 of the Burgh Police Act, 1892.

Part VIII.—Acquisition of Lands.

The Lands Clauses Acts, except the provisions relating to the purchase of land otherwise than by agreement, are incorporated with the Act; also secs. 6 and 70 to 78 of the Railways Clauses Consolidation (Scotland) Act, 1845, with the following interpretations:—"Company" means local authority: "The railway" means any works constructed under this Act: "The construction of the railway" means the construction of any works under this Act, or the acquisition of rights and powers to make sewers or use any sewer: "Lands taken or used for the purposes of the railway" means lands, buildings, apparatus, etc., purchased, leased, or used for the purposes of this Act. "The Lands Clauses Acts" means the above Acts, as interpreted (s. 4).

A local authority may, for any of the purposes of Parts II., III., and VI. of the Act, in terms of the Lands Clauses Acts, by agreement or otherwise, purchase any lands within or without their district, and may by agreement lease, sell, or exchange any lands: they may buy up any water-mill, etc., which interferes with drainage or water supply. They may also, with the sanction of the Board, sell or let any surplus land, applying the proceeds as the Board may direct (s. 144).

Regulations as to Compulsory Purchase.—(1) The local authority must twice publish an advertisement, stating the amount of land required, and the purpose of taking, and naming a place where their plans may be seen: they must serve a notice upon every owner, lessee, and occupier, or reputed owner, etc., requiring to know whether he assents, dissents, or is neuter. (2) Thereafter they may present a petition to the Board, stating all particulars, and praying to be allowed to put in force the Lands Clauses Acts. (3) The Board may either dismiss the petition, or order an inquiry, which may be held by a person appointed by them, or, if the Secretary for Scotland so directs, by the Sheriff, not being a Sheriff-Substitute resident in the district. (4) The Board may then, by Provisional Order, empower the local authority to put in force the Lands Clauses Acts and (with the necessary modifications) secs. 6 and 70 to 78 of the Railways Clauses Consolidation Act, 1845, and may award costs. The local authority must serve a copy of the order upon the same persons as must be served with notices, intimating that it will become final, unless within two months a memorial be presented against it to the Secretary for Scotland. (5) If no memorial is so presented, the order becomes final, and has the effect of an Act of Parliament. (6) If a memorial is so presented, the Secretary for Scotland may submit the order to Parliament for confirmation. (7) Such confirming Bill is referred to a Select Committee, or Joint Committee, after the second reading. (8) If a petition against such order is presented within seven days of the second reading, the petitioner may be heard, with agents and witnesses. (9) The Committee by a majority may award costs, which include, unless otherwise ordered, all costs from the date of the memorial. (10) All expenses relative to such order or Provisional Order may be

charged, to the extent approved by the Board, upon the public health general assessment, or special sewer or water assessment, as the case may be. (11) Questions of disputed compensation are to be referred to a sole arbiter appointed by the parties, or failing agreement, by the Board, who fix his remuneration. The Lands Clauses Acts apply to such arbitration, and the arbiter is to determine the amount of expenses. In construing incorporated Acts, this Act, together with any order hereunder, is deemed to be the special Act. (12) Counsel and agents may appear at inquiries and arbitrations, and witnesses may be heard. (13) No part of any park, garden, etc., or land which is or may be required by a railway or canal company for the purposes of their undertaking, or, in the opinion of the Board, for extension of a factory or public work, may be included in an order; (14) and the Board must have regard to the extent of neighbouring land held by any owner, the convenience of other property belonging to him, and avoid taking an undue quantity from any one owner.

Part IX.—Legal Proceedings.

Neglect of Duty by Local Authority.—Where a nuisance exists on any premises of a local authority, or where they neglect any duty imposed on them by the Act, any ten ratepayers, or a parish council, or procurator-fiscal of the Sheriff Court, or the Board, may give notice to them of such neglect; and on their failure within fourteen days to remedy the same (or within two days where a regulation of the Board under Part IV. is neglected), the said parties may petition the Sheriff, who may compel execution, and deal with the expenses thereof as may seem just. Where drainage works are necessary, he may suspend the case, in order to enable a general drainage system to be carried out (s. 146 (1)). Under the L. G. Act, 1889 (s. 53 (2)), and L. G. Act, 1894 (s. 24 (3)), a county council, or parish council, may make a representation to the Board that the Public Health Acts are not properly enforced; and by sec. 17 (2) (*c*) of the first-named Act, the medical officer or sanitary inspector of a county or district may appeal to the county council, who may thereupon make an order under the P. H. Acts.

Under the Burial Grounds Act, 1855, s. 4, the Board, or local authority, or parish council, may petition the Sheriff, in order to the closing of a burying-ground (s. 146 (2)).

In case of refusal or neglect by a local authority to do what is in the Act or otherwise by law required of them, or in case of any obstruction arising in the execution of the Act, the Board, with approval of the Lord Advocate, may apply by summary petition to either Division of the Court, or during vacation, to the Lord Ordinary on the Bills, who are to do therein as may seem just (s. 147). (See *L. A. of Montrose*, 1872, 11 M. 170; *Pittenweem*, 1874, 1 R. 1124; *Galashiels*, 1874, 12 S. L. R. 111; *Lochmaben*, 1893, 20 R. 434; *Elgin*, 1897, 24 R. 512, for instances of such a petition by the Board.)

Where the Board are satisfied that a local authority have made default in their duty, the procurator-fiscal, with consent of the Lord Advocate, may proceed against them in the Sheriff Court, and may take such proceedings as the local authority might take for removal of nuisances or otherwise, the expense thereof as between agent and client to be paid by the local authority, with such relief as may be competent (s. 148).

Where a nuisance is offensive or injurious, or dangerous to another district, the local authority must remove it on the demand of the local authority of the district complaining, and pay any expense incurred by them; in case of dispute the amount to be fixed by the Board (s. 149).

Any costs or expenses payable to the local authority by the owner of premises may be recovered from the occupier, who is entitled to deduct the same from the rent; but no occupier who is not the author of a nuisance is bound to pay more than the amount of rent due, or which becomes payable after demand of such costs, and after notice not to pay his landlord any rent without such deduction, unless he refuse to disclose the amount of his rent and the name of his landlord to the local authority. The burden of proof that the sum demanded exceeds the rent due lies on the occupier. But no contract between landlord and tenant is to be affected hereby (s. 150).

The penalty for wilfully damaging the property of a local authority is £5, in addition to the cost of repair (s. 151).

A local authority may appear in any legal proceedings by any officer or member generally or specially authorised by resolution, to be certified under the hand of the clerk (s. 152).

Recovery of Penalties.—All penalties, sums of money, and expenses directed to be recovered in a summary manner under the Act, may, unless otherwise provided, be recovered at the suit of the local authority, and applied for the purposes of the Act, without prejudice to any other mode of recovery allowed by the Act, and all contraventions of the provisions relating to overcrowding, and of the provisions regarding common lodging-houses, or bye-laws thereanent, may be prosecuted as police offences before any police judge or magistrate; and in the event of failure to pay the penalty imposed, imprisonment in accordance with the Summary Jurisdiction Acts may follow, without prejudice to poinding or arrestment, if no imprisonment have followed conviction (s. 153). A complaint for contravention of a bye-law must set forth the section of the Act authorising the making of bye-laws, and the fact that it had been confirmed by the Board (*Hastie*, 1894, 22 R. (J. C.) 18).

All applications to enforce any provision of the Act, or for recovery of penalties or sums of money, so far as not otherwise provided for, may be by summary petition, referring to the sections founded on, without setting them forth: the Sheriff, etc., may order answers within three days, or the attendance of the parties, and thereafter, or if the respondent fail to appear, he may at once decern, or appoint any competent person to examine the premises and report, and may decern on such report; or may order proof on specified points, and hear the same, not later than five days thereafter, with power to adjourn. Decree must follow within three days, and may include expenses; also warrant to imprison, in accordance with the Summary Jurisdiction Acts, unless the sums found due be paid within a specified time, but without prejudice to poinding or arrestment (s. 154). It is competent to hear proof at the first diet, if no prejudice is caused to the respondent (*Gibson*, 1892, 20 R. (J. C.) 47).

No written pleadings are allowed, except the petition and answers: the Sheriff, etc., may grant diligence for citing witnesses and havers; and in cases under sec. 16, subsecs. 9, 10, and 11, he must take the evidence as in civil proofs. No decree under the Act is to bar the party's right of relief (s. 155).

Appeal.—Appeal to the Sheriff is competent in cases under sec. 16, subsecs. 9, 10, and 11, where the Sheriff-Substitute certifies in his decree that the true value of the subject complained of as a nuisance, or the cost of the operations ordered, or the value of the business interfered with, exceeds £25, but does not exceed £50. A note of appeal, which operates as a sist of execution, must be lodged within three days, and served upon the

opposite party or his agent. The Sheriff's decision, where the value is not above £50, is final; where above £50, appeal is competent to the Lord Ordinary on the Bills from the judgment of the Sheriff or Sheriff-Substitute, on bond of caution for £50. The note of appeal, which operates as a sist of execution, must be lodged in the Bill Chamber, and a copy served on the opposite party, within eight days of the judgment. The judgment of the Lord Ordinary may only be reclaimed against by leave, and the judgment of the Inner House is final (s. 156). Save in so far as otherwise provided, no other appeal or review is competent (s. 157). This does not exclude the right of appeal on stated case, under the Summary Prosecutions Appeals Act, 1875. An order to execute certain operations for the removal of a nuisance, with certification as to penalties, is not a "cause" appealable under that Act (*Lee*, 1883, 11 R. (J. C.) 1). Neither is a warrant to destroy a carcase, where no penalties are concluded for (*Couper*, 1889, 17 R. (J. C.) 15).

The sheriff, justices, or magistrates may exercise jurisdiction, although members of the local authority (s. 158).

Notices, petitions, etc., may be served by any person delivering the same at the residence of the addressee, or by post; where addressed to the owner or occupier of premises, by delivery to some person on the premises, or by fixing the notice on a conspicuous part thereof; and service may be proved by the certificate of the server, attested by one witness (s. 159).

Copies of any orders, regulations, etc. (other than bye-laws), purporting to be signed by the clerk of the local authority or committee are to be received as evidence thereof, unless the contrary be shown (s. 160).

Where two or more parties are jointly answerable, one or more may be proceeded against, and that even if the acts of one or more of them would not separately be an offence: without prejudice to rights of relief. Proceedings against several persons included in one complaint do not lapse by the death of one or more. In proceedings regarding nuisances, the designation owner or occupier of premises is sufficient, without name or description (s. 161).

An occupier of premises obstructing the owner in executing the Act may be required by order of the Sheriff to permit execution, if he deems the works necessary; failing compliance within a reasonable time, such occupier is liable to a penalty of £5 for each day of continuing refusal (s. 162).

It is an offence punishable with a penalty of £5 to wilfully violate any provision of the Act to which a penalty is not attached, or any regulation of the Board, or to obstruct any person in executing the Act (s. 163).

Compensation.—Full compensation must be made to persons sustaining damage by the exercise of any of the powers of the Act, except when otherwise specially provided: the amount to be decided by the Sheriff where the claim is under £50, and the decision of the Sheriff-Substitute to be appealable to the Sheriff; when the claim exceeds £50, the amount is to be determined by a sole arbiter in terms of sec. 145 (s. 164).

Convictions are not to be void for want of form, or want of notice, if the party has appeared, or the charge come to his knowledge; and the charge may be amended and proceedings adjourned (s. 165).

The local authority and the Board are not liable for any irregularity of their officers in executing the Act, or anything done by themselves in *bonâ fide* execution thereof; and every officer acting in *bonâ fide* execution must be indemnified by the local authority. Every action or prosecution must be commenced within two months; and any member of the local authority

may be surcharged with any payment disallowed by the auditor, which such member authorised (s. 166).

The local authority and their officers are not protected, if their proceedings are not "in execution of the Act" (*Edwards*, 1891, 18 R. 867; *Mitchell*, 1893, 20 R. 253; *Sutherland*, 1894, 22 R. 95).

The forms prescribed in the schedule are authorised, or similar forms; and documents may be wholly or partly written or printed (s. 167). All instruments to or by the local authority are exempt from stamp duty (s. 168).

Police constables must aid the local authority in executing the Act (s. 169). Saving of right of action in respect of nuisances at common law (s. 170).

All powers given by the Act are in addition to powers given by other Acts or any law or custom (s. 171).

Part X.—Port Sanitary Authority.

The Board may, by order, constitute, as port local authority, any local authority whose district or part thereof forms part of or abuts on a port, or any persons having authority over such port or part thereof. They may also constitute a joint port local authority by combining two or more local authorities having jurisdiction within the proposed area, and prescribe the mode of their joint action; or by combining representatives of any two or more such local authorities; or for two or more ports, by combining representative members of the local authorities having jurisdiction therein. Such order, a copy of which must be laid before Parliament, may assign to such authority any powers, duties, etc., and direct the mode of meeting expenses. A port means a port within the meaning of the Customs Acts (s. 172).

An authority so constituted has jurisdiction over all waters and districts specified in the order (s. 173); and may, with the sanction of the Board, delegate their powers to any local authority within or bordering on their district; otherwise no local authority may exercise any powers which have been conferred on a port authority (s. 174).

Expenses.—The expenses of a joint port local authority are to be defrayed out of a common fund to be contributed by the local authorities in such proportions as the Board thinks just. A port local authority, if itself a local authority under the Act, must raise the proportion of expenses due by its own district; and contributory local authorities may be required to pay their contributions either by a port or joint port local authority. Such contribution may be recovered as a debt, or, in default of payment, the sum may be raised within the district, as in the following section.

Where several local authorities are combined in the district of a port or joint port local authority, any of them may be exempted by the Board from contributing to the expenses incurred (s. 175).

A port or joint port local authority, authorised as in the preceding section to raise moneys for payment of debts due, have the same powers as if they were the defaulting authority, and may raise the same by assessment. They may add a sum, not exceeding ten per cent. on the debt, to defray all expenses; and after payment of the debt and expenses, must pay any balance to the defaulting authority (s. 176).

Part XI.—Miscellaneous.

Provisions as to Ships.—Any ship (not belonging to Her Majesty or any foreign Government) lying in any river, harbour, or water is subject to the local authority of the district within or *ex adverso* of which such river, etc., is situate, and to the Sheriff, etc., of the district, as if such ship were a house within such district (s. 177). Any ship within three miles of the coast, and

not within the district of a local authority, is deemed to be within the district of the local authority prescribed by the Board; and until then, within the nearest district (s. 178).

Whenever, in compliance with any regulation of the Board, a medical officer of a local authority performs any medical service on board ship, the local authority are entitled to charge the captain on behalf of the owners for such service, and reasonable expenses for treatment of the sick, the amount, if disputed, to be fixed by the Sheriff.

Any practitioner not a medical officer rendering such services is entitled to charge, with extra remuneration on account of distance, at the rates paid by private patients of the same class; if such charges are not paid, the medical officer or practitioner may sue the person in charge of the ship, which with its cargo and tackle is subject to a lien therefor (s. 179).

A local authority may make bye-laws for the removal to hospital, and detention therein, of persons brought by ship who are suffering from infectious disease (s. 180).

Provisions as to Buildings.—The local authority of any district other than a burgh may, with approval of the county council, make bye-laws for the whole or any part of their district for regulating the building or rebuilding of houses or buildings, or the use for habitation of any building not previously so used, or any alteration of any existing house that will increase the number of separate houses, in respect to (*a*) drainage of subsoil of sites for and prevention of dampness in houses; (*b*) structure of walls, foundations, roofs, and chimneys of new buildings so far as likely to affect health; (*c*) ventilation of houses and buildings; (*d*) sufficiency of air space about buildings; (*e*) construction and arrangement of drainage of houses and buildings and of soil pipes; construction and position of waterclosets, cesspools, etc.; (*f*) production of building plans in respect of above matters, and their inspection; (*g*) intimation to the local authority of commencement of work, inspection during erection or alteration, examination of drains, and alteration of any work executed contrary to the bye-laws. Such bye-laws must have regard to the special circumstances of the district or part thereof to which they relate (s. 181).

No new building may be erected on ground filled up or covered with matter impregnated with faecal, animal, or vegetable matter, until the same has been removed or rendered innocuous, under a penalty of £5, and a daily penalty of 40s. (s. 182).

Bye-laws.—All bye-laws made by a local authority must be under their common seal, or, if they have no seal, must be signed by two members and the clerk; but no bye-law is valid which is repugnant to the law of Scotland or to the Act (s. 183). Penalties for breach thereof may be imposed, not exceeding £5 for each offence, and in the case of a continuing offence, 40s. for each day after written notice from the local authority, but so as to allow of the recovery of any sum less than the full amount. Nothing in any incorporated Act is to authorise the imposition of greater penalties than those here specified (s. 184).

Bye-laws, before having effect, must be submitted to the Board, who may allow, modify, or disallow the same; and before confirmation, one month's notice of intention to apply therefor must be given in a local newspaper or by hand-bill, and a copy of the proposed bye-laws must be kept for one month before the application is considered at the office of the local authority, and in landward districts at the office of every parish council, for inspection of the ratepayers gratis. Any person aggrieved may within the last-named month send notice of his objection to the

Board, who must consider it; and the clerk must furnish any ratepayer applying with a copy of the proposed bye-laws, on payment of 6d. for every hundred words (s. 185).

Bye-laws must be printed and exhibited in the office of the local authority, and any ratepayer may demand a copy; where made by a district committee, a copy must be sent to every parish council affected thereby, to be open to inspection, and any ratepayer of the parish may demand a copy (s. 186).

A copy of bye-laws signed and certified by the clerk to be a true copy and to have been duly confirmed, is evidence thereof until the contrary is proved (s. 187).

The provisions relating to bye-laws do not apply to regulations made by a local authority under the Act, but they may publish these as they see fit (s. 188).

Part XII.—Saving Clauses.

Nothing in the Act is to prejudice or affect (1) the irrigation of lands in a rural district, or the water supply therefor; (2) the water supply of any house or agricultural building; (3) the water supply of any water-works established by Act of Parliament, or the compensation water, unless with consent of the owners; (4) the navigation or use of any river, canal, dock, harbour, etc., for which tolls are leviable, or the water supply or bridges thereof; (5) the purification of any river in respect of which any persons exercise jurisdiction under Act of Parliament. The local authority may not execute works through any quays, docks, reservoirs, etc., without the written consent of the persons entitled to take tolls therefor; and the latter may, at their own expense, take up such drains, etc., constructed by the local authority, on substituting others certified as equally sufficient by the inspector of the local authority (s. 189).

Except as expressly provided, the provisions of the Local Government Acts; Local Authorities Loans Act, 1891; Burgh Police Act, 1892; Public Health Amendment Act, 1891; Anatomy Acts, 1832 and 1871, are hereby saved (s. 190). So too the powers, rights, and liabilities of county councils and standing joint committees with respect to capital works, rating, borrowing, or acquiring and holding land (s. 191); the provisions of local burgh Acts and forms of prosecution and procedure thereunder; and local Acts authorising water supply. Local Act includes Provisional Order and Confirming Act (s. 192). Reference in any Act to the Public Health Acts means the present Act; and public health rate, and any of the assessments mentioned in sec. 95 of the Public Health Act, 1867, mean the public health general assessment hereunder (s. 193).

Crown property, Government buildings, etc., are exempted from building regulations (s. 194).

Acts done or obligations undertaken in virtue of repealed Acts are not affected (s. 196).

II. PUBLIC HEALTH (SCOTLAND) AMENDMENT ACT, 1891 (54 & 55 Vict. c. 52).

The Act is not to take effect in any district until the county council, on the application of the district committee, have passed a resolution to that effect, both application and resolution being passed at meetings called with special notice. An absolute majority of the whole members of the district committee or county council is necessary (s. 2).

There are incorporated with the Act:—The Waterworks Clauses Act, 1847, except the provisions as to the amount of profit to be received by

the undertakers when the waterworks are carried on for their benefit, and except the words in sec. 44, "with the consent in writing of the owner or reputed owner of any such house, or of the agent of such owner." The Waterworks Clauses Act, 1863: and the provisions of the Railway Clauses Consolidation Act, 1845, as to temporary occupation of lands near the railway during construction, but only in the case of any reservoir, filter, or distributing tank which the local authority are authorised to construct, and works immediately connected therewith; such reservoir, works, etc., being substituted for "the railway"; the boundaries thereof for "the centre of the railway"; and the prescribed limits being two hundred yards from such boundaries (s. 3). (See Public Health Act, s. 131, *supra*.)

Upon the Act taking effect, the expense incurred by the district committee for water supply (including payment of interest and instalments of money borrowed) are to be paid out of assessments authorised as follows:—(1) The county council must levy yearly an assessment (domestic water rate) upon all lands and heritages within the district which have been supplied with water, at such rate per £ as will be sufficient, when supplemented by the public water rate, if any, to defray the aforementioned expense. (2) They may levy an assessment (public water rate) on all lands and heritages, not exceeding 3d. per £. (3) Such assessments must not in the aggregate exceed the rates authorised by the Public Health Acts, and are to be imposed and levied as such assessments. Provided (*a*) where a special water supply district has been formed, and a sufficient supply maintained, such district is not liable to assessment for the expense of supplying water to other parts of the district. (*b*) The local authority are not obliged to furnish a water supply to any person for less than 5s. a year. (*c*) No person is entitled to demand a water supply unless a pipe of the local authority is within a hundred feet of his premises, or unless the local authority become bound, by a requisition and agreement under the Waterworks Clauses Act, to cause pipes to be laid down within that distance (s. 4).

The county council may borrow on the security of said assessments, and may assign the same, and the general assessments, or any of them, in security (s. 5).

If in any special water supply district the maximum rates are inadequate to provide a sufficient supply of water, the local authority, at a meeting called with special notice, may resolve, by an absolute majority of their number, to apply to the county council, who may, by an absolute majority of the whole members, resolve to abolish such special district, subject to such conditions as they may fix regarding the payment of any debt affecting it; thereafter such area shall cease to be rated separately for water supply, except for payment of such debt. The resolution must be confirmed by the Secretary for Scotland on application of the county council, after such inquiry as he may deem necessary; the costs thereof to be borne by the local authority (s. 6).

These provisions do not authorise water supply or assessment in districts already supplied under Act of Parliament (s. 7) (see Public Health Act, s. 126 (1), *supra*, to the same effect); nor prejudice rights of creditors in existing loans (s. 8).

III. INFECTIOUS DISEASE (NOTIFICATION) ACT, 1889 (52 & 53 Vict. c. 72).

This Act is extended to every district in Scotland (Public Health Act s. 44).

Where an inmate of any building used for human habitation is suffering from infectious disease (hospitals excepted)—

(*a*) The head of the family, whom failing the nearest relatives present or in attendance, whom failing every person in charge, whom failing the occupier, must send notice, as soon as he becomes aware, to the M. O. of the district (s. 1).

(*b*) Every medical practitioner attending on the patient must send a certificate to the M. O. stating the name of the patient, the situation of the building, and the infectious disease from which he is suffering (s. 2).

Every person required to give notice who fails, is liable on summary conviction to a fine of 40s., provided that if he is only required to give notice in default of some other person, he is not liable if he proves that he had reasonable cause to suppose that it had been given (s. 3).

The Board may prescribe forms of certificates. The local authority must supply forms gratis to medical practitioners, and pay 2s. 6d. for each case notified in private practice, and 1s. where it occurs in their practice as M. O. of any public body or institution. Where there is more than one M. O., notice must be given to the one in charge of the area in which the patient is, or as the local authority may direct (s. 4).

Infectious disease includes small-pox, cholera, diphtheria, membranous croup, erysipelas, scarlatina or scarlet fever, typhus, typhoid, enteric, relapsing, continued, and puerperal fever, and any other to which the local authority may apply the Act (s. 6).

[MacDougall and Murray, *Handbook of Public Health.*]

Public Houses.—See Licensing (Scotland) Acts.

Public Market.—See Market Overt.

Puffer.—A puffer, or white bonnet, is a person employed by the seller, or any other person who would not be entitled to bid, at a roup or auction, to bid so as to raise the price without any intention of purchasing, his employer having undertaken to relieve him of his bid in case of its being accepted (*Grey*, 1753, Mor. 9560; *Watson*, 1743, Mor. 4892; *Anderson*, 16 December 1814, F. C.). The admissibility of a bidder at an auction depends on his competency in the circumstances to purchase privately (Ld.-Pres. Inglis in *Shiell*, 1874, 1 R. 1083, at p. 1089). Therefore the seller cannot himself bid (*Grey, supra*; *Faulds*, 1859, 21 D. 587; *Shiell, supra*). It seems to be questionable whether *pro indiviso* proprietors can, without express notice, bid at a sale of the property which they hold jointly (*Thom*, 1875, 3 R. 161). A person who has the full beneficial interest in any property cannot bid for it, though it be held and exposed by trustees, for he is virtually the seller (*Faulds, supra*); but one of several beneficiaries may bid for trust property (*Shiell, supra*). If a trustee bids as an individual at a sale of trust property, then, whether he or some third party is preferred to the purchase, no one except the beneficiaries is entitled to object, unless he can prove that the trustee was acting collusively in the interest of the trust estate (*Aberdein*, 1867, 5 M. 726; *Shiell, supra*, Ld.-Pres. Inglis, at p. 1089: see also 19 & 20 Vict. c. 79, s. 129; *York Buildings Co.*, 1793, Mor. 13337; rev. 1795,

8 Brown's H. L. R. 42). A heritable creditor exposing lands to sale under a bond in his favour, is not entitled to bid (*Taylor*, 1846, 8 D. 400) unless with concurrence of the trustee on the debtor's sequestrated estate (19 & 20 Vict. c. 79, s. 120; see *Cruickshank*, 1849, 11 D. 614). An indirect interest in the proceeds of a sale does not debar the person interested from bidding; for example, the law agent in a sequestration may bid at a sale of the sequestrated property, though the payment of his account may depend on the success of the sale (*Rutherfurd*, 1891, 18 R. 1061). By the common law of Scotland, which is still in force as to heritage, a seller has no right, without giving notice of his intention, even to interpose a bid for the purpose of preventing the property being sold at an unsatisfactory price (*Chree*, 1 December 1810, F. C.); and though it seems competent for him to do so after notice (*Thom, supra*), the almost invariable practice is to fix an upset price. But as regards moveables, it is now competent under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), for a seller either to fix an upset price or to bid, himself or by an agent, after having expressly reserved power to do so (s. 58 (4)). If he does so without giving notice of his intention, the sale "may be treated as fraudulent by the buyer" (s. 53 (3)). This express enactment suggests a doubt as to what would be the rights of an offerer who did not become buyer, in the event of the seller being preferred to the purchase. Subject to this exception, bidding at an auction by or on behalf of the seller is fraudulent, for "the person who advertises a sale by auction pledges his faith to the public that he is to sell to the highest bidder, and is not to buy for himself" (*Grey, supra*). The ordinary remedy is for the competition to be reduced in so far as it was induced by the fraud, and for the highest offerer in the *bonâ fide* competition to be preferred to the purchase (*Grey, supra*; *Faulds, supra*). But if the circumstances require it, the sale may be reduced *in toto* (*Anderson, supra*; see *Shiell, supra*). In the case of *Chree* (*supra*), where the fraud was not discovered till after a resale, damages were awarded (Ersk. iii. 3. 2 *n.*; More's *Notes on Stair*, lx; see AUCTION). It is the duty of the judge of the roup to see that everything is done fairly and regularly while the sale is in progress, but once it is over, he has no power to decide as to the *bona fides* of a bid (*Strachan*, 1884, 11 R. 756).

Punishment.—In Scotland there are three modes of punishment in general use—*death* (see CAPITAL PUNISHMENT); PENAL SERVITUDE (*q.v.*); and *imprisonment*. Imprisonment, although authorised by some statutes for four years, is never inflicted for more than two years. It may be with or without hard labour; and solitary confinement. Solitary confinement (a sentence only pronounced in modern practice where compulsory by statute) is limited by most recent statutes to one month at a time, and to not more than three months in each year. *Whipping* of juvenile offenders is competent in certain cases; and in the case of trifling offences a fine may be exacted. See ARBITRARY PUNISHMENT; see also FIRST OFFENDERS; ADMONITION. For assaults on the Sovereign, whipping as often (but not exceeding thrice) as the Court shall direct in public or in private, during the term of imprisonment to which the criminal may be sentenced, is prescribed as a punishment (5 & 6 Vict. c. 51, s. 2). For the cases in which the punishment of *banishment* may still be imposed, see BANISHMENT. Transportation as a mode of punishment was abolished by the Act 16 & 17 Vict. c. 99. See also CRIME; INSANITY; CRIMINAL PROSECUTION; PENALTIES (STATUTORY).

Pupil—A male under the age of fourteen years, and a female under the age of twelve years (Ersk. i. 7. 1). In calculating the age, the computation is made *de momento in momentum*; the maxim *Dies inceptus pro completo habetur* does not apply (Ersk. i. 7. 36; Fraser, *Parent and Child*, 146). As the birth of every child must now be registered, an extract from the register of births is an important element in the proof of age (17 & 18 Vict. c. 80, ss. 26, 27, 30, 31, 37, 58; 18 Vict. c. 29; 23 & 24 Vict. c. 85, ss. 10 and 11), and is enough in practice, with a very moderate amount of additional evidence (Ersk. i. 7. 36).

Powers and Capacities of Pupils.

Pupillarity, in contemplation of the law, is "a state of absolute incapacity" (Bell, *Prin.* s. 2067); "a pupil has no person, in the legal sense of the word," therefore *tutor datur personæ* (Ersk. i. 7. 14), and acts for him (*Dalgleish*, 1752, Mor. 2184). "He is incapable of acting or even of consenting . . . hence a pupil cannot subscribe with his tutor" (Ersk. *supra*). He cannot enter into contracts, or grant obligations on which diligence will follow (Stair, i. 6. 35 and 44; Ersk. i. 7. 33); and of course cannot marry or make a will (see Fraser, *P. & C.* 150, note (*i*); *Johnston*, 1770, Mor. 8931). The pupil's deed, or contract, being absolutely null, the nullity is pleadable *ope exceptionis* (Mackay, *Court of Session Practice*, ii. 127). Exceptions to the rule are contracts judged beneficial to the pupil, which the other party is held bound to perform (Ersk. *supra*); and where necessaries are sold and delivered to an infant, or minor, a reasonable price must be paid therefor (Sale of Goods Act, 1893, s. 2). To sum up this general statement of the law,—in the words of Mr. Bell,—"no act done by the pupil, or action raised in his name, has any effect without the interposition of a guardian,"—either the father as administrator-in-law, the mother under the Guardianship of Infants Act, 1886, or a tutor (Bell, *Prin.* s. 2067).

Where any deed, therefore, is granted dealing with the pupil's affairs, it is executed by the guardian in his own name, without the pupil appearing even as a consenter (*Stevenson's Trs.*, 1857, 19 D. 472, Ld. Curriehill), "for subscription imports consent, of which a pupil is presumed incapable" (Ersk. i. 7. 14; Fraser, 150, 227; see Tutor). On the other hand, where no act is performed, and where it is only necessary to remain passive,—as when a deed is granted in the pupil's favour, or title made up in his name, —the pupil is then treated as if *sui juris*, and the deed is taken directly to him alone without mentioning the tutor (Fraser, *supra*; *Kennedy*, 1823, 2 S. 375; *Jurid. Styles*, vol. i. p. 106; cf. *Lambe*, 1834, 12 S. 775). Power, however, is given to a factor *loco tutoris* to complete title to heritage either in his own name or in that of the pupil, by means of a petition to the Court, by the Titles to Land Act, 1868, s. 24, as amended by sec. 3 of the Act of 1869. It is usual for the factor to take the title in his own name where he means to apply to the Court for special power to sell (see Judicial Factor, vol. vii. p. 174). The Sheriff Court, also, has power to appoint a factor who confirms as executor on behalf of the pupil (see *Johnstone*, 1838, 16 S. 541; A. of S., 1730; Dove Wilson, *Sheriff Court Practice*, 423; Fraser, 151), even where the pupil is decerned executor.

Such being the general law in regard to pupillarity, a few special points fall to be noticed.

1. *Legal Proceedings* (1) *by, and* (2) *against a Pupil.*—(1) *Pupil Pursuer.*—A pupil has no capacity to sue (Bell, *Prin.* s. 2067),

and all decrees against a pupil are null in an action where no legal guardian, or curator *ad litem*, is a party to the proceedings (Mackay, *Pract.* i. 312).

(*a*) Where, therefore, *he has a guardian*, an action in the pupil's right must proceed at the legal guardian's instance as such (Ersk. i. 7. 13 and 16; Fraser, 152, 270); and the proper conclusion is for payment, etc., to the latter in that character (Mackay, i. 313; *MacNeil*, 1798, Mor. 16384; see *Caughie*, 1897, 25 R. 1). A summons, however, at the instance of a pupil *with consent* of the tutor, having a conclusion to pay to the pupil, has been held effectual (*Keith*, 1836, 15 S. 116; see *Mackenzie*, 1834, 12 S. 822); and if the action be raised in the pupil's name, it would seem that the guardian's subsequent appearance validates the proceedings (see *Keith, supra*; *Sinclair*, 1828, 6 S. 336; Fraser, 152). Where nearest of kin brought an action to remove tutors, which they afterwards disclaimed, it was allowed to proceed at the instance of the pupil and a curator *ad litem* (*Austin*, 1826, 5 S. 164).

When a pupil, previously represented by his guardian, attains puberty, he ought to be himself sisted, and his proper guardian made a party to the proceedings, or a curator *ad litem* appointed (*Mackenzie's Trs.*, 1846, 8 D. 964; see *Fraser*, 1892, 19 R. 564; *White*, 1894, 21 R. 649; *Wilkinson*, 1897, 24 R. 1001—father as administrator-in-law found liable in expenses).

Where, however, the action is by the pupil against the guardian (*MacNeil*, 1798, Mor. 16384), where the guardian has an adverse interest (*Bogie*, 1840, 3 D. 309; see *Ross*, 1877, 5 R. 182), or refuses to sue (*M'Conochie*, 1847, 8 D. 791), or is incapacitated mentally or otherwise (*Rankine*, 1821, 1 S. 118), the action may be brought in the pupil's name, and a curator *ad litem* will afterwards be appointed on the motion of either party, or by the judge *ex proprio motu*. Where no guardian is appointed, a decree adverse to the pupil is of no effect (Mackay, *Pract.* i. 312).

(*b*) Where the pupil *has no legal guardian*, the action is to be brought in his own name, with a conclusion in his favour, and a curator *ad litem* will be appointed *after* it is in Court and *in dependence* (*Christie*, 1873, 1 R. 237; see *Sinclair*, 1828, 6 S. 336; *Calderhead*, 1832, 10 S. 582; *Keith*, 1836, 15 S. 118 (Ld. Corehouse); *Young*, 1828, 7 S. 220; also *Hamilton*, 1861, 23 D. 1290, 24 D. 31; Fraser, 153; Mackay, *Pract.* i. 313).

Decree obtained by the pupil in an action brought by the tutors in the pupil's name only, cannot be reduced on that ground alone, since this ought to be timeously stated as a defence in the original action (*M'Kenzie*, 1834, 12 S. 822; Fraser, 154).

(2) *Pupil Defender.*—(*a*) Where *he has guardians*, both the pupil and the guardians should (*α*) be *called* as defenders, and the conclusions of the summons should be directed against him and his guardian or tutors *nominatim*, or, if not known, against tutors and curators generally (Fraser, pp. 155, 161, 274; Mackay, i. 344). The pupil is *cited* personally or at his residence: his tutors, if known, should be cited personally; if not known, and even where known, it is enough that they be cited edictally in general as "tutors and curators, if he any has" (Mackay, Fraser, *supra*). Personal service on the pupil, and on the father, or whole tutors, is enough without edictal citation of tutors and curators (*Lie*, 1630, Mor. 2180; *Carnoussie*, 1629, Mor. 2181; *Erskine*, 1852, 14 D. 766). It is unnecessary, but expedient, to cite the father specially as administrator-in-law (*Kinghorn*, 1626, Mor. 2180).

Where the tutors appear and contest the action, the decree against the defenders is, of course, binding on the pupil. Where they do not enter

appearance as tutors, but appearance is made for the pupil, and a curator *ad litem* is thereafter appointed, the decree against the pupil is equally valid (Mackay, i. 344, note (*f*); Fraser, 156, note (*f*); *Johnston*, 1740, Mor. 16346; *Agnew*, 1822, 1 Sh. App. 333). Where the pupil alone appears, and no curator *ad litem* is appointed, the decree appears to be null (*Earl of Craven*, 1854, 16 D. 811); whereas if no appearance was made, it would only be in absence (*Calderhead*, 1832, 10 S. 582; *Sinclair*, 1835, 13 S. 595, 2 S. & M'L. 105, 15 S. 770, 3 D. 871; Mackay, i. 345).

It is now the rule to appoint a curator *ad litem* only *after* the pupil has appeared (*Sinclair*, 1828, 6 S. 336; *Calderhead*, *supra*): the pursuer cannot compel appearance, and the decree when there is no appearance, though formerly held null (*Baillie*, 1621, Mor. 6616; *Sinclair*, *supra*), is now, as stated, regarded as an ordinary decree in absence (see *infra* for effect of decree; Fraser, 157; *Bannatyne*, 14 Dec. 1814, F. C.; *Agnew*, 1822, 1 Sh. App. 333; *Sinclair*, 1835, 13 S. 594; 1837, 15 S. 770; 1841, 3 D. 871; *Dick*, 1828, 6 S. 798, 7 S. 364; Mackay, i. 344, 345). See DECREE *in Absence*; REDUCTION.

In entail and other petitions a curator *ad litem* will only be appointed *after* intimation of the petition (*Inglis*, 1855, 17 D. 1005; cf. *Stewart*, 1857, 19 D. 430; Mackay, i. 345; Fraser, 156, note (*f*); Duncan, *Entail Procedure*, 252. See CURATOR *ad litem*).

(β) Where the tutors are *not called* in any form, the decree is null, even though appearance be made for the pupil; and the appointment of a curator *ad litem* will not remedy the defect (*Thomson's Trs.*, 1863, 2 M. 114 (Ld. Jerviswoode); *Dalgleish*, 1752, Mor. 2184; *M'Turk*, 7 Feb. 1815, F. C.; Fraser, 274).

(*b*) *Where the pupil has no tutors*, (α) he ought to be cited personally, and his tutors and curators, "if he any has," concluded against, and cited edictally (*Crighton*, 1573, Mor. 2178; *Thomson's Trs.*, *supra*; Fraser, 156, 161, 275; Mackay, i. 344). Where the pupil appears, the other party is entitled to require that a curator *ad litem* be appointed (*Calderhead*, 1832, 10 S. 582). Where no curator *ad litem* is appointed for an appearing pupil, the decree will have the effect of one in absence against the pupil though the case may have been debated (*Sinclair*, 1828, 6 S. 336; *Agnew*, *supra*; Mackay, i. 345; Fraser, 158). Where the pupil does not appear, the edictal citation of the tutors, though he has none, is enough to make the decree one in absence (*Dingwall*, 1871, 9 M. 591 (Ld. J.-Cl. Moncreiff); *Sinclair*, 1828, 6 S. 336). With this the pursuer must be content, since he cannot move for a curator *ad litem* where no appearance is made for the pupil (see *supra*; but see *Saunders*, 1822, 1 S. 113, where a curator *ad litem* was appointed to pupil creditors in their father's sequestration on the application of the latter). The pupil will not be forthwith reponed against such a decree after ten days (31 & 32 Vict. c. 100, s. 23), but is under the *onus* of showing that it is erroneous on the merits (see *Sinclair*, 1828, 6 S. 336; *Anderson*, 1828, 6 S. 1145; *Dick*, 1828, 6 S. 798; *Sinclair*, 1835, 13 S. 595, 2 S. & M'L. 105, 15 S. 770, 3 D. 871; Mackay, i. 422, ii. 476, 496. See DECREE *in Absence*; REDUCTION; SUSPENSION). Where the proceedings are such as to *require* the pupil's appearance as defender, the failure to appoint a curator *ad litem* will render the whole proceedings liable to be upset (*Agnew*, 1822, 1 Sh. App. 333).

(β) Where the tutors are *not* cited edictally, the decree against the pupil appears to be null (see *M'Turk*, 7 Feb. 1815, F. C.; Fraser, 275; see Ersk. iv. 1. 8).

Decrees.—Where decree is obtained, the *charge* thereon is made against

the guardian (*Rae*, 1595, Mor. 16237), in whose hands also any arrestments should be left (More, *Notes*, 288); but the pupil's property is attached for the debt (*Drummond*, 1704, Mor. 16320; Fraser, 162). A pupil's person is protected against imprisonment for debt both under the common law (*Mackenzie*, 1695, 4 Mor. Supp. 282) and by statute (1696, c. 41; see Fraser, *supra*).

Intimation of Assignations and such-like ought to be made to the guardian (*Queen's Advocate*, 1566, Mor. 16230; cf. *Robertson*, 1829, 7 S. 421).

2. *Witness.*—Children, however young, are eligible as witnesses ("with reservation of credibility," Bell, *Prin.* s. 2240), if they have intelligence sufficient to comprehend the subject of inquiry, and the obligation to tell the truth; as to which the judge ought to satisfy himself by the manner of the child, and even by the examination of third parties (Dickson on *Evidence*, ii. 1544, 1548; Hume, ii. 341; Macdonald, *Criminal Law*, 448; *Robertson*, 1888, 15 R. 1001, evidence refused; cf. *Robertson*, 1898, 5 S. L. T. No. 508). A youthful witness is accepted more readily in criminal than in civil cases (cf. *Robertson, supra*; *Millar*, 1870, 1 Coup. 430, and cases referred to in Macdonald, 449). The amount of weight to be allowed to the testimony of a pupil is a matter for the judge or jury, having regard to the intelligence and manner of the witness and the nature of the facts in question (*Robertson, supra*). The age at the examination, rather than at the date of the facts, is to be considered, unless the child was very young, and there had been a long interval (Dickson, ii. 1547; Hume, ii. 342).

Pupils under the age of twelve are not *sworn* as witnesses, but are admonished to tell the truth; above the age of twelve they may be sworn in the discretion of the judge; above the age of fourteen they may be sworn without inquiry (Dickson, ii. 1549; Hume, ii. 341; Bell, *Prin.* s. 2240; Macdonald, 460)

A pupil cannot validly witness a formal written deed or instrument (Bell, *Lect.* i. 50; *Davidson*, 1738, Mor. 16899; Ersk. iv. 2. 27).

Reference to Oath.—While the oath of a minor *pubes* is admissible (*Maitland*, 1623, Mor. 8917; *Somervell*, 1670, 2 Bro. Supp. 497), it appears that in a reference to his oath the minor may not be examined on facts occurring during his pupillarity (*Little*, 1826, 4 S. 424; *Anderson*, 4 Feb. 1826, F. C.; *Somervell, supra*; Fraser, *P. & C.* 339). So also, since a pupil has no *persona standi in judicio*, and would be likely to suffer through his immature judgment, a reference to his oath is incompetent (*Gordon's Tutor*, 1707, Mor. 8909; Dickson on *Evidence*, ii. s. 1407).

3. *Responsibility for Crime.*—A child under the age of seven years is not liable to punishment as a criminal (Hume, i. 35). A pupil above that age may be prosecuted and punished arbitrarily (Hume, i. 32, 35, and cases there; Macdonald, 10); above the age of puberty he is liable to the ordinary, even capital, punishment (Macdonald, 10; Hume, *supra*; Alison, i. 663, 664). It is competent to indict a pupil without calling his guardian (Hume, i. 33).

Where the pupil has been benefited by any *wrongous act* done by him, the injured party will have right of action against him in so far as the latter is *locupletior* (see Fraser, 151; *Somerville*, 1541, Mor. 8905).

4. *Contributory Negligence;* Volenti non fit injuria: *Seen Danger.*—Since pupils are responsible for their criminal acts, it is not surprising that they have been held capable, in certain circumstances, of contri-

butory negligence (*Fraser*, 1882, 10 R. 264; *Adams*, 1884, 11 R. 852). The age at which a child shall be held capable depends entirely on the facts of each case, the nature of the risk, etc.; it was laid down in *Campbell* (1873, 1 R. 149—child of four years) that the question whether the pupil had sufficient capacity to be guilty of contributory negligence was a question of fact which had been properly left to the jury. While the general principle is clear, it has been recently stated judicially that the whole question of the pupil's capability of seeing danger, such as unfenced streams, machinery, etc., is in an unsettled condition (*Gibson*, 1893, 20 R. 466, 470 (Ld. Trayner)—child of five years; compare the cases of *Grant*, 1870, 9 M. 258—child of six years; *Green*, 1882, 9 R. 1069—child of three years; *Fraser*, 1882, 10 R. 264—boy of six years; *Adams*, 1884, 11 R. 852—boy of nine years; *Findlay*, 1887, 14 R. 312—child of ten years; *Martin*, 1887, 14 R. 814—child of five years; *Smith*, 1888, 16 R. 57—boy of eleven years; *Duff*, 1889, 16 R. 675—child of three years; *Cormack*, 1889, 16 R. 812—boy of seven years; *Haughton*, 1892, 20 R. 113—child of five years; *Hamilton*, 1893, 20 R. 995—child of four years; *Morrison*, 1896, 23 R. 564—child of six years; *Wilkinson*, 1897, 24 R. 1001—boy of thirteen years).

5. *Privileges and Disabilities.*—The rules in regard to privileges and disabilities in the case of minors apply *à fortiori* to those in pupillarity. While, therefore, the deeds of a pupil are *ipso jure* null, those granted by a father (*Rose*, 1821, 1 S. 154) or tutor (Ersk. i. 7. 34) may be reduced within the *quadriennium utile* on the ground of minority and lesion (see Fraser, 391). See Minor.

[See Stair, i. 5. 12 and 16; More, *Notes to Stair*, xxxix; Ersk. i. 6. 54; i. 7; i. 7. 14 and 33; Bell, *Prin.* s. 2067; Ersk. *Prin.* i. 7; Fraser, *Parent and Child*, 145, 390; Mackay, *Practice*, i. 312, 344; ii. 127; Macdonald, *Criminal Law*, 10, 448, 460; Bell, *Dictionary*, *voce* "Minor."]

See Tutor; Minor; Curator; Curator *ad litem*; Judicial Factor; Parent and Child; Patria potestas; Guardianship of Infants Act; Custody of Children; Aliment; Contributory Negligence; Witness.

Pupils Protection Act.—See Judicial Factor.

Pursuer.—See Title to Sue. See also Judicial Factor; Minor; Curator; Pupil; Tutor; Partnership; etc.

Quadriennium utile.—See Minor (vol. viii. p. 360).

Quanti minoris, Actio.—Under the common law of Rome (*jus civile*) the seller was not liable to the buyer for any faults or defects in the thing sold, unless he was aware of such defects and did not disclose them, or unless he had given an express warranty. The curule ædiles, who had jurisdiction over markets, gave to purchasers of beasts of all kinds included in the term "*pecus*," provided the beast had been sold with a defect, even though the seller was not aware of the defect, the choice of two remedies against the seller:—(1) The *actio redhibitoria*, by which the

contract of sale could be rescinded within six months (see REDHIBITORIA, ACTIO); and (2) the *actio quanti minoris*, by which the seller could obtain an abatement of the price, proportionate to the decrease in the value of the beast at the time of the sale, owing to the defect (*Dig.* 21. 1. 38 pr.; 21. 1. 38. 5). Under the Empire these ædilician remedies were extended to sales of all things whatsoever, moveable or immoveable, so that in the later Roman law an implied warranty of freedom from defects impairing reasonable use was inherent in sale.

The *actio quanti minoris*, known also as the *actio æstimatoria*, could be brought at any time within twelve months (*annus utilis*) from the making of the contract (*Cod.* 4. 58. 2; *Dig.* 21. 1. 48. 2). The action could be brought a second or third time, according as new and distinct defects appeared (*Dig.* 21. 1. 31. 6; 21. 2. 32. 1). The action was available to the purchaser of an estate over which a servitude was found to exist, which was unknown to the purchaser at the date of the contract (*Dig.* 21. 1. 61; 21. 2. 15; cf. per Ld. M'Laren, in *Louttit's Trs.*, 1892, 19 R. 791, at p. 800). The proportion of the price which had to be returned was determined by ascertaining how much less valuable the article was to the purchaser owing to the defects; and where one of several things, which had been bought together for one price and were not conveniently separable, proved defective, the depreciation of the others was taken into consideration (*Dig.* 21. 1. 61; 21. 2. 32. 1; 21. 1. 38. 13). In order to render these remedies available, the defect, whatever it might be, must have been in existence at the date of the contract of sale (*Dig.* 21. 1. 54; *Cod.* 4. 58. 3. pr.). Further, a buyer could not avail himself of either of these ædilician remedies if either he was aware of the defects at the time when the contract was made, or if they were so obvious that, as a reasonable man, he could not have failed to observe them but for his own negligence (*Dig.* 21. 1. 48. 4; 21. 1. 48. 3). The remedy was not available in case of sales by the State (*Dig.* 21. 1. 1. 3).

In Scotland, at common law, the *actio quanti minoris* was not wholly rejected, but its application was much more restricted than in the Roman law (Stair, i. 9, ss. 10 and 11; i. 10, ss. 14 and 15; Bankt. i. 19. 3; Ersk. *Inst.* iii. 3. 10; Bell *Com.* i. 463–465). The weight of authority is in favour of the view that where the seller's conduct was tainted with fraud, the buyer was not at common law obliged to rescind the contract, but might retain the subject and claim damages (Stair, i. 9. 14; *Amaan*, 1865, 3 M. 526; *Dobbie*, 1872, 10 M. 810). In several cases prior to the Sale of Goods Act, 1893, the view that, in case of fraud by the seller, it was competent for the buyer, without rescinding the contract, to bring an action of damages—an action which in effect was equivalent to the *actio quanti minoris*—was favoured by the House of Lords (*Houldsworth*, 1880, 7 R. (H. L.) 53, see per Ld. Cairns, at p. 55; see also opinions in *Brownlie*, 1880, 7 R. (H. L.) 66, where, however, Ld. Watson stated that there was "a great deal of difficulty in regard to the point as the decisions at present stood in Scotland"). The seller's right to retain the goods and claim an abatement of the price, as in the *actio quanti minoris*, was also available in cases of special bargain or usage (per Inglis, L. J. C., in *Hansen*, 1859, 21 D. 441; *M'Cormick*, 1869, 7 M. 854). The Scots common law as to the competency of the *actio quanti minoris* in different sets of circumstances was expounded by Ld. M'Laren, in the year preceding the Sale of Goods Act, 1893, as follows:—"There are only two remedies open to a purchaser which are known to jurisprudence. He has in the first place a right to rescind the contract conditional on his rejecting the goods or heritable property, and

to claim damages. His other remedy is the *actio quanti minoris*, the proper application of which is to the case of a latent infirmity, either in the title or the quality of the subjects sold, discovered when matters are no longer entire. At one time it was doubted whether we had this form of action in relation to sales of moveable property, but it was never doubted that under the claim of warrandice such a right did belong to the purchaser of heritable estate who discovered that some part of the subject of sale had not been conveyed to him. Now, however, it is quite settled, and has been explained in the valuable expositions of the law of sale given by the late Lord-President, that in such cases as sales of ships and fixed machinery, which cannot be returned after they have been in use, if it is discovered after they are in use that the extent or quality of the subjects sold is disconform to contract, the purchaser's remedy takes the shape of an *actio quanti minoris*. Under this form of action the pursuer may recover such sum as will enable him to put the subject in proper repair, or compensate him for loss of profit, where the subject is of less value than he originally bargained for. I see no reason in principle or on authority why the remedies in the cases of personal and heritable property should not be of the same kind . . . If, after buildings have been erected on ground sold or outlay has been incurred, the purchaser discovers that there is a servitude affecting the property, or part of the property is carried away from him, that is a proper case for making effectual the protection secured to him under the claim of warrandice,—that is to say, his remedy is just the *actio quanti minoris*" (*Louttit's Trs.*, 1892, 19 R. 791, per Ld. M'Laren, at pp. 779, 780).

In England the principle of the *actio quanti minoris* has long been recognised. The buyer, after receiving and accepting the goods, may, if the goods delivered to him are inferior in quality to that which was warranted by the seller, either bring an action of damages or, if he has not paid the price, set up a claim of damages for breach of warranty by way of counterclaim in the seller's action for the price (Benjamin on *Sale*, 3rd ed., p. 902; *Mondel*, 1841, 8 M. & W. 858).

By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), a very important change has been made in the law of Scotland in the direction of extending the right of a buyer to avail himself of the *actio quanti minoris*, and so of assimilating the law of Scotland to the law of England. The Sale of Goods Act, 1893, provides, sec. 11 (2):—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages." By sec. 53 it is provided: "Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or (*b*) maintain an action against the seller for damages for the breach of warranty." By sec. 62 it is provided: "As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract." The exercise of the right, extended by these sections to the buyer in an ordinary sale of goods, is safeguarded by the provision (s. 59), that where a buyer does not reject goods, but elects to treat a breach of contract as only giving rise to a claim for damages, he may, in an

action by the seller for the price, be required, in the discretion of the Court, to consign the price of the goods, or give other reasonable security for the due payment thereof.

In a recent case (*Electric Construction Co.*, 1897, 24 R. 312) it has been held by the First Division of the Court of Session (*diss.* Ld. Kinnear) that the purchaser of a machine, having elected to reject it as disconform to contract, but having continued to use it for three months after intimating his rejection of it, was not entitled thereafter to fall back upon the alternative remedy, provided by the Sale of Goods Act, of retaining the machine and claiming compensation on the ground that the seller had failed to perform a material part of the contract. Ld. M'Laren, in giving the leading judgment in this case, observed (at p. 323): "By the enactment of sec. 11 of the Sale of Goods Act the common law of Scotland is radically altered, but it is not made identical with the law of England. The clause as it stands gives the buyer an unqualified right of election either to treat the contract as repudiated, or to affirm the contract and put forward a claim in diminution of the price: but the clause does not entitle the buyer to do two inconsistent things. In this case the defenders made their election to treat the contract as repudiated. They are not in a position to found on their election, because they have taken the use of the machine; but having made their election, and then raised the issue which this action is brought to settle, they are not entitled to recall their election and set up a claim as for breach of warranty." In this case Ld. Kinnear, on the other hand, expressed a strong opinion that the buyers were not deprived of the statutory remedy of retaining the machine and treating the failure to perform a material part of the contract as a breach giving rise to compensation or damages. The buyers, in his opinion, could not be deprived of this remedy by reason of their having accepted the goods, because that was the very condition upon which their right arose. It seemed to him somewhat inconsistent to hold, as was done by the majority of the Court in this case, that the buyers could not reject the goods because they had in effect elected to retain them, and at the same time that they could not claim damages because they had elected to reject the goods. The damages claimable by the buyer would be the difference between the value of the goods actually supplied and the value which they would have had to the buyer if they had been in all respects conform to contract (*Electric Construction Co.*, 1897, 24 R. 312).

Quantum meruit.—Where, without any certain agreement, one employs another to do work or to render services, the law implies that the employer will be liable in payment of reasonable remuneration according to the nature of the work done or the services rendered (*Kennedy*, 1890, 17 R. 1085). There must be, however, either a distinct mandate to undertake the work on the part of the employer, or acquiescence in it as it proceeds.

Where the parties have entered into an express agreement, their rights will fall to be determined under the agreement alone, and the terms of the agreement will regulate the rate of remuneration. In such a case the Court will not allow any extra charges for work done under the agreement or for work done contrary to or beyond the actual terms of the agreement (*Brown*, 1832, 10 S. 667; *Gordon*, 1839, 1 D. 832; *Weatherstone*, 1852, 1 S. 333; *Menzies*, 1895, 22 R. 299). If more is done than is actually bargained for, the employer is not bound to take it unless it consists of

extra work ordered or assented to by him, in the knowledge that it involved extra expense (*Scott*, 1827, 6 S. 233; *Wilson*, 1859, 21 D. 507; *M'Elroy*, 1877, 5 R. 161, revd. 5 R. (H. L.) 171). Where there has been acquiescence in the deviation, the employer will be liable in a *quantum meruit* ascertained by measure or value for the extra labour (*Peacock*, 1825, 3 S. 436). If the extra work is of the same nature as the work contracted for, the extra remuneration will be calculated at the contract rate.

If a contract be departed from by both parties proceeding in manner inconsistent with its terms, the employer will be liable in a *quantum meruit* according to the nature of the work actually done (*Smail*, 1847, 9 D. 1043).

Quarantine.—See Ship.

Quarter Sessions.—See Justice of Peace.

Queen.—See Sovereign.

Queen's Counsel.—The status of Queen's Counsel has long been conferred upon members of the English, Irish, and Colonial Bars, whereby barristers eminent in practice or in legal attainment are appointed Counsel to the Crown, and called within the bar. The status was not until recently recognised at the Scottish Bar, and, with the exception of law officers of the Crown and Deans of Faculty, none received the honour.

It was felt, however, that distinguished members of the Scottish Bar who had occasion to collaborate with English, Irish, or Colonial barristers in the Judicial Committee of the Privy Council, the House of Lords, or before Parliamentary Committees, were put in a false position when those brethren of other Bars who happened to be Queen's Counsel took precedence of them, and it was accordingly resolved by the Faculty of Advocates to petition Her Majesty to create a roll of Queen's Counsel in Scotland similar to those kept in England and Ireland. A petition was accordingly presented in the summer of 1897, and its prayer was shortly thereafter granted.

Members of the English Bar are recommended as Queen's Counsel by the Lord High Chancellor; at the Irish Bar the appointment is made by the Lord-Lieutenant upon the recommendation of the Lord Chancellor of Ireland; while at Colonial Bars the dignity is conferred by the Governor of the particular colony, acting as Her Majesty's representative.

At the Scottish Bar the names of those to be promoted to the rank and dignity of Queen's Counsel are laid before Her Majesty by the Secretary for Scotland, upon the recommendation of the Lord Justice-General for Scotland, and letters patent are granted to those whose names are so approved. Appointments are made from time to time, and Queen's Counsel take precedence according to the dates of their patents.

An Advocate desiring to receive the honour must apply for it in the following form:—

To the Right Honourable the Lord Justice-General for Scotland.

My Lord,—I have respectfully to request your Lordship to recommend me to Her Majesty, through the Secretary for Scotland, for appointment as one of Her Majesty's Counsel.—I am, my Lord, your obedient servant, ...

Before making the above application, he must give notice that he intends to apply to all those members of the Bar who are his seniors, and have not attained the honour.

The etiquette regarding the rights and duties of Queen's Counsel is to a large extent unwritten, and, in Scotland, at least, still a little uncertain. The rule seems to hold here, as in England, that they must not be employed against the Crown without special licence, which is not refused unless the Crown desires to be represented by the individual in the case. They are "senior counsel," and cannot appear in a case without an accompanying junior. This of course applies only to cases in the public Courts. In arbitrations and other tribunals of a like nature they may act alone, and opinions may be given by them without aid of junior counsel. Queen's Counsel do not, as in England, sit within the bar, but they take precedence of all, even their seniors at the Bar who are not Queen's Counsel, in the conduct of a case.

Queen's Evidence—This is an English law term. It is applied where one of several persons accused is admitted by the committing Magistrate as a witness against his accomplices, on the implied condition that he shall not be tried for the offence. In Scotland the power of granting such a promise of immunity from prosecution is vested in the public prosecutor alone. See WITNESS; ACCOMPLICE.

Queen's and Lord Treasurer's Remembrancer.—The Queen's and Lord Treasurer's Remembrancer is the General Administrator of the Crown Revenues in Scotland; and he represents the former ministerial functions of the Court of Exchequer. Originally the offices of Queen's Remembrancer and Lord Treasurer's Remembrancer were distinct; but they were united in 1836. See also EXCHEQUER (COURT OF).

Querela inofficiosi testamenti.—See LEGITIMA PORTIO.

Quinquennial Prescription.—The Act 1669, c. 9, enacts, *inter alia*, that "ministers' stipends and multures not pursued for within five years after the same are due; and likewise mails and duties of tenants, not being pursued within five years after the tenants shall remove from the lands for which the mails and duties are craved; shall prescribe in all time coming; except the said ministers' stipends, multures, mails, and duties shall be offered to be proven to be due and resting owing, by the defenders, their oaths; or by a special writ under their hands, acknowledging what is resting owing; and that all bargains concerning moveables or sums of money, provable by witnesses, shall only be provable by writ or oath of party, if the same be not pursued for within five years after the making of the bargain." The statute further enacts that "all actions proceeding upon warnings, spuilzies, ejections, arrestments, or for ministers' stipends and others foresaid shall prescribe within ten years, except the said actions be wakened every five years; but prejudice always of any of the said actions which by former Acts of Parliament are appointed to prescribe in a shorter time."

The effect of this enactment is not to extinguish any right or obligation, but to impose a limitation upon the mode of proof whereby, after five years, such right or obligation may be established. Modelled upon the Act 1579, c. 83 (see TRIENNIAL PRESCRIPTION), it is applied in precisely the same way as that statute (*Campbell*, 1848, 10 D. 361). Thus, in "bargains concerning moveables," the subsistence as well as the constitution of the obligation must be proved in the specified manner. It is unnecessary here to enter in detail into the subject of proof by reference to oath (see OATH ON REFERENCE), or of proof by writ of party (see TRIENNIAL PRESCRIPTION). It is enough to note that there is no obligation on the defender's part to instruct payment or fulfilment of his obligation (*Heddle*, 1847, 9 D. 1254); and that payments of interest made after the expiry of the *quinquennium*, admitted on record, or proved by the defender's writ, will prove resting owing, though partial payments during the five years rather fortify the presumption that all bygones are cleared (*Nisbet*, 1729, Mor. 11059. See also, as to the question of proof, *Kennard*, 1865, 3 M. 946).

The statute applies to—

(1) Stipends and multures. The prescription or limitation runs even when the charge is vacant during the time for which stipend is payable (*Glouy*, 1753, Mor. 11063).

(2) Tenants' maills and duties, *i.e.* rents, whether the subjects be urban or rural (*Boyes*, 1823, 2 S. 169), and whether the lease be written or verbal. The statute only applies where the tenant has removed from the lands (*M'Intosh*, 1753, Elch. "Preser." 35; *Strahorn*, 1739, Mor. 11059; *Johnston's Executrices*, 3 March 1897, 24 R. 611); but it may be pleaded by the cautioner for the tenant as well as by the tenant himself (*Duff*, 1771, Mor. 11059). Where there is something equivalent to an acknowledgment of the arrears being due, the tenant cannot successfully plead the prescription (*Hogg*, 1826, 4 S. 708), but sequestration before the rent is due merely in security will not exclude the plea (*Cochrane*, 1831, 9 S. 501). The judicial statement within the *quinquennium* of a claim for arrears of rent by way of compensation against a claim by the tenant will bar the plea (*Macdonald*, 1826, 5 S. 26), but prescribed arrears of rent may not be pleaded by the landlord against his tenant's claim for payment of a debt (*M'Intosh*, 1753, Mor. 2680). Where, however, a tenant who had retained rents in his hands was found entitled to a sum for improvements subject to compensation for arrears of rent, he was not allowed to plead that the rents were prescribed (*Nicolson*, 1832, 10 S. 759). The benefit of the statute is, according to Mr. Erskine (*Inst.* iii. 7. 20), confined to *bonâ fide* tenants (*Murray*, 1709, Mor. 11054; *Nisbet*, 1729, Mor. 11059. But see *Fairholm*, 1725, Mor. 11058; *Daes*, 1710, Mor. 11056).

(3) Bargains concerning moveables. These embrace the contracts of sale, hiring, loan, and pledge. Transactions as to single articles which do not come within the category of merchant's accounts fall under the statute (*Nobles*, 11 June 1813, F. C.; *White*, 1683, Mor. 11065; *Ewart*, 1730, Mor. 11067. See also *Gobbi*, 1859, 21 D. 801). Not so, however, transactions between a commission agent and his principal (*M'Kinlay*, 1851, 14 D. 162), or a consignment of goods in security for an advance (*M'Farlane*, 1827, 5 S. 189), or bargains constituted by writing (*Southesk*, 1683, Mor. 12326; *Hunter*, 1843, 5 D. 1285). The statement is to be found in the text-books that the contract of deposit falls within the scope of the statute. Its first appearance is apparently in the 1860 edition of Bell's *Principles*, and there is much to be said against it, for that contract seems necessarily to imply a tract of time. (See *Brown*, 1890, 6 S. L. Rev. 147.) The view there

expressed by Ld. Pearson when Sheriff of Perthshire is equally applicable to a similar contract, far more frequently met with in modern life, viz. *locatio custodiæ*.

(4) Actions proceeding upon a certain class of claims, themselves subject to a short prescription. The statute 1685, c. 14, interprets the enactment of 1669 by declaring that all the actions specified are to prescribe if the first wakening be not raised within five years of the date when the action relied on to exclude prescription fell asleep (see *Graham*, 30 May 1811, F. C.).

The statute 1669, c. 9, expressly enacts that "prescription shall not run in any of the cases foresaid against minors during their year of minority."

The statute further established a quinquennial prescription of arrestments, which by the Act 1 & 2 Vict. c. 114 has been altered to a triennial prescription. See ARRESTMENT

The Conveyancing Act, 1874 (37 & 38 Vict. c. 94), s. 42, enacts a quinquennial prescription of INHIBITIONS (*q.v.*).

[*Authorities.*—More *apud* Stair, cclxxiii; Ersk. *Inst.* iii. 7. 20; Ersk. *Prin.* iii. 7. 8; Bell, *Prin.* ss. 593, 634; Bell, *Com.* i. 347; Dickson on *Evidence*, ss. 464–475 [472–483]; Napier on *Prescription*, pp. 813–822; Millar on *Prescription*, pp. 154–160.]

Rabbits. — Reference is made to the articles upon CLOSE TIME; GAME LAWS; GROUND GAME ACT; GUN LICENCE; LICENCE TO KILL GAME; POACHING.

Rabbits, according to Irvine (p. 21) and the other authorities upon the subject, are not "game," and since the article upon GUN LICENCE in vol. vi. was printed it has been authoritatively determined that they are not "vermin" (*Young*, 8 March 1898). The older Scottish statutes afforded them protection. Thus the taking of them from warrens or "cunning aires" was declared to be punishable as theft (1474, c. 60), whilst the destruction of them in time of snow was also declared penal (1457, c. 88). But prior to any legislation in favour of agricultural tenants it had been held that, as rabbits are not game, the tenant is entitled to destroy them for the protection of his crops (*Moncrieff*, 1828, 6 S. 530). Previous to the passing of the Ground Game Act of 1880, however, the landlord might exclude the tenant's right by stipulation in the lease. Whether, when rabbits come from a protected cover, the agricultural tenant of the proprietor of the cover, or a neighbouring proprietor, or his tenant, may obtain damages for injury done to crops by rabbits from the cover, has never been determined, but would probably depend upon whether circumstances permitted the complainer to kill the rabbits as soon as they entered his own ground, or to prevent them from entering it.

Railways.—The law relating to railways is originally and essentially statutory, although the construction of the enactments, and the many questions which arise in connection with the daily working of the railway system, especially in relation to the conveyance of passengers and merchandise, have resulted in the accumulation of a large mass of legal decisions. Both the statute and the case law naturally fall into four or five broad divisions.

(1) The law relating to the incorporation and constitution of railway companies.

(2) The law governing their powers for the acquisition of the land necessary to enable them to construct and carry out their undertakings.

(3) The law providing for the constructing of the undertaking, and prescribing the conditions under which it must be constructed.

(4) The law regulating the use and working of the constructed undertaking, and conferring rights and imposing certain obligations and duties in reference to the conduct of the business carried on by its proprietors.

To which there should be added—

(5) The law embodying the special provisions which have been found necessary to harmonise the rights of creditors and the public interest in connection with railways, to provide for their taxation and contribution to local rates, and to deal with the contingencies of abandonment, amalgamation, and other specialties.

As regards the first two of these divisions, railways are generally *in pari casu* with other undertakings of a public or quasi-public character for which statutory powers are required, or incorporation by Act of Parliament resorted to. The first has been dealt with in the article on JOINT STOCK COMPANIES, and the second in that on the LANDS CLAUSES ACTS. It will only be necessary in the present article to point out certain specialties in reference to the acquisition of land, and the payment of compensation which arise in connection with the construction of railways.

Railway companies are or may be incorporated, and railway lines constructed either by special Act of Parliament constituting the company, authorising the particular line in question, and applying the general provisions of the Companies, the Lands, and the Railways Clauses Acts, or such of them as are desired, to the new company and its undertaking, or by provisional certificate, obtained on application to the Board of Trade under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), in cases in which the land required can be obtained by agreement, and compulsory powers are not necessary. The construction of light railways is provided for by special statutory provisions (Light Railways Act, 1896, 59 & 60 Vict. c. 48). Existing companies can similarly acquire additional powers either by special Act, or by application to the Board of Trade under the Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120). These two Acts of 1864 are amended by an Act of 1870 (33 & 34 Vict. c. 19).

The constitution and powers of railway companies are therefore governed in the ordinary case by—

(1) The specific provisions of their own special Acts.

(2) The general provisions of the Clauses Acts applicable to all railway companies to the extent to which they are incorporated by the special Act. (See LANDS CLAUSES ACTS.)

(3) The other general public railway Acts applicable to all ordinary railway companies and undertakings.

Of the Clauses Acts, those which have special reference to railways are the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33, the English statute being c. 20), and the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92).

The procedure by application to the Board of Trade for a certificate under the Acts of 1864 and 1870 is only competent where there is no opposition on the part of landowners,—is in fact more directed to facilitate the construction of branch lines,—and has not been much taken advantage of, either by new promoters or existing companies. Where the powers of

these Acts are invoked, the promoters apply to the Board of Trade for a certificate, depositing plans, etc., and giving prescribed notices (1864, c. 120, ss. 3–6; c. 121, ss. 3–8). The Board of Trade consider all objections, and special provisions are made for opposition by a railway or canal company (33 & 34 Vict. c. 19). The Board of Trade settle a draft certificate, lay it before the Houses of Parliament, and if neither House resolves that it ought to be made, proceed to issue the certificate, which on due publication has the effect of a special Act (1864, c. 120, ss. 9–19; c. 121, ss. 11–22). Provisions are made for the incorporation of the Clauses Acts (c. 120, ss. 20 and 21; c. 121, ss. 23, 27, and 31), for restrictions on the issue of shares and the power of borrowing money (c. 120, ss. 22 and 23; c. 121, ss. 28 and 29), and, in the case of new railways, for the incorporation of the promoters as a company,—which is obligatory where they are not already incorporated and are more than seven in number (c. 121, ss. 24–26),—for securing the completion of the line (c. 121, ss. 34–48), for the taking of tolls (c. 121, ss. 49 and 50), and for the application of the general railway Acts (c. 121, s. 51). Where opposition is made by a railway or canal company, the Board of Trade must introduce a Bill into Parliament to confirm the provisional certificate, and railways made under these Acts must be of the gauge prescribed by the general Act of Parliament (33 & 34 Vict. c. 19).

Acquisition of Land.—One or two specialties relating to the construction of railways fall to be noticed, although the subject otherwise has been fully treated under Lands Clauses Acts.

"*Injuriously affecting.*"—By sec. 6 of the Railways Clauses Consolidation (Scotland) Act, 1845, it is expressly provided that "the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or *injuriously affected* by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers vested in the company." But unless land of the claimant has been taken, the injury, in order to entitle to compensation, must be one clearly arising from the construction and not from the subsequent use of the railway (*Brand*, 1869, L. R. 4 E. & I. App. 171; *City of Glasgow Union Rwy. Co.*, 1870, L. R. 2 Sc. App. 78). The prohibition against entering on lands before payment or deposit has no application to operations which merely injuriously affect lands not taken (*Hutton*, 1849, 7 Hare, 259), and notice by the company of such operations is not necessary (*Don*, 1878, 5 R. 972, per Lord-President).

Lands for Additional Accommodation or Extraordinary Purposes.—Sec. 12 of the Lands Clauses (Scotland) Act (8 Vict. c. 19) empowers limited owners to sell, where the promoters are empowered by special Act to purchase lands for extraordinary purposes. Sec. 38 of the Railways Clauses Act authorises the company, in addition to the lands authorised to be compulsorily taken, to contract with any person willing to sell for the purchase of land adjacent or near to the railway, not exceeding in quantity the amount prescribed by the special Act, for the purpose of providing additional stations or similar accommodation, making convenient roads and ways to the railway, and other purposes requisite or convenient for the formation and use of the railway. Lands acquired under this section do not become superfluous (*Cal. Rwy. Co.*, 1871, L. R. 2 Sc. App. 160). Where the Board of Trade requires a bridge to be substituted for a level crossing, the company may take—if necessary compulsorily—the lands specified in the certificate

of the Board of Trade as necessary for the purpose of the work (26 & 27 Vict. c. 92, s. 8).

Special Provisions Relating to Mines.—An ordinary purchase of lands transfers all *a cœlo usque ad centrum*, including the minerals. The right to acquire land would thus, in the absence of express provision, involve the obligation to pay for the minerals below the surface required. It is, however, obvious that, in the making of a railway, what the promoters require is the right to the permanent use of the surface, which involves the purchase, at one time or another, of all that cannot be separated from the surface without damage. On the one hand, the promoters have no use for the minerals, and, indeed, their use of the surface might preclude them deriving profit from the minerals underneath. On the other hand, the owner of the land may be deriving no revenue from the minerals, and has no equitable claim to compensation, unless and until any revenue which he is deriving, or may derive, from them is interfered with. The moment, however, that his right to make profit out of his minerals becomes active, his right to compensation emerges. In view of these considerations, special provisions in regard to mines are made by secs. 70–78 of the Scottish Railways Clauses Act.

In the first place, it is enacted that the company are not to be entitled to mines or minerals under the lands purchased, except so much as must be dug out or carried away or used in construction, unless the same shall have been expressly purchased, and with these exceptions all mines are deemed to be excepted from the conveyance (s. 70). The term mines, by express words of the statute, includes "coal, ironstone, slate, or other minerals," and has been held to embrace limestone (*Wm. Dixon Ltd.*, 1879, 7 R. 216, per Ld. Adam; *M. Rwy. Co.*, 1889, L. R. 15 App. Ca. 19), freestone (*Jamieson*, 1868, 6 S. L. R. 188, per Ld. Kinloch; *G. & S.-W. Rwy. Co.*, 1893, 31 S. L. R. 98), if of merchantable value (*Nisbet Hamilton*, 1886, 13 R. 454), shale in the banks of cuttings above formation level (*Earl of Hopetoun*, 1893, 20 R. 704), china-clay (*Hext*, 1872, L. R. 7 Ch. App. 699), clay of merchantable value (*M. Rwy. Co.*, 1882, L. R. 20 Ch. D. 552; *Loosemore*, 1882, L. R. 22 Ch. D. 25), and apparently everything, such as gravel, marble, fire-clay, or the like, except the mere surface which is used for agricultural purposes (*M. Rwy. Co.*, 1867, L. R. 4 Eq. 19). But common clay forming the surface or subsoil of land is not a mineral in the sense of the Act (*Magistrates of Glasgow*, 1888, 15 R. H. L. 94). The term mines includes minerals whether got by underground workings or such as can only be worked, and by the custom of the district are worked, by open or surface workings (*M. Rwy. Co.*, 1889, L. R. 15 App. Ca. 19).

The company may purchase the minerals at any time before the expiry of the compulsory powers (*Errington*, 1882, 19 Ch. D. 559); but they are in no case entitled to a conveyance including minerals unless there has been an express purchase (*re Metro. Dist. Rwy. Co.*, 1881, 45 L. T. 103); and compensation for minerals is outwith the conditions of the bond to be given where the company enters on land prior to agreement or determination as to the compensation (*Neath & Brecon Rwy. Co.*, 1876, L. R. 2 Ch. D. 201).

The statutory provisions as to the subsequent working or acquisition of the minerals are as follows: If the party in right of the minerals lying under the railway, or within forty yards thereof, desires to work them, he must give notice in writing to the company thirty days before commencing to work (s. 71). The company may then inspect the mines; and if they consider that the working is likely to damage their works, and are desirous that the mines or parts thereof should be left unworked, and are willing to

make compensation, they may give notice to the party in right of the minerals, stating their desire, and specifying the parts of the mines to be left unworked and compensated for; and thereupon the minerals comprised in the notice must be left unworked, and the company must pay compensation for the same, and for all loss or damage occasioned by the non-working thereof, to be settled, in failure of agreement, as in other cases of disputed compensation (s. 71). If the company do not give such notice electing to purchase, the owner may work the minerals, and in any case up to the limits to which the company have agreed to purchase; and if any damage is caused by his working any minerals which the company have thus required to be left unworked, and agreed to make compensation for, the same must be forthwith repaired and removed, and the damage made good at the mineral-owner's expense (s. 72). The effect of these sections is to take away the company's common-law right to support, and to substitute for it a right to purchase, the minerals (*G. W. Rwy. Co.*, 1867, L. R. 2 E. & I. App. 27). If they do not purchase, the owner may work (*Fletcher*, 1859, 28 L. J. Ex. 147, 29 L. J. Ex. 253), even from the surface (*Ruabon Brick & Terra Cotta Co.*, [1893] 1 Ch. 427), and even though the result may be to let down the railway (*G. W. Rwy. Co., supra*). On the other hand, a company whose powers are permissive and not obligatory are not bound to keep up and work a line which has been thus damaged (*Regina* v. *G. W. Rwy. Co., ex parte Ruabon, etc., Co.*, 1893, 62 L. J. Q. B. 572). The effect of the thirty days' period in sec. 71 is merely to determine "how long the mine-owner's right of working shall be kept in abeyance or suspense." The company are not limited to that period, but may at any time, when they apprehend danger to the line, intimate their intention to purchase by a counter notice (*Wm. Dixon Ltd.*, 1879, 7 R. 216, 7 R. H. L. 116). The lessee being dealt with under the section, the right of the owner is secured by the general right to compensation given in sec. 6 of the Act (*Smith*, 1877, 2 App. Ca. 165); and while an owner is entitled to give notice even though he intends to let, his notice must be *bonâ fide* (*G. & S.-W. Rwy. Co.*, 1893, 31 S. L. R. 98); and the proprietor of ungotten coal is not entitled to compensation till the time arrives for working the coal-beds (*Lord Gerard*, [1894] 2 Q. B. 915; [1895] 1 Q. B. 459). It has been held in England that the company are not limited to the prescribed distance in preventing the working of minerals, but that they are at any time entitled to stop all working dangerous to the line, whether within the statutory limits or not (*M. Rwy. Co.*, 1867, L. R. 4 Eq. 19).

Communications of limited dimensions, in the form of airways, gateways, and water levels, may be made through minerals of which the company has thus stopped the working (s. 73; *M. Rwy. Co.*, 1886, 33 Ch. D. 632). The owner is entitled to compensation from time to time for the increased expense caused by his having to work by tunnelling, and not continuously (s. 74; *M. Rwy. Co.*, 1885, 30 Ch. D. 634; *Whitehouse*, 1869, 5 L. R. Ex. 6), and for any minerals that cannot be obtained by reason of making and maintaining the railway; and an arbiter is entitled to include in his award a sum for such expenses to be incurred as can be immediately ascertained (*Whitehouse, supra*). It would appear that the owner entitled to compensation under sec. 74 for minerals that cannot be worked on account of the formation of the railway, is not bound to give the notice, required by sec. 71, from an owner who is desirous of working minerals that can be worked (*Glasgow, Barrhead, etc., Rwy. Co.*, 1848, 11 D. 327), and that his right to compensation is somewhat wider (*Barnsley Canal Co.*, 1844, 13 L. J. Ch. 434). If the company, instead of buying the surface, merely

acquire the right to make a tunnel, the rights of the parties as to the minerals are the same as in the case of an ordinary purchase (*L. & N.-W. Rwy. Co.*, 1862, 31 L. J. Ch. 588). The company may at any time, on giving twenty-four hours' notice, enter and inspect mines in the vicinity of the line (s. 76); a penalty is imposed for refusal to allow such inspection (s. 77); and if mines are improperly worked, the company are entitled to give notice to the owner to construct proper supports and works for making safe the railway, and, on his failure to do so, to construct the necessary works themselves at his expense (s. 78).

Lands for Temporary Purposes.—In the construction and repair of railway works, it is often necessary to use land which will not be required after the completion of the line or of the repairs. The provisions of the Lands Clauses Acts are therefore supplemented by additional provisions in the Railways Clauses Acts, which authorise the acquisition and use of land for temporary purposes. The powers thus given are contained in secs. 27–37 of the Act of 1845, and can only be exercised before the time limited for completion of the line has expired. The company may, without previous payment or deposit, enter and use any lands within the prescribed limits; and if no limits be prescribed, not being more than 200 yards distant from the centre of the railway, and not being a garden, orchard, or plantation attached to a house, nor a park, planted walk, avenue, or ground ornamentally planted, and not nearer to the mansion-house than the prescribed distance, or than 500 yards, and occupy the same during the construction or repair of the railway, or of the accommodation works connected therewith, and use them for certain specified purposes (s. 27). These purposes are: taking earth or soil by side-cuttings, depositing soil, obtaining materials for construction, or forming roads to or from or by the side of the railway. And the company have full powers, "for the purposes aforesaid," to take materials useful in construction from such lands,, and to erect workshops, etc., upon them. But the "purposes aforesaid" are strictly purposes described in the section, and do not include setting up a mortar mill or process of manufacture ancillary to the construction (*Fenwick*, 1875, 20 L. R. Eq. 544); nor does "forming roads" authorise the making of a service railway (*Morris*, [1892] 2 Ch. 47). The liability to an action for nuisance or injury to other persons than the owner of the taken lands remains, and stone or slate quarries, or brick-fields worked for profit at the time cannot be taken (s. 27). The company must give notice before taking temporary possession (ss. 28, 29); the owner may object that other lands should be taken (s. 30), and an inquiry may be held by the Sheriff, who has power to determine finally which lands shall be used (s. 31). The company, if required, must give sureties for the compensation payable in respect of the use (s. 32). They must fence off the lands before using them (s. 33). In getting materials, they must work the land or quarry as the owner or his surveyor shall direct (s. 34), and they must pay full compensation, to be ascertained under the provisions of the Lands Clauses Acts, including rent and compensation for temporary damage and value of materials taken, as well as compensation for all permanent loss or damage sustained by reason of the exercise of the powers (ss. 36, 37). The owner may call upon the company to purchase the lands entered upon at any time during the possession, and before compensation has been accepted (s. 35). But the powers conferred on the company are strictly temporary, and confer no right to take land permanently for the purpose of getting materials for repair (*Douglas*, 1848, 11 D. 225; *Eversfield*, 1858, 3 De G. & J. 286).

The Construction of the Railway.

The powers of construction are conferred by the joint operation of the special Act and of the Railways Clauses Act, 1845. Sec. 6 of the latter Act provides that in exercising the powers given by the special Act, the company are subject to the provisions of the Lands and Railways Clauses Acts, and proceeds to declare the obligation to make full compensation for all lands taken or injuriously affected. Sec. 16 of the Railways Clauses Act confers express powers on the company, "for the purpose of constructing the railway or the accommodation works connected therewith," to execute a large number of specified works. These include the making of temporary or permanent inclined planes, tunnels, etc., bridges, roads, etc., drains, piers, etc., cuttings and fences, in, over, or across any lands, or rivers, streams, roads, railroads, etc., within the lands described in the deposited plans or mentioned in the books of reference; the altering of the course of non-navigable rivers, and the diversion, permanent as well as temporary, of roads, streams, etc., in order the more conveniently to carry the same over or under or by the side of the railway; the making drains in lands adjoining the railway for the purpose of conveying water from or to the railway; and the constructing of warehouses and other works and conveniences. The section also gives power to alter, repair, or discontinue any of these works from time to time, and substitute others in their stead, and generally to do "all other acts necessary for making, maintaining, altering, or repairing, and using the railway." It attaches the conditions to the exercise of all the powers granted "by this or the special Act," that "the company shall do as little damage as can be, and shall make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers."

After some hesitation it was definitely decided that the powers given for the construction of a railway are permissive and not obligatory (*Lord Blantyre*, 1853, 16 D. 90; *York and North Midland Rwy. Co.*, 1853, 7 Rail. C. 459; and other cases cited in Deas' *Law of Railways*, Ferguson's edition, pp. 443 and 444). The same principle is applicable to the maintenance and working of a constructed line (*R.* v. *G. W. Rwy. Co.*, 1893, 62 L. J. Q. B. 572). Cases may, however, occur in which a company render themselves liable in damages to a landowner for failure to construct in accordance with an agreement, although specific implement cannot be enforced (*Se. N. E. Rwy. Co.*, 1859, 3 Macq. 382).

The powers conferred by sec. 16 are only to be exercised so far as necessary, but receive a reasonable construction. Thus while they will not authorise the erection of furnaces for hardening rails (*Cooper & Wood*, 1863, 1 M. 499), or a mortar mill (*Fenwick*, 1875, L. R. 20 Eq. 544), they include reasonable improvements of a station (*Sevenoaks, etc., Rwy. Co.*, 1879, 11 Ch. D. 625), entitle a company in compliance with a demand of the Board of Trade to double their line at a level crossing over a public road (*Western District of Stirlingshire C. C.*, 1896, 23 R. 929), and are not restricted for their exercise to the time limited in the special Act for the construction of the railway (*Emsley*, [1896] 1 Ch. 418). While the company, so long as they act *bonâ fide*, are the sole judges of what works are to be constructed, and the mode of constructing them (*London and Birmingham Rwy. Co.*, 1835, 1 Rail. C. 224, and other cases, *Law of Railways*, p. 446), the convenience to be considered is the convenience of the public and of adjoining owners as well as of the company, and the mere saving of expense is not a sufficient reason for the diversion of a road or river

(*R.* v. *Wycombe Rwy. Co.*, 1867, L. R. 2 Q. B. 310; *Pugh*, 1880, 15 Ch. D. 330). If the company cannot show that they are complying with the condition of doing as little damage as possible, they may be restrained by interdict (*Gillespie*, 1893, 20 R. 1035), and are liable in damages to adjoining proprietors for avoidable injury (*Biscoe*, 1873, L. R. 16 Eq. 636; *Hurdman*, 1878, 3 C. P. D. 168), including such as arises from insufficient or faulty construction either of the railway and railway works, or of the accommodation works connected with it (*Potter*, 1864, 3 M. 83; *Lawrence*, 1851, 16 Ad. & El. Q. B. 643; and other cases cited in *Law of Railways*, pp. 307–309 and 448, 449). Before such a work as a diversion can be carried out, the property of the land upon which the diverted road or river-course is to be formed must be acquired (*Rangely*, 1868, L. R. 3 Ch. App. 309; *Pinchin*, 1854, 5 De G., M. & G. 851); but the company are entitled to take land for such accessory works as well as for the construction of the line itself (*Sadd*, 1851, 6 Rail. C. 783).

The special Act grants authority to make the railway in the line and upon the levels delineated in the deposited plans and described in the books of reference. These plans and books have in Scotland to be deposited with the sheriff clerk of every county, and the schoolmaster of every parish, and the town clerk of every royal burgh through which the line is to pass (1 Vict. c. 83); and provisions are made for the correction of errors and omissions by application to the Sheriff, and for the right of the public to inspect (8 & 9 Vict c. 33, ss. 7–10). The deposited plans show a certain space on each side of the proposed line, known as the limits of deviation. Within these limits the company may deviate their line, provided that in a town the deviation does not exceed ten yards, and elsewhere does not exceed a hundred yards, and that by such deviation the railway is not made to extend into any lands the name of the lessee, owner, or occupier of which is not mentioned in the books of reference without such person's consent, unless the name has been omitted by mistake, and the mistake rectified in the proper manner (8 & 9 Vict c. 33, s. 15). These powers of deviation apply only to the construction of a new railway, and not to the widening of an existing line (*Finck*, 1889, 44 Ch. D. 330), and the deviation is measured from the *medium filum viæ* of the projected, to the *medium filum viæ* of the constructed, line (*Doe d. Armitstead*, 1851, 20 L. J. Q. B. 249) Land may be taken for stations, sidings, or other works, outside the limits of deviation (*Law of Railways*, p. 451). Similarly, the railway cannot be deviated vertically, except where embankments or viaducts are lowered, from the levels as referred to the common datum line on the sections, to an extent exceeding two feet in a town or five feet elsewhere without the previous written consent of the owners and occupiers (s. 11), and if the alteration affects a street or highway, that of the road authority, or, in the absence of such authority, of the Sheriff, and that of the proprietors of any canal, navigation, gaswork, or waterwork affected. Any greater deviation in level can only be made after public advertisement, and determination by the Board of Trade on application by any person affected (s. 12). Limits are also laid down to the deviation of gradients, curves, and other engineering works, which cannot be exceeded without the consent of the Board of Trade (secs. 13 and 14, as amended by 26 & 27 Vict. c. 92, s. 4). In vertical deviation the company are only bound with reference to the datum line, and are under no obligation to adhere to the surface levels indicated on the deposited plans, although the effect of an alteration may be the serious prejudice of a land-owner (*Tod*, 1846, 5 Bell's App. 184. As to deviation generally, see *Law of Railways*, pp. 450–459).

Works on the shore of the sea or a navigable river so far as the tide reaches, cannot be constructed without the consent of the Admiralty and the Commissioners of Woods and Forests (8 & 9 Vict. c. 33, s. 17); and by the Railway Clauses Act of 1863 (26 & 27 Vict. c. 92, ss. 13–19) careful provisions are made as to works on tidal lands, which are placed under the control of the Board of Trade. Secs. 18–23 of the Act of 1845 also provide for the protection of gas and water pipes.

Bridges and Roads.—If the line of railway crosses any turnpike or public carriage road, the crossing must be by an over-line or under-line bridge, unless authority is given by the special Act to cross on the level; but any highway other than a public carriage road may be crossed on the level, with the sanction of the Sheriff or two justices (8 & 9 Vict. c. 33, ss. 39 and 53), and these provisions do not apply to a footpath, which is otherwise dealt with (s. 52; *Dartford Rural Dist. Co.*, [1896] 2 Q. B. 74). It is in the option of the company to carry the road under or over the railway, and to alter the mode of crossing after construction (*South-Eastern Rwy. Co.*, 1851, 4 H. L. C. 471); and within reasonable bounds they may divert a road so as to secure a better crossing (*Att.-Gen.* 1869, L. R. 4 Ch. 194, contrasted with *R.* v. *Wycombe Rwy. Co.*, 1867, L. R. 2 Q. B. 310). The Railways Clauses Act contains provisions (ss. 42–45) regulating the construction and dimensions of bridges and approaches, which will be strictly enforced in the case of headway (*Att.-Gen.*, 1878, 47 L. J. Ch. 776). The duty of maintaining bridges, their immediate approaches, and all necessary works in connection therewith, falls on the company (s. 39), and involves, where the bridge is over-line, the keeping up of the roadway (*North Staffordshire Rwy. Co.*, 1856, 27 L. J. M. C. 147, and other cases, *Law of Rwys.* p. 465), even though the line being in cutting the level of the road is unaltered, and no additional expense caused (*L. & Y. Rwy. Co.*, 1889, 14 App. Ca. 417); but where the bridge is under-line, there is no similar duty to keep the surface of the road in repair (*L. & N.-W. Rwy. Co.*, 1864, 33 L. J. M. C. 158). Repairs may be enforced by summary application to the Sheriff or justices by the road surveyor or two householders (s. 57). Where the line crosses a public carriage road on the level, the company are bound to erect and maintain good and sufficient gates across the road, so constructed, as when closed, to fence in the railway from the road, which must be kept closed across the road, except when required to be opened for the passage of traffic, and proper persons must be employed as gatekeepers. The Board of Trade may, however, order the gates to be kept closed across the line, if satisfied it will be more conducive to public safety (8 & 9 Vict c. 33, s. 40; 5 & 6 Vict. c. 55, s. 9); and these enactments apply only to public and not to private railways (*Matson*, 1877, 5 R. 87, 5 R. H. L. 211). The company are bound to keep the roadway at level crossings in a proper state, and are liable for damage to carriages caused by its improper condition (*Oliver*, 1874, L. R. 9 Q. B. 409). All trains must slow their speed at crossings adjoining stations (s. 41). Shunting must not be carried on over level crossings, and under the Act of 1863, lodges must be built at crossings over turnpike roads (26 & 27 Vict. c. 92, s. 6). The Board of Trade may require a bridge to be substituted for a level crossing (Act of 1863); and the Sheriff or justices have jurisdiction to order proper approaches, fences, and gates to be made or repaired at level crossings, and bridges to be repaired (Act of 1845, ss. 54 and 57). In the case of bridleways and footways, the company are bound to make proper approaches, and proper gates or stiles (s. 52). They may be required by the Board of Trade to erect screens, under penalties, along the side of a highway, where there is danger

from passing trains to horses on the road (ss. 55 and 56). But there is no obligation to screen the roadway leading to a station (*Simkin*, 1888, 21 Q. B. D. 453). It will be noted that the duty is imposed on the company of keeping the gates closed only in the case of turnpike or public carriage roads (s. 40). In the case of public bridleways and footways, while they must provide gates, they have no duty incumbent to keep them always closed (s. 52; *Skelton*, 1867, L. R. 2 C. P. 631). And in the case of accommodation crossings, the duty of closing the gates is expressly laid upon the person using the crossing (s. 68).

Substituted Roads.—The company are bound to provide other roads as substitutes for those interfered with either temporarily or permanently. The provisions which regulate the case of roads only temporarily interfered with during the construction of the railway are found in secs. 25 and 26, read along with secs. 46 to 51 of the Railways Clauses Act. Sec. 25 gives power to the company, before the expiration of the time fixed for completion, to use any existing private road, being gravelled or formed with hard materials, and not being an avenue, or a planted or ornamental road, or approach to a mansion-house, and not more than five hundred yards distant from the proposed line, on giving three weeks' notice, with particulars, and subject to the payment of compensation; and sec. 26 provides for objection that some other road should be taken, and its determination as in the case of lands temporarily occupied for purposes of construction. Sec. 46 provides that if the company have to treat or use any road, public or private, in such a way as to render it impassable or dangerous, they must, before doing so, cause a sufficient road to be made instead, and at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be. This obligation is enforced by a penalty of £20 a day (s. 47), and any person who suffers special damage can recover the amount of his damage by action at law (s. 48). If the road can be restored compatibly with the formation and use of the railway, it must be restored to its former condition; if a turnpike, within six months, and if not a turnpike, within twelve months (s. 49; *Christie*, 1847, 10 D. 312).

If the road cannot be restored, and the interference is therefore permanent, the company must, within the same periods and under a penalty of £20 per day for default, cause the new or some other substitute road to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; but these provisions do not apply to roads express power to raise, alter, or divert which is given by the special Act (*Law & Co.*, 1851, 13 D. 1122), or to roads acquired in property under the Lands Clauses Act (*Campbell*, 1855, 17 D. 613, contrasted with *Hay*, 1874, 1 R. 1191). The interference with the road must be physical and not merely by cutting off access to it (*Carruthers*, 1853, 15 D. 591); but the substituted road must be provided irrespective of the company's opinion that another existing one is equally convenient (*Att.-Gen.* v. *G. N. Rwy. Co.*, 1850, 4 De G. & Sm. 75), and must be equally broad (*R.* v. *London and Birmingham Rwy. Co.*, 1839, 1 Rail. C. 317). There is no obligation to repair or maintain a substitute road after it is handed over, except in so far as the obligations as to bridges may attach (*Mags. of Perth*, 1872, 10 M. 874).

The company must also repair all roads which are damaged by their use (*West Riding and Grimsby Rwy. Co.*, 1864, 33 L. J. M. C. 174) or interference with them in the course of making the railway, any questions being determined by the Sheriff or justices, and repairs being enforced under a penalty

not exceeding £5 a day, due allowance being made for tolls paid (s. 51). (As to special powers to stop up and use streets, etc, see *Law of Railways*, pp. 478–480.)

Accommodation Works.—The Railways Clauses Act contains in secs. 60–68 careful provisions for the protection of those through whose lands the line passes, and for reducing the inconvenience they must necessarily suffer by the severance of their property. The company are bound to make and at all times maintain a number of specified works for the accommodation of the owners and occupiers of adjoining lands. These include gates, bridges, culverts, passages, etc., necessary for the purpose of making good interruptions caused to the use of the lands, which must be made forthwith, after the part of the railway passing over the lands has been formed, or during the formation; sufficient fences, etc., for separating the land taken from the adjoining land not taken, and protecting the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, together with necessary gates, opening towards the lands, and stiles, the fences to be made forthwith after the taking of the lands, and the other works as soon as conveniently may be; all necessary culverts, drains, etc., either over or under or by the sides of the railway, sufficient at all times to convey the water from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be, to be made from time to time as the railway works proceed; and watering places for cattle, with the necessary watercourses.

But the company cannot be required to make such works in such a manner as would prevent or obstruct the working or using of the railway, and may agree to pay compensation in lieu of accommodation works (s. 68). Differences as to the sufficiency of such works fall to be settled by the Sheriff or justices (s. 61). The owners may execute them themselves on default by the company at the company's expense (s. 62); and an owner may, if he considers the works made by the company or authorised by the Sheriff insufficient, by agreement with the company, or by authority of the Sheriff or justices, execute additional works at his own expense (s. 63), but under the supervision of the company's engineers (s. 64). Until accommodation works are made, or consent to compensation instead given, the owners or occupiers are entitled to cross the railway (s. 66); and the right to claim accommodation works ceases on the expiration of the prescribed period, or, if no period be prescribed, after five years from the opening of the railway for public use (s. 65).

The only creditors in the obligation thus imposed on the company to fence are the owners and occupiers of adjoining lands (*Monklands Rwy. Co.*, 1861, 23 D. 1167; *Matson*, 1877, 5 R. 87; *Buxton*, 1868, L. R. 3 Q. B. 549); and there is no obligation on the company to fence where the adjoining land belongs to themselves (*Roberts*, 1858, 27 L. J. C. P. 266), nor to maintain works which have been made for their own accommodation (*R.* v. *Fisher*, 1862, 32 L. J. M. C. 12).

Accommodation works can only be demanded with reference to the existing use of the land, and not in view of its prospective value (*R.* v. *Brown*, 1867, L. R. 2 Q. B. 630); but once constructed, they may be utilised for any use to which the land is put for which they may be available (*United Land Co.*, 1875, L. R. 10 Ch. 586; *Finch*, 1879, 5 Ex. D. 254).

It would rather seem that after the five years the company cannot be made liable for the insufficiency of an accommodation work, although there are Scottish *dicta* which suggest that if, for example, a culvert was carried away, the Sheriff might order an increase of dimensions on reconstruction

(*Colley*, 1880, L. R. 5 Ex. D. 277, contrasted with Ld.-Pres. Inglis' observations in *Brown*, 1864, 2 M. 875, and *Ryan*, 1892, 32 L. R. Ir. 15, contrasted with *Corry*, 1881, 7 Q. B. D. 322).

The difference falling to be determined by the Sheriff under sec. 61 may be a difference between owner and occupier (*Lan. & Dumb. Rwy. Co.*, 1894, 21 R. 1018), and no appeal lies to the Court of Session from the Sheriff (*Main*, 1893, 21 R. 323).

The statute providing a remedy for failure to execute accommodation works, such failure does not afford ground for procedure by interdict against the company (*Black*, 1861, 23 D. 600), although interdict would seem to be the remedy where an express agreement has been violated.

Relations with Contractors.—The actual work of constructing the line of railway is carried out by contractors, and questions frequently arise as to the determination of disputes, as to delay in carrying out the works, as to retention of possession by the contractor, and as to the company's security over his plant for the due fulfilment of his obligations. The rights and liabilities of the company and the contractors are provided for in a formal deed, which generally contains a comprehensive reference clause, referring all disputes to a named arbiter, although very clear words are required to exclude a claim of damages from the jurisdiction of the Courts (*M'Alpine*, 1889, 17 R. 113). It is competent and customary to appoint the company's engineer as arbiter (*Phipps*, 1843, 5 D. 1025; *Trowsdale*, 1864, 2 M. 1334, 4 M. 81; *Adams*, 1889, 16 R. 843). Timely completion is generally secured by a clause providing for heavy penalties in event of the stipulated time being exceeded; and the hardship of a too rigid time-penalty clause may be guarded against by a clause giving the arbiter power to extend the time for completion, so expressed that the power can be exercised by him either when the works are in progress, or upon a review of the whole circumstances after completion (see *Adams*, 16 R. 843, 18 R. H. L. 1). Power is also often given to the arbiter to authorise the company to take the work out of the contractor's hands, or to put on additional men at his expense (*Trowsdale, supra*; *Anderson*, 1850, 12 D. 781). A clause is also usually inserted to the effect that the contractor shall not be entitled to remove his plant; and that, in event of the company requiring to take the work into their own hands, they shall be entitled to employ such plant in its execution (*Wilson*, 1860, 22 D. 697). The contractor is not entitled to retain possession, as against the company, when the line is sufficiently advanced to admit of traffic, or to obstruct the running of trains, in security of his claims against the company (*Castle-Douglas and Dumfries Rwy. Co.*, 1859, 22 D. 18).

The Use and Working of the Railway.

A line of railway falls to be used and worked under statutory conditions and legal liabilities, and in the daily conduct of the company's business questions arise not only with those who travel on the line or send their property in the trains, but also with adjoining owners and members of the general public who are affected by its existence. It is impossible in the limits of an article to deal comprehensively with the many varieties of questions that arise in the working of the railway system, and it is difficult to classify these questions. For their fuller treatment, reference must be made to the recognised treatises on railway law, but a brief view may be taken of the subject under the following headings:—

(i.) Relations with, and responsibility to, adjoining proprietors.

(ii.) Responsibility to the general public.
(iii.) Relations with other companies.
(iv.) Carriage and conveyance of traffic generally—goods, live stock passengers' luggage, passengers.
(v.) The special obligations of the Railway and Canal Traffic Acts.
(vi.) Relations with servants and employees.
(vii.) Special obligations to the Government and the public service.

(i.) *Adjoining Proprietors.*

Branch Railways and Crossings.—It will be seen that the original idea of a railway was that of a road on which private owners and the general public were entitled to travel in their own carriages. The Act of 1845 (s. 69) expressly reserves the right of adjoining owners and other persons to form "collateral branches of railway to communicate with the railway, for the purpose of bringing carriages to or from or upon the railway." Such branch railways are subject to the approval of the Board of Trade; but the company must, if required, make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication. This is subject to the conditions that the place is one where it can be made, with safety to the public, without injury to the railway, and without inconvenience to the traffic thereon (s. 69). The Railway and Canal Commission have jurisdiction to deal with a contravention of an enactment relating to a private branch railway or sidings (51 & 52 Vict. c. 25, s. 9), and have ordered a railway company to restore rails forming communication (*Portway*, 1891, 7 R. & C. T. Ca. 102). The owners of branch lines are subject to the reasonable bye-laws of the company, and the burden of proving unreasonableness lies on the objector (*Rhymney Rwy. Co.*, 1860, 30 L. J. Ch. 482).

See as to junctions and crossings, *Law of Railways*, pp. 496–498).

Special Obligations.—Sidings, Stations, Trains, etc.—An agreement to supply a private siding or to construct a station on an estate will, if sufficiently specific, be enforced (*Lytton*, 1856, 2 Kay & J. 394; *Green*, 1871, 13 L. R. Eq. 44; *Wilson*, 1874, L. R. 9 Ch. 279). An agreement that there shall not be a station will also be upheld if sufficiently definite (*Price*, 1884, 50 L. T. 787). Agreements for the stoppage of trains raise questions of greater delicacy, and each case must turn upon the precise meaning of the language in the contract. A clear obligation will be enforced (*Burnett*, 1885, 12 R. H. L. 25; *Gilmour*, 1893, 20 R. H. L. 53), but the right of the private creditor is construed strictly (*Turner*, 1874, L. R. 17 Eq. Ca. 561; *Rigby*, 1845, 4 Rail. C. 175, 190, 491), and the liability of the company reasonably regarded (*Philipps*, 1872, L. R. 7 Ch. 409; *Hood*, 1869, L. R. 8 Eq. 666, 5 Ch. 525). An undertaking not to erect a station does not prevent the company stopping their trains and letting the passengers get out (*Eton Coll.*, 1838, 1 Rail. C. 200).

General Responsibility.—Water, Fire, Damage caused by Use.—A company whose line crosses or abuts on a river is entitled, as a riparian proprietor, to take water for its engines in reasonable quantity, and even to allow to others the use of water, provided it is returned in proper condition (*E. of Sandwich*, 1878, 10 Ch. D. 707; *Kensit*, 1883, 23 Ch. D. 566). But it cannot take an excessive and prejudicial quantity (*Att.-Gen.* v. *S. E. Rwy. Co.*, 1871, L. R. 6 Ch. 572). Nor can it constitute itself a riparian proprietor by the compulsory taking of a strip of land for the purpose of abstracting water from a stream (*M. of Breadalbane*, 1895, 22 R. 307). If constantly recurring injury is done by floods to an adjoining owner, due to original

faulty construction of a line, a remedy may be obtained by interdict (*Keates*, 1872, 28 L. T. 183). On the other hand, the rule is distinct that for damage caused by the use of the railway there is no liability, unless negligence exists (*Hammersmith Rwy Co.*, 1869, L. R. 4 H. L. 171). This principle has received its most frequent illustrations in cases of fires caused by sparks from engines (*Vaughan*, 1868, 5 H. & N. 679), and the immunity depends on the legislative sanction to the use of locomotives. If no such sanction has been given, there is liability though all precautions have been taken (*Jones*, 1868, L. R. 3 Q. B. 733); and in the case of fire, even where the authority exists, the *onus* of proving that all reasonable precautions have been taken lies on the company (*Piggott*, 1846, 3 C. B. 229; *Smith*, 1870, L. R. 6 C. P. 14). If, however, the company satisfy this *onus* and prove their engine to be of the best construction, and with proper safeguards to reduce the risk of fire as far as possible consistently with the full efficiency of the engine, they are indemnified against the consequences (*Port-Glasgow and Newark Sailcloth Co.*, 1893, 20 R. H. L. 65). The company are bound to exercise their powers with moderation and discretion (*Smith*, 1877, 37 L. T. 224), and are liable in damages for negligent use (*Sneesby*, 1875, 1 Q. B. D. 42; *Hurdman*, 1878, 3 C. P. D. 168). But they are entitled to use their land in any way not inconsistent with their Acts, which does not infringe the rights of others (*Foster*, 1894, 64 L. J. Q. B. 65; *Bonner*, 1883, 24 Ch. D. 1); and where a purpose for which land is acquired is authorised and incidental and necessary to authority given to carry on traffic, the mere deterioration of adjoining property, and discomfort of its owners, is not sufficient to prevent the company exercising their discretion in the selection of the site (*Iruman*, 1886, L. R. 11 App. Ca. 45).

(ii.) *The General Public.*

Responsibility to—Use of Line by, and Control of.—As regards members of the general public, the company are bound in the conduct of their business to show no negligence, and adopt all reasonable precautions (see *Harper*, 1886, 13 R. 1139; *Cramb*, 1892, 19 R. 1054). If they are bound to convey traffic which may be a nuisance, they must make reasonable arrangements to reduce the nuisance necessarily caused as much as possible (*Lord Advocate* v. *N. B. Rwy. Co.*, 1894, 2 S. L. T. 71).

Questions of liability frequently arise in connection with accidents at level crossings. The company are bound to take all reasonable precautions to reduce the danger to members of the public lawfully using such crossings to a minimum, and the question whether this duty has been fulfilled depends on the circumstances of each case (*e.g. Russell*, 1879, 7 R. 148; *Ireland*, 1882, 10 R. 53; *Words*, 1886, 13 R. 1118; *Gilchrist*, 1850, 12 D. 979; *Cliff*, 1870, L. R. 5 Q. B. 258). If the crossing is more than usually dangerous, special precautions must be taken (*Bilbee*, 1865, 34 L. J. C. P. 182); to sound the whistle on approaching is generally a proper precaution (*Grant*, 1870, 9 M. 258; *James*, 1867, 36 L. J. C. P. 255; but see *Newman*, 1891, 55 J. P. 375); but there is no general obligation to station watchmen at level crossings (*Stubley*, 1865, L. R. 1 Ex. 13). Negligence will be presumed if any precautions provided by statute have not been complied with (*Stapley*, 1865, L. R. 1 Ex. 21; *Wanless*, 1871, L. R. 6 Q. B. 481, 7 H. L. 12). Notices not to cross the line will not avail to free the company from liability if they have been habitually disregarded with the knowledge of the railway servants (*Dublin, Wicklow, and Wexford Rwy. Co.*, 1878, L. R. 3 App. Ca. 1155); and any active departure from duty on the

part of the company's servants which conduces to accident will involve responsibility (*Clarke*, 1880, 43 L. T. 381). The negligence on the part of the company or their servants must, however, be shown to have caused, *i.e.* to have been directly contributory to, the accident (*Davey*, 1883, 12 Q. B. D. 70; *Wakelin*, 1886, L. R. 12 App. Ca. 41); and the defence of contributory negligence, if established, elides liability (*M'Naughton*, 1850, 21 D. 160; *Grant*, 1870, 9 M. 258). At other places than ordinary level crossings, at which the company must anticipate the presence of members of the public, either lawfully entitled or tacitly sanctioned in practice to be there, the company are responsible for the consequences of any want of care on their part (*Barnett*, 1891, 28 S. L. R. 339; *Haughton*, 1892, 20 R. 113). But they have no duty to care for the safety of trespassers (*Harrison*, 1874, 29 L. T. 844); and there is no obligation to fence land belonging to a private owner on which harbour rails are laid which are run over for shunting purposes (*Smith*, 1888, 16 R. 57).

A railway is a public highway (*Rex* v. *Severn and Wye Rwy. Co.*, 1819, 2 B. & Ad. 648), and on payment of the tolls demandable all companies and persons are entitled to use the railway with engines and carriages properly constructed as prescribed by the general Act of 1845, and the special Act (8 & 9 Vict. c. 33, s. 85). Such use is subject to the provisions of the general railway Acts and to the regulations of the company; secs. 86–95 and 99 of the Act of 1845 impose certain obligations upon the company, and provide for the recovery of tolls in connection with the use of the line; secs. 114–118, amended by sec. 19 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), contain regulations as to the engines and carriages admitted on the line, including provisions for consumption by engines of their own smoke, and the inspection of engines brought on the line, which will, if insisted on, be enforced (*M. Rwy. Co.*, 1853, 10 Hare, 359). This general right to use the line would seem to carry no right to use the stations (*M. Rwy Co., supra*; *Hall*, 1885, 15 Q. B. D. 505), and involves no obligation on the owning company to work the signals (*Powell Duffryn Steam Coal Co.*, 1874, L. R. 9 Ch. 341). Secs. 101–104 of the Act of 1845 give the company full power to make regulations for the conduct of traffic on the line, and generally for regulating the travelling upon or using and working of the railway, provided that the railway must not be closed, or passage upon it at reasonable times obstructed, except for purposes of repair or other sufficient cause; and by a later statute this power is extended to making bye-laws for maintaining order in and regulating the use of stations and their approaches (52 & 53 Vict. c. 57, s. 7). Statutory powers are also given for dealing with, and penalties imposed on, obstruction to the servants of the company in their duty, or trespassing on the railway property (3 & 4 Vict. c. 97, ss. 16 and 17; 31 & 32 Vict. c. 119, s. 23; 34 & 35 Vict. c. 78, s. 14; 8 & 9 Vict. c. 33, s. 146. *Law of Railways*, pp. 526, 527).

(iii.) *Other Companies.*

Running Powers, etc.—The provisions of the Railways Clauses Act already referred to, affirming the public right to use the line, apply equally to other companies. In practice, the conditions attached to the exercise of the public right, and the limitations affecting it in the development of the railway system, have resulted in its practical desuetude. Sec. 80 of the Act of 1845, however, gave express power to a company to contract with other companies for the mutual passage over their respective lines of their own or of other trains running on their lines, and authorised contracts for

the division or apportionment of tolls. Such a contract does not affect the rights of third parties as to tolls (*Simpson*, 1852, 10 Hare, 51. For cases as to running powers, see *Law of Railways*, pp. 529–531 ; also *N. E. Rwy. Co.*, 1897, 25 R. 333), and anything that amounts to a delegation of statutory powers is *ultra vires* and invalid (*Shrewsbury and Birmingham Rwy. Co.*, 1853, 3 Mac. & G. 70, 6 H. L. C. 113 ; *Linch*, 1852, 7 Rail. C. 384 ; *Law of Railways*, p. 136). *Junctions* with the line of another company are regulated by the Railways Clauses Act of 1863 (26 & 27 Vict. c. 92, ss. 9–12), and differences as to a common terminus, line, or junction fall to be determined by the Board of Trade or an arbiter appointed by it (5 & 6 Vict. c. 55, s. 11 ; 31 & 32 Vict. c. 119, s. 30). Questions of delicacy may arise where two companies agree as to the use of a *joint-station*, in which a third company has ownership or interest. The tendency is to protect the rights of the company which is not a party to the arrangement, and to limit an existing right of property only in so far as is necessary for purely railway purposes (*N. B. Rwy. Co.*, 1853, 16 D. 250 ; *Aberdeen Joint-Station Committee, etc.*, 1893, 21 R. H. L. 48).

A railway cannot be leased without the authority of Parliament (8 & 9 Vict. c. 33, ss. 105 and 106), and working agreements are subject to certain statutory conditions, which include sanction and revision by the Railway Commission (Railway Clauses Act, 1863, Part III. ; 26 & 27 Vict. c. 92 ; 36 & 37 Vict. c. 48, s. 10 ; *Law of Railways*, pp. 537–539).

(iv.) *Carriage and Conveyance of Traffic Generally.*

The double character which railway companies possess as owners of a road, which the public have a right to use on certain conditions (s. 85, Rwy. Cl. Act), and as traders authorised by Parliament to carry on the business of common carriers (s. 79, Rwy. Cl. Act), has its equivalent in the distinction between "tolls" and "rates," which is of vital importance in the questions that arise in connection with charges for the conveyance of goods (*Hall*, 1885, L. R. 15 Q. B. D. 505). "A toll is a payment for the use of the road, with perhaps an added charge for the supply of locomotive power, while a rate (or in the case of passengers, a fare) is a charge for the carriage of anything from place to place" (*Law of Railways*, p. 541). But the use of the word "toll," which in the Railway Clauses Act itself is "a word of varying meaning" (Ld.-Pres. Inglis in *H. Rwy. Co.*, 1876, 3 R. 850), is not decisive of the question whether the charge is a toll proper or a rate, *i.e.* a charge for conveyance (use of road and locomotive power) or a charge for carriage. The tolls clauses of the Railways Clauses Act, and the construction that has been judicially placed upon them, will be found examined in detail in the *Law of Railways in Scotland*, pp. 542–546 (2nd ed., 1897) ; but when it is necessary to construe the word tolls, the point to which attention must be directed is whether there is in the context or subject anything repugnant to the more comprehensive connotation of the term. Forfeiture for non-payment of tolls exists only in the case of tolls proper, and not of charges for carriage (*Sc. N. E. Rwy. Co.*, 1863, 1 M. 1056) ; the omission to erect milestones disentitles to take tolls, but does not bar the exaction of passenger fares (*Brown*, 1882, L. R. 9 Q. B. 744) ; and the lien over carriages and goods (s. 90, Rwy. Cl. Act) for the payment of tolls does not extend to cover charges for carriage (*H. Rwy. Co.*, 1876, 3 R. 850). It has been held that, in any case, the carriage cannot, under the first part of sec. 97 of the English Act (s. 90), be detained and sold for default in payment of tolls in respect of the goods carried in it (*North Central Waggon Co.*, 1887, L. R. 13 App. Ca. 554), although under the latter part of that section the company's right may be

wider. There must be a demand for payment before the lien is enforced by sale (*N. B. Rwy. Co.*, 1870, 8 M. 998). The weight of legal authority is to the effect that the "limiting charges" clause of a special Act is "not a toll clause, but a clause regulating the charges for carriage" (*Aberdeen Com.*, 1876, 6 R. 67); but the practical importance of this opinion is lessened by the statement in the same case, that a company cannot claim to be conveying merely under its tolls clauses, "if that which they do in point of fact, and for which they claim to be remunerated, is neither more nor less than simply acting as carriers of the goods." The maximum rates which railway companies are now entitled to charge are fixed by the various Railway Rates and Charges Acts of 1891 and 1892, passed after the full inquiry held under the Railway and Canal Traffic Act, 1888 (as to terminals, etc., see *infra* 162).

Apart from statutes imposing obligations, the obligation of a railway company is to carry according to their profession, and to receive and carry the goods they profess to carry, and have accommodation for, upon tender of a reasonable remuneration, and without subjecting the sender to any unreasonable condition (*Garton*, 1861, 1 B. & S. 112; *Oxlade*, 1854, 15 C. B. N. S. 680; *Johnson*, 1849, 6 Rail. C. 61). It would, however, seem that their obligations have been extended by the Railway and Canal Traffic Acts, and that they are bound to "carry," or rather "convey," every class of goods or animals which they have facilities for carrying, their liability, however, not being that of common carriers, but of ordinary bailees for reward (*Dickson*, 1887, L. R. 18 Q. B. D. 176). They are not bound to carry dangerous goods (8 & 9 Vict. c. 33, s. 98), the sender of which is liable to a penalty if cognisant of the contents (*Herne*, 1859, 2 El. & Bl. 66), and responsible in damages (*Farrant*, 1862, 31 L. J. C. P. 137. For the statutory provisions regulating the conveyance of explosive substances by rail, see 38 Vict. c. 17). In respect of traffic in private waggons, the obligation is to use reasonable care and diligence (*Watson*, 1870, 9 M. 50; *Barr & Sons*, 1890, 18 R. 139); and where the company supply waggons to private parties, they are entitled to demurrage or damages for detention (*G. & S.-W. Rwy. Co.*, 1879, 24 S. L. R. 437), the waggon hire being subject to the triennial prescription (*N. B. Rwy. Co.*, 1873, 1 R. 309).

Carriage of Goods.—The responsibility of the company is that of insurers, but in exceptional cases where goods are damaged in transit, owing to some occult cause arising from the nature of the article, corresponding to "inherent vice" in the case of animals, the carrier may escape liability (*Ohrloff*, 1866, L. R. 1 P. C. 231). In the absence of express agreement, the carrier is bound to forward and deliver within reasonable time, regard being had to his facilities and the nature of the goods. There is no warranty as to time (*Hales*, 1863, 31 L. J. Q. B. 292; *Taylor*, 1866, L. R. 1 C. P. 385; *Briddon*, 1858, 28 L. J. Ex. 51; *Lord*, 1867, L. R. 2 C. P. 339); but perishable articles (given notice of) are entitled to expedition and preference (*Macdonald & Co.*, 1873, 11 M. 614), and circumstances may impose an obligation to deliver for a particular market (*Anderson*, 1875, 2 R. 443). If detention can be foreseen, responsibility for delay will be more easily inferred (*M'Connachie*, 1875, 3 R. 79); and a special agreement to carry by a particular train, or deliver within a certain time, may sometimes be inferred from circumstances (*Pickford*, 1844, 12 Mee. & W. 766; *Hawes & Son*, 1884, 54 L. J. Q. B. 174). Imperfect addressing (*Cal. Rwy. Co.*, 1858, 20 D. 1097), or any contributory cause of delay due to the sender, may have the effect of freeing the carrier (*Baldwin*, 1882, L. R. 9 Q. B. D. 582).

Delivery falls to be made to the person and at the place indicated by

the address (*Gilmours*, 1853, 15 D. 478; *Hay & Kyd*, 1887, 25 S. L. R. 132), or at the place at which the consignee has instructed delivery to be made (*L. & N.-W. Rwy. Co.*, 1861, 31 L. J. Ex. 92). It is the duty of the consignee to examine the goods on delivery; and if he does not intimate objection, delivery in good condition will be presumed (*A. & J. Stewart*, 1878, 5 R. 426). And he is entitled to refuse to accept delivery if made too late or not in proper condition (*Keddie, Gordon, & Co.*, 1886, 14 R. 233). If the goods are refused, or the consignee cannot be found, the company are bound to take reasonable care of them, under an obligation analogous to that of deposit, and afford the consigner an opportunity of directing their disposal, but their liability ceases to be that of insurers (*Hough*, 1870, 5 L. R. Ex. 51; *Searle*, 1874, L. R. 9 Q. B. 122; *Metzenbury*, 1869, 7 M. 919). The consignee is, however, entitled to a reasonable time after notice for removal (*Mitchell*, 1875, L. R. 10 Q. B. 256); and if the goods are left on the company's hands, their final remedy is sale to defray the charges (*Ivens*, 1889, 53 J. P. 148).

The seller may countermand the delivery or alter the destination of the goods *in transitu* (*Scotthorn*, 1853, 7 Rail. C. 810); and this right exists as long as the goods are actually undelivered (*ex parte Barrow*, 1877, L. R. 6 Ch. D. 783; *ex parte Gibbs*, 1875, L. R. 1 Ch. D. 101); and if the carrier delivers to the consignee, he will be liable to the consigner in the invoice price of the goods, with a right to restitution from the consignee, or a third party to whom he has transferred (*Cal. Rwy. Co.*, 1879, 7 R. 151; see also *N. B. Rwy. Co.*, 1881, 9 R. 97; *Malone & M'Gibbon*, 1884, 11 R. 853; *Stavert*, 1895, 3 S. L. T. 17).

In addition to the statutory lien for tolls provided by sec. 90 of the Railways Clauses Act (see *Wallis*, 1870, L. R. 5 Ex. 62; *H. Rwy. Co.*, 1876, 3 R. 850), the company has the ordinary carrier's lien over the goods for the cost of carriage (*Cronch*, 1857, 26 L. J. Ex. 418, 27 L. J. Ex. 345).

The amount of damages recoverable for failure to fulfil a contract of carriage is what might have been reasonably in the contemplation of the parties in view of the breach (*Horne*, 1873, L. R. 8 C. P. 131, 137). They do not include special loss from failure of a specific object aimed at, unless this was within the information of the carrier (*Simpson*, 1876, L. R. 1 Q. B. D. 274), and are estimated by the market value of the goods at the time and place of proper delivery (*Rodocanachi*, 1886, L. R. 18 Q. B. D. 67; and other cases referred to in *Law of Railways*, p. 637). If the sender adopts another mode of carriage, the onus is on the carrier to show that it has been more expensive than was necessary (*Connal, Cotton, & Co.*, 1883, 10 R. 824).

Where goods pass over the lines of several companies, the accepted rule in England is that the company receiving for carriage is, in the absence of special contract, responsible for the safe transport and due delivery of the goods (*Muschamp*, 1841, 8 Mec. & W. 421; *Bristol and Exeter Rwy. Co.*, 1859, 7 H. L. C. 194; *Coxen*, 1860, 29 L. J. Ex. 165; and other cases, *Law of Railways*, p. 639). But it has not been decided in Scotland that the receiving company is *alone* liable when the loss is on another company's line, and doubts have been expressed as to whether the laws of Scotland and England are the same in this respect (*Scottish Central Rwy. Co.*, 1863, 1 M. 750).

The company have special powers, where the transit is partly by sea, of exempting themselves by notice from liability for loss occurring during the sea transit (31 & 32 Vict. c. 119, ss. 14 and 16; 34 & 35 Vict. c. 78, s. 12).

Limitation of Liability.—(*a*) *Under the Carriers Act*, 1830.—The state of the law prior to 1830 was unsatisfactory, both because of the heavy

liability to which carriers were exposed in respect of articles of great value contained in packages the contents of which were not disclosed, and also of the decisions as to the limitation of liability by general notices and advertisements, and the difficulty of fixing knowledge of such notices. The Land Carriers Act (1 Will. IV. c. 68), therefore, provided that the value of articles of specified descriptions tendered for carriage, if over £10, must be declared, that the carrier should not be liable for loss or injury when the value exceeds £10 unless declaration had been made of the value (s. 1); and that the carrier should be entitled, by notice legibly affixed in the office or place where the goods are received for conveyance, to demand and receive an increased rate of charge notified in the notice (s. 2). Otherwise, no public notice or declaration is valid as limiting the common law liability of carriers (s. 4). And while special contracts are excepted from the operation of the Act (s. 6), the protection given by it is expressly declared not to extend to loss or injury arising from the felonious acts of the carrier's servants (s. 8). For the specific articles in reference to which the carrier is protected by the declaration required, reference must be made to sec. 1 of the Act (*Scottish Railway Statutes*, p. 1), and to the cases upon it which will be found cited in *Law of Railways in Scotland*, p. 645.

If the sender has failed to comply with the Act, the carrier escapes liability, even where the loss has been caused by the gross negligence of his servants (*Hinton*, 1842, 2 Q. B. 646); and though there must be loss or injury, and not mere damage sustained by the sender owing to delay (*Hearn*, 1855, 10 Ex. 793), temporary loss is covered (*Miller*, 1882, L. R. 10 Q. B. D. 142). If the carriage is partly by land and partly by sea, the land journey is protected (*Le Conteur*, 1865, L. R. 1 Q. B. D. 54).

The notice to be given by the carrier is a notice of the extra charge, and while the sender must declare the value, the carrier must demand the charge (*Hart*, 1851, 6 Ex. 769; *Behrens*, 1862, 6 H. & N. 366; 7 H. & N. 950), and the declaration must be made whether the goods are delivered at the office or elsewhere. An inn where a carrier has been in the habit of receiving goods is "an office" (*Stephens*, 1886, L. R. 18 Q. B. D. 121), and the term "parcel or package" has also received a liberal construction (*Whaite*, 1874, L. R. 9 Ex. 67). In the case of a special contract founded on the terms of a notice posted up, there must be evidence of the customer's assent to the terms of the notice (*Drayson*, 1875, 32 L. T. 691).

In order to deprive the company of the benefit of sec. 8 it is not sufficient to show that the company's servants had the full opportunity of stealing goods which have disappeared (*Campbells*, 1875, 2 R. 433; *G. W. Rwy. Co.*, 1856, 18 C. B. 575). It is sufficient to establish a *primâ facie* case against the servants (*Vaughton*, 1874, L. R. 9 Ex. 93; and see contrasted cases noted in *Law of Railways*, p. 649). A servant of a delivering agent is a servant of the company (*Stephens*, 1886, L. R. 18 Q. B. D. 693), and the company are responsible for a sub-contractor (*Machu*, 1848, 2 Ex. 415). But it must be noted that the application of sec. 8 is limited to the case of the articles specified in sec. 1 of the Act (see *Shaw*, [1894] 1 Q. B. 373, at p. 383).

(*b*) *Under the Railway and Canal Traffic Act*, 1854, *s.* 7.—Prior to 1854 the limitation of liability by special contract was stretched to extravagant lengths, and was held to include even responsibility for the consequences of direct negligence, and of defective construction of plant (*Carr*, 1852, 7 Ex. 707; *Austin*, 1850, 10 C. B. 454; *Chippendale*, 1851, 7 Rail. C. 824; *Shaw*, 1849, 18 L. J. Q. B. 181). Special contracts were even inferred from facts and circumstances (*Walker*, 1853, 2 El. & Bl. 750).

Sec. 7 of the Railway and Canal Traffic Act of that year (17 & 18 Vict. c. 31) provided a remedy for this state of things. It affirmed the liability of a railway company for the loss of, or injury to, live stock, or any articles, goods, or things, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration by the company to the contrary, or in any way limiting such liability, every such notice, etc., being declared null and void. It, however, provided that nothing in the statute should be construed to prevent the company from making *such conditions as shall be adjudged* by the Court before which the question is raised *to be just and reasonable*. After a special enactment in relation to live stock, to be noticed later, it further provided that no special contract between such company and other parties, in reference to carriage, etc., should be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage. It specially saved the rights, privileges, or liabilities of any such company, under the Carriers Act of 1830, with respect to articles of the descriptions mentioned in that Act.

Loss by felonious act (theft) of servants is not within the provision of the Act of 1854 (*Shaw*, [1894] 1 Q. B. 373). The requisites of the Act are concurrent, and the conditions of a special contract must be embodied in a written contract, signed as required, and also be just and reasonable (*Peck*, 1863, 10 H. L. C. 473). The signature required is such as indicates that the special conditions have actually been brought under the notice of, and consented to by, the consigner (*Peebles*, 1875, 2 R. 347. For illustrations of the circumstances in which questions arise as to signature, by the owner or someone on his behalf, see *Law of Railways*, pp. 653–655).

The question, what are just and reasonable conditions, necessarily depends on the circumstances of the case; and while the reports are full of illustrations, especially in the carriage of live stock, it is impossible to lay down complete rules of general application, or even to summarise within the limits here available, the decisions that have been pronounced. It may, however, be taken as established, that conditions exempting from fraud and direct negligence are unreasonable (*M'Manus*, 1859, 4 H. & N. 327; *Peek*, 1863, 10 H. L. C. 473; *Ashendon*, 1880, L. R. 5 Ex. D. 190); that a condition that goods shall be subject to a general lien is unreasonable (*Scottish Central Rwy. Co.*, 1863, 1 M. 750); that a condition providing against loss of market, except where due to gross negligence, is reasonable (*Beal*, 1860, 3 H. & C. 337); that a condition requiring a claim for loss to be made within a certain time is reasonable (*Lewis*, 1860, 29 L. J. Ex. 425); and that, as a general rule, the offer of an alternative rate is an important element in the determination. But, in the latter case, the option must be real: and if there is a mere Hobson's choice between a reduced rate without liability and a rate so high as to be prohibitory, the offer would not justify the condition (*Finlay*, 1870, 8 M. 959). The following are instances of cases where there was an alternative rate, and the conditions were held just and reasonable: *M'Connachie*, 1875, 3 R. 79; *M. S. & L. Rwy. Co.*, 1883, L. R. 8 App. Ca. 703 (fish); *Foreman*, 1878, 38 L. T. N. S. 851; *G. W. Rwy. Co.*, 1887, L. R. 12 App. Ca. 218 (cattle); *Moore*, 1882, 10 L. R. Ir. 95 (horse); *Gallagher*, 1874, Ir. R. 8 C. L. 326; *Sheridan*, 1888, 24. L. R. Ir. 146. In the following the conditions were held unreasonable: *D'Arc*, 1874, L. R. 9 C. P. 325; *Lloyd*, 1862, 15 Ir. C. L. R. N. S. 37; *M'Nally*, 1880, 8 L. R. Ir. 81 (cattle); *Conigar*, 1879, 6 L. R. Ir. 90.

A fair offer of an alternative mode of carriage may also render the conditions reasonable (*Robinson*, 1866, 35 L. J. C. P. 123; *Nevin*, 1891, 30

L. R. Ir. 125 (horses)). But the alternative mode must be a reasonable one (*Lloyd, supra*). An absolute condition that the sender should take the risk of loading and unloading is not reasonable (*Rooth*, 1867, L. R. 2 Ex. 173), but in certain circumstances, where the owner himself superintends, may be reasonable (*Rain*, 1869, 7 M. 439). A condition absolutely exempting from the consequences of detention is unreasonable (*Allday*, 1864, 5 B. & S. 903).

If a company carry at a reduced rate, repudiating liability except for wilful misconduct, actual wilful misconduct must be proved (*G. W. Rwy. Co.*, 1873, 29 L. T. 423; *Webb*, 1877, 26 W. R. 111; *Haynes*, 1879, 41 L. T. N. S. 436). Mere misdelivery, unaccompanied by any circumstance inferring fault, is not sufficient to infer misconduct (*Stevens*, 1885, 52 L. T. 325, contrasted with *Hoare*, 1877, 37 L. T. 186; and as to detention, see *Gordon*, 1881, L. R. 8 Q. B. D. 44).

The Act of 1854 is only applicable to traffic on a company's own line, and does not affect loss on a foreign line (*Zaon*, 1869, L. R. 4 Q. B. 539; *Gill*, 1873, L. R. 8 Q. B. D. 186).

Carriage of Live Stock.—The liability of carriers in the case of live stock is not so absolute as in that of inanimate articles. They are "not insurers to the extent that if the animal die in the course of the transit, the value or loss must fall on them" (*Paxton*, 1870, 9 M. 50), but they are "required to take all reasonable precautions for the security of the goods they carry, which do not require from them any unusual expenditure, and the providing of which does not require any unusual sagacity or foresight" (*Ralston*, 1878, 5 R. 671). The responsibility may be affected by the owner providing his own truck (*Rain*, 1869, 7 M. 439), or harness and appliances (*Richardson*, 1872, L. R. 7 C. P. 75), by his servant being allowed to travel with cattle with a free pass (*Rooth*, 1867, L. R. 2 Ex. 173), and by failure on the part of the consignee to provide for timeous removal on arrival (*Wise*, 1856, 25 L. J. Ex. 258; *Shepherd*, 1868, L. R. 3 Ex. 189).

The liability does not extend to any act attributable to inherent vice or defect in the temper of the animal, or event attributable to the irresistible act of nature (*Nugent*, 1876, L. R. 1 C. P. D. 423; *Kendall*, 1872, L. R. 7 Ex. 373, contrasted with *Blower*, 1872, L. R. 7 C. P. 655). There is no obligation to provide fences at stations, but their absence may be an element for consideration by a jury in deciding whether there has been negligence (*Roberts*, 1858, 27 L. J. C. P. 266; *Crawford*, 1889, 26 S. L. R. 440).

Sec. 7 of the Act of 1854 contains a special provision limiting the sums recoverable for certain animals unless their value has been declared, in which case the company may charge a further "reasonable percentage" on the value, to be notified, as in the Act of 1830. The contract under this section need not be in writing (*Hill*, 1880, 42 L. T. 513), and the declaration must be made with the intention that it shall be understood as one for the purpose of insurance. If the owner declines to pay the additional charge, the company are not entitled to refuse to carry (*Robinson*, 1865, 34 L. J. C. P. 234); and if he signs a declaration that his animal is under £10 in value, he cannot recover more (*M'Cance*, 1864, 3 H. & C. 343). Dogs, though not specially mentioned, are within the statute (*Harrison supra*; and see *Dickson*, 1886, 18 Q. B. D. 176).

Certain special obligations are laid upon railway companies under the Diseases of Animals Acts (57 & 58 Vict. c. 57), including the provision of food and water on request, which may be implied from the company's custom to provide (*Curran*, 1896, 2 Ir. R. 183); and the disinfecting of trucks and pens, the cost of which is not a charge incidental to conveyance

recoverable from the owner (*Cox*, 1869, L. R. 4 C. P. 181), nor the obligation a defence to an action for damage to animals caused by the means used (*Shaw*, 1881, 8 L. R. Ir. 10). The company are entitled to refuse to carry into a scheduled district until provided by the owner with a declaration under the Act (*Williams*, 1885, 52 L. T. N. S. 250); and if they receive from another company, and forward into a prohibited district without a declaration, are liable to conviction of an offence (*Mid Rwy. Co.*, 1884, L. R. 12 Q. B. D. 629).

Carriage of Passenger's Luggage.—The responsibility in the case of loss of or injury to personal luggage is the same as under an ordinary contract for the conveyance of goods, "modified only to the extent that if loss happens by reason of want of care of the passenger himself, who has taken within his own immediate control the goods which are lost, the carrier's contract as insurers does not apply to loss occasioned by the passenger's own default" (*Bunch*, 1888 L. R. 13 App. Ca. 31). There may be liability for loss apart from contract, inferred by receiving for carriage; and thus where through tickets are issued and a second company take on the luggage, they may be liable for its loss on their line (*Hooper*, 1880, 50 L. J. Q. B. 103; *Foulkes*, 1880, L. R. 5 C. P. D. 157). If the luggage has been accepted for carriage, the liability attaches, even although it was not addressed (*Campbell*, 1852, 14 D. 806); and a servant is entitled to sue in respect of loss of his luggage, although his master may have paid the fare and taken his ticket (*Marshall*, 1851, 21 L. J. C. P. 34).

The amount of luggage which a passenger is entitled to take free is generally fixed by the special Act, and any bye-law which infringes on the right thus given by attaching unreasonable conditions will be inoperative (*Williams*, 1854, 10 Ex. 15); but if the company waive the limitation and allow a passenger to take more than the specified amount, they are nevertheless liable for its loss (*Macrow*, 1871, L. R. 6 Q. B. 612; *G. N. Rwy. Co.*, 1852, 21 L. J. Ex. 286). The term "passenger's luggage," though it receives a liberal interpretation, properly includes only what is ordinarily and usually carried as such (*Law of Railways*, pp. 767 and 768). It does not embrace merchandise (*Shepherd*, *supra*; *Cahill*, 1861, 30 L. J. C. P. 289, 31 L. J. C. P. 271), nor legal documents, the business property of an agent (*Phelps*, 1865, 34 L. J. C. P. 259), nor a rocking-horse (*Hudston*, 1869, L. R. 4 Q. B. 366), nor an invalid-chair (*Cusack*, 1891, 7 T. L. R. 452), nor furniture or household goods (*Macrow*, *supra*). If a master sends a portmanteau by a servant by one train without declaration, and travels himself by another, he cannot maintain an action for its loss (*Becher*, 1870, L. R. 5 Q. B. 241). But if a servant takes his portmanteau with him, containing his livery, being his master's property, and it is destroyed, the master can maintain an action for its value (*Meux*, [1895] 2 Q. B. 387). The company would seem bound to carry in the van smaller articles of luggage, and are not entitled to insist on a passenger taking such with him in the carriage (*Munster*, 1858, 27 L. J. C. P. 308). Responsibility attaches from delivery to a servant of the company for purposes of transit, irrespective of whether the passenger has taken his ticket (*Lovell*, 1876, 45 L. J. Q. B. 476; *Leach*, 1876, 34 L. T. N. S. 134; *Bunch*, 1888, L. R. 13 App. Ca. 31, overruling *Beryheim*, 1878, L. R. 3 C. P. D. 221). But if the luggage is placed at a passenger's request in a compartment, and exposed to more than ordinary risk by his carelessness, the company will not be liable (*Talley*, 1870, 6 L. R. C. P. 44). Responsibility lasts until the whole articles are delivered by the company, *i.e.* until a cab is completely loaded (*Butcher*, 1855, 16 C. B. 13; see also *Kent*, 1874, L. R. 10 Q. B. 1), or till a reasonable time has been allowed for removal (*Patscheider*,

1878, L. R. 3 Ex. D. 153, contrasted with *Hodkinson*, 1884, L. R. 14 Q. B. 228; and *Welch*, 1885, 34 W. R. 166). To impose liability on a company there must be evidence that the loss occurred while the luggage was in their custody (*Mid. Rwy. Co.*, 1856, 25 L. J. C. P. 94). If a company issue a through ticket, their liability is the same whether the loss occurs on their own line or that of another company, but, as has already been noted, the Railway and Canal Traffic Act (s. 7) applies only to the traffic on the company's own line (*Zunz*, 1869, L. R. 4 Q. B. 539). The provisions as to just and reasonable conditions apply to passenger's luggage (*e.g. Cohen*, 1877, L. R. 2 Ex. 253; *Cutter*, 1887, L. R. 19 Q. B. D. 64), and it is a question for the jury whether the conditions, or the fact that there are conditions, are sufficiently brought to the passenger's notice (*Parker*, 1877, L. R. 2 C. P. D. 416; *Richardson, Spence, & Co.*, 1894, 70 L. T. 817). In the absence of proof of assent the conditions are no defence (*Henderson*, 1879, 2 Sc. App. 470); but "see back" on the face of ticket is sufficient (*Harris*, 1876, L. R. 1 Q. B. D. 515); and where the notice was on the inside of the cover of a book of coupons, it was held the whole book was the contract, and the passenger bound (*Burke*, 1879, L. R. 3 C. P. D. 1). Special regulations may be made as to luggage by excursion trains (*Rumsey*, 1863, 14 C. B. N. S. 641), and this even by notices not actually brought to the passenger's knowledge (*Stewart*, 1864, 33 L. J. Ex. 199).

Left Luggage.—The liability in respect of luggage deposited in a luggage office is merely that of depositaries. Sec. 7 of the Railway and Canal Traffic Act does not apply, and the conditions do not require to be signed to be binding (*Van Toll*, 1862, 12 C. B. N. S. 75), although a cloak-room may be a reasonable facility (*Singer Manufacturing Co.*, [1894] 1 Q. B. 833). But if luggage is not actually deposited in the luggage office, having been handed over for deposit, and is lost, liability attaches (*Handon*, 1880, 7 R. 966, contrasted with *Harris*, 1876, L. R. 1 Q. B. D. 515). The company would seem to be bound to keep the office open and to deliver upon request (*Stallard*, 1862, 2 B. & S. 419). The contract being one of deposit, the company cannot, in the absence of special agreement, be made liable for more than the value of the article (*Anderson*, 1861, 4 L. T. N. S. 216); and in the absence of a condition limiting liability, the company seem to be responsible for the actual value of the contents, even though undisclosed (*Roche*, 1889, 24 L. R. Ir. 250).

Carriage of Passengers.—*Liability for Injury.*—There is a broad distinction between the liability of railway companies as carriers of goods and carriers of passengers. As carriers of passengers their obligation is merely to use all reasonable care and diligence, and they are responsible only for the consequences of negligence on their part or that of their servants. But the care and diligence prestable is of a high kind, enforced by penal statutes and by a very strict civil responsibility (*Law of Railways*, p. 677). They do not warrant the road-worthiness of their vehicles, and if they have taken reasonable care to see that they are in proper condition, are not liable "to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use which no human skill or care could either have prevented or detected" (*Readhead*, 1869, L. R. 4 Q. B. 379). If they manufacture their own plant, they must satisfy a jury that they have used proper skill and care in construction (*Holton*, 1885, 1 C. & E. 542). A jury are entitled to be satisfied that proper precautions have been used to test the condition of the plant when used (*Manser*, 1861, 3 L. T. 585); and it is the duty of a company to see that trucks coming on their line are in a safe state, though a minute examination, which would

defeat the purposes of through traffic, cannot be required (*Richardson*, 1876, L. R. 1 C. P. D. 342). The true question for a jury is not whether a company could possibly have detected defects, but whether practically and by the use of ordinary and reasonable care, these should have been observed (*Stokes*, 1860, 2 F. & F. 691; *Ford*, 1862, 2 F. & F. 732).

The mere fact that they have employed competent engineers or manufacturers in the construction of the line and rolling stock is not sufficient to exonerate, unless the best method and materials have been used (*Grote*, 1848, 2 Ex. 251); and they "must use due and reasonable care to keep the line over which they contract to carry passengers in a safe condition" (*G. W. Rwy. Co.*, 1862, 7 H. & N. 992, and *Daniel*, 1868, L. R. 3 C. P. 216, contrasted with *Hanson*, 1872, 20 W. R. 297).

Any breach of working regulations issued to the servants (*Adams*, 1875, 3 R. 215), or of statutory enactment, which has contributed to the accident, will be clear evidence of negligence, and the absence of a work (*e.g.* a footbridge) which the company are not bound to make, but which would have been an important element of safety, will throw on the company a greater *onus* to provide otherwise for the safety of those who use their line or crossings (*Thomson*, 1876, 4 R. 115, per Ld. Neaves).

A special duty to warn passengers may be imposed by unusual circumstances, as, for example, knowledge of a breakdown or unusual occurrence affecting the state of the line, which may render the journey more dangerous to old or infirm persons (*Jarrie*, 1875, 2 R. 623), or the train overshooting the platform on a dark night (*Potter*, 1873, 11 M. 664, contrasted with *Muirhead*, 1884, 11 R. 1043; and see *Stewart*, 1869, 8 M. 486; *Aitken*, 1891, 18 R. 836).

If a servant travelling with his master has taken his own ticket, the master cannot maintain an action for injury to him and loss of his services (*Alton*, 1865, 34 L. J. C. P. 292); but if the master has taken the ticket, the servant can sue, because, apart from contract, there is a duty to carry safely (*Marshall*, 1851, 21 L. J. C. P. 34; *Austin*, 1867, L. R. 2 Q. B. 442). The master, although he cannot sue on contract where the servant has taken his ticket, may recover for injury caused to the servant by the negligence of a company not a party to the contract of carriage (*Berringer*, 1879, L. R. 4 C. P. D. 163), although he has no claim in case of death (*Osborn*, 1873, L. R. 8 Ex. 88). In certain cases the accident may be *primâ facie* proof of negligence (*G. W. Rwy. Co. of Canada*, 1863, 1 Moo. P. C. N. S. 116, contrasted with *Latch*, 1858, 27 L. J. Ex. 155); but the company is not liable for a *damnum fatale* (*Withers*, 1858, 27 L. J. Ex. 417), or act of a stranger (*Thomas*, 1871, L. R. 6 Q. B. 266), or the act of a servant not at the time acting in the course of his employment (*Rohl*, 1890, 7 T. L. R. 2), and the burden of proof is on the pursuer (*Bird*, 1858, 28 L. J. Ex. 3; *Law of Railways*, p. 685, note (*d*)).

The company are not liable if the injured person was a trespasser; but the mere fact that a person is in technical contravention of a bye-law, though acting in conformity with a usage sanctioned in practice, does not disentitle him to recover (*Hamilton*, 1857, 19 D. 457); and an honest mistake on the part of a passenger, or an act which he may have done lawfully, though rashly or unnecessarily, is not sufficient to bar his claim (*Austin*, 1867, L. R. 2 Q. B. 442; *Pagan*, 1867, 39 Sc. Jur. 194). There is no responsibility if the accident was due to a wrongful act on the part of the passenger (*Thompson*, 1882, 9 R. 1101); and the establishment of contributory negligence on the part of the passenger, *i.e.* negligence without the existence of which the accident would not have happened, is a complete

defence (*M'Naughton*, 1858, 21 D. 160). What constitutes contributory negligence is so essentially a question of fact, that all that can be done here is to give a note of some cases in which this defence was considered. In the following it was sustained or approved: *Clark*, 1877, 5 R. 273; *Pirie*, 1890, 17 R. 1157. In the following it was ineffectual: *Potter*, 1873, 11 M. 664; *Jarvie*, 1875, 2 R. 623; *Thomson*, 1876, 4 R. 115; *Woods*, 1886, 13 R. 1118.

It would seem that, in spite of the existence of the contributory negligence, if the defenders could by reasonable care have avoided the injury, they may still be liable (*Radley*, 1876, L. R. 1 App. Ca. 754); and the acts or omissions of the company may have an important bearing on the establishment of contributory negligence (*Dublin, Wicklow, and Wexford Rwy. Co.*, 1878, L. R. 3 App. Ca. 1155). The injury must of course be directly connected with circumstances for which the company are responsible (*Kearney*, 1886, 18 L. R. Ir. 303).

Where running powers are exercised, or a through-fare arrangement exists, the servants of the company whose line is run over, or upon which the journey is continued, are generally to be considered, for the purposes of the journey, as the servants of the company issuing the ticket (*G. W. Rwy. Co.*, 1862, 7 H. & N. 987; *Thomas*, 1871, L. R. 6 Q. B. 266). But the liability of the issuing company only extends to circumstances in which the servants of the other may be reasonably held to be acting on their behalf, and does not free the owning company from liability for the fault of their own servants (*Self*, 1880, 42 L. T. 173). In the absence of negligence on their part, the owning company are not liable for injuries to their own passengers caused by the fault of a driver of a running-power train (*Wright*, 1873, 8 L. R. Ex. 137); and the running company are bound to make reasonable provision for the safety of the persons they carry, if the construction of the stations they use under their running powers should be ill adapted to their carriages (*Foulkes*, 1879, L. R. 4 C. P. D. 267, 5 C. P. D. 157).

The company issuing a through ticket is liable though the accident occurs on the line of another company traversed in the course of the journey (*Horn*, 1878, 5 R. 1055; *Eisten*, 1870, 8 M. 980; *G. W. Rwy. Co.*, 1862, 31 L. J. Ex. 346; *Buxton*, 1868, L. R. 3 Q. B. 549; *Thomas*, 1870, L. R. 6 Q. B. 266). Contracts to carry on special conditions, avoiding and limiting liability, are not uncommon in the cases of persons using season tickets, men travelling in charge of live stock, and workmen going in large bodies to their place of employment at reduced rates. The exemption from liability, provided by the stipulation travels at "his own risk," receives full effect (*M'Cawley*, 1872, L. R. 8 Q. B. 57: *Hall*, 1875, L. R. 10 Q. B. 437; *Gallin*, 1875, L. R. 10 Q. B. 212; *Duff*, 1878, 4 L. R. Ir. 178). (As to notice of and effect of conditions on season ticket, see *Burke*, 1879, L. R. 5 C. P. D. 1; *Cooper*, 1879, L. R. 4 Ex. D. 88.) What constitutes negligence is a question of fact. Cases exhibiting it are of many varieties, and illustrations may be referred to under the following heads: 1. Invitation to alight, train being beyond platform (*Foy*, 1865, 18 C. B. N. S. 225, contrasted with *Siner*, 1868, L. R. 3 Ex. 150; *Harrold*, 1866, 14 L. T. N. S. 440; *Bridges*, 1874, L. R. 7 H. L. 213; *Cockle*, 1870, L. R. 5 C. P. 457, 7 C. P. 321; *Weller*, 1874, L. R. 9 C. P. 126, contrasted with *Lewis*, 1873, L. R. 9 Q. B. 66; *Nicholls*, 1873, Ir. R. 7 C. L. 40, contrasted with *Owen*, 1877, 46 L. J. Q. B. 486). 2. Reasonable means of alighting not afforded (*Robson*, 1875, L. R. 10 Q. B. D. 272, 2 Q. B. D. 85; *Rose*, 1876, L. R. 2 Ex. D. 248). 3. Reasonable time to alight not allowed (*Gemmell*, 1881, 18 S. L. R. 627;

Stockdale, 1863, 8 L. T. N. S. 289). 4. Passenger quitting train in motion (*Roe*, 1889, 17 R. 59; *L. & N.-W. Rwy. Co.*, 1872, 26 L. T. 557). 5. Injuries when entering a carriage, or from carriage-doors (*Fordham*, 1868, L. R. 3 C. P. 368, 4 C. P. 619; *Richardson*, 1868, L. R. 3 C. P. 374; *Metro. Rwy. Co.*, 1877, L. R. 3 App. Ca. 193; *Maddox*, 1878, 38 L. T. 458; *Gee*, 1873, L. R. 8 Q. B. 161; *Richards*, 1873, 28 L. T. 711; *Murray*, 1873, 27 L. T. 762; *Cassidy*, 1873, 11 M. 341). 6. Management of trains (*Burke*, 1870, 22 L. T. 442; *Blamires* (absence of statutory precaution), 1873, L. R. 8 Ex. 283; *Bulman*, 1875, 32 L. T. 430; *Wylie*, 1871, 9 M. 463). 7. Injury in crossing the rails (*Nicholson*, 1865, 34 L. J. Ex. 84; *Wilby*, 1876, 35 L. T. 244; *Rogers*, 1872, 26 L. T. 879; *Falkiner*, 1871, Ir. R. 5 C. L. 213; *Thomson*, 1876, 4 R. 115). 8. Persons on platform (*Wilson*, 1873, 1 R. 172; *Hogan*, 1873, 28 L. T. 271; *Cannon*, 1879, 6 L. R. Ir. 199). 9. Defective condition of premises and station accommodation (*Tooney*, 1857, 37 L. J. C. P. 39; *Cornman*, 1859, 29 L. J. Ex. 94; *Blackman*, 1869, 17 W. R. 769; *Shepherd*, 1872, 25 L. T. 879; *Osborne*, 1888, L. R. 21 Q. B. D. 220; *Crafter*, 1866, 35 L. J. C. P. 132; *Lay*, 1876, 34 L. T. 30; *Longmore*, 1865, 19 C. B. 183). 10. Works upon the line (*Patchell*, 1871, 6 Ir. R. C. L. 117). 11. Post-office apparatus contiguous to line (*Pirie*, 1890, 17 R. 1157).

The amount of damages in actions for personal injury is essentially a jury question; but damages ought not to be given *in pœnam*, and gross excess and gross inadequacy both form valid grounds for setting aside a verdict (*Law of Railways*, p. 717; *Stewart*, 1870, 8 M. 486). It is, in practice, with difficulty that a verdict can be overturned on the sole ground of excess of damages; but one result of the application frequently is, that opinions are expressed in view of which a pursuer who has obtained an extravagant verdict consents to a reduction of the sum awarded (*Law of Railways*, p. 718, and cases there referred to). The law of Scotland, differing from that of England, admits *solatium* for injury to feelings as an element in the assessment of damage, and even as entitling to damages *per se* (see *Haxton*, 1863, 35 Jur. 596, compared with *Brash*, 1845, 7 D. 539). It is uncertain whether damages can be recovered for fright or nervous shock, apart from physical injury. In a case on appeal from the Colony of Victoria, the Privy Council held that such damages were too remote (*Coultas*, 1888, L. R. 13 App. Ca. (P. C.) 222); but there is Irish authority in favour of a contrary opinion (*Bell*, 1890, 26 L. R. 428, following *Byrne* (1884 C. A. Ireland, unreported)). The extent of *culpa* is an element which may be taken into account in fixing the damages (*Morton*, 1845, 8 D. 288; *Dobbie*, 1856, 18 D. 862; *Wark*, 1850, 12 D. 1074); and the social position and professional standing of the injured person must be considered (*M'Kechnie*, 1858, 20 D. 551; *Philipps*, 1879, L. R. 5 C. P. D. 280, 5 Q. B. D. 70); as also may his personal habits (*Butchart*, 1859, 22 D. 184). Under special statutory provision the amount of damage may be referred to an arbiter appointed by the Board of Trade, and any judge or arbiter may order a medical examination by an independent medical man (31 & 32 Vict. c. 119, ss. 25 and 26). Questions may arise as to the effect of a discharge granted in respect of a comparatively small payment soon after the accident, when more serious symptoms subsequently develop. The House of Lords has held that a writing being a discharge, there being no attempt to mislead, the pursuer being capable of understanding it, and there being no reservation of claims, the company fell to be assoilzied (*N. B. Rwy. Co.*, 1891, 18 R. H. L. 27).

All railway companies must send notice to the Board of Trade of

accidents causing, or likely to cause, loss of life or personal injury, and the Board of Trade may direct an inquiry into the circumstances by an inspector appointed by the Board (34 & 35 Vict. c. 78, ss. 6 and 7).

The title to sue, where an accident has proved fatal, exists in the person of husband or wife, parent or child, and, apparently, of any ascendant or descendant, but does not extend to collaterals (*Eisten*, 1870, 8 M. 980. For incidental points connected with actions of damages for personal injury, see *Law of Railways in Scotland*, 2nd ed., pp. 724–726).

Liability for Detention of Trains.—The mere issue of a ticket is not *per se* a warranty of punctuality. It imposes no other obligation than to convey within a reasonable time. But the issue of time-tables amounts to an express contract with the public, and an erroneous statement in the time-tables will involve responsibility, especially if notice has antecedently been received from another company that a connecting train has been taken off (*Hurst*, 1865, 34 L. J. C. P. 264, compared with *Denton*, 1856, 5 El. & Bl. 860; but see, as to mere statement by a sleeping-car company that certain trains correspond, *Lockyer*, 1892, 61 L. J. Q. B. 501). The company may, however, limit their liability by a notice in the time-bill to the effect that the times are not guaranteed (*Prevost*, 1865, 13 L. T. N. S. 20; *Thompson*, 1876, 34 L. T. 34; *Woodgate*, 1855, 51 L. T. 826; *Sutton*, 1896, 12 T. L. R. 425); but such a notice will not free them from the consequences of their own negligence (*Buckmaster*, 1870, 23 L. T. 471).

The question as to what is reasonable diligence presents some difficulty. If a company are prevented sending on a passenger by unavoidable causes, such as floods, or the line becoming impassable, they are not bound to forward by a special train (*Fitzgerald*, 1876, 34 L. T. 771). If the passenger takes one, the question whether he can recover the cost from the company depends on whether it was or was not a reasonable thing to do in the circumstances, and may be determined by considering whether a prudent person would have taken a special train at his own expense to avoid a delay that had arisen through his own fault (*Le Blanche*, 1876, L. R. 1 C. P. D. 286; *McCartan*, 1885, 54 L. J. Q. B. 441). The damages recoverable are those which directly represent the inconvenience suffered, *e.g.* the wages of a day's work lost (*Cook*, 1892, 57 J. P. 388), actual expenditure incurred, or inconvenience caused by having to walk, but not indirect damage sustained by being too late for engagements (*Hamlin*, 1856, 26 L. J. Ex. 20), or consequential illness (*Hobbs*, 1874, L. R. 10 Q. B. 111). As to special contract constituted by printed notice on ticket, see *G. N. Rwy. Co.*, 1852, 21 L. J. Q. B. 178.

Regulation of Passenger Traffic.—The company are entitled to make reasonable regulations for the conduct of its traffic, and *inter alia* within reasonable limits to prescribe the carriages in which passengers shall travel (*Scott*, 1895, 22 R. 287). It is a more difficult question to what extent they may be bound to protect a passenger from the violence of fellow-passengers, and the case upon the subject cannot be regarded as an absolute authority (*Pounder*, [1892] 1 Q. B. 385, commented on in *Cobb*, [1894] App. Ca. 419).

Questions as to Fares and Tickets, and Removal from Train.—Such questions depend upon direct statutory provision, or on the effect of bye-laws made by the company under statutory authority. Apart, however, from statute, the company are entitled to summarily remove from their carriages persons who have established no right to be there. If a person, in spite of a reasonable regulation that the ticket-office shall be closed a certain time before the starting of a train, arrives too late to take his ticket, seats himself in the train, and insists upon travelling, he can be

removed even though he tenders payment of the fare (*Sc. N. E. Rwy. Co.*, 1866, 5 Irv. 237); and it would seem that a passenger can be removed into his own from a higher class into which he has intruded (*Brahan*, 1895, 3 S. L. T. 105, Lord Ordinary; and see *Scott*, 1895, 22 R. 287).

The statutory provisions declaring offences and imposing penalties are:— 8 & 9 Vict. c. 33, s. 96, which enacts that "if any person travel, or attempt to travel, in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding 40s." By sec. 97 an offender may be apprehended either by the company's servants or an officer of the law, and detained till he can be taken before the Sheriff or a justice.

52 & 53 Vict. c. 57, s. 5 (The Regulation of Railways Act, 1889), enacts, extending the policy of the Act of 1845, that "every passenger by a railway shall, on request by an officer or servant of a railway company, either produce, and, if so requested, deliver up, a ticket showing that his fare is paid, or pay his fare from the place whence he started, or give the officer his name and address; and in case of default shall be liable on summary conviction to a fine not exceeding 40s." If he fails to comply with any of these alternatives, any officer of the company or constable may detain him till he can be conveniently brought before some justice, or otherwise discharged by due course of law (s. 5, subs. 2). If a person commits any of the offences (travelling without payment either wholly or beyond distance) described in the Act of 1845, or, having failed to pay his fare, gives, in reply to a railway officer's request, a false name and address, he is liable on summary conviction to a fine not exceeding 40s., or in the case of a second or subsequent conviction, to a fine not exceeding £20, or, in the discretion of the Court, to imprisonment for a term not exceeding one month (s. 5, subs. 3). Liability to punishment does not prejudice the recovery of any fare payable (s. 5, subs. 4).

It is also enacted by sec. 6 that every passenger ticket must (subject to certain powers vested in the Board of Trade) bear upon its face, printed or written in legible characters, the fare chargeable for the journey for which it is issued; and any company failing to comply with this enactment is liable to a penalty not exceeding forty shillings for each ticket issued in contravention.

The statutory provisions dealing with bye-laws and the statutory right of removal are secs. 101–104 of the Act of 1845, and sec. 7 of the Act of 1889. Sec. 101 of 8 & 9 Vict. c. 33 confers power on the company to make regulations for regulating the speed and times of the trains, the loading and weighing of carriages, the prevention of nuisance, and "generally the travelling upon, and using, and working of the railway." Sec. 102 authorises the making of bye-laws, "provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect," or to the provisions of the general or special Act for enforcing the regulations, and the imposition of a penalty not exceeding £5 for any offence against a bye-law, and, further, empowers the company, "if the infraction or non-observance of any such bye-law or other such regulation

be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway . . . . summarily to interfere to remove such danger, annoyance, or hindrance," and that without prejudice to the penalty incurred. Bye-laws must be duly published (ss. 103 and 135), and when so published are binding (s. 104). They must previously be approved by the Board of Trade (s. 102; also 3 & 4 Vict. c. 97, ss. 7–9). 52 & 53 Vict. c. 57, s. 7, extends the powers given by the Act of 1845 to include maintaining order in and regulating the use of stations and their approaches.

To entitle a passenger to travel with a train, he must not only have a ticket which he maintains to be sufficient, but one that is in fact the right one for the contemplated journey; and if he objects to leave the train on remonstrance, the right of removal under sec. 102 of the Act of 1845 (which must be distinguished from the right to detain under sec. 97) may be exercised (*H. Rwy. Co.*, 1878, 5 R. 887; *M'Carthy*, 1878, 18 W. R. 782). But the mere absence of a lost ticket, the passenger being in *bonâ fide*, does not justify forcible removal (*Butler*, 1888, L. R. 21 Q. B. D. 207; *Harris*, 1891, 18 R. 1009), nor, coupled with refusal to pay fare, apprehension (*Chilton*, 1847, 16 L. J. Ex. 89). The servants of a company have implied authority to remove misbehaving passengers, and the company are liable if they make a mistake and misuse of this authority (*Lowe*, 1893, 62 L. J. Q. B. 524).

The essence of the statutory offences under sec. 96 of the Act of 1845, and sec. 5 of the Act of 1889, is the intent to defraud (*Dearden*, 1865, L. R. 1 Q. B. 10). But under the Acts a passenger with a lower class ticket can be convicted for fraudulently travelling in a higher class (*Gillingham*, 1881, 44 L. T. 715). The statutes (apart from bye-laws) do not cover the case of a passenger getting out at an intermediate station (*R.* v. *Frere*, 1855, 4 El. & Bl. 598). They reach the case of a transferee using a "not transferable" return ticket (*Langdon*, 1879, L. R. 4 Q. B. D. 337). A company has been held not justified in detaining a passenger under the Act of 1889 who had given her name and address pending inquiry, when they proved to have been correctly given (*Knights*, 1893, 62 L. J. Q. B. 378). Holders of season tickets must produce them if required (*Woodward*, 1861, 30 L. J. M. C. 196; and see generally, *Law of Railways*, pp. 744–747). Bye-laws must be reasonable and not repugnant to the statutory provisions. Thus if non-payment of fare, irrespective of intent, is constituted an offence, the bye-law is void (*Dearden*, 1865, L. R. 1 Q. B. D. 10; *Bentham*, 1878, L. R. 3 Q. B. D. 289; cf. *Thom*, 1886, 14 R. J. C. 5). The company must keep strictly to the provisions of their own bye-law, and if they issue servants' tickets to a master, cannot refuse to let the servants travel because they do not produce their tickets (*Jennings*, 1865, L. R. 1 Q. B. 7). A penalty calculated at a varying amount, according to the distance travelled by the train, is unreasonable where the offence has no relation to the distance travelled (*Saunders*, 1880, L. R. 5 Q. B. D. 456; *L. & B. Rwy. Co.*, 1878, L. R. 3 C. P. D. 429, 4 C. P. D. 118). The penalty must be made clearly referable to a legal offence, and not mixed up with provisions which are unreasonable (*Dyson*, 1881, L. R. 3 Q. B. D. 289). To sustain a conviction there must be full establishment, not only of failure to produce a ticket, but of refusal to pay the fare (*Craig*, 1865, 5 Irv. 206).

A bye-law that a passenger shall show his ticket, or pay the fare for the distance travelled, is good, and the fare can be recovered where the passenger has inadvertently torn up his ticket (*Hanks*, 1896, 65 L. J. M. C. 41); and under a similar bye-law a passenger refusing to show his ticket has been held liable to a penalty (*Lowe*, 1896, 65 L. J. M. C. 43). But a notice of demand for the fare must first be made to the passenger who refuses or is

unable to produce his ticket, to entitle a company to take proceedings under a bye-law (*Brown*, 1877, L. R. 2 Q. B. D. 406).

Liability for Acts of Servants.—In addition to the powers given by sec. 97, the servants of a railway company are authorised by sec. 146 of the Act of 1845 to seize and detain any person found committing an offence against that Act, the special Act, or any Act incorporated with it, whose name and residence are unknown to them, and convey him with all convenient despatch before the Sheriff or a justice. The question whether the company are liable for an arrest which turns out to be unwarranted, depends on whether they have by general or particular instructions authorised the servant to make the arrest (*Bayley*, 1873, L. R. 8 C. P. 148; *Moore*, 1872, L. R. 8 Q. B. 36). There is a presumption that they have at their stations officials authorised to determine without delay whether such arrests shall be made (*Goff*, 1861, 30 L. J. Q. B. 148; and other cases, *Law of Railways*, p. 755–757). Subsequent ratification is equivalent to express authority (*Law of Railways*, p. 755). Removal of persons misconducting themselves must be done without unnecessary violence (*Seymour*, 1861, 30 L. J. Ex. 189); and the company are not liable if the official acts outwith the scope of his duty as indicated by his instructions (*Walker*, 1870, L. R. 5 C. P. 640; and other cases, *Law of Railways*, p. 758; see form of issue in *Maxwell*, 1898, 35 S. L. R. 449).

Stations.—The public are entitled to reasonable accommodation at the stations; and in impugning arrangements as to the admission of vehicles to a station, public inconvenience must be proved (*Law of Railways*, p. 759). The company are entitled to exclude from their platforms the uniformed servants of external hotels, who come to obtain customers for their hotels —at least until access has been determined to be a proper facility by the Railway Commissioners (*Perth Gen. St. Co.*, 1897, 25 R. H. L. 44).

Protection of Passengers.—Various provisions are made by statute, for the details of which reference must be made to the text-books (*Law of Railways*, pp. 759–761), for securing the comfort and safety of passengers, including the provision of communication cords, continuous brakes, and the block system, and returns and inquiries as to accidents and apparatus. No line can be opened for passenger traffic without inspection and passing by the Board of Trade (*Law of Railways*, pp. 761, 762).

Cheap Trains.—Special statutory enactments exist providing for cheap trains. The operative Act is that of 1883 (46 & 47 Vict. c. 34). All fares not exceeding a penny a mile are exempted from passenger duty, and its reduction on "urban traffic" provided for. Powers are given to the Board of Trade and the Railway Commissioners for securing that a "due and sufficient proportion of the accommodation" on any railway route is at fares not exceeding 1d. per mile, and that proper and sufficient workmen's trains are provided for workmen, going to and returning from their work, at reasonable times and fares between 6 p.m. and 8 a.m.

(v.) *The Special Obligations of the Railway and Canal Traffic Acts.*

The only common law obligation upon a carrier in reference to his charges is that they shall be reasonable (*G. W. Rwy. Co.*, 1869, L. R. 4 E. & I. App. 226). But in the case of railway companies the Legislature has always asserted a supervision over the charges made, and latterly over the facilities afforded. So important has this supervision become, that it has led to the passage of a series of enactments, to the accumulation of a mass of case law, and to the establishment of a specially constituted tribunal.

The original public enactment is sec. 83 of the Act of 1845, which gives

a company power to alter or vary its tolls, "provided that all such tolls be at all times charged equally to all persons and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description . . . passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway." To constitute a violation of this—*the Equality*—clause, there must be a difference of charge for goods carried on precisely the same journey, from the same place to the same place (*Murray*, 1883, 11 R. 205; *Finnie*, 1853, 15 D. 522, compared with *Yeats*, 1889, 16 R. 535). The remedy is an action for overcharge (*G. W. Rwy. Co.*, 1868, L. R. 4 H. L. 226; *L. & Y. Rwy. Co.*, 1875, L. R. 7 H. L. 517); and in view of this section a railway company are not entitled to make higher charges for "packed parcels" than for an ordinary package of the same weight (*G. W. Rwy. supra*; *Pickford*, 1842, 10 Mee. & W. 399; and other cases, *Law of Rwys.* p. 566).

In 1854 was passed the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), sec. 2 of which provides—

(1) That every railway company shall provide all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles:

(2) That no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever; nor subject any particular person or company, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: and

(3) That every company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus station or wharf of the one company near that of another, shall afford all due and reasonable facilities for forwarding traffic arriving by the one railway by the other, without any unreasonable delay, and without any preference, advantage, prejudice, or disadvantage, and so that no obstruction shall be offered to the public desirous of using such railways, etc., as a continuous line of communication, and all reasonable accommodation shall be at all times afforded to the public.

The remedy for a contravention of this statute was by summary application to the Court of Session for interdict, which could be enforced by the ordinary remedies, and by a substantial fine on the company (ss. 3, 4, and 5), and no other proceeding was competent (s. 6). Overcharges, therefore, which were only struck at under its provisions, could not be recovered by action in the ordinary Courts (*Murray*, 1883, 11 R. 205; *M. S. & L. Rwy. Co.*, 1885, L. R. 11 App. Ca. 97; *L. & Y. Rwy. Co.*, 1888, L. R. 21 Q. B. D. 215; *Rhymney Rwy. Co.*, 1890, L. R. 25 Q. B. D. 146).

In 1873, and again in 1888, the scope of this legislation was further extended. By sec. 11 of the Act of 1873 (36 & 37 Vict. c. 48), included and repeated in sec. 25 of the Act of 1888 (51 & 52 Vict. c. 25), facilities were defined to include through rates, and careful provision made to regulate the application and determination. The Act of 1888, in particular, contains detailed provisions on the whole subject of traffic facilities, for which

reference must be made to the Act itself, and the various text-books and manuals which deal with this branch of railway law (see Ferguson's *Scottish Railway Statutes*, p. 386; *Law of Railways in Scotland*, pt. vii. chs. ii. and iii.). By a subsequent Act of 1894 (57 & 58 Vict. c. 54), the burden of showing that the rate is reasonable is placed on a railway company, wherever it has increased a rate subsequent to 31st December 1892, the date at which the revision of charges carried out under the Act of 1888 was fully in operation.

Undue Preferences and Prejudices. — What constitutes an undue preference is essentially a question of fact, and for illustration reference must be made to the cases that have occurred (see *Law of Railways*, pp. 575–588). It is an undue preference to neutralise the advantage that one customer has owing to his access to sea-carriage (*Ransome*, 1857, 1 C. B. N. S. 437), or if a company receive goods through a particular carrier without insisting on conditions with which others are obliged to comply (*Baxendale*, 1862, 11 C. B. N. S. 787), or carry at a less rate goods consigned through their own agents (*Baxendale*, 1857, 3 C. B. N. S. 324). There must be something amounting to a systematic contravention (*Pickford*, 1866, 4 M. 755). The company are not entitled to exclude or prejudice other carriers in competing with them in collection and delivery (*Baxendale*, 1858, 5 C. B. N. S. 336; *Garton*, 1859, 5 C. B. N. S. 669), but they are entitled to employ their own agents in delivering (*Pickford*, *supra*), and are not bound to give effect to general orders that all goods carried by them shall be handed to a particular carrier for delivery (*Wannan*, 1864, 2 M. 1373). A special order stands in a different position (*Fishbourne*, 1875, 2 R. & C. T. Ca. 224). The company may, it would seem, give their own agents additional facilities for assorting goods in their stations (*Pickford*, *supra*; *Cooper*, 1858, 4 C. B. N. S. 738), but they must not, by fixing a later hour for reception of goods, give a special advantage to their own agent (*Garton*, 1859, 6 C. B. N. S. 639; *Palmer*, 1871, L. R. 6 C. P. 194), though they may make reasonable regulations for the reception of goods (*Palmer*, 1892, 8 R. & C. T. Ca. 53). A company may lawfully carry for one person at a less rate than for another, if there are circumstances which render the act of carrying less (*Oxlade*, 1857, 1 C. B. N. S. 454); and the fair and legitimate interests of the company (*Ransome*, 1857, 1 C. B. N. S. 437; *Nicholson*, 1858, 5 C. B. N. S. 366), and the benefit and convenience of the public affected, are to be taken into account (*Lees*, 1874, 1 R. & C. T. Ca. 352). Under the Act of 1888 (s. 27) the Commissioners are empowered to consider whether a lower charge or difference in treatment is necessary for securing the traffic in the interests of the public. Access to a competing line may be considered under this section (*Pickering Phipps*, [1892] 2 Q. B. 229); and the public is the public of the locality or district (*Liverpool Corn Traders' Association*, 1892, 8 R. & C. T. Ca. 114). But there can be no difference in the treatment of home and foreign merchandise in respect of the same or similar services (s. 27; *Mansion-house Association*, [1895] 1 Q. B. 927). A guarantee of large quantities and full train loads at regular periods justifies a lower rate (*Greenop*, 1876, 2 R. & C. T. Ca. 319), as does sea competition (*Foreman*, 1875, 2 R. & C. T. Ca. 202); while increased cost of construction or working may vindicate a higher one (*Richardson*, 1884, 4 R. & C. T. Ca 1; *Nitshill & Lesmahagow C. C.*, 1874, 2 R. & C. T. Ca. 39). The profit to the company must be one accruing to the line on which the advantage is given (*Baxendale*, 1858, 5 C. B. N. S. 309); and a preference, the object of which is to discourage the construction of a competing line, is not justifiable (*Diphwys Casson Slate Co.*, 1874, 2 R. & C. T. Ca. 73).

Undue preference is unjustifiable not only as between traders, but as between towns, districts, ports, and competing routes (*Law of Railways*, p. 584).

The Act of 1854 (though not that of 1888) applies to passenger traffic, but a complaining passenger must show a competition of interest, or personal disadvantage (*Hozier*, 1855, 17 D. 302), except in the case of an application for through trains on a continuous line of communication, where it is not necessary to show individual grievance, but a case of public inconvenience must be made out (*Barret*, 1857, 1 C. B. N. S. 423). If no case of public inconvenience be made out, the company are entitled to regulate the admission of vehicles to their stations; but where inconvenience is caused by undue preference, the Court will interfere (*Marriott*, 1857, 1 C. B. N. S. 499; *Beadell*, 1857, 2 C. B. N. S. 509; and other cases, referred to in *Law of Railways*, p. 588).

Facilities Generally.—The facilities a company must afford are such as may be reasonably required in view of the business they profess to conduct, and are within their powers. (For illustrations, see cases collected in *Law of Railways*, pp. 588 and 589).

Facilities connected with Continuous Communication.—Through working is a proper facility (*Innes*, 1875, 2 R. & C. T. Ca. 155). So is the working of signals where running powers have been granted (*G. W. Rwy. and M. Rwy. Cos.*, 1885, 5 R. & C. T. Ca. 94), and an owning company can make an application against the working company (*Solway Junction Rwy. Co.*, 8 R. & C. T. Ca. 177. As to proper facilities at stations, see cases referred to in *Law of Railways*, pp. 589, 590).

Through Rates.—Any forwarding company or an interested individual may apply for a through rate (*G. W. Rwy. Co.*, 1887, 5 R. & C. T. Ca. 170). The company may be terminal (*Greenock and Wemyss Bay Rwy. Co.*, 1875, 2 R. & C. T. Ca. 227, 3 R. & C. T. Ca. 145) or intermediate (*Central Wales and Carmarthen Junction Rwy. Co.*, 1882, L. R. 10 Q. B. D. 231), and need not be working its own traffic (*ib.*), or even maintaining or managing its line (*Cal. Rwy. Co.*, 1879, 5 R. 995). The reasonableness of granting or refusing must necessarily depend on the circumstances of each case; and the apportionment falls to be made, in case of difference, by the Railway Commissioners (see illustrations in *Law of Railways*, pp. 590–593).

Traffic over Sea.—The provisions of the Traffic Acts have been specially made applicable to traffic over sea (26 & 27 Vict. c. 92, ss. 30 and 31; 31 & 32 Vict. c. 119, s. 16; 51 & 52 Vict. c. 25, ss. 25 and 28; and cases *Law of Railways*, p. 594).

Publication of Charges, and Order to distinguish.—A series of provisions exist by which railway companies are bound to publish their charges, and can be compelled by application to the Commissioners to give the particulars of which they are made up (31 & 32 Vict. c. 119, ss. 15 and 17; 36 & 37 Vict. c. 48, s. 14; 51 & 52 Vict. c. 25, ss. 33 and 34; 57 & 58 Vict. c. 54, ss. 1 and 3; and cases quoted in *Law of Railways*, pp. 594–600).

Terminal Charges.—Terminals are charges made by railway companies for services in the receipt and delivery of goods over and above the expense of carriage on the rails. They are "incidental to the business of a carrier," and are over and above the charges incidental to conveyance. Jurisdiction was in 1873 (36 & 37 Vict. c. 48, s. 15) given to the Railway Commissioners to determine questions as to terminals and to fix their amount; and by the Act of 1888 (51 & 52 Vict. c. 25, ss. 24 and 55) they were defined and further provisions made, while by the Railway Rates and Charges Confirmation Acts, 1891 and 1892, they were classified into "station terminals"

and "service terminals," and subjected to a statutory maximum (*Mansion-house Association*, 1896, 9 R. & C. T. Ca. 174. As to terminals generally, see *Pegler*, 1861, 6 H. & N. 644; *Gidlow*, 1875, L. R. 7 E. & I. App. 517; *Hall*, 1885, L. R. 15 Q. B. 505; *Sowerby*, 1891, 60 L. J. Q. B. D. 467; and decisions by Railway Commissioners collected in *Law of Railways*, p. 601).

Special Services.—Under the Railway Rates and Charges Confirmation Acts, 1891 and 1892, certain additional charges are recognised for special or extraordinary services (see specimen Act in Ferguson's *Scottish Railway Statutes*, p. 420; *Pidcock*, 1895, 9 R. & C. T. Ca. 45; *M. Rwy. Co.*, 1896, 9 R. & C. T. Ca. 161; *Mansion-house Association*, 1896, 9 R. & C. T. Ca. 174).

The Court of the Railway and Canal Commission.—By the Act of 1873 a special tribunal was established for determining questions of undue preference and facilities, which was reconstituted in 1888 with an extended jurisdiction and the *status* of a Court. The *Railway and Canal Commission* now consists of two appointed and three *ex officio* Commissioners, these latter being respectively judges of the English, Scottish, and Irish Superior Courts. The appointed Commissioners are nominated on recommendation by the Board of Trade, and one must be of experience in railway business. They sit with the judge of the country to which a case belongs (51 & 52 Vict. c. 25). The duties of the Commission are partly judicial, partly administrative, and partly those of arbiters. Their jurisdiction is extensive, including—

a. All violations or contraventions of sec. 2 of the Act of 1854, and of the Acts containing relative or amending enactments (51 & 52 Vict. c. 25, ss. 8, 9, and 11).

b. Questions arising under special Acts as to cognate matters to those dealt with by the Act of 1854, provision of accommodation, obligations in favour of the public or an individual, and branch railways or private sidings (51 & 52 Vict. c. 25, s. 9).

c. Any question involving the legality of a toll, rate, or charge (51 & 52 Vict. c. 25, s. 10).

d. Any complaint as to the increase of a rate subsequent to 31st December 1892 (57 & 58 Vict. c. 54, s. 1).

e. Disputes as to rebates on sidings rates (57 & 58 Vict. c. 54, s. 4).

f. Power to award damages, subject to certain conditions (51 & 52 Vict. c. 25, ss. 12 and 13).

g. Arbitrations under general and special Act, at instance of one party, and with consent of the Commission (36 & 37 Vict. c. 48, s. 8).

h. Arbitrations referred of consent (36 & 37 Vict. c. 48, s. 9).

i. Arbitrations, where appointed by the Board of Trade (37 & 38 Vict. c. 40, s. 6).

j. Powers, formerly vested in Board of Trade, as to approval of working agreements, and steam vessels (36 & 37 Vict. c. 48, s. 10; 26 & 27 Vict. c. 92, Parts III. and IV.).

k. Disputes as to third-class accommodation and workmen's trains (46 & 47 Vict. c. 34, s. 3).

l. Differences as to remuneration payable for mails by the Post Office (36 & 37 Vict. c. 48, s. 19; 56 & 57 Vict. c. 38, ss. 1 and 4).

m. Differences as to telegraphs (41 & 42 Vict. c. 57, s. 2).

n. Enforcement of Board of Trade orders as to block system, interlocking or continuous brakes (52 & 53 Vict. c. 57, s. 2).

o. Determination of questions as to hours of labour of railway servants (56 & 57 Vict. c. 29, s. 1).

p. Arbitration in disputes between traders and companies, under the Railway Rates and Charges Confirmation Acts, as to rebates,

terminals, detention of trucks, special services, and transhipment, if appointed by Board of Trade.

The Commission have extensive powers to make orders on two or more companies, and apportion expenses. While their jurisdiction is extensive, their action, if it transcends the limits, may be challenged in the ordinary Courts (see *Cal. Rwy. Co.*, 1878, 5 R. 995; *Aberdeen Com. Co.*, 1878, 6 R. 67; and other cases referred to in *Law of Railways*, pp. 614–619); and it would seem that the jurisdiction of the Commission has been to some extent limited in respect of its previous scope by the provisions for arbitration contained in the Railway Rates and Charges Acts (*Mansion-house Association*, [1896] 1 Q. B. 273), at least where the question is as to the reasonableness of a rate. In the case of an *increase* of a charge for cartage, where complaint made is under the Act of 1894, both the arbiter and the Commission appear to have jurisdiction (*Mansion-house Association, supra*); and the jurisdiction of the Commission as to provisions in special Acts is not exclusive of that of the ordinary Courts (*Barry Rwy. Co.*, [1895] 1 Ch. 128). Under the Act of 1854 and amending Acts, their jurisdiction is exclusive (*Murray*, 1883, 11 R. 205).

Appeal.—There is an appeal from the Commission to the Inner House of the Court of Session, except upon questions of fact and questions regarding the *locus standi* of a complainant (51 & 52 Vict. c. 25, s. 17; A. of S., 1 June 1889; Ferguson's *Scottish Railway Statutes*, App. p. i; *Law of Railways*, pp. 619–620). An appeal lies if it appears, from the opinions of the Commissioners, though not in the order itself, that in reaching the result arrived at they have decided a question of legal right, and against an order pronounced by them acting under sec. 8 of the Act of 1873 (*North-Eastern Rwy. Co.*, 1897, 25 R. 333). The decision of the superior Court is final, except in the case of a difference between the English, Scottish, and Irish Courts, when the Court in which a matter affected is pending may give leave to appeal to the House of Lords (51 & 52 Vict. c. 25, s. 17).

Instance.—Proceedings under the traffic Acts may be instituted by any aggrieved individual or company (17 & 18 Vict. c. 31), by municipal corporations and local or harbour boards, with approval of the Board of Trade (36 & 37 Vict. c. 48, s. 13, and 51 & 52 Vict. c. 25, ss. 7 and 30); by various local authorities, including town and county councils, representative county bodies, justices in quarter sessions, urban or rural sanitary authorities, without such approval; and by "any such association of traders and freighters or Chamber of Commerce or Agriculture as may obtain a certificate from the Board of Trade that it is, in the opinion of the Board, a proper body to make such complaint" (51 & 52 Vict. c. 25, s. 7); and such association cannot be compelled to give particulars of the traders it represents (*Mansion-house Assoc.*, [1895] 2 Q. B. 141. For the procedure before the Commission, see *Law of Railways*, pp. 622–624, and the Rwy. and Canal Com. Rules; Ferguson, *Scottish Railway Statutes*, App. p. iii).

(vi.) *Relations with Servants and Employees.*

The responsibility of the company to passengers and the public for the acts of their servants has already been noticed. Their relations *inter se* are rather a branch of the law of master and servant; but one or two specialties may be noted.

Liability for Accident.—Under the Employers Liability Act of 1880 (43 & 44 Vict. c. 42), railway servants have special privileges, and alone are

entitled to its benefits irrespective of whether they are engaged in manual labour or not (s. 8). They also have the further advantage that the defence of collaboration is completely swept away where injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway." "Railway" includes a temporary road laid down by a contractor (*Doughty*, 1883, L. R. 10 Q. B. D. 358). A capstan-man has been held to be a person having control of a train (*Cox*, 1882, L. R. 9 Q. B. D. 106); but a cleaner of locking apparatus who leaves his lever in such a position that it causes accident, is not (*Gibbs*, 1884, L. R. 12 Q. B. D. 208). "Charge or control" may exist though a portion of the train is uncoupled, and may be exercised by more than one person where there are various duties in connection with the train (*M'Cord*, [1896] App. Ca. 57).

At common law the determination of what is common employment may arise in circumstances peculiar to railway accidents. There is no community between the servants of a company whose line is run over and those of the running company (*Calder*, 1871, 9 M. 833; *Adams*, 1875, 3 R. 215). Nor apparently between a contractor's servant and the company's (*Turner*, 1875, 33 L. T. 431; *M'Callum*, 1893, 20 R. 385). Nor even where the servants of two companies are employed at a joint station (*Warburton*, 1866, L. R. 2 Ex. 30; *Swainson*, 1878, L. R. 3 Ex. D. 341). There is no obligation on a company to fence their line in the interest of their own or other companies' servants (*Clark*, 1877, 5 R. 273); and while "seen danger" may be an effective defence (*M'Ghie*, 1887, 14 R. 499), the company are bound to take reasonable precautions for the safety of surfacemen in specially dangerous circumstances (*Cairns*, 1889, 16 R. 618). Where apparatus proves defective, it is no defence that the company have placed the management in the hands of competent officers (*M'Killop*, 1896, 33 S. L. R. 586). The guard of a goods train is not a workman in the sense of the Truck Acts (*Hunt*, [1891] 1 Q. B. 601; see also *Lamb*, [1891] 2 Q. B. 281).

The company have power, under the Companies Clauses Act, to make bye-laws for the control of their officers and servants (8 Vict. c. 17, ss. 127–130), and, under the Regulation of Railways Act, 1842, may summarily apprehend in case of serious or dangerous misconduct (5 & 6 Vict. c. 55, ss. 17 and 18). They may publish in a circular addressed to their servants the fact and grounds of a dismissal, without responsibility for libel (*Hunt*, [1891] 2 Q. B. 189).

They must make returns to the Board of Trade as to the hours of servants whose work involves the safety of trains or passengers (52 & 53 Vict. c. 57, s. 4); and under the Railway Regulation Act of 1893 (56 & 57 Vict. c. 29), the Board of Trade have powers to require, and the Railway Commission to enforce, such a schedule of time as will bring the hours of work within reasonable limits, in the case of servants other than those engaged in clerical work or in the company's workshops.

(vii.) *Special Obligations to the Government and the Public Service.*

The company are under special statutory obligations in reference to the conveyance of troops, their dependants and baggage. The operative statute is the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34, s. 6), which provides that, for the purpose of moving by rail on any occasion of the public service a detachment of the forces (naval, military, volunteer, or police), the company shall, on the production of a route duly signed, provide conveyance, on such terms as may be agreed on between the company and the Secretary of

State, Admiralty, or police authority, or upon certain specified conditions (see *Law of Railways*, pp. 786, 787). The fact that baggage is under guard does not protect the company from liability for loss attributable to their own negligence (*Martin*, 1867, L. R. 3 Ex. 9), and the baggage need not be proportionate to the troops (*Att.-Gen.*, 1863, 14 Ir. C. L. R. 447). It would seem that an individual soldier whose baggage is lost can sue the company, not upon contract, but on the ground of fault (*Martin, supra*).

The Government have also express powers of taking possession of a railway, or the plant thereof, in case of national emergency (34 & 35 Vict. c. 86, s. 16); or when an order for the embodiment of the militia is in force, to declare that it is expedient for the public service that naval and military traffic shall have precedence over other traffic, and to require by warrant such traffic to be forwarded in priority (51 & 52 Vict. c. 31, s. 4), compensation and remuneration respectively being payable.

Detailed enactments also impose obligations in favour of the Post Office relating to mails (1 & 2 Vict. c. 98; 7 & 8 Vict. c. 85, s. 11; 36 & 37 Vict. c. 48, ss. 18–20; 56 & 57 Vict. c. 38) and Post Office parcels (45 & 46 Vict. c. 74); and of the Board of Trade and the Post Office in regard to telegraphs (7 & 8 Vict. c. 85, ss. 13 and 14; 25 & 26 Vict. c. 131, s. 43; 26 & 27 Vict. c. 112, ss. 6 and 32; 31 & 32 Vict. c. 110; 41 & 42 Vict. c. 76). The Postmaster-General can demand that mails shall be forwarded, either by the ordinary trains or by special trains, at such hours by day or night as he shall direct, and the remuneration or compensation falls to be settled by the arbitration of the Railway Commission. (For details, see *Law of Railways*, pp. 789–794.) The Board of Trade exercises a general supervision over many details of railway management and working. (See "Board of Trade" in Index, Ferguson's *Scottish Railway Statutes*.)

Rights of Creditors, Taxation, Abandonment, etc.

(*a*) *Rights of Creditors.*

The extent of the company's capital which may be raised by borrowing is generally fixed by the special Act. It would seem that the power of borrowing exists in the case of incorporated companies, provided the object is not to increase capital, but for the necessary purposes of the company's undertaking (*Bryon*, 1858, 4 E. Jur. N. S. 1262). It may be exercised by a majority of the shareholders, and even by the directors (*Royal British Bank*, 1855, 5 El. & Bl. 248). The issue of loan notes is expressly prohibited unless authorised by the special Act (7 & 8 Vict. c. 85, s. 19). Lloyds Bonds are invalid if issued simply for the purpose of raising money (*Chambers*, 1864, 5 B. & S. 588); but if in respect of sums actually due, found a claim in so far as the company has had the benefit of the money represented (*in re Cork & Youghal Rwy. Co.*, 1869, L. R. 4 Ch. 748). A cash credit is not a loan (*Waterlow*, 1869, L. R. 8 Eq. 501; and see *Millar*, 1880, 8 R. 220).

The company's statutory borrowing powers are regulated by the provisions of the Companies Clauses Act, 1845 (8 Vict. c. 17, ss. 40–63); the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); and the Railway Companies Act, 1867 (30 & 31 Vict. c. 120, ss. 23 and 24).

Mortgagees, and it is thought ordinary contract-creditors, cannot operate payment of their debts by sale of the undertaking (*Dundee Union Bank*, 1844, 6 D. 521; *Gardner*, 1867, L. R. 2 Ch. 201; *Glover's Trs.*, 1869, 7 M. 338), but the lien of an unpaid landowner may be enforced by sale (*Walker*, 1865, L. R. 1 Eq. 195; and cases referred to in *Law of Railways*, p. 816), and it would seem that superfluous lands can be brought to sale or

adjudged (*in re Calne Rwy. Co.*, 1870, L. R. 9 Eq. 658; and other cases, *Law of Railways*, pp. 816 and 817). Rolling stock is excepted from diligence by special statutory enactment (30 & 31 Vict. c. 126, s. 4; 35 & 36 Vict. c. 50; and cases cited in *Law of Railways*, p. 818).

The ordinary method of dealing with an insolvent railway company is by obtaining the appointment of a judicial factor. It is thought that the Court of Session has power at common law to make such an appointment, and in one case it was done (*Dundee Suburban Rwy. Co.*, 1898, unrep., referred to in *Law of Railways*, p. 819).

A judicial factor may be appointed—

(*a*) Under the Companies Clauses Act, 1845 (ss. 56 and 57), at the instance of mortgagees.

(*b*) Under the Companies Clauses Act, 1863 (ss. 25 and 26), at the instance of holders of debenture stock.

(*c*) Under the Railway Companies Act, 1867 (s. 4), at the instance of creditors who have obtained decree for their debts.

The appointment in the first case is not competent to the Outer House (*Garnkirk Rwy. Co.*, 1850, 12 D. 944); but a vacancy in vacation may be supplied by the Lord Ordinary on the Bills (*Primrose*, 1851, 13 D. 1214). A written demand for payment must previously have been made.

In the second case, no such demand is required, and the factor collects for the holders of debenture stock rateably, instead of for the use of the party on whose behalf he was appointed.

In the third case, the applying creditors must have obtained decree (1) on a contract entered into after the passing of the Act of 1867, or (2) in an action not on a contract similarly commenced, or (3) on a protested promissory note or bill of exchange, or (4) on a deed containing a clause of registration, registered after the passing of the Act. The factor must in the first place make allowance for the working expenses and proper outgoings, including rent for running powers (*G. E. Rwy. Co.*, 1881, 44 L. T. 903), hire of rolling stock (*Cornwall Minerals Rwy. Co.*, 1883, 48 L. T. 41), instalments for payment of rolling stock (*Eastern & Midlands Rwy. Co.*, 1890, L. R. 45 Ch. D. 367), but not a claim for rails for making the line (*Navan and Kingscourt Rwy. Co.*, 1885, 17 L. R. Ir. 398), or the promotion of a bill to work by electricity instead of steam (*Mersey Rwy. Co.*, 1895, 64 L. J. Ch. 623), or a fixed dividend upon the capital of a loop-line constituted a separate undertaking (*Eastern & Midlands Rwy. Co., supra*).

The remainder of the receipts must be distributed under direction of the Court "in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein." The factor under the Act of 1867 has the sole and exclusive power of management (*Haldane*, 1881, 8 R. 669, 8 R. 1003; and see also *Haldane*, 1881, 9 R. 253, and 1882, 9 R. 854). A company which has not acquired land or begun to construct is not an undertaking on which a factor can be appointed under the Act of 1867 (*Birmingham and Lichfield Junction Rwy. Co.*, 1881, L. R. 18 Ch. D. 155); but the construction of line, however short, would appear to justify an appointment involving the whole business of the company (*Southern Rwy. Co.*, 1880, 5 L. R. Ir. 165; *East and West India Dock Co.*, 1888, L. R. 38 Ch. D. 576; and other cases, *Law of Railways*, pp. 823 and 824).

The Railway Companies Act of 1867 (30 & 31 Vict. c. 126) also contains careful provisions for dealing with the affairs of a company, unable to meet its engagements, by means of a scheme of arrangement. Such a scheme is prepared by the directors, and submitted to the Court of Session for

confirmation (s. 6). The Court may sist or interdict any action against the company, and after publication of notice in the *Edinburgh Gazette*, no diligence is available without leave of the Court obtained on petition. Within a limited time the assent must be obtained to the scheme of the holders of mortgages, debentures, and bonds, of holders of debenture stock, of each class of guaranteed or preference shareholders, of any other company or person in right of any annual payment charged on the receipts, of the ordinary shareholders at a meeting specially called, and, if the company are lessees of a railway, of the leasing company. The Court may, after hearing parties, confirm the scheme, and on extract its provisions have, as against the company and all parties assenting or bound, the same effect as if enacted by Parliament (s. 18). The Court will not confirm a scheme which alters the constitution of the company (*Stafford and Uttoxeter Rwy. Co.*, 1872, 41 L. J. Ch. 777); and the scheme, though confirmed, does not bind outside creditors (*Cambrian Rwy. Co.*, 1868, L. R. 3 Ch. 278, 296); nor, on the other hand, can it operate to increase their rights (*Stevens*, 1873, L. R. 8 Ch. 1064). The Court have sometimes refused to confirm schemes opposed by outside creditors, but are not likely to do so on general allegations (*Law of Railways*, p. 828). They will not restrain proceedings at the instance of unpaid landowners and outside creditors, unless a scheme be proposed in good faith, which offers a reasonable prospect of providing for the claims of creditors (*Cambrian Rwy. Co., supra*; *Bristol and North Somerset Rwy. Co.*, 1868, L. R. 6 Eq. 448). Dissenting shareholders may appear and oppose, but are bound by the consent of the requisite majority of their class (*East and West Junction Rwy. Co.*, 1869, L. R. 8 Eq. 87), and debenture-holders seem to be in the same position (*re Tunis Railways*, 1874, 30 L. T. 512). The assent of the statutory majority cannot be dispensed with (*Neath and Brecon Rwy. Co.*, [1892] 1 Ch. 349), and the power to restrain actions ceases upon extract of the scheme. Unpaid calls are property of the company, and as such protected from diligence (*Devon and Somerset Rwy. Co.*, 1868, L. R. 6 Eq. 610).

The liability of shareholders individually for the debts of the company is limited to the amount of their shares not paid up (8 Vict. c. 17, s. 37); and they are only liable to diligence to this extent in event of the company's property and effects proving insufficient (s. 38), and are entitled to be reimbursed from the funds of the company (s. 39). Calls may be arrested by a creditor in the hands of a shareholder (*Hill*, 1849, 12 D. 46).

(*b*) Taxation of Railways—(A) *Imperial*; (B) *Local*.

(A) *Imperial Taxation*.—Railway companies are subject to land tax (*Metro. Rwy. Co.*, [1893] App. Ca. 416) and inhabited house duty (*G. & S.-W. Rwy. Co.*, 1880, 7 R. 1161), and assessment under the Income and Property Tax Acts (*Cal. Rwy. Co.*, 1880, 8 R. 89; *Highland Rwy. Co.*, 1885, 13 R. 199; *Highland Rwy. Co.*, 1889, 16 R. 950; *Forth Bridge Rwy. Co.*, 1890, 28 S. L. R. 576). A special tax, known as passenger duty, is levied on them in respect of the conveyance of passengers, and calculated on the receipts from passenger traffic (5 & 6 Vict. c. 79; 26 & 27 Vict. c. 33; 46 & 47 Vict. c. 34, s. 7). They must keep accounts of their passenger receipts, and no duty is exigible for fares not exceeding the rate of a penny a mile. The ordinary rate of duty is 5 per cent., but is reduced to 2 per cent. in urban areas certified by the Board of Trade. The duty is chargeable upon additional sums charged for sleeping accommodation (*Att.-Gen.* v. *L. & N.-W. Rwy. Co.*, 1881, L. R. 6 Q. B. 216. See also *G. W. Rwy. Co.*, 1866, L. R. 1 H. L. 1).

(B) *Local Taxation.—Rating of Railways*—(α) *Valuation*; (β) *Assessment.*

(α) *Valuation.*—The Scottish system of valuation provides for an annual roll being made up for the time being, showing the "yearly rent or value" of all lands and heritages in each county, parish, and burgh, the standard of value being "the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year" (17 & 18 Vict. c. 91, s. 6). The valuation of railways is specially provided for by the appointment of a separate assessor, with extensive powers, whose duty it is to discover and fix (1) the *cumulo* yearly value of all lands and heritages in Scotland belonging to or leased by each railway or canal company, and forming part of its undertaking; (2) the amount which, one year with another, would be required in order to the acquisition, formation, and erection of the several stations, etc., and other houses and places of business connected with each such undertaking, including the *solum* on which such stations and others are erected; (3) all other matters necessary to enable him to make up a valuation roll in terms of the Act (17 & 18 Vict. c. 91, ss. 20 and 21).

The valuation roll, when made, must contain the information obtained, under seven specified heads, showing the total valuation of the railway, and the value of the portions in each parish, county, and burgh. On demand, a separate valuation must be assigned for the portion of any railway within the limits of a burgh, town, or populous place where a Police Act is in force (30 & 31 Vict. c. 80, s. 5), or any police district, special water supply, or other similar district in counties (57 & 58 Vict. c. 58, s. 45). An appeal lies from the assessor's valuation to the Lord Ordinary on the Bills, or, where the lands and heritages of the company are all situated in one county, to the Sheriff.

To be dealt with by the railway assessor and inserted in the *cumulo* yearly value, the subjects must belong to or be leased by the company, and must *form part of their undertaking.* Thus houses occupied by railway employees have been held not to be part of the undertaking (*Dundee & Arbroath Joint Line Com.*, 1883, 11 R. 396). Stations are included (*Ed. & Gl. Rwy. Co.*, 1853, 15 D. 537, 2 Macq. 331), and a book-stall and a cab-stance have been held covered (*N. B. Rwy. Co.*, 1866, 4 M. 645), but not a refreshment-room let to a tenant (*ib.*). A ferry has been held to be rateable as a separate property (*Ed., Perth, & Dundee Rwy. Co.*, 1854, 17 D. 252); but this decision was under the Poor Law Act of 1845, and by the Valuation Act ferries are expressly embraced, for the purpose of ascertaining lineal measurement. Running powers do not make the running company "tenants," or constitute the line run over part of their undertaking (*Highland Rwy. Co.*, 1886, 23 S. L. R. 762. See also *Forth Bridge Rwy. Co.*, 1889, 16 R. 797; *Forth Bridge Rwy. Co.*, 1888, 15 R. 595; *Hall*, 1883, 10 R. 857; and *Law of Rwys.*, pp. 843–847).

In estimating annual value, the railway is to be valued as a railway, and the rent to be arrived at is the hypothetical rent at which the composite heritable subject, a railway, would let for the purpose of carrying on the business of a railway company. If the line is let to another company, the rent under the lease may be taken as the criterion (*Ed. & Gl. Rwy. Co.*, 1858, 20 D. 677). If the company are their own tenants, the gross revenue is ascertained, working expenses and a sum representing tenants' allowances are deducted, and the balance is the assessable value. Under these two heads deductions are made by the assessor in detail for—

1. Working Expenses.
   (1) One half of the expenses truly expended in maintaining or repairing the permanent way (30 & 31 Vict. c. 80, s. 3; but see *N. B. Rwy. Co.*, 1884, 12 R. 6).
   (2) Other working expenses, including cost of management, locomotive power, repairing and renewing rolling stock, traffic and other charges, passenger duty, occupiers' local rates, and occupiers' income tax.
2. Tenants' Allowances.
   (1) Twenty-five per cent. on estimated present value of stock and plant.
   (2) Twenty-five per cent. on value of office and station furniture and plant, etc.
   (3) Ten per cent. for interest on and deterioration of stores on hand.
   (4) Five per cent. for interest on estimated sum of floating capital.
   (5) Eighteen per cent. on value of plant employed in working other lines.
   (6) An abatement, arrived at by a complicated calculation, in respect of earnings from traffic carried in plant belonging to traders (see *Law of Railways*, p. 851).

The proportion of the total valuation effeiring to each parish, county, or burgh is thus ascertained. The total *cumulo* value of the whole undertaking, and the cost of the stations, etc., being separately fixed, a sum equal to five per cent. upon the latter is deducted from the former. The balance thus obtained is divided, in proportion to mileage, between the various parishes, counties, and burghs, and to the sum thus allocated to each parish, etc., is then added a sum equal to five per cent. of the cost of any station, etc., within such parish, etc., and the sum thus arrived at is the yearly value of the company's lands and heritages in the parish, etc., forming part of its undertaking (17 & 18 Vict. c. 91, s. 22; 30 & 31 Vict. c. 80, s. 4).

(β) *Assessment.* — Railway companies are liable for poor-rates as owners and occupiers, and a company having a 999 years' lease has been held liable as owners (*Glasgow and Barrhead Rwy. Co.*, 1855, 17 D. 1148). Under the Poor Law Act of 1845 (8 & 9 Vict. c. 83), they were entitled to deduction of "the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same." This included the maintenance of permanent way; and it would seem that the second half of the expense of this (the first being now otherwise deducted in all cases) falls to be deducted in a question with the poor-law rating authority (see *Glasgow Gas Light Co.*, 1863, 1 M. 727; *Ed. & Gl. Rwy. Co.*, 1866, 4 M. 301); but it is only the expenditure actually incurred that the company can claim to have deducted (*Ed. & Gl. Rwy. Co., supra*). Property and income tax is not deducted (*Ed. & Gl. Rwy. Co.*, 1866, 4 M. 1006); and where an assessment was levied according to usage on real rent under sec. 35 of the Poor Law Act, no deductions could be claimed (*Croll*, 1861, 23 D. 747). Railway companies are also liable for church and manse assessments; and where these are laid upon the real rent, they are assessed on the value in the valuation roll (*Macfarlane*, 1864, 2 M. 519; *Highland Rwy. Co.*, 1870, 8 M. 858). Where the assessment is on valued rent, the real rent of the strip of ground belonging to the company, valued as an agricultural subject, forms the best approximation (*Deeside Rwy. Co.*, 1869, 7 M. 1068). They are also liable

for the rates leviable under the Roads and Bridges Act, the county consolidated rate, the public health rates, the school rate, and the special parish rate. Under later decisions it seems that a company cannot now effectually found on a clause of exemption from public burdens contained in their special Act (*Se. N. E. Rwy. Co.*, 1870, 8 M. H. L. 53; *Com. of Supply for Lanarkshire*, 1870, 8 M. H. L. 141).

A special statutory obligation is imposed (s. 127, Lands Clauses Act, 1845) on railway companies to make good the deficiency in land tax, poor-rate, and prison assessment, caused by lands having been taken for their works, until the works are completed and assessed. In determining whether such a deficiency exists in a particular parish, the company's undertaking within the parish is to be regarded as a whole (*Hall*, 1881, 8 R. 887); but where land is acquired for adding to an existing undertaking, it is no answer to a claim for a deficiency on the land so taken, that the whole assessable value of the whole railway undertaking in the parish is higher than was the previous assessable value of the undertaking *plus* the value of the taken land before it was taken (*Hall*, 1883, 10 R. 857; and on valuation and assessment generally, see *Law of Railways*, pp. 840–867).

(*c*) *Arbitration, Amalgamation, and Abandonment.*

Arbitration.—The jurisdiction of the ordinary Courts may be excluded by agreements to refer differences to arbitration (*G. N. S. Rwy. Co.*, 1871, 9 S. L. R. 92; *N. B. Rwy. Co.*, 1895, 23 R. 76, compared with *Cal. Rwy. Co.*, 1871, 44 Jur. 134); and the statutory arbitrations for the purpose of assessing compensation for land have been considered under *Lands Clauses* Acts. Special provisions are made by the Railway Companies Arbitration Act of 1859 (22 & 23 Vict. c. 59) for the settlement of differences between companies by arbitration, including the appointment of arbiters, if necessary, by the Board of Trade. Under the Traffic Acts of 1873 and 1888, powers of referring differences, required or authorised by general or special Acts, or agreements confirmed or authorised by such Acts, to the Railway Commissioners were conferred; and by the Board of Trade Arbitration Act, 1874 (37 & 38 Vict. c. 40), the Board were empowered to refer to the Commissioners questions referred, under the provisions of a general or special Act, to the arbitration of the Board, or of any person appointed by the Board of Trade. It would seem that an agreement for arbitration under the Act of 1859, made under a special Act which makes no provision for arbitration at all, does not fall within these provisions (*G. W. Rwy. Co.*, 1881, L. R. 17 Ch. D. 493). Where an agreement provided for arbitration according to the Act of 1859, it was held that if one company insisted on arbitration, the jurisdiction of the Courts was excluded (*Waterford and Rickmansworth Rwy. Co.*, 1869, L. R. 8 Eq. 231; see also *Cal. Rwy. Co.*, 1874, 1 R. H. L. 8). If neither party insists on arbitration, the ordinary jurisdiction is not excluded (*London, Chatham, and Dover Rwy. Co.*, 1888, L. R. 40 Ch. D. 100). Nor, it would seem, if a standing arbitrator provided for has not been appointed (*Wolverhampton and Walsall Rwy. Co.*, 1873, L. R. 16 Eq. Ca. 433).

The Court may interdict proceedings in a statutory arbitration if the arbiter has no such power as he is called to exercise (*G. & S.-W. Rwy. Co.*, 1871, 44 Sc. Jur. 29), or if his actings have disqualified him (see *Cal. Rwy. Co.*, 1897, 25 R. 74), but it will not intervene unless the claim is clearly ill-founded in whole or part, and the arbiter is moved to do what is beyond his powers (*Dumbarton Water Commrs.*, 1884, 12 R. 115).

Amalgamation.—The Railway Clauses Act of 1845 (s. 84) provided for the calculation of tolls in case of amalgamation, but the general statutory

provisions regulating amalgamation are contained in Part V. of the Railway Clauses Act of 1863 (26 & 27 Vict. c. 92, ss. 36–55), and apply to companies amalgamated by a subsequent special Act incorporating Part V. of the general Act. The general effect is to put the amalgamated company in the place of the previous companies, and fully vest it in their rights and liabilities. These provisions have reference to total dissolution or transference of the dissolved company; and if the dissolution is with the exception of "purposes hereinafter mentioned," it will be a question of construction of the special Act whether a claim against the dissolved company existing before the amalgamation cannot be insisted in against the dissolved company (*Smith*, 1866, 4 M. 362; see *Law of Railways*, pp. 897–899).

Abandonment.—The statutory provisions regulating the abandonment of railways and the winding up of unsuccessful companies are contained in the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), in certain sections of the Railway Companies (Scotland) Act, 1867 (30 & 31 Vict. c. 126, ss. 31–35), and in the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 113). They provide for application to the Board of Trade, with consent of three-fifths of the shareholders, for leave to abandon, for due advertisement, for due publication of the warrant of abandonment granted by the Board of Trade, for compensation for the non-fulfilment of contracts for land in lieu of accommodation works and in lieu of keeping bridges in repair, and for sale of the lands acquired within a limited time. Abandonment may be total or partial, and the Board of Trade may insist on the condition that the parliamentary deposit shall be applied as part of the assets of the company, while provision is made for cancellation of the bond for completion, and paying over of the deposit (30 & 31 Vict. c. 126). When a warrant of abandonment has been granted, a petition for winding up under the Companies Act of 1862 may be presented, and the company wound up as an unregistered company under the Companies Acts of 1862 and 1867. The Court may direct that the deposit shall not be applied to payment of a debt which, having regard to what is fair and reasonable between all parties interested, appears to have been incurred on account of the promotion of the company, and may order the deposit to be transferred, or the bond assigned, to the official liquidator (32 & 33 Vict. c. 113). These Acts only apply, unfortunately, to railways authorised prior to the Session of 1867. The Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), empowers the Court of Session, where the undertaking has not been completed in the time limited, to order the deposit fund to be applied towards compensating any landowner or other persons whose property has been interfered with, or subjected to loss in consequence of the compulsory powers; and also authorises the Court to order payment of the deposit fund to the judicial factor or liquidator, to be applied as part of the assets of the company for the benefit of the creditors thereof. Since the passage of that Act, previous distinctions between meritorious and non-meritorious creditors have ceased to exist (*Bradford and District Tramways Co.*, [1893] 3 Ch. 463). The time for completion must have expired (*Chambers*, [1893] 1 Ch. 47. For cases relating to abandonment, see *Law of Railways*, pp. 902–905).

Jurisdiction.—The Court of Session has jurisdiction over all railway companies which carry on their business in Scotland. The Railway Commission has, in questions of undue preference and facilities, an exclusive, and in certain matters a concurrent, jurisdiction. The domicile of a railway company is not confined to its principal station (*Aberdeen Ry. Co.*, 1854, 16 D. 422; *Dick*, 1860, 3 Irv. 617; *Jack*, 1885, 12 R. 1029); but, apart from

the *locus contracti* or *locus delicti*, it does not follow that it can be sued in any county its line traverses, or cited wherever it has a station (*Edward*, 1862, 4 Irv. 185).

Jurisdiction against an English company may be founded by arrestment of funds in Scotland (*Lindsay*, 1855, 18 D. 62; affd. 3 Macq. 99, also 22 D. 571; *Gray & Illidge*, 1847, 9 D. 1146). But the Court will not try a case for which the English Courts clearly provide a more convenient *forum* (*Williamson*, 1884, 11 R. 596); and where the cause of action arose in England, it may have to apply principles of English law (*Goodman*, 1877, 14 S. L. R. 449).

The Guild Court of a burgh has jurisdiction to take such measures as it thinks necessary for protecting the safety of the public where a railway company is executing works in a town (*Edin. and Glasg. Rwy. Co.*, 1847, 10 D. 158); and where a statutory jurisdiction has been conferred (*e.g.* on a compensation jury, or of a special kind on the Sheriff), review is competent when that jurisdiction has been exceeded (*Fraser*, 20 May 1806, Hume, 256; *Cal. Rwy. Co.*, 1856, 2 Macq. 229, at p. 240), when the statute has been misconstrued (*Edin. and Glasg. Rwy. Co.*, 1840, 2 D. 1255), or when the subject-matter falls within the ordinary as well as the statutory jurisdiction of the inferior tribunal (*Edin. and Glasg. Rwy. Co.*, 1842, 5 D. 218; *Cal. Rwy. Co.*, 1849, 12 D. 399).

The company may sue and be sued by its corporate name (*Whitehaven and Furness Junction Rwy. Co.*, 1848, 10 D. 1127); and certain proceedings may be taken in name of the secretary (8 Vict. c. 17, s. 142). Service may be made on them at their principal office, or one where there are more, by post or by handing to the secretary, or where there is none, to a director (8 Vict. c. 17, s. 137; 8 Vict. c. 19, s. 128; 8 & 9 Vict. c. 33, s. 130; *Garton*, 1858, 27 L. J. Q. B. 375; and other cases, *Law of Railways*, pp. 886 and 887); and careful provisions are made by the Consolidation Acts (8 Vict. c. 17, ss. 147–164; 8 Vict. c. 19, ss. 130–141; 8 & 9 Vict. c. 33, ss. 132–152) for the infliction and recovery of penalties (*Carruthers*, 1853, 15 D. 591, 16 D. 425).

[See generally, *The Law of Railways in Scotland*, by Francis Deas, 2nd ed., enlarged and revised by James Ferguson, 1897; Ferguson's *Scottish Railway Statutes*, 1898; Ferguson's *Railway Rights and Duties*, 1889; Hodge's *Treatise on the Law of Railways*, 7th ed., 1888; Balfour Browne and Theobald's *Law of Railway Companies*, 2nd ed., 1888; Butterworth's *Railway Rates and Traffic*, 2nd ed., 1889; *Practice of the Railway and Canal Commission*, 1889; and *Maximum Railway Rates*, 1897; Darlington's *Railway Rates*, 1893; *The Law of Mines, Quarries, and Minerals*, by R. F. MacSwinney, pp. 326–388.]

Ranking and Sale.—Before the introduction of the process of ranking and sale, considerable hardship was occasioned to creditors by the numerous difficulties placed by the law in the way of realising their debtors' heritable property (Bell, *Com.* ii. 233). Until the expiry of the legal becomes absolute, an adjudging creditor is only in the position of a heritable creditor without power of sale (Bell, *Com.* i. 744; ii. *ib.*; see ADJUDICATION); and the insertion of a power of sale in voluntary heritable securities only became customary about the end of last century (Duff, 286). This state of the law was particularly inconvenient when there was a competition of heritable creditors, as even after the expiry of the legal there were no means, failing agreement among the creditors, of bringing the lands to sale (Ersk. ii. 12. 59; Bell, *Com.* ii. *ib.*). To remedy this, the process of

ranking and judicial sale was introduced by the Legislature (Act 1681, c. 17). The conditions on which this action was made competent were: (1) that it should be brought by a heritable creditor (see Shand, *Practice*, ii. 864); (2) that the proprietor should be notoriously bankrupt; and (3) that one or more of the creditors should be in possession of the estate. The Lords of Session were empowered in such circumstances to have the subjects valued, to appoint commissioners to sell them by public roup subject to the Court's direction, after intimation as appointed by the Act, and with consent of the debtor while there was "a legal reversion" competent to him, and to rank the creditors upon the price. This procedure was found unworkable, owing principally to the difficulty of obtaining the consent of debtors to the sale of their lands. It was therefore enacted that the sale might proceed without the debtor's consent even before the expiry of the legal if the debtor was "bankrupt and utterly insolvent," and that the purchaser should have right to the subjects "by the decreet of sale to be pronounced by the Lords adjudging the lands sold to the buyer for the price decerned" (Act 1690, c. 20). By a later Act purchasers paying or consigning the price were protected from subsequent challenge (1695, c. 6).

The subjects to which this process is applicable are those which may be adjudged (Shand, *Practice*, ii. 866). In order to give a good title to the purchaser, it was at first thought necessary for each creditor to lead a separate adjudication, so as to connect his debt with the subject sold; but this was remedied, first by permitting a factor appointed by the Court to manage the subjects, to lead a common adjudication, and then by declaring a decree of sale at the instance of a creditor equivalent to a decree of adjudication in favour of all creditors included in the decree of ranking (Bell, *Com.* ii. 235; Act of Sederunt, 23 Nov. 1711; 33 Geo. III. c. 74; Act of Sederunt, 11 July 1794; 19 & 20 Vict. c. 91, s. 4). As to the proviso that the debtor must be bankrupt, a judicial sale at the instance of creditors is now competent where the interest of debts and other annual burdens exceed the yearly income of the property in question, or where sequestration has taken place, without further proof of bankruptcy or insolvency (19 & 20 Vict. c. 91, s. 3). The debtor's whole heritable estate must be included in the process (*Monro*, 1749, Mor. 13362; *Macpherson*, 1784, Mor. 13363). It is sufficient possession by the creditors if an action of maills and duties has been brought by one or more of them, or if the lands have been sequestrated (Shand, *Practice*, ii. 865; Ivory, *Form of Process*, i. 319).

This process originally consisted of three actions: (1) an action of sale; (2) an action of reduction improbation to test the claims of creditors; and (3) a multiplepoinding to divide the price. These are now combined in the one action of ranking and sale. The procedure, which is long and complicated, is fully described in Shand's *Practice* (ii. 867 *et seq.*), Ivory's *Form of Process* (i. 317 *et seq.*), and Beveridge's *Forms of Process* (ii. 513 *et seq.*; see also 19 & 20 Vict. c. 91, s. 2). The form of summons is now regulated by the Statute 13 & 14 Vict. c. 36, and the Act of Sederunt of 31 October 1850. The action is an Inner House process (Mackay, *Practice*, 177). The expenses of the process fall upon the postponed creditors (Act of Sederunt, 10 August 1754. See Stair, iii. 2. 55; iv. 36. 2; iv. 51. 4; Menzies, 773 *et seq.*; Bell, *Lect.* ii. 825; Bell, *Prin.* 833, 2333–2336).

While the making up of a title by an heir involved general liability for his ancestor's debts, an apparent heir was enabled to bring his ancestor's estates to judicial sale without incurring such liability whether the estate was bankrupt or not (Act 1695, c. 24). This right was not barred by behaviour as heir,

though that involved a passive title, nor by renunciation in an action of constitution, nor by general service *cum beneficio inventarii*, nor by special service *cum beneficio inventarii* so long as the title was not completed (Shand, *Practice*, ii. 931 *et seq.*). If there remains a surplus after payment of the creditors, the heir is entitled to it without making up any title (*ib.* 938). The procedure is the same as in the form at the instance of a creditor, except that there is no need to aver or prove that the estate is bankrupt (*ib.* 937); but a ranking and sale at the instance of an heir was always held to be for behoof of all concerned, so that separate adjudications were unnecessary (*ib.* 936. See Menzies, 781; Bell, *Com.* ii. 234; Bell, *Prin.* 2337; Ivory, *Form of Process*, i. 343; Beveridge, *Forms of Process*, ii. 548).

Since mercantile sequestration was made to include the heritable property of those engaged in trade (23 Geo. III. c. 18, s. 6), and finally was made competent in all cases of bankruptcy (19 & 20 Vict. c. 79, s. 13), this process has become almost obsolete. But it is still competent, and under sequestration heritable property may be realised by judicial sale (19 & 20 Vict. c. 79, ss. 96 and 114; Goudy on *Bankruptcy*, 524). The principal advantage of the form at the instance of an heir has been lost, since the liability of heirs has been limited in all cases to the amount of the estate to which they succeed (37 & 38 Vict. c. 94, s. 12).

Rape is the carnal knowledge of a woman forcibly and against her will, or even without force in the case of a female under twelve or of an idiot (Hume, i. 301, 302; Alison, i. 209). By statute, connection with a woman obtained by personating her husband is rape (Criminal Law Amendment Act, 48 & 49 Vict. c. 69, s. 4). Penetration to any extent, however slight, is sufficient to constitute the crime, though there be no emission, or rupture (*Robertson*, 1836, 1 Swin. 93). Violent connection with any woman is rape, except in case of husband and wife, and a husband may be guilty as accessory of the rape of his wife (Hume, i. 306). A prostitute may be ravished, though in that case stronger proof of violence is required (Hume, i. 304).

The necessary force is the overcoming of resistance, whatever the means employed, including the overpowering of the woman's will, though without actual personal violence, *e.g.* drugging her into insensibility, threatening her life with a dangerous weapon, stupefying her by blows (Hume, i. 302, 303, and cases there; *Mackenzie*, 1828, Syme, 322; *Fraser*, 1847, Ark. 280; *Sweenie*, 1858, 3 Irv. 109). Taking advantage of a woman while asleep is not rape, though it is an indictable offence, and is commonly known as "clandestine injury to women" (Macdonald, *Crim. Law*, 166; *Sweenie*, *supra*; *Thomson*, 1872, Coup. 346).

The resistance offered by the woman must be shown to have endured to the last, until actually overpowered by sheer force, exhaustion, the fear of death, or unconsciousness (Hume, i. 302, 303). This is not required where the woman is physically incapable of resistance. Females below twelve, and idiots, are regarded as incapable of consent, and the mere fact of penetration is therefore enough. In cases of weakness of mind, though not amounting to idiocy, a much less degree of opposition is required than in the case of ordinary adult women (*M'Namara*, 1848, Ark. 521; *Clark*, 1865, 5 Irv. 77).

There is no restriction as to the age at which a boy may commit rape. A boy under fourteen has been convicted (*Fulton*, 1841, 2 Swin. 564).

A previous conviction of any crime inferring personal violence, or lewd, indecent, or libidinous conduct, would be an aggravation (Criminal Procedure Act, 1887, 50 & 51 Vict. c. 35, ss. 64–65; Macdonald, 168). A charge of rape can be tried only before the Court of Justiciary. The offence was by statute capital (Act 1612, c. 4) until the Criminal Procedure Act, 1887, s. 56. The punishment now usually imposed is penal servitude for a long term, or for life. The sentence in one case, where there was a recommendation to "the utmost lenieney," was twelve months' imprisonment (*Davidson*, 1887, 1 White, 535). The offence is now bailable (51 & 52 Vict. c. 36, s. 2).

[Hume, i. 301–311; Alison, i. 209–227; Bell, *Notes*, 82–86; Macdonald, 166–168, and 295, 382, 383 (indictment).]

Rating.—In Scotland the valuation of rateable property and its assessment are separate and distinct operations. Each is intrusted to a different set of officials, in many cases acting under authorities entirely independent of each other The subject, therefore, falls to be considered under these two heads: A, *Valuation*; B, *Assessment.*

A. VALUATION.

The Lands Valuation (Scotland) Acts are:—

1. 1854, 17 & 18 Vict. c. 91 (General).
2. 1857, 20 & 21 Vict. c. 58 (Assessor, etc.).
3. 1867, 30 & 31 Vict. c. 80 (General).
4. 1879, 42 & 43 Vict. c. 42 (Appeal committee; Special case).
5. 1886, 49 & 50 Vict. c. 15 (Sporting lands).
6. 1887, 50 & 51 Vict. c. 51 (Waterworks).
7. 1889, 52 & 53 Vict. c. 27 (Advertising Stations).
8. 1894, 57 & 58 Vict. c. 36 (Railway Assessor).
9. 1895, 58 & 59 Vict. c. 41 (Tenants' erections).

I. *Organisation.*
II. *Property entered in the Valuation Roll.*
III. *Persons entered.*
IV. *Annual Value—How Estimated.*

I. Organisation.

1. Purpose and Scope of the Acts.—The purpose of the original statute, as stated in the preamble, is the establishment and annual revision of one uniform valuation of lands and heritages, by means of which all county, municipal, parochial, and other local public assessments leviable according to the real rent may be assessed and collected. This is accomplished by the appointment in each county and burgh (royal or parliamentary) of an official called the assessor, whose duty it is to make up annually a valuation roll containing all the lands and heritages within the county or burgh. This roll is conclusive evidence as to value in questions of rating (1854 Act, s. 33); *primâ facie* evidence in questions of parliamentary registration (19 & 20 Vict. c. 58, s. 17; *Dunbar*, 1883, 11 R. 167); and on other questions, *e.g.* the composition due under a feu-charter, it may be disregarded (*Hill*, 1877, 5 R. 386). The liability to assessment is not affected by the Valuation Acts (1854 Act, s. 41; *Univ. of Glasgow*, 1870, 11 M. 982).

2. Areas of Valuation.—These are counties and royal and parliamentary burghs (1854 Act, ss. 1, 36, 42; 31 & 32 Vict. c. 48, s. 46). Police

burghs are valued as part of the county, their assessment roll being made up from the county roll. The county assessor must now make up his roll so as to show the subjects situated within the boundaries of each police burgh and the various special rating districts in the county (57 & 58 Vict. c. 58, s. 45 (1)); and the railway assessor is bound, if required, to give the valuation separately of so much of the undertaking of any railway, gas, water, or other company as may be situated within the burgh (30 & 31 Vict. c. 80, s. 5; 50 & 51 Vict. c. 51, s. 2). When a farm is partly within and partly without a special district, it is valued, with the buildings, as an *unum quid*, and the value distributed according to acreage (*Forbes Irvine*, 1897, 24 R. 741).

3. The Assessor.—This official is appointed by the county council of each county, and the magistrates or commissioners of each burgh (see Assessor). He may be appointed for the whole county or burgh, or only a particular district (1854 Act, s. 3; 31 & 32 Vict. c. 48, s. 46). Officers of Inland Revenue may be appointed with the consent of the Treasury (1857 Act, s. 1; 52 & 53 Vict. c. 50, s. 83 (4)), the expense of making up the roll being then borne by the Treasury. In any case, they must assist if required. It is the duty of the assessor to make up annually a valuation roll showing the yearly rent or value of the several lands and heritages within the county or burgh respectively, other than the lands and heritages of railway and canal companies, which appear in a separate roll made up by the railway assessor. To enable him to perform these duties, he may call for a written statement of particulars from any proprietor, tenant, or occupier, under penalties for refusal or for giving a false return (1854 Act, ss. 7, 37, 38). His connection with the valuation roll ceases on 8th Sept. in each year, when he must transmit the roll just completed to the county clerk or town clerk, except that he is bound to attend every County or Burgh Valuation Appeal Court, and answer on oath all competent interrogatories (*ib.* s. 10).

The Assessor of Railways and Canals.—For the purpose of making up valuations and valuation rolls of the lands and heritages belonging to all railway and canal companies, as well as such gas, water, and other similar companies as desire it, a special assessor, known as the assessor of railways and canals, is appointed by the Crown. His salary and staff expenses are paid by the various companies in his roll rateably. While in his hands (*i.e.* till 8th April), he must make his valuation roll accessible to any person having an interest therein, and explain the principles on which the valuation is founded without any fee. He has ample powers to compel the production of information and materials necessary to enable him to make up his valuation roll, and may examine witnesses on oath (1854 Act, ss. 20–29). See Assessor of Railways and Canals.

4. The Valuation Roll.—The form of valuation roll now in use was introduced by the Registration Act, 1885 (48 & 49 Vict. c. 16, s. 3 (4) and Sched.). Many of the particulars contained are necessary to make the roll the basis of parliamentary registration. Giving precedence to those required for rating purposes, the roll contains in separate columns: (1) the yearly rent or value for the time of the whole lands and heritages within each county or burgh, distinguishing the parishes and also police burghs and special rating districts (57 & 58 Vict. c. 58, s. 45), and specifying the nature of such lands and heritages; (2) the names and designations of proprietors or reputed proprietors; (3) of tenants; and (4) of occupiers, if such there be (1854 Act, s. 1). The following particulars are also required for registration purposes:—(5) in counties the feu-duty, ground-annual,

rent, or other yearly consideration payable by every proprietor of lands and heritages of the yearly value of £5 or upwards (31 & 32 Vict. c. 48, s. 16), and the same in burghs for £10 or upwards, and in both the name of every £10 tenant in a lease for not less than fifty-seven years (24 & 25 Vict. c. 83, s. 4). All these particulars must be stated as to each dwelling-house separately (48 & 49 Vict. c. 16, s. 6). (6) Where the proprietor is a married woman, the name and designation of her husband must be inserted (24 & 25 Vict. c. 83, s. 4). (7) The names of all inhabitant occupiers not rated, *i.e.* those entitled to the service franchise, for which a separate column is provided in the roll (48 Vict. c. 3, ss. 3, 9), and also the annual value of the dwelling-house occupied by each (52 & 53 Vict. c. 50, s. 29). (8) Lastly, the assessor is to write the word "lessee" immediately after or under the name of every lessee entered as a proprietor (in virtue of sec. 6 of the 1854 Act), to prevent his claiming to be a commissioner of supply (19 & 20 Vict. c. 93, s. 2). The form of the valuation roll may be altered by an Order in Council (48 & 49 Vict. c. 16, s. 3), but particulars not authorised by statute are not to be entered (*Addie*, 1868, 11 M. 979).

Time for making up the Roll.—The valuation roll is made up on or before 15th August in each year (1854 Act, s. 4). It is thereafter retained by the assessor till 8th September for alteration, when he must transmit it to the county clerk or town clerk, as the case may be, in whose hands it remains for inspection by parties interested (*ib.* s. 11). Appeal Courts are held by the county council or magistrates between 10th and 15th September (*ib.* s. 8). Appeals must be disposed of by 30th September, and the roll is altered accordingly. A further appeal on a case stated may be taken to two judges of the Court of Session, whose decision is final (42 & 43 Vict. c. 42, s. 7).

Currency.—After being authenticated, the roll comes into force as the valuation roll for the year commencing at the previous Whitsunday (1854 Act, s. 12), and the various parishes are entitled to a copy of the part concerning them, free of cost (*Orwell* case, 1874, P. L. M. p. 198).

Finality of the Valuation Roll for Rating.—When completed and placed in the hands of the rating authorities as the basis for levying assessments, the valuation roll is final and conclusive (1854 Act, s. 33), and it is incompetent in an action for payment of rates to adduce evidence to contradict the valuation roll (*Maclachlan*, 1871, 2 Coup. 45). A distinction has been drawn, however, between questions of assessment and valuation; and where the same lands were erroneously entered twice, poor-rates were held not to be due for both entries (*Sharp*, 1883, 10 R. 1163; see also Armour on *Valuation*, p. 17).

The Railway Assessor's Roll.—The lands and heritages belonging to or leased by any railway or canal company must be entered in a separate roll made up by the railway assessor. In it may also be entered similar property belonging to any gas, water, or other such company having continuous lands and heritages in more than one parish, county, or burgh, or belonging to any corporation or local authority.

Form of the Railway Assessor's Roll.—The railway assessor's roll sets forth in columns: (1) The yearly rent or value of the whole undertaking of each railway or canal company; (2) the names of the several parishes, counties, and burghs in which any part is situated; (3) the lineal measurement of the entire line, and the portion situated in each parish, county, or burgh; (4) the cost of erecting the several stations, wharfs, houses, etc., connected with each undertaking, including the site; (5) the proportion of such cost expended in each parish, county, or burgh; and (6) the yearly

rent or value of the portion of the undertaking in each parish, county, or burgh.

Time for making up the Roll.—This valuation must be made up on or before the 15th March in each year. Complaints against the assessor's valuation may be made either to the assessor himself, who up to 8th April is entitled to alter his roll, or by note of appeal to the Lord Ordinary officiating on the Bills in the Court of Session, or in certain cases to the Sheriff, on or before 10th April. Such appeals are to be determined on or before 15th May following, after which date the roll is authenticated by the railway assessor's signature, and is in force for the year from 15th May.

Transmission to Counties and Burghs.—Whenever the railway assessor has completed his roll, he must transmit to the various county clerks and town clerks interested a certified copy of that part of his roll affecting their respective areas. Such certified copies are engrossed in the county and burgh valuation rolls, and deemed and taken to be part of the valuation roll of the county or burgh.

The procedure by which gas, water, or other similar companies are handed over to the railway assessor is set forth in sec. 23 of the principal Act (17 & 18 Vict. c. 9, ss. 20–28; 30 & 31 Vict. c. 80; 50 & 51 Vict. c. 51; 57 & 58 Vict. c. 36).

5. Appeals and Complaints.

A. *Against the Valuation of the County and Burgh Assessors.*

Remedies against Erroneous Valuation.—Appeals.—In the case of the valuation rolls made up by the county and burgh assessors, any proprietor, tenant, or occupier may obtain redress (1) by satisfying the assessor, on or before 8th September in each year, that the valuation should be altered (17 & 18 Vict. c. 91, s. 5). (2) If the assessor declines to alter his valuation, an appeal lies to the county or burgh valuation committee, as the case may be (*ib.* s. 8). (3) A further appeal, on a case stated, lies to the Lands Valuation Appeal Court (20 & 21 Vict. c. 58, s. 2; 42 & 43 Vict. c. 42, s. 7).

Complaints.—Complaints may also be presented to the county or burgh valuation committee by third parties, either that the yearly rent or value (17 & 18 Vict. c. 91, s. 13), or any other particular (42 & 43 Vict. c. 42, s. 6), set forth in any entry is erroneous. In the former case the decision appears to be reviewable on a case stated to the Lands Valuation Appeal Court; in the latter it is not.

(1) *The County and Burgh Valuation Courts.—Counties.*—The county valuation committee (or committees) is appointed annually by the county council of each county (42 & 43 Vict. c. 42; 52 & 53 Vict. c. 50), and assigned a certain area of jurisdiction.

Burghs.—The burgh valuation committee may be appointed annually by the magistrates and council of each royal or parliamentary burgh (58 & 59 Vict. c. 41, s. 5).

Procedure.—Every county and burgh valuation committee must annually hold a Court for hearing appeals on or before 15th, but not earlier than 10th September. Ten days' notice must be given, and it may be adjourned from time to time, and to whatever places the Court may fix. All appeals and complaints must be lodged not later than 10th September, and must be heard and determined not later than 30th September in each year (30 & 31 Vict. c. 80, s. 7). The valuation committee may cite and examine on oath the parties and their witnesses, and call for papers and documents. No

formal record of their proceedings need be kept, except a note of the assessment, appeal, and judgment (17 & 18 Vict. c. 91, s. 10). Either party may have the evidence taken in shorthand at his own expense (42 & 43 Vict. c. 42, s. 8). Any person whose name has been entered in the valuation roll may appeal; but he must give the assessor six days' notice in writing, stating what he holds the correct valuation (17 & 18 Vict. c. 91, s. 15; *Symington*, 1895, 22 R. 588).

Expenses.—The valuation committee may award expenses against a complainer if they think the complaint unreasonable (17 & 18 Vict. c. 91, s. 13). In appeals they have no statutory power to deal with expenses at all.

(2) *The Lands Valuation Appeal Court.*—Any person entered in the roll who is dissatisfied with the valuation committee's decision may appeal, on a case stated, to two judges of the Court of Session (known as the Lands Valuation Appeal Court), whose decision is final (*Magistrates of Glasgow*, 1887, 14 R. 319; 20 & 21 Vict. c. 58; 42 & 43 Vict. c. 42).

The Case, how stated.—The case must, of course, depend largely upon circumstances; but it is necessary that there should be a full and plain statement of—

(1) The facts as found by the valuation committee—not in the form of a mere report of the evidence, but rather in the shape of distinct findings of the results held proved;

(2) The grounds of the appeal or complaint, and the replies thereto;

(3) The decision arrived at by the valuation committee;

(4) A certified copy of the evidence must be appended.

The case is prepared by the clerk to the valuation committee, signed by the chairman, and transmitted to the solicitor of Inland Revenue to be laid before the judges. The parties must see that the facts are properly set forth (*Ld. Middleton*, 1882, 10 R. 28).

Amendment of Case.—The case may remitted back to the valuation committee to be more fully stated (42 & 43 Vict. c. 42, s. 9); but if it be improperly or incompetently stated, apparently it will be dismissed (*Union Tube Co.*, 1895, 22 R. 583).

Expenses.—There is no record of expenses having been awarded, though the judges have threatened to do so against assessors persistently disregarding former decisions (*Forbes Irvine*, 1893, 20 R. 626).

B. *Appeals and Objections to the Valuation of the Assessor of Railways.*

Any of the various companies appearing in the railway assessor's roll may obtain redress, if dissatisfied with the valuation, either by inducing the assessor to alter the valuation, which he may do up to 8th April, or by presenting a note of appeal on or before 10th April.

Appeals.—Appeals are presented to the Lord Ordinary on the Bills, or, where the company's property is all in one county, to the Sheriff. The proceedings are summary, and conducted as the Lord Ordinary or Sheriff may allow. A remit is usually made to a man of skill (*N. B. Rwy. Co.*, 1887, 25 S. L. R. 14).

Objections.—Appeals may also be presented in the form of objections by any parish, county, or burgh having interest in the valuation. The proceedings are the same as above. All appeals and objections must be presented not later than 10th April, and heard and determined not later than the 15th day of May in each year, and the decision of the Lord Ordinary or the Sheriff is final and not subject to review (17 & 18 Vict. c. 91, s. 24; 30 & 31 Vict. c. 80, s. 7; 57 & 58 Vict. c. 36).

II. Property entered in the Valuation Roll.

1. Lands and Heritages.—The valuation roll must contain a full and accurate list of all the "lands and heritages" in each county and burgh. By sec. 42 of the Act of 1854, the expression "lands and heritages" "shall extend to and include all lands, houses, shootings, and deer forests (whether let or not; 49 Vict. c. 15), fishings, woods, copse and underwood from which revenue is actually derived (by sec. 6 they must in any case be valued as pasture or grazing land), ferries, piers, harbours, quays, wharfs, docks, canals, railways, mines, minerals (for the distinction between "mines" and "minerals," see *Blantyre Par. Board*, 1883, 10 R. 773), quarries, coalworks, waterworks, limeworks, brickworks, ironworks, gasworks, factories, and all buildings and pertinents thereof, and all machinery fixed or attached (see *N. B. Rwy. Co.*, 1887, 25 S. L. R. 4, for a definition of the meaning of "fixed and attached") to any lands or heritages: Provided always that no mine or quarry shall be assessed unless it has been worked during some part of the year to which such assessment applies." This definition is not intended to be exhaustive, and it has been decided that various descriptions of heritable property fall to be entered in the valuation roll though not specifically mentioned, *e.g.* multures (*M'Leod*, 1869, 11 M. 980), kelp shores (*Gordon*, 1866, 4 M. 1141), peat cutting (*Forbes*, 1873, 11 M. 990), etc.

2. Principal and Accessory.—(1) *Property Rateable as Accessory to Lands and Heritages.*—Wherever there is a profitable occupation of land (using that term in its most comprehensive sense) that is permanent and exclusive, the owner and occupier must be entered in the valuation roll. And anything that enhances the value of land must be valued as an accessory, either separately or thrown in along with the principal subject. Tolls and trade profits—though in their own nature moveable—are so entered; also machinery, fishing and shooting rights, mill multures, the right of kelp gathering, cutting peats, etc.

Improvements.—Improvements or additions to a heritable subject are now entered in the roll, the lessee being deemed proprietor, under 58 & 59 Vict. c. 41, although the duration of the lease is under twenty-one years (minerals thirty-one). There are certain exceptions, *e.g.* additions and improvements for agricultural purposes to agricultural subjects, and in certain circumstances erections and improvements to mineral subjects, such as coke ovens, etc.

(2) *The Separate Entry of Accessory Subjects.*—Whether an accessory subject is to be entered in the roll separately depends on (1) the essential nature of the right or subject, and (2) the terms of letting. An accessory subject can only be enrolled as part of the principal if it be a necessary appurtenance of the latter, and, on the other hand, even then it may require to be entered separately if there be a separate letting (see cases in Armour on *Valuation*, pp. 98 *et seq.*).

3. Tolls and Trade Profits.—Tolls and trade profits are not rateable and cannot be entered in the roll *per se*, for they do not come under the description of lands and heritages. But though not directly rateable *quâ* tolls or trade profits, they are rateable indirectly where they form part of the profits of the occupation of land. (1) *Tolls.*—On this footing, harbour dues (*Gardiner*, 1866, H. L. 4 M. 14), market tolls (*Town of Inverness*, 1874, 4 R. 1144), bridge dues (*Dumbartonshire Road Trs.*, 1884, 11 R. 571), etc., have indirectly been entered in the valuation roll as enhancing the value of lands and heritages. (2) *Trade Profits.*—In valuing lands and heritages

regard must be had to the fact that they may be enhanced in value by being specially available for earning profits. The best example of this is a railway, for its trade could not be carried on elsewhere. It is, therefore, really part of the occupation, and consequently the trade profits become the direct basis upon which the value must be estimated. In applying the principle that trade profits, like tolls, though not rateable *per se*, are to be taken into account when they are due to the occupation of a heritable subject, and so enhance its value, these three cases may be distinguished: (*a*) Where it is immaterial what premises a person occupies for carrying on his trade, the premises are merely an adjunct of the trade, and the profits of the trade do not increase their value, and consequently do not appear in the valuation roll even indirectly, *e.g.* a carting business was held not to enhance the value of a pier (*Hunter's Trs.*, 1883, 10 R. 666), nor the revenue derived from the exhibition of articles of interest the value of Abbotsford (*Scott*, 1890, 17 R. 833). (*b*) But where the premises are particularly advantageous for the special trade, so that it cannot be transferred without injury, then the profits of trade form an element in the value, and appear in the roll indirectly, *e.g.* where the goodwill of a public-house is sold by the proprietor, who is also tenant, to an incoming tenant or purchaser of the premises, the whole payment made is not to be treated indiscriminately as additional rent. Half is usually held to be so, though there is no fixed rule (*Hughes*, 1892, 19 R. 840). The payment made by an incoming to an outgoing tenant for goodwill during the currency of the lease does not affect the value to be entered in the roll (*Drummond*, 1886, 13 R. 540); nor does an obligation not to commence a rival business (*Assessor for Lanark*, 1887, 14 R. 579). (*c*) Where the trade is so much a part of the occupation that it cannot be carried on elsewhere, as in the case of railways, canals, waterworks, etc., then the trade profits become the direct basis upon which the value must be estimated. The assessor cannot value undertakings of this class by the method of comparison—in the case of corporation waterworks, where no profit can be made, it is not easy even to imagine a "hypothetical tenant." The assessor, therefore, has no data of the ordinary sort upon which he can estimate the rent a tenant might be expected to give, and in default, the system has been adopted of taking the gross revenue or profit of the previous year as a basis, and after making certain deductions, such as working expenses and tenant's profits, the balance remaining is held to be rent or annual value. This "highly artificial system of rules" (per Ld. M'Laren in *Mags. of Glasgow*, 1887, 14 R. 319) has been sanctioned by a long series of decisions.

III. Persons entered in the Valuation Roll.

1. Proprietors.—The assessor must enter "the names and designations of the proprietors or reputed proprietors, and where there are tenants or occupiers, of the tenants and of the occupiers thereof respectively," of all lands and heritages (1854 Act, s. 1). The word "proprietor," it is enacted, "shall apply to liferenters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons in the actual receipt of the rents and profits of lands and heritages" (*ib.* s. 42). Title is therefore immaterial; and a water company has been held liable to assessment as owner and occupier of the ground under the streets of a city in which its water-pipes were laid though not vested in any title of property in the streets, the power acquired under its Act of Parliament being a mere permission to open the streets to lay the pipes and repair them (*Hay*, H. L. 1854, 1 Macq. 682). Similarly, a tramway company is liable in respect of the tramway rails or the ground they occupy, though the only exclusive privilege

enjoyed is the right to use flanged wheels upon the rails (*Craig*, 1874, 1 R. 947).

Tenant entered as Proprietor.—A tenant is entered as proprietor when holding ordinary subjects under a lease of more than twenty-one years, or minerals of more than thirty-one (1854 Act, s. 6). Under 58 & 59 Vict. c. 41, a tenant under a lease of shorter duration is also deemed proprietor of any erections or structural improvements he may have made, except in the case of agricultural and certain mineral subjects.

2. Tenants and Occupiers.—Both the tenant and occupier must be entered in the roll, and this holds even where subletting is prohibited in the tenant's lease. The fact that the subtenants are in beneficial possession justifies the assessor in enrolling them as occupiers (*D. of Richmond*, 1869, 11 M. 981). Under the Registration Acts, every occupier of a separate dwelling must now be entered in the roll, however small his rent or short his lease, not necessarily for rating purposes, but in order that he may be transferred to the list of voters.

3. Profit—Beneficial Occupation.—Occupation in order to be rateable must be "beneficial," which has been defined as yielding, or capable of yielding, a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent. It is not, however, necessary that the occupation should be beneficial to the person in occupation, if the property be capable of yielding a clear rent over and above the necessary outgoings (Ld. Chan. Westbury in the *Mersey Dock* cases, 1865, 11 H. L. C. 443; also 3 M. (H. L.) 102, note). The House of Lords thus authoritatively defined beneficial occupation in the great *Mersey Dock* cases in 1865. Accordingly, in the case of charities, etc., where persons occupy as bare trustees for the benefit of the public, and do not derive any personal pecuniary benefit or advantage from the occupation, they are nevertheless now held rateable (*Greig*, 1868, 6 M. (H. L.) 97; *Local Authority of Dalbeattie*, 1882, 10 R. 23).

4. Crown not Rateable.—Where lands and heritages are owned and occupied by the Crown, there is neither an owner nor an occupier within the meaning of the Poor Law Act of 1845, and other rating statutes, for these statutes apply only to subjects, the Crown not being bound by them, because not named in them. There is nothing, however, to prevent assessors inserting Crown property in the valuation roll if they choose—indeed, where the subject is a dwelling-house, it must be entered, along with the name of the inhabitant occupier, under the Reform Act of 1884 (48 & 49 Vict. c. 3, s. 9 (9)). The Treasury, however, retain in their own hands the right to value all Government property, for the purpose of making contributions to the rates in respect thereof. The Crown's exemption extends not only to property in the private occupation of the Crown, but also to property in the occupation of servants of the Crown occupying for the purposes of the Crown, such as buildings used for the purposes of the Royal Navy or Army, or of the Post Office; for Court-Houses; for Prisons, etc.

IV. Annual Value—How Estimated.

1. Stipulated Rent as the Basis of Annual Value.—The rule for fixing the yearly rent or value is contained in sec. 6 of the 1854 Act, which enacts:—

> "In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with

another, such lands and heritages might in their actual state be reasonably expected to be let from year to year; . . . . and where such lands and heritages are *bonâ fide* let for a yearly rent conditioned as the fair annual value thereof, without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act." The section goes on to provide that where the lease is for more than twenty-one years (minerals thirty-one) the rent may be disregarded.

The fundamental idea is that rent or lettable value shall form the basis of valuation for rating purposes; and if property is let under a *bonâ fide* lease of ordinary endurance, the assessor has no alternative but to accept the stipulated rent as the annual value.

There are certain cases, however, in which, although the property is let, the stipulated rent cannot be adopted as the true annual value. (1) If the lease is not *bonâ fide*, the rent conditioned therein cannot be accepted for valuation purposes. The relation created by the lease must be truly that of landlord and tenant, and it must not be granted for some ulterior object. It is not a *bonâ fide* letting where a farm is let to an old and valued servant at a nominal rent in consideration of his long and faithful services (*Kerr's Trs.*, 1871, 11 M. 983). Relationship between landlord and tenant does not *per se* affect the *bonâ fides* of a lease (*Alexander*, 1890, 17 R. 835); but it may do so (*Harkom*, 1893, P. L. M. 477). (2) The money rent must be the sole consideration payable for the use of the property. If a grassum be payable at the commencement of the lease, or if in addition to the rent the landlord is entitled under the lease to further considerations that have an appreciable value, then the rent ceases to represent the true annual value, and the assessor is not bound to adopt it. Such payments and considerations take a variety of shapes, but the most common are: undertakings by the tenant to improve the property let, for the proprietor's benefit, or to pay interest on improvement expenditure laid out by the proprietor himself, payments for goodwill, etc. (see *Dundee Harbour Trs.*, 1886, 13 R. 829, and cases in Armour on *Valuation*, pp. 216 *et seq.*). (3) The rent must be a yearly rent, and therefore the rent of a property let for less than a year cannot, in ordinary circumstances, be taken as the annual value. In practice, grass parks, which are usually let from May to November, are entered in the roll as in the occupation of the proprietor, and at the rent which, one year with another, they might be reasonably expected to bring if let for ordinary agricultural purposes. This holds whether the result be to make the annual value lower (cases of *Maitland and Campbell*, 1858, 20 D. 1356), or higher (*Ker's Trs.*, 1878, 9 R. 1236; see also *Berwick*, 1888, 15 R. 629). (4) If the lease be of the nature of an improving lease of more than twenty-one years' duration (minerals thirty-one), the rent therein need not be adopted as the annual value. In such cases the stipulated rent cannot obviously represent the true annual value, more especially towards the end of the lease, and the assessor is not bound by it.

2. Probable Rent as ascertained by the Assessor.—Where property is in the owner's own occupation, unlet, or in the foregoing cases, where the stipulated rent cannot be taken, the assessor is compelled to fall back on rules for estimating the annual value which are more or less arbitrary. These rules are not rules of law, but of fact, adopted by the assessors, and approved of by the judges, as being on the whole the means best adapted and most equitable for carrying out the direction contained in the first part of sec. 6 of the Valuation Act. There are various modes of

ascertaining what rent might be reasonably expected for a subject. When it falls within a class of property ordinarily in the market, such as houses in towns, and agricultural land in the country, the usual mode is to compare it with similar property actually let. Another method, used chiefly in the case of mills, factories, etc., is to take a certain percentage on what it would cost to erect the building on the footing that if a manufacturer finds it worth his while to build, he must expect to derive a profit from the erection equal to a percentage on his outlay. This is known as the "contractors' principle," and may be adopted in default of other means of estimating annual value (*St. Cuthbert's Co-operative Assoc.*, 1896, 23 R. 681).

Property ordinarily in the market may be valued according to either of these methods, or even by a combination of both. But in the case of exceptional properties which are not in the market, and are not ordinarily subject to the contract of letting, so that the rent cannot be ascertained by comparison with similar properties, the rule is to estimate the rent on the basis of profits. The gross receipts for the preceding year are taken, and after deducting the working expenses, tenant's allowances, etc., the rent the tenant can afford to pay may be estimated. This is known as the "profits principle." The assessor must ascertain the probable rent the best way he can, and in doing so may avail himself of any of the above methods; always keeping in view that the subject must be valued in its "actual state," and that an average value over several years must be taken.

Trade Buildings—Profits or Percentage System.—From the decisions (see Armour on *Valuation*, pp. 250 *et seq.*) it appears that buildings and undertakings such as mills, manufactories, warehouses, distilleries, etc., have been valued (1) on the principle of comparing the subject in question with similar subjects, according to floorage space or cubic contents; (2) on the basis of a percentage on structural cost or value; (3) on the basis of the net profits after deducting working expenses and tenant's profits; and (4) in some cases on a complex consideration of more than one of these methods in combination. The "profits principle" will be preferred to the "contractors' principle" in most cases (case of *Falkirk Gas Co. Ltd.*, 1883, 10 R. 651; *Kinross Gas Co. Ltd.*, 1890, 17 R. 850). But a linen factory has been valued on the basis of 7½ per cent. on the cost of construction (*Shields*, 1875, 4 R. 1146); an oilworks on the basis of 15 per cent. on the original cost (*Drumgray Coal Co.*, 1867, 11 M. 977), though the practice is now to take 7½ per cent. on the capital value, as appearing in the last balance-sheet, thus allowing for depreciation. A distillery has been valued at a rate per bushel of mashing capacity (*Sheriff*, 1885, 12 R. 919). A better mode, however, is that of comparison (*Islay* case, 1884, 11 R. 841; *North British Distillery Co.*, 1890, 17 R. 845).

Railways, Canals, etc.

These subjects are valued by a special assessor and under special statutory rules which apply to no other form of rateable property (1854 Act, ss. 21, 22, etc., and 30 & 31 Vict. c. 80). The railway assessor has (1) to ascertain the *cumulo* yearly value of the railway or canal as a whole, and (2) to apportion this *cumulo* value among the several parishes, counties, and burghs through which the line of railway or canal passes.

1. Railways.—*Cumulo Yearly Value—How Determined.*—Under sec. 23 of the Valuation Act the railway assessor must "inquire into and fix *in cumulo* the yearly rent or value in terms of this Act of all lands and heritages in Scotland belonging to or leased by each railway and canal company, and forming part of its undertaking."

(*a*) *What is to be considered as "forming part of the undertaking."*—The statute may be said to include stations, depôts, counting-houses, etc., by implication (s. 21); and the following have also been held part of the undertaking:—bookstalls, cab-stances, advertising places, offices and warehouses, and the cultivated banks and slopes of the railway. On the other hand, hotels, refreshment-rooms, stabling, workshops, etc. under the arches of a railway bridge let to tenants at yearly rents, coal depôts and auctioneers' stances let by the railway company, and dwelling-houses belonging to a railway company, and situated beyond the railway fence, though occupied by employees of the company, are not part of the railway undertaking, and are therefore to be valued separately by the county or burgh assessor.

(*b*) *Cumulo Yearly Value—How fixed "in terms of the Act."*—The annual value of the whole undertaking of a railway company is fixed on the basis of the profits earned. The gross revenue for the preceding year is taken, and after making certain deductions, the net revenue represents the annual value of the railway for the purpose of assessment.

Having got the gross revenue, the various deductions may be classed under these heads: *First*, Working Expenses; *Second*, Tenants' Allowances.

Working Expenses.—1. *Maintenance of Permanent Way.*—This is one of the principal working expenses, and is allowed as a deduction to the extent of one-half the amount incurred in the preceding year (30 & 31 Vict. c. 80, s. 3). "Permanent way" is defined as "the line or lines of railway, bridges under or over the same, viaducts, tunnels, fences, and ditches along the said lines, signals and apparatus connected therewith" (*ib.* s. 2).

2. Other working expenses are, *inter alia*: (1) general cost of management, including salaries of directors and other officials, coals, etc.; (2) locomotive power; (3) traffic charges; (4) Government duty; (5) law charges.

Tenants' Allowances.—These are—

1. Twenty-five per cent. upon the estimated present value of the working stock and plant. This percentage is made up as follows:—

12	per cent.	for tenants' profits.
5	„	for deterioration of the stock and plant.
5	„	for interest on capital invested in stock and plant.
3	„	for accidents and incidents, such as keeping the line clear of snow and the like.
25		

The present value of the working stock and plant is estimated thus:—In the first valuation, made up shortly after the passing of the Act of 1854, the value of the stock and plant was ascertained by a valuation by persons of skill. The working plant of a railway company being of all grades, from what is absolutely new to what is just about to be discarded as worn out, it was considered fair to enter this value as diminished by a fourth, *i.e.* 75 per cent. of the original cost. Since that time 75 per cent. of the sum annually expended, as appearing from the published accounts of the company, has been added each year to the former total value of the company's plant. This is taken as representing the plant extant at the time.

2. Twenty-five per cent. on the value of workshop tools, office and station furniture and plant, horse and carting plant, etc., on the same principle as above.

3. Ten per cent. for interest and deterioration on the value of general and locomotive stores on hand.

4. Five per cent. for interest on an estimated sum for floating capital necessary to carrying on the business.

5. Eighteen per cent. on the value of plant employed in working other lines.

6. An abatement is given in respect of earnings accruing to each company from traffic carried on in plant belonging to traders.

The total amount of the foregoing expenses and allowances having been deducted from the gross revenue for the year, the sum remaining is regarded as the *cumulo* yearly rent or value for rating purposes.

A new valuation requires to be made every year, as both the traffic returns and the expenses fluctuate very considerably, causing corresponding variations in the annual value.

2. *Apportionment of the Cumulo Value among Parishes*, etc.—The rules for carrying this out are contained in sec. 21 and 22 of the Act of 1854, as amended by the Act of 1867, and may be thus summarised:—*First*, the assessor is to ascertain the *cumulo* yearly rent or value of the whole undertaking. *Secondly*, he is to inquire into and fix "the amount which, one year with another, would be required in order to the acquisition, formation, and erection of the several stations, wharfs, docks, depôts, counting-houses, and other houses and places of business respectively in Scotland, of or connected with each such undertaking (including the *solum* on which such stations and others are erected)." *Thirdly*, from the former sum (*i.e.* the *cumulo* value) he is to deduct a sum equal to five per cent. upon the latter sum (*i.e.* the value of the stations, etc.; 30 & 31 Vict. c. 80, s. 4). *Fourthly*, the balance thus obtained is to be divided among the various parishes, counties, and burghs through which the line passes, in proportion to the mileage of the line situated in each. *Fifthly*, to the sum thus allocated to each parish, county, or burgh is to be added a sum equal to five per cent. of the cost (ascertained as above) of any station or place of business within such parish, county, or burgh. The sum thus ascertained is to be "deemed and taken to be the yearly rent or value, in terms of this Act, of the lands and heritages in such parish, county, or burgh belonging to or leased by such railway or canal company, and forming part of its undertaking." This is known as the "mileage system," and differs from the English, or "parochial system," under which the profits actually earned in each town and parish are separately ascertained, and the valuation made accordingly. The chief advantage of the Scottish system lies in its simplicity, though its inequality in many cases cannot be disputed. On the other hand, the system in England, while perhaps theoretically fairer and more exact, is surrounded with numerous practical difficulties and seems more uncertain and troublesome in its operation.

Various other undertakings, such as canals, corporation waterworks, gasworks, docks, harbours, piers, tramways, etc., are valued on the basis of profits on practically the same principles as railways (see Armour on *Valuation*, pp. 277 *et seq.*). In the case of corporation waterworks where no profit can be made, the whole cost of management, maintenance, and repairs is allowed, and no allowance is made for tenants' profits (*Mags. of Glasgow*, 1884, 12 R. 3).

B. ASSESSMENT.

I. *Parish Assessments.*
II. *County Assessments.*
III. *Burgh Assessments.*
IV. *Burdens falling on the County and Burgh General Assessment.*
V. *County and Burgh Assessments under various Statutes.*

Areas of Assessment.—The principal areas of local assessment are: (1) the

parish, (2) the *county*, and (3) the *burgh*. There are also *districts* for special purposes, *e.g.* lunacy, roads, public health, fisheries, drainage, and water, with a special rate within the district. As the rating authority, however, is in each case either the parish council, the county council, or the burgh authority, the various rates may be classed under these heads, premising that the terms "parish," "county," and "burgh" are not always applied in the different rating statutes to precisely the same area. Speaking generally, parish rates are levied on owners and occupiers equally, according to the net rental; county rates, chiefly on owners, according to the gross rental; and burgh rates fall largely on occupiers, according to gross rental, with a system of differential rating.

I. Parish Assessments.

1. *Rating provisions of the* 1894 *Act.*
2. *Poor Rate.*
3. *School Rate.*
4. *Registration Rate* (*Births, etc.*).
5. *Burial Ground Rate.*
6. *Library Rate.*
7. *Valuation Rate.*
8. *Special Parish Rate.*

1. *Rating Provisions of the* 1894 *Act.*

Parish Budget.—The rating authority in the parish is the parish council. A landward committee cannot levy rates (57 & 58 Vict. c. 58, ss. 23 and 27). The financial year runs from Whitsunday, and at a meeting in July each year the parish council must adjust its annual budget. At that meeting it receives the estimates of the receipts and expenditure for all purposes during the current financial year (including those of a landward committee), and revises the estimates, except those of a landward committee, which it has no power to revise. It then authorises the expenditure sanctioned, and makes provision for meeting it (s. 37).

Accounts.—The Act provides for two separate parish funds and two relative sets of accounts. (1) The *general* parish fund is for all receipts and payments necessary in the exercise of powers vested in the parish council, as coming in place of the parochial board. Into this fund are paid all sums received as poor rates, registration rates, burial-ground rates, etc., and against it are charged all expenses laid on these rates. (2) The *special* parish fund is for all the receipts and expenditure in connection with the new powers conferred by the Act on rural districts (*v. infra, Special Parish Rate*). In a purely burghal parish there is only the general parish fund. In a parish partly burghal and partly landward, the special parish fund is in charge of the landward committee. All accounts must be so kept as to prevent the proceeds of a rate from being applied to any purpose to which it is not properly applicable (s. 35).

Rates.—All assessments which a parish council is authorised or required to levy are directed to be recovered in the same way as the poor rate. All assessments are accordingly included in one demand note, but they must be separately specified as poor rate, school rate, registration rate, burial-ground rate, library rate, special parish rate,—all or any of these, as the case may be. The whole sum set forth in the demand note is recovered as if it were poor rates. Occupiers of agricultural subjects pay on three-eighths only of the annual value, subject to the deductions allowed by sec.

37 of the Poor Law Act, 1845 (59 & 60 Vict. c. 37). The right of appeal to the parish council to correct an erroneous assessment is regulated by the various rating statutes.

Joint Collection.—A parish council may arrange with another parish council, or county council, or district committee, or town council, or burgh commissioners, for the collection of their respective rates by the same collector (s. 51 (3)).

2. *Poor Rate.*

The poor rate is the most important assessment levied within the parish, the other parochial assessments being levied along with it and in the same manner. The principal Poor Law Act of 1845 (8 & 9 Vict. c. 83, as amended by 24 & 25 Vict. c. 37) throws the burden of providing for the paupers in each parish or combination of parishes in Scotland, to the extent of one half upon the owners, and the other half on the tenants or occupants of all lands and heritages within the same, rateably according to the annual value of such lands and heritages (s. 34). It is optional whether an assessment shall be levied at all, and there are still a few parishes (24 out of 877) where the poor are supported by church collections or a voluntary levy among the heritors. Established usage (s. 35) is no longer recognised (59 & 60 Vict. c. 37, s. 5). The assessment of means and substance, after falling gradually into disuse, was finally abolished in 1861.

Imposition of Assessment.—After the annual budget has been approved in July, the parish council must cause an assessment roll to be prepared, containing the names of the ratepayers and the sum leviable from each. The current valuation roll supplies this information, but is only conclusive as to yearly value (*University of Glasgow*, 1870, 11 M. 982; *The Glasgow Tramway Co.*, 1873, 1 P. L. M. 270, 274). An appeal lies to the parish council, which may at any time correct any error, omission, or surcharge in the assessment roll. It may also exempt from payment on the ground of inability to pay; and it may impose additional assessments in the case of unforeseen deficiency. It has been decided that one half of the sum required must be assessed on owners as a class, and the other half on tenants or occupiers as a class; and not in such a way as to throw a uniform rate on all the ratepayers indiscriminately (*Galloway*, 1875, 2 R. 650).

By the 31st section of the Valuation Act it is enacted that where subjects are let separately at rents not exceeding £4, and the names of the occupiers are not inserted in the roll, the proprietor shall be charged with the whole assessments (even although his remedy against tenants is suspended by the Crofters Acts, *Macfarlane*, 1888, 16 R. 230), reserving a claim for reimbursement of what was properly chargeable against the occupiers. On the other hand, the 43rd section of the Poor Law Act provides for the levying of the whole assessment from the tenants or occupiers, with right to them to recover the half due by the owners, or to retain the same out of their rents on production of the collector's receipt. This mode of collection is only applicable, however, to those cases where the assessment on owners and occupiers is an equal rate, there being in the parish no exemption on the ground of poverty, no failure to levy on account of non-occupation, and no classification of occupancy (*Galloway, supra*).

Apportionment.—There is no statutory authority for making any apportionment of the poor rate. An equal division between outgoing and

incoming tenants has been held to be the legal and equitable rule (*Meall's Exrs.*, 1875, 3 P. L. M. 326).

Exemptions.—1. *Crown Property.*—Lands and heritages occupied by the Crown, or the servants of the Crown for the purposes of the Crown, are not liable to be assessed (*v. supra*).

2. *Parish Churches* are excluded from the valuation roll, and therefore from assessment, as being *extra commercum* and incapable of beneficial occupation (*v. supra*).

3. *Poverty.*—The parish council may exempt from payment of the poor assessment on the ground of inability to pay (s. 42). This exemption applies, of course, mainly to tenants and occupiers; but cases may occasionally occur where the owner is unable to pay. A resolution to exempt all occupants of houses under £4 of rental is illegal (*Douglas*, 1868, 10 P. L. M. 363).

4. *Unoccupied Property.*—Non-occupation does not relieve the owner of his share of the assessment (*Tod*, 1858, 20 D. 445). An owner cannot be exempted on the ground that his property is unlet (as to county rates, see 52 & 53 Vict. c. 50, s. 62 (4)). Unlet shootings and deer forests are now assessable under 49 Vict. c. 15.

5. *Parish Minister.*—The minister of the parish is not liable for assessment in respect of his manse and glebe (*Forbes*, 1850, 13 D. 341; affd. 1 Macq. 106). But when the glebe is let, the tenant is liable for the occupier's rates. When the glebe is feued under the provisions of the Glebe Lands Act, 1866, it becomes an assessable subject. The exemption of the minister from assessment applies to poor rates only.

6. *Mines and Quarries* which have not been worked during some part of the year to which such assessment applies are exempt by 17 & 18 Vict. c. 91, s. 42 (The Valuation Act, 1854).

7. *Churches*, chapels, meeting-houses, and "premises exclusively appropriated to public religious worship" are not assessable (37 & 38 Vict. c. 20); even if they are used for Sunday or infant schools, or for the charitable education of the poor.

8. *Burial-Grounds* are exempt under the same Act.

9. *Sunday and Ragged Schools* may be exempted from occupier's rates under 32 & 33 Vict c. 40.

10. *Scientific, etc., Societies.*—Societies established exclusively for purposes of science, literature, or the fine arts are exempt from assessment, either as occupiers or owners, in respect of the land and buildings used by them for the transaction of their business, and for carrying into effect their purposes, provided that they are supported in whole or part by annual voluntary contributions, that they do not, and, by their laws may not, make any dividend, gift, division, or bonus in money to their members, and that they obtain a certificate in terms of the Act 6 & 7 Vict. c. 36.

11. *Militia Storehouses* are exempt under 17 & 18 Vict. c. 106, s. 36.

12. *Volunteer Storehouses*, under 26 & 27 Vict. c. 65, s. 26.

13. *Lighthouses* and premises connected therewith, under 57 & 58 Vict. c. 60, s. 731.

14. *Telegraphs, etc.*—The rateable value of land taken for telegraphs (31 & 32 Vict. c. 110, s. 22), or for the defence of the realm (23 & 24 Vict. c. 112, s. 33), is stereotyped at the value when acquired.

There is no exemption in favour of schools, schoolhouses, school playgrounds, industrial schools, charitable institutions, hospitals, lunatic asylums, parish council offices and houses, poorhouses, or similar property.

Classification.—The parish council formerly had power to classify lands and heritages according to the purpose of their occupation, and to impose differential rates (s. 36). The object was to give relief to subjects used as tools of trade,—such as shops, mines, and farms. The classification was optional, but, if adopted, required to be exhaustive (*Cardross* case, 1887, 14 R. 478), and was confined to occupiers. Since 15th May 1897 agricultural lands and heritages in every parish, as regards the occupier's share of the parish rates, are rated at only three-eighths of their annual value in the roll, subject to the deductions allowed by sec. 37 of the Poor Law Act, 1845. Old classifications can only receive effect if equally favourable to agricultural subjects, and if they are so certified by the Secretary for Scotland. They are called "certified classifications." All classifications other than such "certified classifications," and all established usages, are abolished. A parish council has power (1) to alter any classification so far as necessary to enable it to become a certified classification, or (2) to abandon any certified classification. An imperial contribution out of the proceeds of the estate duty is made towards the deficit in the local rates caused by the diminished rateable value of agricultural subjects (The Agricultural Rates, etc., Act, 1896, 59 & 60 Vict. c. 37).

Annual Value.—The poor assessment cannot be imposed on the gross value,—the rent stated in the valuation roll,—but only "under deduction of the probable average cost of repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same" (s. 37).

Deductions.—The deduction for repairs will, of course, vary according to the nature of the property. It is usually made by means of percentages on the gross value, varying according to the nature of the property. Thus land may be allowed 12½ per cent.; houses 20 per cent.; and railways considerably more (*Edin. and Glasg. Rwy. Co.*, 1864, 3 M. 229). The decided cases have all been concerned with large public undertakings, such as railways, gasworks, and waterworks, where the gross value in the valuation roll is estimated on the basis of profits, after making certain deductions for repairs, etc. It has been decided that the deductions allowed by sec. 37 must be allowed in addition to these (*Glasg. Mags.*, 1887, 14 R. 319). Repairs are a legitimate deduction; but a percentage on the annual value of a railway, over and above actual repairs, on the footing that the life of a railway is only sixteen years, was disallowed (*Edin. and Glasg. Rwy. Co.*, 1866, 4 M. 301). Deduction has been allowed in the case of a gasworks for annual depreciation, including the annual depreciation and renewal of meters, for insurance, on the footing that the company was insuring itself, and for poor rates, but not for feu-duties (*Glasg. Gas Light Co.*, 1863, 1 M. 727). It is the *actual* rates, taxes, and public charges that are to be deducted. In addition to poor rate, these include land tax, county rates, minister's stipend, manse and glebe assessment, road money, and school rates, but not property and income tax. The latter, though derived from lands and heritages, is a personal burden (*Edin. and Glasg. Rwy. Co.*, 1866, 4 M. 1006).

Recovery.—The parish council may recover poor rates either by summary warrant or in the ordinary Courts of law. The provisions enacted for collecting summarily the land and assessed taxes, or either of them, and other public taxes (43 & 44 Vict. c. 19, s. 97; see also secs. 86 and 89, and 46 & 47 Vict. c. 15, s. 14; 47 & 48 Vict. c. 62, s. 7), are applicable to poor rates; and they may also be recovered in the Small Debt Court (s. 88). In granting a summary warrant, the Sheriff or magistrate is acting in a

ministerial capacity only: accordingly, it is sufficient if it be signed by one justice; and an erroneous reference to the Assessed Taxes Act of 1812 was held not to be fatal (*Oakley*, 1867, 6 M. 12). If, on the other hand, application is made in the Small Debt Court or in the Sheriff's ordinary Court, the judge is called on to exercise his judicial functions, and to decide on the merits as well as the form of the assessment (*M'Tavish*, 1876, 3 R. 412). Any number of local rates and taxes due by the same person may be included in the same complaint, and the invalidity of one part will not affect the rest (25 & 26 Vict. c. 82). Interest is due on each year's rate from the date when it ought to have been paid. In *Greig*, 1879, 6 R. 801, it was allowed at the rate of 2½ per cent.

Ratepayers' Remedies.—The remedies at law against an improper assessment existing prior to 1845 are continued, but to the extent and effect only of exempting the ratepayer individually from payment of any surcharge which may have been made upon him (s. 40). Suspension (*Edin. and Glasg. Rwy.*, 1864, 3 M. 229) or reduction (*Archibald*, 1856, 18 D. 329) are the appropriate forms of action where action is competent at all (*Edin. and Glasg. Rwy.*, 1866, 4 M. 301).

Not debitum fundi.—The burden of poor rates, though levied partly in respect of ownership, is not a *debitum fundi*. It therefore does not run with the land, but rests on the representatives of the original debtor (*Allan*, 1846, 20 Sc. Jur. 1; *Macfarlane*, 1864, 2 M. 519, 532, per. Ld. J.-Cl. Inglis). It ranks, in case of bankruptcy or insolvency, before all other debts of a private nature due by the ratepayer (s. 88),—even before a poinding of the ground (*N. B. Prop. Invest. Co.*, 1888, 15 R. 885). And it does not fall under the triennial prescription (*Munro*, 1857, 20 D. 72).

3. *School Rate.*

The school rate was introduced by the Education (Scotland) Act, 1872 (35 & 36 Vict. c. 62). Under the Act the expenses of the school board, including those incident to the election thereof (but not including the expenses of any member or candidate), are to be paid out of the school fund. The school fund consists of: (1) parliamentary grants (s. 67); (2) money raised by loan (s. 45); (3) all money not specially appropriated to any other purposes (s. 43).

Any deficiency is raised by a local rate within each parish or burgh, royal or parliamentary. This is known as the "school rate," and is levied and collected in exactly the same manner as the poor rate (*q.v.*) (s. 44). The school board of each parish and burgh shall annually, and not later than 12th June in each year, certify to the parish council the amount of the deficiency in the school fund. The parish council add this to the next poor assessment, and levy and collect it along with, but separately from, the poor assessment, and pay over the amount, without any charge for the cost of collecting (41 & 42 Vict. c. 78, s. 32), to the school board. When any burgh, parish, or school district with a school board includes two or more parishes having separate parish councils, the school board must certify to each parish council the amount of the rate on each pound of rental which they shall lay on and collect as school rate. If there be no poor rate, or if it be differently levied, the school board must itself assess directly by the same rules and with the same powers of rating as a parish council. Any surplus is carried on to, and any deficiency included in, the rate for the succeeding year (s. 44). The exemption of manses and glebes from the payment of poor rates does not extend to the school rate (*Gillanders*, 1884, 12 R. 309).

4. *Registration of Births, Deaths, and Marriages.*

The present system was introduced in 1854 (17 & 18 Vict. c. 80; amended by 18 & 19 Vict. c. 29, and 23 & 24 Vict. c. 85). The local management is intrusted, as a rule, to parish councils, the area for registration being the parish. There are, however, two important exceptions: (1) In burghs royal or parliamentary the town council is the local authority; and (2) in registration districts specially formed by the Sheriff out of two or more parishes, or in parishes where there is no poor rate, all the duties of local authority are conferred on the heritors. There are provisions for annexing small portions of a parish to an adjoining parish, and for the union of the landward and burghal parts of a parish. The total sum required by the parish council for registration purposes is raised by an assessment levied in the same manner and along with, but separate from, the poor rate. In burghs it is thrown on the real rent of lands and heritages within the burgh, and levied as part of the burgh general assessment on occupiers, and in other cases laid on as the Sheriff may direct.

The rate covers the payment of the registrar's account according to a fixed scale of fees; such other sum as may be necessary for his remuneration; his salary and petty disbursements; and the providing of fire-proof accommodation for the books, and, if necessary, of an office.

5. *Under the Burial Grounds Act*, 1855.

This Act (18 & 19 Vict. c. 68) was passed for the purpose of closing, when necessary, existing burial-grounds, and providing new or additional accommodation.

The Act is administered in parliamentary burghs by the town council, or the magistrates of a burgh of regality included within the limits of the former class of burghs; in parishes outside the limits of parliamentary burghs, by the parish council, or that part of it, in case of there being a combination, which belongs to the parish. The town council of a parliamentary burgh is the authority within the burgh, if the burgh comprehends more than one parish, or parts of more than one parish; if a parliamentary burgh lies wholly within one parish which is also in part landward, the Sheriff may determine whether the town council or the parish council shall be the authority. A royal burgh which is not a parliamentary burgh is, for the purposes of the Act, regarded as part of the parish, and in such a burgh the parish council will execute the Act. (Secs. 2 and 3, amended by 19 & 20 Vict. c. 103, s. 69, which was inadvertently repealed by the Police Act of 1862, but re-enacted by 29 & 30 Vict. c. 50.)

The expenses incurred in carrying the Act into execution, so far as not covered by the price of lairs and fees of interment (s. 24), are to be raised by assessment, to be levied in the same way as that which may be in force for the time being for the relief of the poor within the parish, with the like powers (s. 26).

6. *Library Rate.*

The Public Libraries Consolidation (Scot) Act, 1887 (50 & 51 Vict. c. 42), has for its object the provision and maintenance of free public libraries, and, in connection with these, art galleries and museums. The Act is administered in burghs (including police burghs) by the town council or commissioners; and in parishes (exclusive of any burghal area therein), by the parish council; and in parishes partly burghal and partly landward, by the landward committee. In each case the management is intrusted to a

standing committee (ss. 2, 7, 18). It rests with the "householders" to decide whether the Act shall be adopted,—"householders" meaning, in burghs, all persons on the municipal register, and in parishes all persons entitled to vote at a school board election.

The expense of carrying out the Act is to be defrayed out of "the library rate," which in burghs is levied in the same way as the burgh general assessment, and in parishes as the poor rate (s. 7). It must not exceed a penny in the pound of yearly rent, and is to include the interest of borrowed money, the formation of a sinking fund, the defraying of expenses of maintenance and management, and the purchase of the contents of the library, gallery or museum (ss. 7, 8). The local authority may borrow on mortgage, or on the security of the rates, sums not exceeding the capital sum represented by one-fourth of the library rate capitalised at twenty years' purchase, and lay aside as a sinking fund for the extinction of loans a sum annually equal to at least one-fiftieth part of the money so borrowed (ss. 13, 14).

The library committee makes up in April its estimate of the sum required for the year from the following Whitsunday, and reports this to the town council or parish council, which fixes the library rate accordingly (s. 30).

7. *Valuation Rate.*

It is competent for county councils and town councils to apportion the expenses of valuation upon the parishes within the county or burgh according to their annual value, and in that case the sum apportioned is assessed and levied along with the poor rate for the current year (17 & 18 Vict. c. 91, s. 18).

8. *The Special Parish Rate.*

The parish council of a landward or rural parish, or a parish partly landward and partly burghal, may, for the purposes set forth in Part IV. of the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), levy a rate not exceeding sixpence in the pound on the annual poor-law value of the lands in the parish. These purposes include *inter alia* the acquisition of buildings for public offices and meetings of the parish council, with the necessary land; the acquisition, maintenance, and improvement of grounds for public recreation; the acquisition of rights of way by agreement; the acceptance of any gift of property for the benefit of the parish; and the execution of works incidental to these powers (s. 24): the leasing of land for allotments or common pasture (s. 26): and the maintenance of public ways (s. 29). The rate is levied in the same way as, and along with, the poor rate, but must be separately set forth and demanded. It covers all expenses, including payment of interest and repayment of debt. Where no poor rate is levied, the special parish rate is to be levied half on owners and half on occupiers, as if it were a poor rate. A landward committee certifies to the parish council annually, not later than 12th June, the amount required to be raised by special parish rate. The parish council levies the rate on the landward or rural part of the parish, and pays over the amount collected to the landward committee (s. 27).

II. County Assessments.

1. *Rating Provisions of the* 1889 *Act.*
2. *Police Rate.*
3. *County General Assessment.*

1. *Rating Provisions of the* 1889 *Act.*

The assessing powers of county councils are contained in secs. 26 and 27 of the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50).

County Fund.—All receipts of the county council are carried to, and all payments in the first instance are made out of, the county fund. If it is insufficient to meet the expenditure, rates (known as the owners' consolidated rate and the occupiers' consolidated rate—together as the *consolidated rates*) may be levied, if for general county purposes, on all the rateable property of the county, and if for highways, public health, and any special purpose dealt with in divisions of the county, then on the rateable property in the district or parish concerned (s. 26). The county council can only levy a consolidated rate within the county, and no other rate (*Corporation of Galashiels*, 1896, 23 R. 818; *Macarthur*, 1898, 35 S. L. R. 612).

Average Rate.—Prior to the Act of 1889 the county rates (apart from road rates under the Act of 1878) were paid by the owners alone. The policy of the statute being to stereotype the owners' burden at the passing of the Act, and make any increase fall on owners and occupiers equally, the device was resorted to of getting an *average rate* fixed by the Sheriff, on a ten years' average amount in the pound, of each rate payable by owners only.

These were —

1. Police Assessment.
2. County General Assessment.
3. County Registration of Voters.
4. Lunatic Asylums.
5. Militia.
6. Sheriff Court-Houses.

Then if the estimate in respect of any branch of expenditure does not exceed the average rate it is payable by owners only, and if it does so exceed, the excess is payable by owners and occupiers equally. In computing the average rate, any portion of a rate applicable to the payment of interest on, and the repayment of, borrowed money is excluded. It is included in the owners' consolidated rate. In the demand note the average rate and the increment are separately set forth (s. 27).

Levy of Rates.—Every year in October the estimates for the current year (beginning at Whitsunday), prepared by the Finance Committee, are submitted to and revised by the county council, and provision made for meeting the expenditure (s. 71). This is done by the council fixing the rate in the pound of the rateable property which will be necessary to meet the deficiency in the county fund in respect of each branch of expenditure. The rate is imposed upon all lands and heritages in the county according to the gross annual value as appearing in the valuation roll. There are one or two exceptions, such as the assessments for roads and public health, which fall on the rateable property in the division, district, or parish concerned. In the case of each old branch of expenditure, the rate is deemed to be made under the particular Rating Act as modified by the present Act. The rate necessary for any new or unprovided for branch of expenditure is imposed as a "general purposes rate" on owners and occupiers. This rate and the other rates beyond the *average rate* are divided equally between owners and occupiers, and the sum of all the rates so fixed and divided shall, as affecting owners and occupiers respectively, constitute the owners' consolidated rate and the occupiers' consolidated rate (s. 27).

The rates imposed by the county council are deemed to be for the year from 15th May preceding the date of imposition, and are payable on a day fixed by the council, not being earlier than 1st November then ensuing. The demand note sets forth the several branches of expenditure, the amount in the pound applicable to each branch, the amount to be paid, the manner

and time of appealing against and praying such amount, and such other particulars as may be prescribed by the Secretary for Scotland (ss. 62, 93). The hearing of appeals may be delegated to a committee (s. 73 (1)).

Occupiers of subjects valued at less than £4 a year may be relieved from payment on the ground of poverty, but only on application being made; but no subjects shall be exempted from assessment on the ground that they are under £4 annual value, or as having been unoccupied and unfurnished during the period of assessment, except in respect of the amount payable by the occupier (s. 62). An outgoing occupier removing during the currency of a rating year has a right of relief against the incomer for the rest of the broken year (s. 27). County rates may be recovered summarily or by an ordinary action, in the same way as poor rates. More than six defenders may be called in one action. And the rates are preferable, in the case of bankruptcy, to all debts of a private nature (s. 62); but this preference cannot be made effectual by poinding the effects of a company after the commencement of a liquidation by the Court (*Allan*, 1892, 20 R. 36). These provisions apply to all county rates, and need not be repeated. In abnormal cases the rating provisions of the Act may be modified or added to, after advertisement and after confirmation by the Sheriff (s. 63). Any ratepayer may, without fee, inspect the assessment roll and any estimate made previously thereto, and may take copies and extracts (s. 64). And the production of the assessment roll is *primâ facie* evidence of the making and of the validity of the rates (s. 65).

Burgh Contributions.—The administration of the Police and of the Contagious Diseases (Animals) Acts in all burghs with a population under 7000 having been committed to the county council (ss. 13 and 14), every such burgh must contribute to the county fund in aid of the necessary expenditure. For this purpose the rateable property of the burgh is included in that of the county, and the item of the consolidated rates applicable to the above expenditure is fixed as if each burgh were one of the parishes in the county. The amount is not assessable, however, by the county council in the burgh, but is paid by the town council out of the burgh general assessment, or out of any other assessment actually levied, or out of the common good (s. 60). Contributions due by royal and parliamentary burghs under this head are payable on or before 15th January, after requisition by the county council made not later than the month of October preceding (s. 66). The county council can only levy consolidated rates, and that within the county as distinguished from royal and parliamentary burghs. It cannot break up the rate for the purpose of levying an assessment for one particular purpose upon a parliamentary burgh, which for the purpose of all other assessments is beyond the assessable area (*Corpor. of Galashiels* and *Macarthur*, *supra*). Police burghs not having a separate police force simply remain part of the county, and are assessed by the county council accordingly (s. 60).

2. *The Police Rate.*

The police assessment in counties is imposed by the Police Act of 1857 (20 & 21 Vict. c. 72), modified by the Local Government Act of 1889. Under the statute the county council, acting through the standing joint committee, must maintain a sufficient police force in the county to the satisfaction of the Secretary for Scotland. Rules are laid down regarding the salaries of the chief constable, his deputy, and other constables; and the furnishing of clothing, accoutrements, and other necessaries (Act 1857, ss. 3–27). These and all the other expenses incurred in carrying out the

Act, including arrears of assessment and the cost of collection, are to be defrayed by the county council out of the police assessment leviable under the Act (s. 28). The rate is assessed (ss. 29–33, amended by the Act of 1889), according to the gross value appearing in the valuation roll, on all the lands and heritages within the county, excluding only burghs or towns with a separate police establishment (52 & 53 Vict. c. 50, s. 13; *v. supra*). The rate is one of those stereotyped under the Act of 1889, and until the average rate is exceeded it is payable by owners only; thereafter the excess is payable equally by owners and occupiers. It may be levied either from the proprietor or the tenant in the first instance, the latter being entitled to deduct the amount from his rent. The exemption of unoccupied and unfurnished property in respect of the owners' share of the rate is abolished (Act 1889, s. 62 (4)). Similarly, small urban subjects liable to the rate can no longer claim exemption when unoccupied or unfurnished on the ground that the rent is under £4 (*ib.*). Relief may be granted in the case of poverty (*v. supra*). With the exception of Renfrew and Lerwick, all burghs with a population of less than 7000 are policed by the adjoining county, and rated as part of the county. Burghs with a larger population may still consolidate with the adjoining county by agreement, so as to utilise the same police establishment (s. 61). A county may be divided into police districts, each district being for certain police-expenditure a separate area of assessment (ss. 58–60). The police assessment is relieved to some extent by a grant from the Treasury annually of about half the sum spent on pay and clothing (Act 1857, s. 66, amended by 38 & 39 Vict. c. 48, continued annually). Under 53 & 54 Vict. c. 67, certain liabilities of a more or less uncertain and transitory character are thrown on the police rate as guaranteeing the fund for pensioning constables.

Pedlars Act, 1871 (34 & 35 Vict. c. 96).—The enforcement of this Act is thrown on police districts, *i.e.* any areas maintaining a separate police force. The fees chargeable for pedlars' certificates (5s.) are paid to the collector of the police assessment (s. 21), and go to the police pension fund.

3. *County General Assessment.*

The county general assessment imposed under the County General Assessment Act of 1868 (31 & 32 Vict. c. 82) took the place of what was known as the "rogue money," a county assessment introduced in 1724 by the Act 11 Geo. I. c. 26, s. 12, for the purpose of apprehending, subsisting, and prosecuting criminals.

Purposes.—The county general assessment may be applied to the following payments:—

(1) The salaries and necessary outlays of the county officials;

(2) The salaries, fees, and necessary outlays of procurators-fiscal in the Sheriff and Justice of Peace Courts, and clerks of Justice of Peace Courts;

(3) The expenses incurred in searching for, apprehending, subsisting, prosecuting, or punishing criminals;

(4) The expenses connected with court-houses and other county buildings;

(5) The expense, within certain limits, of striking the fiars' prices;

(6) The damage caused by riots;

(7) All expenses or payments presently directed by any Act to be defrayed out of the "rogue money" (s. 3).

The foregoing purposes, and such others as are expressly thrown on this assessment by Act of Parliament, are the only purposes to which it can be legally applied. It cannot legally be used to defray the cost of opposing a

Bill in Parliament (*Wakefield*, 1878, 6 R. 259). It is levied in exactly the same way as the police assessment under the Act of 1857. The only real distinctions are, that as the Act of 1868 applies only to the county exclusive of the burghs, the assessing area is more limited; and in the later Act there is no power of borrowing money.

The "county general assessment" is payable by owners of lands and heritages until the average rate (*v. supra*) is exceeded, in which case the excess is payable equally by the owner and occupier. It cannot be imposed upon lands and heritages within a parliamentary burgh (*Macarthur*, 1898, 35 S. L. R. 612).

Penalties imposed under the Pedlars Act, 1871 (34 & 35 Vict. c. 96, s. 20), go to the collector of the consolidated rate in aid of the county general assessment, when imposed by the Justice of Peace Court.

III. Burgh Assessments.

A. *Assessments under the Act of* 1892.
B. *Gas Contingent Guarantee Rate, etc.*

A. *Assessments under the Act of* 1892.

The rating powers of the commissioners within burghs are contained in Part V. of the Burgh Police (Scot.) Act, 1892 (55 & 56 Vict c. 55). Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock have private local Acts of their own, but may adopt the Act of 1892 in whole or part. If Part V. be adopted only partially, the provisions relating to the incidence of assessments must be included (s. 15). The following assessments may be imposed:—

1. The burgh general assessment.
2. The general improvement rate.
3. A special assessment to pay the damage occasioned by riots.
4. A general sewer rate.
5. A special sewer rate.
6. Private improvement expenses rate.

These are all imposed on the gross value of lands and premises within the burgh as appearing in the current valuation roll. The first is payable by occupiers, the second and third by owners and occupiers, and the remaining three by owners alone. The assessments levied under this Act are not applicable to the purposes of other Acts administered by the commissioners, unless there is statutory provision to that effect (s. 59; *Kirkintilloch Police Commrs.*, 1890, 18 R. 67; also *Leith Dock Commrs*, 1897, 25 R. 126).

1. Burgh General Assessment.—*Imposition.*—Once a year (generally in October) the commissioners must assess all occupiers of lands or premises within the burgh, according to the valuation roll made up, or about to be made up, for the general purposes of the Act of 1892. The rate may be imposed while the roll is incomplete, *e.g.* on 8th September, if the tax is levied according to the completed roll (*Burgh of Partick*, 1881, 8 R. 480).

Purposes.—In the absence of any definition, "general purposes" may be held to mean all the purposes for which provision is made in the Act, *e.g.* officials' salaries, cost of police, etc., save those for which special assessments are leviable (s. 340). Damage occasioned by a riot may be defrayed out of the burgh general assessment (s. 341); also the cost of maintaining the foot pavements (s. 360); and arrears of private improvement expenses, when necessary (s. 372). Penalties imposed under the Pedlars Act, 1871 (34 & 35 Vict. c. 96), when imposed in the burgh or police Court, go to the

treasurer of the burgh or commissioners in aid of this assessment (s. 20). A number of assessments imposed under various Acts are directed to be levied either along with or in the same way as the burgh general assessment.

Publication.—The commissioners, when fixing the rate, must fix, and publish by handbill in the burgh and newspaper advertisement, the day when it is payable (usually about 11th November), another day on which appeals may be lodged, and a day or days on which appeals may be heard. The assessment is imposed as from Whitsunday to Whitsunday, and may not exceed four shillings in the £ of the gross yearly rent when it covers a water supply under the Act, or otherwise at a rate of two shillings in the £. An existing classification, according to rent, may be retained (s. 340).

How Levied.—The assessment may be remitted on the ground of poverty or inability, but on no other account whatever (s. 343). Where lands or premises are let at a rent of £4 or under, the owner is assessed instead of the occupier. He gets a deduction, however, of one-tenth, and has relief against the occupier for the full amount (s. 344). The owner is also liable where he lets his lands or premises for less than a year (s. 345). The commissioners have power, where premises are occupied by different occupiers during the assessing year, to rate the new occupier (though his name do not appear in the valuation roll) for the period of his occupancy, and the owner for the rest (s. 346). The rate will be levied on the rent actually payable (*Auld*, 1891, 7 S. L. Rev. 111).

Differential Rating.—For assessments under the Act of 1892, the annual value of the following lands or premises shall be held to be one-fourth of that entered in the valuation roll, viz.:—

"1. All lands and premises used exclusively as a canal or basin of a canal, or towing-path for the same, or as a railway or tramway, constructed under the powers of any Act of Parliament for public conveyance, excepting the stations, depôts, and buildings (a station refreshment-room was held to be part of the station 'buildings,' *Police Commrs. of Oban, etc.*, 1885, 13 R. 339), which shall be assessable to the same extent as other lands and premises within the burgh, and all bridges, pontages, and ferries not being private property:

"2. All the underground gas and water pipes, or underground works, of any gas or water company or corporation:

"3. Salmon-fishings, and all woodland, arable, meadow, or pasture ground, or other ground used for nurseries, market gardens, or for agricultural purposes."

And where the burgh has a water supply under the Act, the annual value of all quarries and manufactories within the burgh shall, as regards the burgh general assessment, so far as it is applicable to water, be held to be one-fourth of the annual value. Disputes as to what falls within the above exceptions are to be decided by the Sheriff or Sheriff-Substitute, the former of whom is final. Differential rating is suspended in certain cases when money has been borrowed on the security of former assessments, till the borrowed money has been repaid (s. 347). For shops, the water rate, or portion of the burgh general assessment applicable to water, shall be chargeable only on one-fourth of the rental of the premises, unless in special circumstances the commissioners see cause to charge the ordinary rates, in which case an appeal lies to the Sheriff (s. 267).

The Assessment Roll.—Immediately after the general assessment is imposed, an assessment roll must be made up by the collector or other officer

appointed, showing the yearly rent or value of the rateable property within the burgh. For this purpose the custodian of the valuation roll is bound to exhibit it, or give access to it, free of charge. And owners must furnish within seven days a written statement as to property let by them, under penalty in case of failure. The commissioners have large powers to alter and amend the assessment roll, even apparently to the extent of contradicting the valuation roll "by inserting therein the name of any person who ought to have been assessed, or who since the making thereof has become liable to be assessed, or by striking out the name of any person who, according to a written certificate by the assessor, ought not to have been assessed, or by correcting the amount of any rent or assessment which may have been inaccurately entered." Any alteration must be made within one year after expiry of the year of assessment, and does not vitiate the assessment (ss. 348–351).

Notice of Assessment.—In addition to the publication of the rate by bill or advertisement, the collector must issue to each ratepayer a schedule or notice, which may include all or any of the various burgh assessments (s. 352). Where no notice was given, the ratepayer was awarded expenses in an action for payment of rates (*Mags. of Leith*, 1881, 18 S. L. R. 313.)

Recovery.—Rates may be recovered either in the ordinary Courts or by obtaining a summary warrant from the Sheriff or any of the magistrates to recover the arrears due with 10 per cent. added. Under the warrant (see Sched. VIII. for form) the party's effects may be poinded and removed, and after the lapse of four days without payment, they may be sold by public auction on three days' notice. The collector must preserve for three months evidence of the amount of the proceeds of the sale, and the disposal thereof. The warrant also decerns and ordains instant execution by arrestment (s. 353). The remedy for oppressive or irregular proceedings by the collector, or any officer or licensed auctioneer, is equally summary. The party aggrieved presents a petition to the Sheriff or magistrate who granted the warrant, "who shall thereupon summarily call before him the party complained of and such petitioner, and, without written pleadings, shall inquire into and decide any dispute, question, or claim of damage raised by such petition, and may award expenses to either party." No other mode of obtaining redress is competent, and the decision is final and not subject to review (s. 354).

Rates may be recovered from persons about to remove (s. 355); and from persons who have removed and are beyond the burgh (s. 357). No misnomer, mistake, or informality shall prejudice the recovery of any assessments under the Act; a new collector, or a change in the persons holding office as commissioners, is immaterial; and an action is incompetent on the ground of any mistake or informality in executing a warrant in reference to any assessment under the Act, if the effects seized or sold were *bonâ fide* the property or in the lawful possession of the person actually liable in payment thereof under the provisions of the Act (s. 356).

Contribution from Common Good.—The common good of a burgh may contribute to the purposes of the Act so as to assist the rates, provided there is a free income after paying interest on debt and the necessary annual outgoings of the burgh (s. 358).

2. General Improvement Rate.—Whenever the commissioners resolve to make provision for the general improvement of the burgh (under ss. 154 and 315), they may impose this rate. It is levied and recovered (in the case of the occupier) in exactly the same way as the burgh general assessment, except that it falls equally on owners and occupiers, though the occupier

may be called on for payment of the whole, with relief to him against the owner for his proper share. The rate may not exceed 3d. in the pound of the gross rent over and above all other assessments under the Act (s. 359).

During the year of assessment, and for the period of six months thereafter, each of the foregoing rates, in case of bankruptcy or insolvency, shall be paid out of the first proceeds of the estate, and shall be preferable to all debts of a private nature due by the parties assessed (s. 370).

3. Special Assessment for Damage by Riots. — Claims for damage done by riot within the burgh may be defrayed out of the burgh general assessment, or, in the option of the commissioners, a special assessment may be levied on occupiers, the occupiers being entitled to deduct one-half from the next payment of rent (s. 341).

4. The General Sewer Rate is payable by owners, and is applied "in maintaining and clearing and ventilating the sewers, and all other expenses connected with such sewers not herein otherwise provided for, or which may not be fully defrayed by the special sewer rate hereinafter provided for, and for securing and paying off any moneys which may be borrowed on the security of the special sewer rate under the provisions of this Act, and the interest of such moneys which the special sewer rate shall be insufficient to defray" (s. 361).

5. The Special Sewer Rate is chargeable on owners of all lands or premises within the burgh, or, where there are separate drainage districts, within the respective districts, whenever the commissioners shall resolve to make any new sewer (s. 362).

Special officers may be appointed for each district, and separate accounts shall be kept for every rate, each district's rates being applied therein (s. 363). Where premises have been built or enlarged subsequent to the sewer being made and assessed for, the owners may be charged a reasonable sum of money for the use of the sewer, which may be recovered like any assessment under the Act (s. 364). There must be inquiry into each case; but the Court will not interfere with the discretion of the commissioners except on clear and urgent grounds (*M'Callum*, 1878, 5 R. 683).

Both the sewer rates are imposed over and above all other rates, and seem unrestricted as to amount.

6. Private Improvement Expenses.—Where expenses are incurred by the commissioners in respect of any premises in order to carry out the provisions of the Act, either on the default of the owner or occupier of the premises or otherwise, the commissioners shall charge such owner or occupier with the said expenses, and they may be recovered in the same manner as any assessment under the Act (s. 365). If they cannot recoup themselves out of any private improvement assessment, they may take such expenses out of the burgh general assessment (s. 372).

Mode of Collecting Special Rates.—The three rates last mentioned may be imposed and made payable at such times as the commissioners appoint. A fortnight's notice is sent to each ratepayer, who may appeal to the commissioners against the rate. The want of proper notice would seem only to relieve the ratepayer until the assessment be reimposed and timeous notice given (*Glasgow Police Commrs.*, 1894, 21 R. 895). Their decision is final (s. 368). As soon as the appeals are disposed of, a roll or separate rolls of assessment are made up (generally by the town clerk) and delivered to the collector, who must take legal proceedings against defaulters for the rates overdue, interest, and expenses, in the same way as already provided for the recovery of the burgh general assessment. The three last-mentioned rates, with interest from the time when payable, and expenses, continue

burdens on the premises for seven years from the date of payment as against *bonâ fide* singular successors or heritable creditors, and (if the ground is unbuilt on) also superiors (s. 366); and the collector may be called on to furnish a list of these burdens still due (s. 367).

The surplus of each rate is ear-marked and kept distinct (s. 371).

Sec. 373 deals with the incidence of assessments, and contains certain powers of exemption and restriction.

B. *Gas Contingent Guarantee Rate.*

The town council or police commissioners of any burgh which has adopted the Burghs (Scotland) Gas Supply Act, 1876 (39 & 40 Vict. c. 49), may impose and levy a rate called "the gas contingent guarantee rate," to pay any annuities and interest thereon, and the interest of money borrowed under the Act (s. 38). These annuities are the price or part of the price of private gasworks taken over by the burgh authorities, and money may be borrowed for the purchase or erection of gasworks for the burgh (ss. 27–37). The rate is imposed, levied, and collected on property within the burgh in the same manner as the burgh general assessment (s. 39).

See also *School Rate*, *Registration (of Births, etc.) Rate*, *Burial-Grounds Rate*, and *Library Rate*, as levied within burghs, *supra*.

IV. Burdens thrown on the County and Burgh General Assessments by Various Acts.

1. *By the Petroleum Act*, 1871.
2. „ „ *Explosives Act*, 1875.
3. „ „ *Prisons Act*, 1877.
4. „ „ *Weights and Measures Act*, 1878.
5. „ „ *Sale of Food and Drugs Act*, 1879.
6. „ „ *Sheriff Court-Houses Act*, 1884.

By the following Acts certain minor burdens are thrown on the county and burgh general assessments respectively:—

1. By the Petroleum Act, 1871 (34 & 35 Vict. c. 105), any expenses incurred in testing petroleum and similar substances, and not recovered from the dealer, come out of any funds for the time being in the hands of the local authority, and in case the local authority are the justices, out of the county general assessment (s. 11). Penalties go to aid the latter rate when the Court which imposes them is the Justice of Peace Court, and in aid of the funds of the burgh where the Court is a Burgh or Police Court (s. 15 (8)).

2. By the Explosives Act, 1875 (38 & 39 Vict. c. 17), the expenses incurred by the local authority in carrying out the Act, including the salary and expenses of officers, are paid out of the local rate (s. 70), which in a burgh is the burgh general assessment; in a harbour, the fund or rate leviable or applicable by the harbour authority; and elsewhere, the county general assessment (s. 111). A police burgh may become the local authority for administering the Act (the burgh general assessment being then liable instead of the county) by an order from the Home Secretary, made upon the application of the police commissioners (s. 112). Penalties and forfeitures go to the Treasury (s. 114).

3. By the Prisons (Scotland) Act, 1877 (40 & 41 Vict. c. 53), which transfers the ownership and administration of prisons from local prison boards to one of Her Majesty's Principal Secretaries of State,—now the Secretary for Scotland,—the liability of the local prison authorities for

insufficient cell accommodation at the date of transfer was made a charge on the county general assessment and the burgh police assessment (now the burgh general assessment) or common good, in proportions determined by a Secretary of State (s. 18). On the other hand, assets in the hands of the prison authorities had to be paid to the above-mentioned county and burgh funds in proportion to valuation (s. 26). County councils and magistrates of burghs may resolve, with the approval of the Secretary for Scotland, to contribute to any reformatory or industrial school, certified under the Acts passed in 1866, out of the county general assessment, or any municipal, police, or other burgh assessment, as the case may be (s. 67).

4. By the Weights and Measures Acts, 1878 and 1889 (41 & 42 Vict. c. 49; 52 & 53 Vict. c. 21), the expense of providing and reverifying local standards, the salaries of inspectors, and all other expenses incurred by the local authority, are thrown on the "local rate," which in counties is the county general assessment, and in burghs the burgh general assessment (s. 51 and Sched. IV.). Fines and forfeitures pass into the county general assessment if recovered in a Justice of Peace Court, into the burgh funds if recovered in a Burgh Court, and into the police funds if recovered in a Police Court (s. 72).

5. The expenses of executing the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), are borne in counties by the county general assessment, and in burghs by the burgh general assessment, to which funds respectively are paid the penalties imposed and recovered under the Act (s. 33).

6. Formerly the whole cost of maintaining, cleaning, etc., Sheriff Court-Houses was borne by Exchequer. It is now met by a fixed annual contribution by Exchequer, and any excess of expenditure must be defrayed by the county and the burgh or burghs situated therein, in proportion to their respective real rents; and in the case of the county it is paid out of the county general assessment, and in the case of burghs out of the burgh general assessment (47 & 48 Vict. c. 42, s. 6).

V. County and Burgh Assessments under Various Statutes.

1. *The Roads and Bridges Act*, 1878.
2. *The Public Health Act*, 1897, *and kindred statutes, e.g.*—
   (1) The Rivers Pollution Act, 1876.
   (2) „ Public Parks (Scotland) Act, 1878.
   (3) „ Contagious Diseases (Animals) Acts, 1878–1886 (Dairies).
   (4) „ Factory and Workshops Acts, 1878–1883 (the Sanitary Provisions).
   (5) „ Alkali Works Regulation Act, 1881.
   (6) „ Infectious Diseases (Notification) Act, 1889.
   (7) „ Housing of the Working Classes Act, 1890.
3. *Contagious Diseases Animals Acts*, 1878–1890.
4. *Lunacy Act*, 1857.
5. *Militia Acts*, 1802 *and* 1854.
6. *Valuation Act*, 1854.
7. *County and Burgh Voters Acts*, 1861 *and* 1856.
8. *Sheriff Court-Houses Acts*, 1860–1884.
9. *Local Authorities Loans Act*, 1891.
10. *Sea Fisheries Regulation Act*, 1895.

Under various statutes a number of assessments have been imposed on counties and burghs from time to time. In counties they are now levied as

part of the consolidated rates, and subject to the provisions of the Local Government Act of 1889 (*supra*). By the Agricultural Rates, etc., Act, 1896, the occupier's consolidated rate is assessed on only three-eighths of the annual value of agricultural subjects. The following are the most important:—

1. The Roads and Bridges Act, 1878.—This Act (40 & 41 Vict. c. 51, as amended by 52 & 53 Vict. c. 50), which establishes a complete system of road administration, has effected the most important alterations on county and burgh rating of recent times. The rating areas are: (1) the *county*, including police burghs with less than 5000 inhabitants, and (2) the *burgh*, including royal and parliamentary burghs, and all police burghs with more than 5000 inhabitants. In counties, the county council alone has power to assess, though the Act is practically administered by "the county road board," a committee of the county council not exceeding thirty members, with all that body's powers except that of assessment (Act 1878, s. 15, amended by Act 1889, s. 16 (2) (*b*)). For the management and maintenance of highways, counties (with certain exceptions) are divided into districts, and there must be a district committee for each district, consisting of the county councillors for the electoral divisions comprised in the district, together with a representative of each parish and small burgh therein (Act 1889, ss. 16, 77, and 78). Burghs of 10,000 inhabitants or less may devolve their duties under the Act on the county by agreement, whereupon the provost or chief magistrate and another are added to the rating authority (Act 1878, ss. 12, 47). Any police burgh (as defined) is now entitled to accept, or a county council may enforce on a police burgh, the control and management of its roads and streets on terms to be settled (failing agreement) by the Sheriff (54 & 55 Vict. c. 32).

The assessments levied are, in both counties and burghs, of three kinds:—

1. For management and maintenance of roads.
2. For construction of new roads.
3. For payment of debt.

In *counties* (1) the assessment for maintenance, etc., is imposed by the county council at a uniform rate on lands and heritages either within each district, or within each parish of the district, or, when there is no division into districts, within the whole county. One half is payable by owners, the other by tenants and occupiers. When the value of the tenancy does not exceed £4, the proprietor pays the whole, with right to recover half from the tenant or occupier. (2) The assessment for the construction of new roads, etc., formerly fell upon proprietors alone, and might be levied either upon the whole county (except in certain cases) or upon the district or districts within which the new road or bridge is situated. The cost of new roads and bridges authorised after 15th May 1890 is payable equally by owners and occupiers, in the same way as the cost of maintenance (Act 1889, s. 16 (2) (*c*)). (3) The assessment for repayment of debt, and for payment of interest on any debt (*i.e.* for roads made prior to 15th May 1890), is imposed annually, and is payable by proprietors only.

In *burghs* which had no previous rate for the maintenance, etc., of streets and roads, (1) the assessment for this purpose is levied by the burgh local authority on all lands and heritages within the burgh, and is payable one half by the proprietor and the other half by the tenant or occupier, unless the latter's name does not appear in the valuation roll, in which case the owner pays the whole, and recovers half from the tenant (Act 1878, s. 54). The burgh authority must levy from each owner or occupier such equal rate

per pound as will produce the aggregate sum required—in contrast to the poor-law rule, where one half of the aggregate sum is levied from owners as a class, and the other from occupiers (*Govan Police Commrs.*, 1887, 14 R. 461). Occupiers (not owners) are entitled to the exemptions provided by the Burgh Police Act, 1892, and remission on the ground of poverty does not depend on the amount of rent (*ib.*). (2) The assessment for construction is levied in the same way as that for maintenance (s. 38). (3) The assessment for payment of debt and interest is payable by owners in the same way as in the county. But any existing mode of assessment in burghs may be continued till duly altered, disregarding any maximum limit if necessary (s. 55). In lieu of causeway maill there may be levied an assessment equivalent to the net yearly amount thereof, but not exceeding 3d. in the pound, separately, or as part of, and under the same conditions as, any police or burgh rate (s. 34).

Neither for counties nor for burghs is there any fixed limit of assessment. Appeals, etc., are regulated in counties by the Local Government Act, 1889, and the assessment is collected as part of the consolidated rates. In burghs it may be collected along with the burgh general assessment or any other burgh rate, and under the same rules as to recovery, etc. The tenant or occupier may be called on to pay the whole, with relief out of his rent for the landlord's share.

Existing funds available to the burgh local authority may be applied in aid or in place of this assessment (s. 87). There are special provisions applying to certain counties, and for assessing insular districts and bridges connecting the areas of separate road authorities.

2. The Public Health Act, 1897, and Kindred Statutes.—The Act of 1897 (60 & 61 Vict. c. 38) repeals and codifies all former Acts save that of 1891 (54 & 55 Vict. c. 52). It is administered in counties by the district committee, or where there is none, by the county council; in burghs, by the town council or burgh commissioners. The county council alone has power to assess in counties.

The following three rates may be levied:—

1. A public general health assessment in burghs and in districts (or counties where not divided) other than burghs.
2. A special sewer assessment.
3. A special water assessment.

1. In *burghs* the public health general assessment is separately assessed upon all the lands and premises in burghs in the same manner and with the same powers as the general improvement rate under the Burgh Police Act, 1892 (*q.v.*), or where there is none, as it might be assessed. No part of the cost of drainage or waterworks in burghs will fall on this rate, which must not exceed one shilling in the pound. The rate is to be applied only to the authorised purposes (*Leith Dock Commissioners*, 1897, 25 R. 126).

The *district* public health general assessment is levied upon all lands and heritages within the district, separately from, but in the same manner as, the assessment for the maintenance of roads under the Roads and Bridges Act, 1878, or where there is none, as it might be assessed and levied. It must not exceed one shilling in the pound. Occupiers of agricultural lands are assessed on three-eighths of the rental appearing in the valuation roll (59 & 60 Vict. c. 37).

Though the local authority are not entitled to assess in any other manner than that prescribed by the statute (*Wordie, etc.*, 1895, 23 R. 168), and though the rate is in terms limited to the expenses of executing the 1897 Act and the Acts which it repeals, it will also be applicable (s. 193)

to any other objects for which there is statutory authority for applying the public health general assessment. Among these are the execution of—

(1) The Rivers Pollution Act, 1876 (39 & 40 Vict. c. 75, s. 8).
(2) The Public Parks (Scot.) Act, 1878 (41 & 42 Vict. c. 8, s. 13).
(3) The Contagious Diseases (Animals) Acts, 1878–1886, respecting dairies (41 & 42 Vict. c. 74, s. 34; 49 & 50 Vict. c. 32, s. 9).
(4) The Factory and Workshops Acts, 1878–1883, the sanitary provisions (41 & 42 Vict. c. 16, ss. 3, 4, 33–35; 46 & 47 Vict. c. 53, ss. 15–19).
(5) The Alkali, etc., Works Regulation Act, 1881 (44 & 45 Vict. c. 37).
(6) The Infectious Diseases (Notification) Act, 1889 (52 & 53 Vict. c. 72, s. 9).
(7) The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70).

2. and 3. The special sewer assessment and the special water assessment for the cost of sewers and water supply are levied, within any burgh or special drainage or water-supply district, in the same manner and with the same remedies and modes of recovery as the public health general assessment. The rate is limited in each case to three shillings in the pound, unless the Local Government Board consent to an increase.

Under the Public Health Act, 1891 (54 & 55 Vict. c. 52), the county council may levy, to defray the cost of water supply, (1) a domestic water rate "within the district which shall have been supplied with water"; and (2) a public water rate not exceeding threepence in the pound "within the district."

Sewerage works must be paid for out of the assessment authorised by the Act under which they are carried out (*Commrs. of Police of Kirkintilloch*, 1890, 18 R. 67. (Compare the rating provisions as to sewerage in the Burgh Police Act, 1892, *supra*.)

3. Contagious Diseases (Animals) Acts, 1878–1890.—In administering these Acts, among which the Destructive Insects Act, 1877, falls to be included (40 & 41 Vict. c. 68 (Insects); 41 & 42 Vict. c. 74; 47 & 48 Vict. cc. 13 and 47; 49 & 50 Vict. c. 32; 53 & 54 Vict. c. 14), the central authority is now the Board of Agriculture (52 & 53 Vict. c. 30). The local authority in Scotland is, in burghs which return or contribute to return a member to Parliament and have a population of seven thousand or upwards, the magistrates and council. In counties exclusive of such burghs it is the county council. These local authorities may act (except in regard to rating) by means of a committee or committees, which may consist partly of persons who do not belong to the local authority, provided they be occupiers in its district (Act 1878, Sched. VI.; 52 & 53 Vict. c. 50, s. 73 (1)). The expenses are met by a rate levied by the local authorities on the lands and heritages within their respective areas. The rate is payable half by owners and half by tenants, and is recoverable in the manner prescribed by the County Police Act, 1857 (*q.v.*). When the rate exceeds sixpence per pound, the local authority may borrow for seven years, giving security over the rates. When they have erected a wharf under the Act, they may make charges for the use of it. Fines are applied in the same way as under the Weights and Measures Act (*q.v.*).

4. Lunatic Asylums.—Under the Lunacy Act, 1857 (20 & 21 Vict. c. 71), Scotland was divided into districts "with a view to the erection of asylums for the reception and care of pauper lunatics" (*ib.* ss. 49, 110; 50 & 51 Vict. c. 39; 52 & 53 Vict. c. 50). The districts were

scheduled to the Act with power to alter them. There are at present twenty-five. The central authority is the General Board of Lunacy; the local authority, district boards of lunacy chosen annually by the county council (52 & 53 Vict. c. 50, s. 113), and magistrates of burghs respectively in each county within the district, in numbers fixed by the general board, and proportioned to the value of property situated in each such county and burgh (40 & 41 Vict. c. 53, s. 61). The general board determines when additional asylum accommodation is necessary, and has power to require the district board to provide it. The expense of building, altering, and furnishing the asylum, and the whole expense of management for the first year, and also the after-expense of altering, repairing, and keeping in repair, are apportioned by the general board upon the landward parts of counties and upon the burghs (royal and parliamentary) in each district according to their respective real rents, and the result intimated by the district board to the convener of each county and the chief magistrate of each burgh. That part of the expense apportioned to a county, along with the cost of collection and remittance and arrears, is levied by the county council. The portion allocated on a burgh is leviable by the magistrates. The assessment was formerly collected under the Prisons Acts of 1839 and 1860. It is now collected in terms of the Prisons Act, 1877 (40 & 41 Vict. c. 53, s. 63); that is to say, in the same way as any other rate leviable by the county council within the county, or by the magistrates within the burgh, on the lands and heritages appearing in the valuation roll. In the county the rate is paid wholly by the owner till the "average rate" is exceeded, in which case the occupier pays half the excess; in burghs, by owner and occupier equally, though it may be levied wholly on the latter, who may deduct from his rent. The county council may exempt subjects not exceeding £2 annual value on account of the owner's poverty; and the magistrates may exempt subjects not exceeding £5 on account of the occupier's poverty.

In districts where there is no asylum, the allocation and notification of the assessment are made by the clerk of the district board. In this case the sum due by the landward county is a charge on the county general assessment, and the sum due by the burgh is paid out of any burgh assessment, payable equally by owner and tenant, and if there be no such assessment, then out of any other assessment (s. 62). The whole sum must be remitted to the district board within eight months after the notice sent to the convener or chief magistrate (s. 55). The assessing clauses of the Act do not apply to Shetland (s. 114). Trustees holding funds for a county or a parish asylum may apply them so as to relieve the assessment (s. 56).

The current expenses of the asylum are met by sums paid by the various parish councils for the pauper lunatics sent by them for treatment (s. 73).

5. Under the Militia Acts.—The assessments connected with the militia imposed by the Acts of 1802 and 1854 have not been disturbed by the Consolidating Acts of 1875 (38 & 39 Vict. c. 69) and 1882 (45 & 46 Vict. c. 49). Under the first (42 Geo. III. c. 91), all males between the ages of eighteen and forty-five are liable to be enrolled for service in the militia unless specially exempted. The men to be enrolled are chosen by ballot from every parish, and the parish is liable in the sum of £10 for every man deficient. To meet this, an assessment is levied by the county council proportionally from the various parishes or parts of parishes in the county (ss. 150–158), according to the valued rent, or the customary payment of land tax and cess, or, if so resolved on, the real rent appearing in

the valuation roll (17 & 18 Vict. c. 91, s. 40), and is collected by the collector of land tax.

In times of security it has been the practice to suspend annually the operation of the ballot under the Act of 1802; and provision is made for keeping up the militia by voluntary enlistment by an Act passed in 1854 (17 & 18 Vict. c. 106). Under this Act, county councils may be called upon to provide suitable storehouses for arms, etc., the cost being met by a rate levied in the same way as that for asylums (*q.v.*), *i.e.* an assessment on owners in counties, and in burghs on owners and occupiers equally. The rate is apportioned between the landward part of the county and the burghs by the county council according to their respective real rents, with appeal to the Sheriff. In counties the "average militia rate" is payable by owners only, and any increase falls equally on owners and occupiers (40 & 41 Vict. c. 53, s. 63; 23 & 24 Vict. c. 105, ss. 1–32, 50; 52 & 53 Vict. c. 50, s. 27).

6. Valuation.—By sec. 18 of the Lands Valuation Act, 1854 (17 & 18 Vict. c. 91), the county council in each county and the magistrates of each burgh are to make up an account of the expenses incurred in making up the annual valuation roll, and to apportion the amount upon the parishes according to their real rent, and cause the same to be levied (1) along with the poor rate (*supra*), or (2) by a separate rateable assessment on the lands and heritages (exclusive of those entered in the railway assessor's roll) in each county and burgh, laid equally on proprietors and occupiers, the expenses of collection being included, or (3) along with any other assessment levied on the real rent; or (4) from available funds other than rates. Valuation areas and the above option as to assessment are left untouched by the Local Government Act of 1889 (s. 95). A surplus from one year is carried on to the next. Where the surveyor of income tax and assessed taxes within the county or burgh is appointed valuation assessor, the expense of making up the roll is defrayed by the Treasury (20 & 21 Vict. c. 58, s. 1; 52 & 53 Vict. c. 50, s. 83 (4)). An "average valuation rate" could only be fixed where, as matter of fact, owners had before 1889 alone borne the burden.

7. Registration of Voters.—The expense of making up the register of voters in counties, so far as it is not paid by Exchequer, is laid by the County Voters Act, 1861 (24 & 25 Vict. c. 83, s. 41; 52 & 53 Vict. c. 50, s. 95), upon the lands and heritages of the county (exclusive of burghs having the parliamentary franchise) according to the real rent. It is assessed and collected along with any county rate for the current year. Any balance is carried forward to the same account. Even where a county has been divided for the purposes of the Reform Act, 1868, the assessment is laid on the whole county (31 & 32 Vict. c. 48, s. 42). The rate is now levied on owners to the extent of the average rate, and beyond that equally on owners and occupiers.

In burghs, by the Burgh Registration Act, 1856 (19 & 20 Vict. c. 58, s. 43), the magistrates are directed to apportion the expense (including the remuneration of the assessor and town clerk) among the parishes within the burgh (when it will be collected along with the poor rate), or to assess the burgh in one of the other modes of assessment allowed by sec. 18 of the Valuation Act (17 & 18 Vict. c. 91). Any surplus is to be carried forward to next year. In the case of the burghs newly enfranchised by the Reform Act, 1868, and without magistrates or town clerk, the police commissioners appoint the assessor and an official to act as town clerk; and the expense of making up the valuation roll and of the annual

registration of voters is levied by the commissioners from the same persons and property as the burgh general assessment, "provided that no person shall be liable to such assessment who is not a proprietor or occupier of a dwelling-house or other lands and heritages within the burgh" (31 & 32 Vict. c. 48, ss. 46–48).

8. Sheriff Court-Houses Acts, 1860–1884.—The expense of erecting and furnishing Sheriff Court-houses under these Acts (23 & 24 Vict. c. 79; 29 & 30 Vict. c. 52; 47 & 48 Vict. c. 42) is payable one half by the Treasury, the other by an assessment on the county and the burghs therein. This assessment, which includes the cost of collection, is allocated on the landward district and the burghs in proportion to the real rent, and is levied by the county council and magistrates respectively. It is payable by owners, subject to exemptions for poverty—non-occupancy is no longer a ground for exemption (52 & 53 Vict. c. 50, s. 62 (4)). When the "average registration rate" is exceeded, the increment is payable by owners and occupiers equally. The powers of assessment are exactly the same as those conferred by the Police Act, 1857. To meet the cost of maintenance, the Treasury contribute a fixed annual sum, and any excess, after being allocated on the landward district and the burghs in proportion to the real rent, is paid out of the county or burgh general assessment respectively.

9. Local Loans Guarantee Rate.—Provision is made by the Local Authorities Loans (Scotland) Act, 1891 (54 & 55 Vict. c. 34), for the creation by county councils, town councils, or other local authorities having statutory borrowing powers of redeemable stock (s. 5). A fund called the "consolidated loans fund," or the "loans fund," must be established for paying dividends on this stock, and for its redemption and extinction, or purchase and extinction (s. 9). If at any time the local authority think that the amount of any deficiency in respect of any contribution from any of the local revenues to the loans fund should be raised by a "guarantee rate," they may do so (s. 14). This rate is imposed on owners and occupiers equally within the district of the local authority, and is levied and recovered in the same manner as the "general purposes rate" in a county, the "burgh general assessment" in a burgh, and any other local rate elsewhere (s. 15).

10. Fishery District Expenses.—Under the Sea Fisheries Regulation (Scotland) Act, 1895 (58 & 59 Vict. c. 42, s. 6 (6)), the expenses of a fishery district committee, so far as sanctioned and payable by a county council, shall be levied and collected within the county (excluding police burghs) as an addition to the "general purposes rate," and, so far as sanctioned and payable by the authorities of a burgh, as an addition to the "burgh general assessment," or where there is none, to any other available assessment, and the amounts so collected shall on or before the 15th January next ensuing be paid to the fishery district committee without any deduction whatever.

Real Burden.—See Burdens.

Real Right.—See Jus in re, etc.; Heritable and Moveable.

Rebel; Rebellion.—A rebel is a subject who levies war or offers forcible opposition against the sovereign. See Treason. In Scots law a debtor who disobeys a charge on letters of horning is accounted a rebel. See Horning, Letters of; Denunciation. See also Fugitation; Outlawry.

Receipt.—See Stamps.

Recess.—See Christmas Recess.

Reclaiming Notes.—Reclaiming is the form by which an appeal is taken from the Lord Ordinary to the Inner House of the Court of Session. Prior to 1825 procedure in reclaiming was by a reclaiming petition, but since then the form has been a reclaiming note.

The form and regulations as to reclaiming notes are now regulated by the Judicature Act of 1825, and later Acts of Parliament and Acts of Sederunt which have modified its provisions.

I. General Provisions as to Reclaiming, Presenting, and Boxing the Note—Giving Notice to Respondents—Printing Documents, etc.
II. Reclaiming Days generally—When they expire in Session and in Vacation.
III. Reclaiming Note where Reclaiming Days have been allowed to expire through inadvertency.
IV. Various Classes of Interlocutors—Time within which and conditions upon which they may be reclaimed against.
V. Effect of Reclaiming Note.
VI. Miscellaneous Decisions as to Reclaiming.
VII. Procedure in Reclaiming Notes.
VIII. Withdrawing Reclaiming Notes.

I. General Provisions as to Reclaiming, Presenting, and Boxing the Note—Giving Notice to Respondents—Printing Documents, etc.

The 17th section of the Judicature Act, 1825, 6 Geo. iv. c. 120, enacted that every interlocutor of the Lord Ordinary should be final in the Outer House, subject, however, to the review of the Inner House in manner after directed. Sec. 18 provided that when any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties dissatisfied therewith should be entitled to apply for a review of it to the Inner House of the Division to which the Lord Ordinary belonged; provided that such parties should, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers, to be perused by the judges, a note reciting the Lord Ordinary's interlocutor, and praying the Court to alter the same in whole or in part. The party so applying was bound to box with the note printed copies of the record in the case, and to give notice of his application for a review by delivery of six copies of the note to the known agent of the opposite party. A reclaiming petition, as a mode of bringing a case under review, was declared to be no longer competent. The provisions of sec. 18 have been varied in the following respects:—(1) There is no longer a prayer in a reclaiming note; (2) certain reclaiming notes must be presented within a shorter period than twenty-one days; and (3) certain interlocutors cannot be reclaimed against without leave of the Lord Ordinary.

The reclaiming note now in use is a printed paper. It gives the interlocutor reclaimed against, and the Lord Ordinary's opinion appended to that interlocutor. It then proceeds as follows:—

Unto the Right Honourable the Lords of Council and Session.

Reclaiming Note for *A. B.* [*designation*],—*Pursuer and Reclaimer*, in action at his instance against *C. D.* [*designation*],—*Defender and Respondent* [*date of interlocutor*]. Of

this date Lord , Ordinary, was pleased to pronounce the prefixed interlocutor, which is humbly submitted to review.

According to Justice, etc.

(*Signed by Counsel.*)

The form of the reclaiming note is given in sec. 51 of the Court of Session Act, 1868. Reclaiming notes to the Inner House shall not contain any prayer, but shall bear in general terms that the interlocutor or interlocutors reclaimed against are submitted to review. A reclaiming note must be signed by counsel: it is not sufficient if signed by party. In a recent case the Court allowed a reclaiming note signed by a party, which was boxed on the last reclaiming day, to be signed by counsel on the day following (*Smith*, 1897, 5 S. L. T. 76; see also *Watt*, 1863, 1 M. 269; *Denny*, 1863, 1 M. 269; see ADVOCATE). It is sometimes the practice not to print the Lord Ordinary's opinion in the reclaiming note itself, but in an appendix. In the appendix the interlocutors prior to that which is submitted to review are generally printed. A reclaiming note was thrown out as incompetent on the ground that the interlocutor reclaimed against had not been correctly printed. A passage which was of importance had been omitted; and the Court, in refusing the reclaiming note as incompetent, observed that even if the omission arose through a clerical error it deserved to be visited by the severest penalty (*Don*, 1859, 21 D. 751). A reclaiming note which bore to be by "A's Trustee," and which did not give the name of the party who was trustee, was remitted to be corrected by supplying the proper name of the party (*Milne's Trustee*, 1842, 5 D. 68). In another case objection was taken to a reclaiming note as incompetent which bore to be in the name of John Mackenzie. The reclaimer's real name was James Mackenzie. The Court appointed the case to be put to the roll, allowing the reclaimer to substitute the name of James for that of John erroneously printed in the note (*Mackenzie*, 1853, 15 D. 664).

Following upon the 18th section of the Judicature Act, the 77th section of the Act of Sederunt, 11th July 1828, provided as follows:—

That Reclaiming Notes, not being against decrees in absence or upon failure to comply with orders, shall at first be moved merely as single bills, and immediately ordered to the Roll, and shall then be put out in the Short or Summar Roll, as the case may be. Provided always that such Notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto Copies of the Letters of Suspension or Advocation, and of the Summonses with amendment, if any, and Defenses (excepting Summonses of Multiplepoinding, Adjudication, Constitution, Waking, Transference, and *Cessio Bonorum*, and Defenses therein); and provided also, that when any of the proceedings or documents in a cause have once been printed and boxed in the Appendix of any Note or other paper given in to the Inner House, it shall not be necessary, at any subsequent stage of the cause, to box the same again, but only refer to such former paper, by its description and date, as containing the same in the Appendix thereto. And the Respondent shall, at moving the Note, be entitled to crave leave from the Court to print any additional productions which he may think necessary to be laid before the Court for their consideration, reserving the question by what party the expense of such additional printing shall be defrayed.

In regard to the provision as to not boxing papers which had already been boxed, the Act of Sederunt, 24th December 1838, s. 12, modified the rule and enacted that the former regulation should be held to apply only to proceedings or documents which had been boxed within two years previous to the date at which they were again to be referred to. After two years papers had to be boxed again.

In construing these two Acts of Sederunt as to boxing of papers previously boxed, it was held that a reclaiming note, which referred for the

record to a reclaiming note boxed more than two years previously, and to an appendix to that reclaiming note boxed only seven months previously, was not incompetent; and that if any paper in a cause had been boxed bearing reference to a record previously boxed within two years, that brings the date of boxing the record down to the date of the new print in judging of the competency, if referring to it instead of boxing anew (*Fraser*, 1858, 20 D. 1185). It has been held that where a record had been boxed with a previous reclaiming note, the omission to refer to that note or record did not render a second reclaiming note boxed without the record incompetent (*Maxtone*, 1848, 10 D. 1040).

A reclaiming note was refused as incompetent in respect that it had not appended thereto a copy of the record, but merely made reference to the record as boxed two years before (*Thomson*, 1847, 9 D. 1061); but a similar objection was repelled in a later case (*Maclean*, 1866, 4 M. 464). The whole record must be printed (*National Exchange Co.*, 1860, 23 D. 27; *Bell*, 1862, 24 D. 375; *Brown*, 1845, 17 Sc. Jur. 568). An omission to print pleas in law was held to be fatal (*Carter*, 1847, 9 D. 598). So also the omission of the summons (*Millar*, 1863, 2 M. 225), and of the answers to a suspension (*Brown*, 1866, 2 S. L. R. 3). In another case the record in the Outer House had been amended in writing. The record appended to the reclaiming note was the original record with the manuscript additions. That was held to be fatal to the reclaiming note (*Muir*, 1874, 2 R. 26). But where pleadings have been revised, it is not necessary to print the originals (*Forrest*, 1853, 15 D. 379). In another case the pursuer, a pauper, reclaimed against a judgment without appending a print of the record, which had by the defender's consent not been printed when the case was in the Outer House. The reclaiming note was held incompetent (*M'Evoy*, 1891, 18 R. 417). But it has been held unnecessary to print the whole of a record if a great part of it has no bearing on the question before the Court. Thus in a reclaiming note in a multiplepoinding it was held unnecessary to print a claim which was not disputed (*Scottish Missionary Society*, 1856, 19 D. 30). In another case, which was against several defenders, and had been dismissed against one of them on his preliminary pleas, the pursuer printed the summons appended to his reclaiming note, omitting everything which related exclusively to the other defenders. The note was held not to be incompetent (*Mercer*, 1838, 16 S. 1048). The omission to print a letter referred to on record and in the Lord Ordinary's note was held not to be fatal to a reclaiming note (*Campbell*, 1852, 14 D. 769). In a reclaiming note where the printed papers were in an extremely inaccurate state, and no printer's name appeared on them, the Court ordained the printer to appear personally at the bar (*Butcher*, 1874, 11 S. L. R. 654).

It has lately been decided that the 77th section of the Act of Sederunt, 11th July 1828, applies only to cases where the record has been closed. Thus in a divorce case, where the defender did not defend till the proof stage, and where the Lord Ordinary granted decree without closing the record, an objection to reclaiming note on the ground that the record was not appended was repelled (*Dombrowitzki*, 1895, 22 R. 401). That case is directly contrary to an old decision, which was not cited to the Court (*Fraser*, 1833, 12 S. 21).

In regard to the printing of documents and productions, it is not now the custom to make use of the provision in the 77th section of the Act of Sederunt of 1828, whereby the respondent may crave leave from the Court to print documents. Productions which are referred to by the Lord

Ordinary are usually printed by the reclaimers; and in one case where this had not been done, the Court, on the motion of the respondent, ordered the reclaimers to print the documents referred to (*Birnie*, 1855, 18 D. 33). If there has been a proof, and the interlocutor reclaimed against proceeds upon it, the reclaimers, if they do not do so, will be ordered to print the proof (*Thomson*, 1840, 2 D. 839). The general practice now is for the parties to adjust a joint print of documents which they consider of importance, and which are likely to be referred to in the debate. Failing the arrangement of a joint print, each party prints what documents he desires to bring under the notice of the Court. In certain cases the Court has ordered prints to be withdrawn, as where comments by a party were inserted in a print of a correspondence (*Lockyer*, 1845, 8 D. 1; *Douglas*, 1832, 11 S. 225). A party is not entitled to print what he may consider important parts of documents in italics, so as to draw special attention to them (*Milne*, 1836, 14 S. 533). A print of a correspondence passing between the agents in a case, as to a proposed settlement which had failed, was ordered to be withdrawn (*Williamson*, 1845, 7 D. 842); and also a print of a long correspondence after an action had been raised (*Miln*, 1845, 7 D. 888).

Although it has been held that the provisions of the 18th section of the Judicature Act, 1825, as to boxing a reclaiming note within twenty-one days are imperative (*Ross*, 1882, 9 R. 710; *Watt's Trs.*, 1890, 17 R. 318), it has also been held, in a case where the six copies of the reclaiming note were not sent to the respondent's agents till four days after the case was sent to the roll, and they had no intimation of the reclaiming note, that the provisions of the 18th section were directory merely, and not imperative, and that it was in the power of the Court, if no prejudice were suffered by the respondent, to relieve the reclaimer of the consequences of his neglect (*Allan's Tr.*, 1891, 19 R. 15; see also *Campbell*, 1868, 6 M. 563). These cases cannot be reconciled with the earlier case of *Taylor*, 1844, 6 D. 637.

In a case where a reclaiming note had been duly boxed on a box-day in vacation, and the clerk of the reclaimer's agent had by mistake omitted to lodge the principal reclaiming note in process till one day later, the Court, the respondents not objecting, sent the case to the roll (*Harris*, 1877, 4 R. 714).

II. Reclaiming Days generally—When they expire in Session and in Vacation.

The days within which a reclaiming note may be presented are called reclaiming days. They vary according to the nature of the interlocutor reclaimed against, as explained below. The statutory reclaiming days cannot be extended by consent of parties (*Hopkirk*, 1830, 9 S. 152). If reclaiming days expire on Sunday, the reclaiming note can be received on the Monday following (*Russel*, 1874, 2 R. 82); or if the clerk's office is not open on the day on which the reclaiming days expire, the note may be received on the next day when the office is open (*Henderson*, 1888, 16 R. 5), but not later than the first day the office is open (*Lockhart*, 1851, 13 D. 996). Where reclaiming days expired on a Saturday, it has been held that the reclaiming note may be received of consent on the following Monday (*Lothian*, 1829, 7 S. 525; *Hume*, 1855, 17 D. 477; *M'Call*, 1868, 40 Sc. Jur. 509), but only of consent (*Ross*, 1882, 9 R. 710; *Watt's Trs.*, 1890, 17 R. 318).

An interlocutor issued in vacation, when dated at or prior to the first box-day, may be reclaimed against on the second box-day, and when dated

after the first box-day, then on the first sederunt day, or within such number of days from the date of such interlocutor as would have been competent if it had been signed during the session. The same rule applies to the Christmas recess. If leave is required before the interlocutor can be reclaimed against, such leave may be given by the Lord Ordinary who pronounced the interlocutor, or, failing him, by the Lord Ordinary on the Bills (31 & 32 Vict. c. 100, s. 94). This section applies to interlocutory judgments, and even where it has the effect of allowing a much longer time for reclaiming than would be the case during session (*Countess of Seafield*, 1898, 6 S. L. T. 11).

In addition to this statutory provision, it was provided that reclaiming days should not expire in vacation and recess till the first box-day or first sederunt day after the ordinary date at which they would have expired (Act of Sederunt, 11th July 1828, s. 79). That section refers only to twenty-one days' interlocutor. By the Act of Sederunt, 20th July 1853, it was enacted that in cases where the time allowed for reclaiming was ten days, and these days expired in vacation, they should continue open till the first box-day; or if they expired after the box-day, they should continue open till the first sederunt day. There was thus no provision in cases where six days were allowed for reclaiming; and the Second Division, dissenting Ld. Young, dismissed a reclaiming note presented on the first sederunt day after the February recess (*Mackenzie*, 1894, 21 R. 545). Shortly after that decision an Act of Sederunt was passed, 14th March 1894, by which it is provided that in all cases where the days allowed for presenting a reclaiming note against an interlocutor pronounced by a Lord Ordinary in the Outer House expire during any vacation, recess, or adjournment of the Court, such reclaiming note may be presented on the first box-day occurring in said vacation, recess, or adjournment after the reclaiming days have expired; and if there be no such box-day, then on the first ensuing sederunt day. This Act of Sederunt applies to the Court of Session, not to the Bill Chamber, where the reclaiming days are fourteen either in session or vacation. (See as to time for reclaiming Bill Chamber Interlocutors in vacation, *Hopkirk*, 1850, 21 D. 835.) It has been laid down that a reclaiming note against an interlocutor of the Lord Ordinary on a petition for loosing arrestments, must be lodged within ten days from the date of the interlocutor, whether the reclaiming days expire during session or in vacation (1 & 2 Vict. c. 14, s. 20; *Lockhart*, 1851, 13 D. 996). Possibly the Act of Sederunt 1894, or sec. 94 of Court of Session Act 1868, would alter this; but see *Joel*, 1860, 22 D. 357, per Inglis, Ld. Justice-Clerk. In sequestrations, which are not Bill Chamber processes, reclaiming notes may be lodged on the box-day following the expiry of the reclaiming day (19 & 20 Vict. c. 59, s. 171; see *Joel, ut supra*). Reclaiming notes in summary petitions before the Junior Lord Ordinary will be dealt with under the Act of Sederunt of 1894. (See *Suttie's Trs.*, 1883, 11 R. 3, where it was held that the provisions of 31 & 32 Vict. c. 100, s. 94, applied to such petitions.)

III. Reclaiming Notes where Reclaiming Days have been allowed to expire through Inadvertency.

A reclaiming note will never be entertained when it has been boxed too late, that is, after the reclaiming days have expired (*Callender Brodie*, 1897, 5 S. L. T. 169; *Watt's Trs.*, 1890, 17 R. 318). There is, however, a provision in sec. 16 of the Administration of Justice and Appeals Act, 1808, 48 Geo. III. c. 151, which provides that if the reclaiming days have expired

without a reclaiming note being lodged, through mistake or inadvertency, it shall be competent, with the leave of the Lord Ordinary, to submit the interlocutor to the review of the Division, subject to the payment of the expenses previously incurred in the process by the other party. A reclaiming note is now used instead of a petition (*Bennet*, 1833, 11 S. 414). A wife was allowed in such circumstances to bring a late reclaiming note in a divorce action against her without payment of expenses (*Steedman*, 1887, 14 R. 682).

In a case where the days for reclaiming had expired without a reclaiming note being lodged, the party, a Town Council, moved the Lord Ordinary for leave to reclaim under the Act of 1808, on the ground that the proof-print of the reclaiming note which had been sent to the town clerk's office had not been properly delivered there, and that the reclaiming days had, through this mistake, expired. The Lord Ordinary refused the motion, and a reclaiming note was brought against his interlocutor. It was held, in the circumstances, that the Lord Ordinary had exercised a sound discretion in refusing leave to reclaim, and it was questioned whether it was competent to bring his judgment in the matter under a review (*Magistrates of Leith*, 1875, 3 R. 152). The provisions of the Act of 1808 cannot be used by a party who has acquiesced in an interlocutor, but who afterwards alleges that it had become final by a mistake (*Ferrier*, 1829, 7 S. 349). Where a reclaiming note had been refused as incompetent, because the summons had not been appended to it through a mistake, it was held that the interlocutor had become final through inadvertence and that the case fell under the Act of 1808 (*Mills*, 1829, 7 S. 716). But where a party alleged that he had been under a mistake as to the proper time for reclaiming (his counsel being absent in London), it was held that that case did not fall within the statute (*Williams*, 1841, 3 D. 1014). A reclaiming note against an interlocutor pronounced in vacation by the Lord Ordinary on the Bills having been refused to be written upon, as not being marked by a Principal Clerk of Session or his assistant, the interlocutor was afterwards allowed to be submitted to review under the Act of 1808 (*Ploek & Logan* 1841, 4 D. 271). Under this Act Ld. Kinnear, Ordinary, granted leave to reclaim against a judgment of the Lord Ordinary on the Bills in a sequestration. The reclaiming days had been allowed to expire owing to the illness of the reclaimer's agent, and a mistake of his clerk (*Smellie*, 1883, 20 S. L. R. 709).

An interlocutor of a Lord Ordinary, not reclaimed against, was extracted. Afterwards several interlocutors of the Inner House in the cause were appealed to the House of Lords. The appellant then obtained leave from the Lord Ordinary to reclaim against his interlocutor, on the ground that the reclaiming days had been allowed to expire through "mistake or inadvertency." The Inner House, in the circumstances of the cause, superseded consideration of the reclaiming note. The House of Lords remitted to the Court to consider it. After a lapse of nearly twenty years the son of the reclaimer (who had died) was sisted in the process, and prayed the Court to send the note to the roll. The prayer was granted, disregarding objections to the competency of the note: (1) that when the leave to reclaim was granted by the Lord Ordinary, the process was extracted; (2) that the reclaimer was bound now to produce evidence that he had not reclaimed in proper time through mistake or inadvertency. It was questioned whether 48 Geo. III. c. 151, s. 16, makes the payment of the previous expenses in the cause a condition precedent to the hearing of a reclaiming note presented under the clause (*Officers of State*, 1864, 2 M. 1294).

IV. Various Classes of Interlocutors—The Time within which and the Conditions upon which they may be Reclaimed against.

1. Interlocutors disposing of the whole merits of the case: twenty-one days from date of interlocutor.
2. Interlocutors disposing in part of the merits: twenty-one days from date; and within ten days of the interlocutor granting leave to reclaim, leave necessary.
3. Interlocutors allowing proof, or limiting proof to writ or oath, or refusing proof, or adjusting issues six days from date of interlocutor: leave not required.
4. Interlocutors not disposing of any part of the merits except those dealing with the question of proof: within ten days, with leave of Lord Ordinary.
5. Interlocutors in summary petitions before Junior Lord Ordinary: within eight days.
6. Interlocutors in petitions for recall of arrestments and inhibitions: within ten days.
7. Interlocutors in petitions under the Trusts Acts: within eight days.
8. Interlocutors in Bill Chamber: within fourteen days.
9. Interlocutors in sequestrations: within fourteen days.
10. Interlocutors in Exchequer Court.
11. Interlocutors in Teind Court.

1 and 2. Interlocutors on the Merits.—An interlocutor disposing in whole or in part of the merits of a case must be reclaimed within twenty-one days from the date of the interlocutor. The regulation as to the time for reclaiming these interlocutors has not been changed by any of the Acts which have amended the Judicature Act in regard to other classes of interlocutor. When the Court of Session Act of 1850 made the alteration in the time for reclaiming against interlocutory judgments, the judgments which disposed "in whole or in part of the merits of the cause" were still allowed to be reclaimed within twenty-one days (13 & 14 Vict. c. 36, s. 11). No statutory definition has been given of "disposing in whole or in part of the merits of the cause," and there have been many questions raised as to the meaning of these words in objections to the competency of reclaiming notes. These cases are referred to below. The Court of Session Act of 1868 did not make any change in the time for reclaiming against interlocutors disposing of the merits, but by sec. 54 it made it necessary to obtain the leave of the Lord Ordinary before reclaiming against an interlocutor pronounced before "the whole cause had been decided in the Outer House." Sec. 53 of that Act states when it is to be held that a whole cause has been decided in the Outer House.

53. *Definition of Final Judgment in the Outer House.*—It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for; and for the purpose of determining the competency of appeals to the Court of Session, this provision shall be applicable to the causes in the Sheriff and other inferior Courts, the name of the Sheriff or other inferior judge or Court being read instead of the words "the Lord Ordinary," and the name of the Sheriff Court or other inferior Court being read instead of the words "Outer House."

Sec. 54 provides as follows:—

54. *No Appeal allowed against Interlocutory Judgment without Leave; Effect of such Appeal.*—Except in so far as otherwise provided by the 28th section hereof, until the whole cause has been decided in the Outer House, it shall not be competent to present a reclaiming note against any interlocutor of the Lord Ordinary without his leave first had and obtained; but where such leave has been obtained, a reclaiming note, presented before the whole cause has been decided in the Outer House, may be lodged within ten days from the date of the interlocutor granting leave with one of the clerks of the Division of the Court in which the cause depends, without transmission of the process, or any part thereof; and such note shall not have the effect of removing the cause or the process from the Outer House, or of staying procedure before the Lord Ordinary, or of excusing obedience to or implement of the interlocutor reclaimed against, unless the Lord Ordinary shall otherwise direct, upon motion made for that purpose, and the decision of the Lord Ordinary on such motion shall be final.

In an action of multiplepoinding the Lord Ordinary pronounced findings construing the trust deed, but without any finding as to expenses, and without ranking the claimants. A reclaiming note against that interlocutor, presented without leave, was held incompetent under sec. 53 (*Govans*, 1889, 27 S. L. R. 210). If any question, even expenses, is reserved, the whole subject-matter of the cause has not been decided (*Baird*, 1882, 9 R. 970; *Crellin's Tr.*, 1893, 21 R. 21; *Lamond's Trs.*, 1872, 10 M. 690; *Burns*, 1897, 34 S. L. R. 264). In an action of multiplepoinding the Lord Ordinary pronounced an interlocutor exhausting all the questions of law between the different claimants, settling the shares of the fund *in medio* (the amount of which had not been ascertained), appointing the case to be enrolled for further procedure, and finding no expenses due to or by the claimants. It was held that a reclaiming note against that interlocutor required leave (*Kennedy*, 1873, 11 M. 603; see also *Governors of Strichen Endowments*, 1891, 19 R. 79).

An interlocutor finding that a contract on which an action was founded could only be proved by writ or oath, is an interlocutor on the merits (*Kennard*, 1864, 2 M. 677); as is also an interlocutor finding it incompetent to pronounce further on the merits of the case, and finding one of the parties liable in expenses (*Kirk-Session of Wester Anstruther*, 1868, 5 S. L. R. 495); also an interlocutor *ad factum præstandum*, with expenses, allowing interim extract and continuing the cause (*Kirkwood*, 1874, 1 R. 1190). An interlocutor disposing of objections to the condescendence of a fund *in medio* is an interlocutor on the merits (*Walker's Tr.*, 1878, 5 R. 678; *School Board of Harris*, 1881, 9 R. 371). An interlocutor refusing to sustain minute of reference to oath after merits of case had been disposed of, is an interlocutor disposing of the merits (*Maclarens*, 1883, 10 R. 1067). An interlocutor finding expenses due, following a prior interlocutor which had reserved the question of expenses, disposes in part of the merits (*Baird*, 1882, 9 R. 970). But where an interlocutor had been pronounced by a Lord Ordinary, disposing of the whole merits of a cause and finding one of the parties liable in expenses, it was held that a subsequent interlocutor, which approved of the Auditor's report (to which no objections had been lodged) and decerned for the taxed amount of expenses, could not be reclaimed against—that interlocutor being merely executorial (*Stirling Maxwell's Trs.*, 11 R. 1). But where an interlocutor, decerned on merits, found a party liable in expenses, but reserved as to modification till after taxation, it was held that it was competent to reclaim within twenty-one days against a subsequent interlocutor modifying the expenses and giving decree for the amount thereof. The reclaiming note brought up all previous interlocutors (*Crellin's Tr.*, 1893, 21 R. 21; *Taylor's Trs.*, 1896, 23 R. 738).

Where a claimant in a multiplepoinding had been allowed to withdraw his claim under reservation of all question of expenses, a decree by the Lord Ordinary finding him liable in expenses was held to be a judgment upon the merits of the only question which remained for discussion between the parties, and therefore reclaimable within twenty-one days (*Fisher*, 1831, 13 D. 906). An interlocutor preferring a claimant to a fund *in medio* is one disposing of the merits (*Thomson*, 1851, 13 D. 1260). So also an interlocutor in a reduction-improbation refusing the pursuer's motion for certification *contra non producta*, though pronounced before the record was closed (*Gracie's Trs.*, 1851, 14 D. 18). An interlocutor which decerned for a certain sum in favour of the pursuer, and found him entitled to expenses, was held to be reclaimable within twenty-one days, although the principal question at issue between the parties had been decided by a prior interlocutor of the Lord Ordinary (*Henderson*, 1852, 15 D. 11). A judgment disposing of preliminary defences objecting to title in a reduction is a judgment on the merits (*Threshie*, 1854, 16 D. 341). An interlocutor repelling an objection to the competency of an action is an interlocutor on the merits (*Anstruther*, 1857, 19 D. 674; *Henderson*, 1857, 20 D. 149; but see case of multiplepoinding held incompetent on ground of no double distress, *Stewart*, 1889, 26 S. L. R. 656). An interlocutor in a suspension of a decree of removing, allowing reference to oath for the purpose of proving a lease for three years, and recalling the interlocutor of the Sheriff, who had held a reference incompetent, and had decerned in the removing, was held to be an interlocutor disposing of the merits, seeing that it recalled the decree of removing (*Walker*, 1863, 1 M. 303). An interlocutor allowing decree of consignation of the fund *in medio* in a multiplepoinding is a judgment on the merits (*Duthie's Trs.*, 1864, 2 M. 388). But an interlocutor refusing to disallow a proposed issue as rested on grounds not relevant in law to inferred damages, and finding "that there is no point of law or relevancy in the case which it is expedient to decide before trial," is not an interlocutor on the merits (*Cairns*, 1858, 21 D. 116); neither is an interlocutor which decerns for expenses already found due (*Cowper*, 1872, 10 M. 353). Such an interlocutor cannot be reclaimed unless there are objections to the Auditor's report (*Stirling Maxwell*, 1883, 11 R. 1).

3. Interlocutors dealing with Proof, etc.: Six Days.—Sec. 27 of the Court of Session Act of 1868 provided for the procedure after the record has been closed before the Lord Ordinary, and gave directions as to the interlocutors to be pronounced, allowing proof or limiting proof to writ or oath, or adjusting issues, etc. Sec. 27 was altered by sec. 1 of Act of Sederunt, 10th March 1870, in accordance with the power conferred on the Court of Session by sec. 106 of the Court of Session Act, and was finally repealed by the Statute Law Revision Act of 1893. The Act of Sederunt provides as follows:—

I. That the 27th section of the said Act shall be altered to the effect of substituting for the enactments thereof the following provisions:—

At closing the record, the Lord Ordinary shall require the parties to state whether they renounce probation; and—

(1) If the parties shall then renounce probation, the Lord Ordinary shall, in respect thereof, appoint the cause to be debated in the debate roll, and it shall forthwith be enrolled in the said roll by the Lord Ordinary's clerk,—without prejudice to the Lord Ordinary or the Inner House ordering proof, *ex proprio motu*, at any after stage of the cause, if they shall deem proof to be necessary for the purpose of enabling the Court to do complete justice between the parties, subject to such conditions as to expenses as shall seem just.

(2) If the parties, or any of them, shall not renounce probation, the Lord Ordinary shall require them to state what proof they propose; and if parties are agreed that proof

is necessary, and as to what proof ought to be allowed, the Lord Ordinary, if himself satisfied of the propriety of the proof proposed, shall appoint the same to be taken.

(3) If the parties are at variance as to whether there shall be proof, or as to what proof ought to be allowed, or if they or any of them shall maintain that one or more of the pleas stated on the record should be disposed of before determining on the matter of proof, the Lord Ordinary shall appoint the cause to be enrolled in a roll to be called the procedure roll; and the cause shall be forthwith enrolled in the said roll by the Lord Ordinary's clerk; and, after hearing the parties in the said roll, the Lord Ordinary shall pronounce such interlocutor as shall be just; and may either appoint proof to be taken, or dispose of such pleas on the record as he thinks ought to be disposed of at that stage. Provided always that it shall be competent to the Lord Ordinary, if he shall think right, to appoint the cause to be heard in the debate roll, in place of the procedure roll.

(4) It shall be always competent for parties having a cause standing in the procedure roll, in regard to which they have come to be agreed, that it should be disposed of by a proof before the Lord Ordinary, or a trial by jury, or otherwise, to enrol the cause in the motion roll, in order that the matter may be brought under the consideration of the Lord Ordinary, and such interlocutor be pronounced as he shall think right in the circumstances.

(5) In every case in which proof is to be taken before a jury, issues shall be adjusted either at the time of proof being appointed in the cause, or on a day to be fixed not later than eight days thereafter; and the parties shall lodge the issues respectively proposed by them two days before the day so fixed.

Provided always that it shall be competent to try any cause by jury on the record without issues, if it shall appear to the Lord Ordinary expedient that such cause should be so tried.

(6) The provisions of the Act of Sederunt of 15th July 1865, in the first seven sections thereof, shall be enforced in causes in the procedure roll, as well as in causes in the debate roll.

II. That the provisions of the 28th section of the said statute shall apply to all the interlocutors of the Lord Ordinary hereinbefore referred to, so far as these import an appointment of proof, or a refusal or postponement of the same.

Sec. 28 of the Court of Session Act, 1868, provides as follows:—

28. *Review of certain Interlocutors of the Lord Ordinary.*—Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming note against it to one of the Divisions of the Court by whom the cause shall be heard summarily; and when the reclaiming note is advised, the Division shall dispose of the expenses of the reclaiming note, and of the discussion, and shall remit the cause to the Lord Ordinary to proceed as accords: Provided always, that it shall be lawful to either party within the said period, without presenting a reclaiming note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, specifying in the notice of motion the variation that is desired: Provided also, that nothing herein contained shall be held to prevent the Lord Ordinary or the Court from dismissing the action at any stage upon any ground upon which such action might at present be dismissed according to the existing law and practice.

When a reclaiming note had been lodged within six days, but not boxed till later, it was held that it had been duly presented in the sense of sec. 28 of the statute (*Bain*, 1884, 11 R. 650).

As to what interlocutors import an appointment of proof, or a refusal or postponement of the same, it has been held that interlocutors ordering issues and deciding the relevancy of the action (*Little*, 1877, 4 R. 980; *Mason*, 1877, 4 R. 513), interlocutors remitting to a man of skill to report (*Quin*, 1888, 15 R. 776; but see *Anstruther*, 1893, 20 R. 723; *Edinburgh Northern Tramways Co.*, 1894, 21 R. 930), interlocutors renewing an order for proof, but not interlocutors appointing a proof already allowed to proceed on a certain day (*Clark*, 1876, 3 R. 780)—are all six days' interlocutors. An interlocutor discharging diet of proof and fixing a new diet is not an interlocutor importing an allowance of proof (*Kinness*, 1881, 8 R. 386). But an interlocutor ordering issues, but not deciding the plea of relevancy,

does not fall under sec. 28 (*Kennedy*, 1890, 17 R. 1036; *Brown*, 1889, 16 R. 987). An interlocutor finding that an alleged agreement could only be proved by writ or oath, was held not to be an interlocutor importing an appointment of proof (*Stewart*, 1871, 9 M. 616). It was held that an interlocutor allowing proof before answer did not fall under the 4th subdivision of the 27th section of the Court of Session Act of 1868, and that sec. 28 did not apply to it. This decision was given prior to the Act of Sederunt of 1870 (*Christie*, 1869, 7 M. 1001).

Issues.—The latter part of sec. 28 gives the procedure in regard to an interlocutor approving of issues. By Act of Sederunt, 14th October 1868, sec. 6, it is provided that: When an interlocutor has been pronounced by a Lord Ordinary, approving of an issue or issues under sec. 27, subsec. 3, of the said recited Act, it shall not be necessary nor competent to reclaim against the said interlocutor if the party aggrieved thereby desires only to obtain a variation of the terms of the issue or issues, and does not desire to have such issue or issues, or one or more of such issues, disallowed *in toto*; but in every such case the party shall apply by motion to the Inner House, in terms of the 28th section of the said recited Act, specifying precisely in his notice of motion the particular variation or variations which he desires should be made on the said issue or issues, and at the same time box copies of the record. In an action for damages the defender reclaimed against an interlocutor of the Lord Ordinary closing the record and assigning a day for adjustment of issues, and moved the Court to remit the case to the Lord Ordinary for proof. The Court, reserving opinion as to the competency of the reclaiming note, refused it as inconvenient, on the ground that the interlocutor reclaimed against left the Lord Ordinary's discretion as to the mode of proof unexercised (*Brown*, 1889, 16 R. 987).

When it is desired to obtain an issue entirely different from that approved by the Lord Ordinary, it is questioned whether a reclaiming note or a motion to vary issues is the proper form in which to bring the case before the Inner House. See *Rintoul*, 1869, 7 S. L. R. 199; *Hare*, 1870, 8 S. L. R. 189; *M'Arthur*, 1871, 8 S. L. R. 499.

It is competent to reclaim against an interlocutor approving of an issue when the reclaiming note is brought with a view to having the summons amended (*Shotts Iron Co.*, 1870, 8 M. 383).

Where an issue has been approved of, and a party has moved the Lord Ordinary to fix a day for trial, he cannot thereafter reclaim against the interlocutor approving the issue, or make a motion to have the issue varied (*Craig*, 1871, 9 M. 715).

4. Interlocutors not Disposing of any Part of the Merits: Ten Days, with Leave of Lord Ordinary.—This class of reclaiming note was introduced by the Court of Session Act of 1850. Secs. 11 and 12 provide as follows:—

> Sec. 11. It shall not be competent to reclaim against any interlocutor of the Lord Ordinary at any time after the expiration of *ten* days from the date of the signing such interlocutor, with the exception only of reclaiming notes against interlocutors disposing in whole or in part of the merits of the cause. . . .
>
> Sec. 12. It shall not be competent to reclaim against any interlocutor of the Lord Ordinary, not being an interlocutor disposing of a dilatory defence, or an interlocutor sisting process, or an interlocutor disposing in whole or in part of the merits of the cause, pronounced before the closing of the record: Provided always, that any interlocutor pronounced before the closing of the record may be reclaimed against, with the leave of the Lord Ordinary, at any time within ten days from the date of pronouncing the same, or, without the leave of the Lord Ordinary, at any time within ten days from the date of signing the interlocutor closing the record.

By sec. 54 of the Act of 1868, quoted above, the leave of the Lord Ordinary is necessary for all reclaiming notes under this class, and by sec. 28 of the same Act special conditions are applied to interlocutors allowing proof. Interlocutors falling under this class are those dealing with points of procedure and incidental motions. Perhaps the most common are reclaiming notes against interlocutors granting or refusing diligence to recover documents. Such interlocutors do not fall within the meaning of the Act of Sederunt of 10th March 1870. They therefore require leave of the Lord Ordinary (*Stewart*, 1890, 17 R. 755).

In an action of accounting the Lord Ordinary pronounced an interlocutor closing the record and allowing a proof. Thereafter he pronounced another interlocutor making a remit to a man of skill to report on certain objections to an account lodged by the defenders. It was held that this later interlocutor required leave of the Lord Ordinary to reclaim (*Edinburgh Northern Tramways Co.*, 1894, 21 R. 930).

An interlocutor repelling an objection to the competency of a multiplepoinding on the ground that there was no double distress can only be reclaimed against within ten days, and with leave of the Lord Ordinary (*Stewart*, 1889, 26 S. L. R. 656). A reclaiming note without leave by trustees, against an interlocutor remitting the accounts of the law agents of the trust to the Auditor for taxation, was refused as incompetent (*Turner*, 1896, 34 S. L. R. 236).

A Lord Ordinary pronounced an interlocutor on the last day on which he called his rolls before a vacation. It was a ten days' interlocutor, and required leave to reclaim. A reclaiming note was presented on the first box-day. The Court, in considering its competency, expressed the opinion that the Lord Ordinary's consent might have been obtained during vacation, but remitted the case to him to consider whether he would give his consent (*Galloway*, 1854, 16 D. 342). (As to rules for obtaining leave of Lord Ordinary in vacation, see *Reclaiming Days*.)

5. Interlocutors in Summary Petitions before Junior Lord Ordinary.—The Distribution of Business Act, 1857, s. 4, provided for certain petitions going before the Junior Lord Ordinary. Sec. 6 gives the rules as to reclaiming against interlocutors pronounced in such petitions—

Sec. 4. *Summary Petitions, etc., How disposed of.*—All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz.—

1. Petitions and applications under any of the various statutes now in force relative to entails:
2. Petitions and applications under any of the General Railway Acts, or under the Lands Clauses Consolidation (Scotland) Act, 1845, or under any local or personal Act:
3. Petitions and applications relative to money consigned under any statute or law, subject to the order, disposal, or direction of the Court of Session:
4. Petitions and applications for the appointment of judicial factors, factors *loco tutoris* or *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration or discharge:
5. All petitions, applications, and reports under the Act of the twelfth and thirteenth Victoria, chapter fifty-one, intituled *An Act for the better protection of the property of Pupils, absent Persons, and Persons under mental incapacity*, in Scotland.

Sec. 6. It shall not be competent to bring under review of the Court any interlocutor pronounced by the Lord Ordinary upon any such petition, application, or report

as aforesaid, with a view to investigation and inquiry merely, and which does not finally dispose thereof upon the merits; but any judgment pronounced by the Lord Ordinary on the merits, unless where the same shall have been pronounced in terms of instructions by the Court on report as hereinbefore mentioned, may be reclaimed against by any party having lawful interest to reclaim to the Court, provided that a reclaiming note shall be boxed within eight days, after which the judgment of the Lord Ordinary, if not so reclaimed against, shall be final.

An interlocutor making an appointment of a judicial factor may be reclaimed against even by a respondent who had not appeared in the petition (*Sharp*, 1860, 23 D. 38). But an interlocutor which allowed a proof was held not to be reclaimable, and it was held that the Court of Session Act, 1868, did not alter the provisions of sec. 6 of the Distribution of Business Act. As to time for reclaiming in vacation in such petitions, see above, *Reclaiming Days*. Interlocutors in petitions pronounced in vacation by the Lord Ordinary on the Bills are not Bill Chamber interlocutors (*Staig*, 1875, 2 R. 701). The Act of Sederunt of 1894 is so worded as to apply to them.

6. Interlocutors in Petitions for Recall of Arrestments and Inhibitions: within Ten Days.—Sec. 20 of the Personal Diligence Act, now called the Debtors (Scotland) Act, 1838, provides that in vacation the Lord Ordinary on the Bills may recall strict arrestments on a petition by the debtor, duly intimated to the creditor or pursuer, provided that his judgment shall be subject to the review of the Inner House by a reclaiming note duly lodged within ten days from the date thereof. As to whether it is still necessary that the reclaiming note should be lodged within ten days in vacation, see *Reclaiming Days in Vacation*, above. If the clerk's office is not open on the last reclaiming day, it is sufficient if the note is lodged on the first day when the office is open (*Henderson*, 1888, 16 R. 5).

In regard to inhibitions, it is provided by sec. 158 of the Titles to Land Consolidation Act, 1868, 31 & 32 Vict. c. 101, that . . . it shall be competent to the Lord Ordinary in the Court of Session, before whom any summons containing warrant for inhibition shall be enrolled as judge therein, or before whom any action on the dependence whereof letters of inhibition have been executed, has been or shall be enrolled as judge therein, and to the Lord Ordinary on the Bills in time of vacation, on the application of the defender or debtor by petition duly intimated to the creditor or pursuer, to which answers may be ordered, to recall or restrict such inhibition on caution, or without caution, and dispose of the question of expenses, as shall appear just; provided that his judgment shall be subject to the review of the Court by a reclaiming note, duly lodged within ten days from the date thereof.

7. Interlocutors in Petitions under the Trusts Acts.—Under the 16th section of the Trusts Act, 1867 (30 & 31 Vict. c. 97), the provision is made for application to the Court being made in the first instance to one of the Lords Ordinary in the Outer House, subject, as respects procedure, disposal, and review, to the same rules and regulations as are enacted with respect to petitions coming before the Junior Lord Ordinary under the Distribution of Business Act (see No. 5, above).

8. Bill Chamber Interlocutors: within Fourteen Days.—Secs. 14 and 15 of the Act of Sederunt of 11th July 1828 provide as follows:—

XIV. Interlocutors passing or refusing bills shall take effect as soon as the Clerk of the Bills shall have delivered up the passed bill, in order to the expeding of the letters,

or duly issued a certificate of the refusal of the bill; but the Lord Ordinary on the Bills may, either by the interlocutor itself or subsequently, on cause shown by a note for the party, prohibit the delivery of the bill, or issue of the certificate, during such time as he may judge reasonable for enabling the party to obtain a review of the interlocutor.

XV. The modes of review applicable to interlocutors in the Bill Chamber shall be as follows, viz.:—1. Interlocutors entered in the minute-book during the last ten days of either vacation or of the Christmas recess, or in session time except during the last four sederunt days of each session, by a reclaiming note to the Court. 2. Interlocutors entered in the minute-book during the last four sederunt days of each session, or during vacation or Christmas recess, excepting the last ten days of each vacation and recess, if the same be interlocutors passing any bill, by a reclaiming note to the Court; and if the same be interlocutors refusing a bill, by presenting a second bill to the next succeeding Ordinary on the Bills; and in case such second bill shall also be refused, by a reclaiming note to the Court within fourteen days from the date of the interlocutor reclaimed against: Provided always, that all reclaiming notes in such cases shall be intimated to the opposite party; and in time of session be duly marked and boxed within the said fourteen days; and in vacation or recess that the same are duly marked and boxed on the first box-day after the lapse of the said fourteen days, or, if no box-day intervenes, on the first sederunt day thereafter. As also providing, that such reclaiming notes shall not hinder the Clerk to the Bills from issuing the passed bill, or certificate of refusal, as the case may be, or the interlocutor submitted to review from being carried into effect by the opposite party, unless the Lord Ordinary on the Bills shall have stayed proceedings, by prohibiting the delivery of the bill or issue of the certificate, as provided for in sec. 14.

Sec. 5 of the Act of Sederunt, 24th December 1838, provides as follows:—

It being enacted in sec. 4 of the said Act (1 & 2 Vict. c. 86) that it shall be competent to reclaim to the Inner House against the interlocutor passing or refusing a note of suspension; and it being enacted in sec. 6 that the power to reclaim to the Inner House shall remain as at present; and as the form of review by second notes of suspension to the Lord Ordinary is not given or referred to in the statute;—It is therefore declared that parties dissatisfied with the interlocutor of any Lord Ordinary on a note, advised either during the sitting of the Court or in vacation, shall lodge a reclaiming note to the Court against the same; provided always, that all reclaiming notes shall be intimated to the agent of the opposite party and Clerk of the Bills; and in time of session be duly marked and boxed within fourteen days from the date of the interlocutor reclaimed against; and in vacation or recess, that the same shall be intimated to the opposite agent and the Clerk of the Bills within the said fourteen days, and duly marked and boxed on the first box-day, or, if no box-day intervenes, on the first sederunt day thereafter: And it is further declared that such reclaiming notes shall neither prevent the Clerk to the Bills from issuing the passed note or a certificate of refusal, as the case may be, nor hinder the interlocutor submitted to review from being carried into effect by the opposite party, unless the Lord Ordinary on the Bills shall, as heretofore, stay proceedings, on special cause shown by a note for the party, by prohibiting the delivery of the note or the issuing of the certificate, on such terms and conditions, and during such time, as he may judge reasonable for enabling the party to obtain a review of the interlocutor.

The words "Bill Chamber" must be printed on a reclaiming note against an interlocutor of the Lord Ordinary on the Bills (*A.* v. *B.*, 1859, 21 D. 203).

By sec. 90 of the Court of Session Act of 1868 it is provided that as soon as an interlocutor passing a note in the Bill Chamber has become final, the case becomes a Court of Session process.

9. Interlocutors in Sequestrations: Fourteen Days.—It is provided by sec. 170 of the Bankruptcy Act of 1856 that the Lord Ordinary's decision in sequestration cases should, when not expressly made final by the Act, be subject to review of the Inner House. Sec. 171 provides that where any judgment of the Lord Ordinary is to be brought under review of the Inner House, the same shall be done by a reclaiming note in common form presented within fourteen days from the date of the judgment, and such reclaiming note shall be disposed of by the Inner House as speedily as the

forms of Court will allow. Sec. 4 of the Bankruptcy Amendment Act, 1860, provides that all interlocutors pronounced by the Lord Ordinary or the Sheriff under the provisions of that Act should be subject to the review of the Court of Session (see *Daris*, 1866, 5 M. 80).

It has been held that the Court of Session Act, 1868, does not apply to proceedings under the Bankruptcy Acts, and that a reclaiming note against an interlocutor of a Lord Ordinary on the Bills, in an appeal against a resolution of creditors in a sequestration, was competently brought within fourteen days, and without leave of the Lord Ordinary (*Macgeorge*, 1887, 14 R. 841). It follows that the provisions of sec. 52 of the Act of 1868 as to a reclaiming note submitting previous interlocutors to review, does not apply to sequestration proceedings (see *Alison*, 1890, 18 R. 212). Where the fourteen days allowed for reclaiming in a sequestration expired during vacation, it was held that a reclaiming note was competently presented and boxed on the first box-day after the expiry of the reclaiming day (*Joel*, 1868, 22 D. 357). In an appeal against the judgment of the trustee in a sequestration, the party reclaiming against an interlocutor of the Lord Ordinary on the Bills has the right of fixing the Division, even if he is not the original appellant (*Gow*, 1862, 1 M. 25).

10. Reclaiming Notes in Exchequer Causes.—These are regulated by the ordinary rules applicable to reclaiming notes in the Court of Session (19 & 20 Vict. c. 56, s. 20).

11. Reclaiming Notes in Teind Court.—Sec. 54 of the Judicature Act of 1825 (6 Geo. iv. c. 120) provided that the interlocutors of the Lord Ordinary on Teinds should be subject to review in the manner directed in causes before the Court of Session.

V. Effect of Reclaiming Note.

Before 1868 it was necessary for each party desiring to reclaim, to present a separate reclaiming note, but sec. 52 of the Court of Session Act, 1868, provided as follows:—

LII. *Effect of a Reclaiming Note against a Final Judgment.*—Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice, without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary, and without the necessity of any counter reclaiming note; and after a reclaiming note has been presented, the reclaimer shall not be at liberty to withdraw it without the consent of the other parties as aforesaid; and if he shall not insist therein, any other party in the cause may do so, in the same way as if it had been presented at his own instance.

It has been held that where an interlocutor has been acted upon, it could not be brought under review by a reclaiming note against a later interlocutor. For instance, an interlocutor sustaining the competency of a multiplepoinding, repelling objections to the fund *in medio*, and ordering consignation, was not allowed to be brought under review by a reclaiming note against an interlocutor on the merits in the competition. Ld. Cowan observed that the general words of the statutory provision (s. 52) could not be held to authorise what would be in itself unjust and contrary to established practice (*N. B. Rwy. Co.*, 1872, 10 M. 870; see also *Duncan's Factor*, 1874, I. R. 964).

Under the 52nd section, a reclaiming note against an interlocutor disposing of the whole subject-matter of the cause, but reserving the

question of expenses, may be competently submitted to review of the Inner House, after the lapse of twenty-one days from its date, by a reclaiming note against a subsequent interlocutor disposing of the question of expenses (*Bannatine's Trs.*, 1872, 10 M. 317). It is stated that sec. 52 would not have the effect of allowing an interlocutor which had become final, granting a proof to be brought under review by a reclaiming note against a later interlocutor (Mackay's *Practice*, p. 304; Balfour's *Practice*, p. 205). But that question is not treated as settled in the case *Duke of Hamilton*, 1897, 24 R. p. 294, per Ld. Kinnear, p. 297. In the later case of *Macgowan*, 1897, 24 R. 481, the Court was asked, in the exercise of its *nobile officium*, to recall an interlocutor allowing a proof; but in that case there was no reclaiming note, the matter being before the Division on report by the Lord Ordinary.

It is not competent to reclaim against an interlocutor pronounced on the reclaimer's motion, so as to bring a previous interlocutor under review (*Watson*, 1894, 21 R. 433).

As to what the effect, under the provisions of sec. 52, of a reclaiming note against certain of the defenders only would be on the other defenders, see *Ayr Road Trs.*, 1883, 10 R. 1295.

A testator by will left a legacy to all his servants who had been in his service for a certain time. His executors brought an action against a number of persons, who might be supposed likely to claim under this provision, for declarator that they were not entitled to benefit under the will. The Lord Ordinary assoilzied certain of the defenders, and granted decree against others. Certain of the last-mentioned reclaimed. It was held, by a majority, that the effect of this reclaiming note was to entitle parties who had not reclaimed, to submit to review the interlocutor of the Lord Ordinary, not only as regarded the right of the reclaimers to legacies, but also as regarded the right of other defenders, whether successful or not (*Stirling Maxwell's Exrs.*, 1886, 13 R. 854).

VI. Miscellaneous Decisions as to Reclaiming.

A reclaiming note by a defender against a judgment by the Lord Ordinary repelling a plea of compensation, and decerning for the amount concluded for, with interest and expenses, was refused in respect that the defender, since the interlocutor was pronounced, had paid the sum decerned for, with interest and also the expenses; it being held that voluntary and final implement of a decree excludes review, and that the payment in this case, although originally an interim payment conditional on the result of an appeal in another action, had become final and absolute by the dismissal of that appeal, and the subsequent payment of the expenses found due by the interlocutor reclaimed against (*Menzies*, 1863, 1 M. 1025).

If, by minute, questions are referred to the Lord Ordinary for his decision, and the right to reclaim is not reserved in the minute, a reclaiming note will be incompetent (*Lindsay*, 1877, 4 R. 870; *Shiels*, 1874, 1 R. 502).

It has been held that a person who is a party to a cause only to the extent of giving his consent and concurrence thereto, has no title to present a reclaiming note against an interlocutor pronounced in the cause (*Martin* 1894, 21 R. 759). It is incompetent to reclaim against an interlocutor pronounced on the reclaimer's motion (*Watson*, 1891, 21 R. 433).

A reclaiming note presented within the proper time was held competent although the interlocutor reclaimed against had been previously extracted (*Young*, 1850, 12 D. 939; *Johnstone*, 1845, 8 D. 23).

The pursuers in an action of reduction averred that a deed had been impetrated from the granter while in a weak and facile state of mind. The Lord Ordinary allowed them a proof of these averments, and fixed the diet. A month after the allowance of proof, they moved for a commission to Australia to examine a witness. The Lord Ordinary refused the motion, as also a motion for leave to reclaim against his judgment. The pursuers then, a week before the diet of proof, stated that they no longer proposed to lead evidence, and the diet of proof was discharged. When the case came to the Inner House on a reclaiming note against the Lord Ordinary's judgment on the merits, the pursuers moved that proof be now allowed. The Court refused the motion (*Reid*, 1881, 9 R. 80).

VII. Procedure in Reclaiming Notes.

A reclaiming note first appears in the Single Bills, and counsel for the reclaimer then moves that it be sent to the roll, either Short or Summar (see sec. 77, Act of Sederunt, 11th July 1828, quoted above). As to what cases are appropriate to Short or Summar Rolls, see Summar Roll; Short Roll. If objection is to be taken to the competency of a reclaiming note, counsel for the respondent must attend at the Single Bills and take the objection. It is too late to object to the competency when the case appears on the Short Roll (but see *Moffat*, 1849, 11 D. 1200). The Court will, as a general rule, decide on the competency of a reclaiming note, and throw it out if incompetent, notwithstanding a waiver by the respondent (*Governors of Strichen Endowments*, 1891, 19 R. 79). It is often the practice to send a note to the roll reserving the question of its competency to be discussed along with the merits.

Sec. 78 of the Act of Sederunt, 11th July 1828, provides as follows:—

> That where a reclaiming note is presented against an interlocutor not exhausting the whole merits of the cause, it shall be competent for the Court, either when such note is moved in the Single Bills or when it is put on the Short or Summar Roll, to supersede consideration thereof till other points in the cause are disposed of by the Lord Ordinary, or to remit to the Lord Ordinary to recall the interlocutor, and thereafter pronounce an interlocutor exhausting the whole cause.

When the case appears in the Summar or Short Roll, agent instructs counsel to argue the case: as to number of counsel and their duty as to attending, see Advocate; see also *Dargarvel*, 1871, 8 S. L. R. 400, and *Cheye*, 1870, 8 S L. R. 142. In the latter case the sole counsel for the reclaimer did not apppear, being engaged on a proof. The Court refused to hear another counsel who was instructed on the spot. The practice is that the junior counsel for the reclaimer opens the case, and is replied to by the junior counsel for the respondent; the seniors follow in the same order. Written cases are not often used now, but the Court has power to order parties to prepare and print cases, on which counsel may be heard before judgment is given. Cases are to commence with a copy of the record, and each ground of law or plea is to be separately argued in the case. If the judges of either Division are equally divided in opinion, they may direct the cause to be heard by two Divisions, or by the whole Court. The judgment to be pronounced is to be according to the views of the majority of the judges present; the interlocutor is to bear to be the judgment of the Division before which the cause depends after consulting with the other judges. After hearing a case, the Court either pronounces judgment at once, or makes *avizandum*, in which case the cause is put out for advising at some future date. The interlocutor, which contains a record of

the judgment of the majority of the Court, is signed by the presiding judge in the presence of the other judges. The Inner House, in deciding a cause, must determine the matter of expenses. Expenses must be moved for when the case is advised; if this is not done, they cannot be awarded afterwards (*Wilson's Trs.*, 1869, 7 M. 457). If a party desires to get expenses, which were not awarded by the Lord Ordinary, he should make use of the reclaiming note, and open on the question of expenses, otherwise the Court will not consider it (*Clark*, 1897, 24 R. 821). See EXPENSES. As to procedure in the Inner House, of which a summary is given above, see the Judicature Act of 1825, 6 Geo. IV. c. 120, ss. 17–24. Under sec. 29 of Court of Session Act, 1868, the Inner House may allow the record to be amended, if necessary for the purpose of determining in the existing action the real question in controversy between the parties. In allowing such amendment, the Court makes such order as to expenses as may seem proper. It is not competent, by amendment, to subject to the adjudication of the Court any larger sum, or any other fund or property, than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment. (See AMENDMENT OF RECORD.) The Inner House may allow additional evidence to be taken, although this is rarely done; and may order proof to be taken before one of the judges in the Division. See sec. 6, Court of Session Act, 1868, and sec. 3 of the Evidence Act of 1866 (29 & 30 Vict. c 112). This latter provision is amended by sec. 62 of the 1868 Act, which provides that the case be not remitted to a Lord Ordinary, but to one of the judges of the Division.

The Court of Session Act of 1868, s. 57, was passed to make it unnecessary for a successful reclaimer to bring a reduction in certain cases. It provides as follows:—

> In the event of any interim decree or interlocutor pronounced in the Outer House having been implemented, it shall be lawful for the Court, in any interlocutor recalling such interim decree or interlocutor, to order the repayment of any money which shall have been paid or recovered in implement thereof, or to pronounce such warrant *ad factum præstandum*, or other order, as may be necessary in order to give effect to such recall or alteration of the Lord Ordinary's interlocutor, notwithstanding that the interlocutor of the Lord Ordinary may have been extracted and put to execution.

Certain reclaiming notes, as has been already seen (sec. 54 of the Act of 1868), do not remove the process to the Inner House; but in other cases the Court has power to remit the cause to the Lord Ordinary for further procedure (s. 55). But by sec. 56 it is provided that in a reclaiming note against a final judgment, the cause need not be remitted to the Outer House, except in special circumstances if the remit should appear expedient.

The judgment of the Inner House is final in the Court of Session; but if the interlocutor contains a clerical error, which is pointed out without delay, it may be corrected; and where an interlocutor has been signed and pronounced under an error in point of fact induced by the parties, it is within the power of the Court to order it to be cancelled (*Harvey*, 1875, 2 R. 980).

VIII. WITHDRAWING A RECLAIMING NOTE.

In view of the provisions of sec. 52 of the Act of 1868 quoted above, a reclaiming note once presented cannot be withdrawn without the consent of the other parties, who may wish to insist on it. If a reclaimer wishes to withdraw his note, he may ask leave to do so in the Single Bills, and in the absence of opposition he will be allowed leave on payment of expenses.

These are usually modified. £2, 2s. is often allowed where the case has only appeared in the Single Bills. If it has appeared in the Short or Summar Roll, and counsel have been instructed, a larger sum will be allowed (*Johnston*, 1876, 3 R. 879). See EXPENSES.

Notice that a reclaiming note is to be withdrawn should at once be given to the Keeper of the Rolls, so as to guide the Court in putting out cases for hearing (*Maclcod*, 1870, 8 S. L. R. 156).

See REPONING.

Recompensation. — A pursuer, when he is creditor to the defender by a separate debt, which has not been included in the libel, may, if the defender should plead any ground of compensation, elide his defence, by pleading compensation upon that separate debt also (Ersk. iii. 4. 19). This is termed recompensation. Recompensation is governed by the same rules as COMPENSATION (*q.v.*); but where recompensation is pleaded, matters generally resolve into an action of count and reckoning (Ersk. *ib.*). (See also Stair, i. 18. 6; iv. 40. 37; *Thomson*, 1855, 17 D. 739; *Cargill*, 1829, 7 S. 662.)

Recompense. — Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify that other to the extent of the gain (Bell, *Prin.* s. 538). The right to recompense arises in various relations. The best and most familiar example is the case of one building on another's land, in the *bonâ fide* belief that it is his own. The property of the building passes by accession to the owner of the ground, but he is liable in recompense or remuneration to the extent of what he has thus acquired (Ersk. iii. 1, s. 11; *Jack*, 1665, Mor. 13412; Rankine, *Landownership*, 81; cf. *Yellowlees*, 1882, 9 R. 765; *Mags. of Selkirk*, 1830, 9 S. 9). The obligation is founded on the consideration that the party making the demand has been put to some expense or some disadvantage, and by reason of that expense or disadvantage there has been a benefit created to the party from whom he makes the demand of such a kind that it cannot be undone (Ld.-Pres. Inglis in *Stewart*, 1878, 6 R. 145, at p. 149). Notwithstanding the dictum of Ld. Stair (i. 8. 6) that "even he who *malâ fide* buildeth upon another man's ground or repaireth unnecessarily his house, is not presumed to do it *animo donandi*, but hath recompense by the owner *in quantum lucratus*," it has been held that where a person has held possession of a subject *malâ fide* he is not entitled to recompense for meliorations against the true owner evicting the subject from him (*Barbour*, 1840, 2 D. 1279; cf. Ersk. iii. 1. 11; Bell, *Prin.* s. 538; Rankine, *Landownership*, 83). The true owner is liable only *in quantum lucratus est* (Stair, *ib.*; Ersk. *ib.*; Rankine, 86). If a person's right is merely of a temporary nature, any improvements or additions he may make are presumed to be for his own conveniency, and he has no claim for recompense (Stair, *l.c.*; Ersk. *l.c.*; *Hodge*, 1664, Mor. 13400; Bell, *Prin.* s. 538; Rankine, *l.c.*). Exception to this rule has been introduced by the AGRICULTURAL HOLDINGS ACTS (*q.v.*). As to improvements, etc., by a liferenter, see LIFERENT AND FEE. (See also *Rankin*, 1886, 13 R. 903; *Fraser's Trs.*, 1894, 21 R. 790.)

Reconvention.—See JURISDICTION (vol. vii. p. 228).

Record.—The record, in Scottish procedure, consists of the summons, with condescendence and pleas in law, and the defences. For adjustment, closing, revising, etc., see ACTIONS, ORDINARY PROCEDURE IN.

Records.—The public records of Scotland, in the widest acceptation of the term, comprise not only the constitutional archives of the nation, but also the judicial records of the various Courts, and the contents of the numerous public registers instituted for the protection of property and the convenience of the lieges. For all such records Her Majesty's General Register House in Edinburgh is the great national repository. The contents of the General Register House fall naturally into two distinct classes, viz., (1) records whose value and interest are now purely historical; and (2) registers which subserve the purposes of present every-day business transactions. The corresponding branches of the Register House are designated respectively, the Historical Department, which is under the charge of a Curator, and the General Record Office, which is supervised by the Deputy Keeper of Records. The titular custodian of the whole public records of Scotland is the Lord Clerk-Register; but the practical control of the public registers, records and rolls, and of the keepers and other officers thereof was on 11th August 1879 transferred to the Deputy Clerk-Register by the Act 42 & 43 Vict. c. 44.

In the Historical Department is preserved the national collection of documents relating to the general and constitutional history of the country, including the extant records of the Scottish Parliament and Privy Council, the Exchequer Rolls, and numerous miscellaneous monastic, judicial, and other records of early date. For an account of the existing constitutional records of Scotland, reference is made to the preface to Thomson's edition of the *Acts of the Parliaments of Scotland*. No fees are charged for literary researches in this department.

To the second class of records, preserved in the General Record Office, belong the various public registers in regular use in connection with the transactions of private persons. The compilation and the preservation of these registers are kept in distinct hands, the volumes for their formation being marked and issued to the respective keepers by the Deputy Clerk-Register, and on completion being retransmitted to his department for preservation. Registration in one or other of these registers forms an essential step in a large class of conveyancing and other transactions and proceedings, and investigations of them are constantly made for the protection of contracting parties and for other business purposes; for such searches fees are chargeable. It may be sufficient here to enumerate briefly the more important of these registers in common use, which are as follows:—

1. The Registers of Sasines, with which the Register of Interruptions of Prescription is now incorporated.
2. The Register of Entails.
3. The Registers of Diligences, viz., Inhibitions, Adjudications, and Hornings.
4. The Register of Deeds, Probative Writs and Protests in the Books of Council and Session.
5. The Register of English and Irish Judgments.
6. The Records of the Great Seal, Privy Seal, and Quarter Seal.
7. The General Register of Births, Deaths, and Marriages.

There are also various other records lodged for preservation in the General Register House, including the Valuation Rolls for (1) Counties and

Burghs and (2) Railways and Canals, Printed Abstracts of Petitions for Service of Heirs and Disponees, Printed Indexes to Retours and Services, Printed Abstracts of Petitions for Appointment of Executors, Calendars of Confirmations and Inventories granted and given in, in the several Sheriff Courts of Scotland, etc.

The General Register House is, further, the repository for the records of the judicial proceedings of the Court of Session, and there are preserved the Register of the Acts and Decrees of the Lords of Council and Session, the General Minute Book, the Rolls of Court, the Register of Edictal Citations, and all processes, both extracted and unextracted. Numerous other records are compiled in the Office of the Accountant of Court, the Bill Chamber Office, Chancery Office, Lyon Office, Teind Office, the Office of the Registrar of Friendly Societies, etc., the Office of the Registrar of Joint Stock Companies, and other departments, some of which are transmitted periodically to the General Record Office, while others are retained in their respective offices.

The records of the various local Courts throughout the country are preserved at their seats. The Sheriff Clerks have custody, not only of the Registers of the Decrees pronounced in their Courts and of the processes which have depended there, but also of the Registers of Deeds, Probative Writs and Protests in the Sheriff Court Books. The Town Clerks of Royal Burghs keep Registers of Sasines for lands within burgh formerly held by burgage tenure, and also Registers for such Deeds and Protests as can competently enter their books.

[For fuller information as to the particular records, see the Articles on REGISTRATION and SEARCHES, and on the various writs, diligences, etc., which enter the different registers. See also the Articles on REGISTER, LORD CLERK, and the *Report of the Commissioners on Public Records*, 1800–19, and subsequent Government Reports, and Millar and Bryce's *Handbook of Records*.]

Records of Courts of Law.—The interlocutors and decrees of a Court, the verdicts of juries, and the different steps of procedure throughout a cause, are set forth in the *record*, which is prepared by the Clerk of Court, and is generally signed by the judge. When duly authenticated, the record is valid proof on all matters which fall immediately within its object and which are set forth in it (Dickson on *Evidence*, ss. 1114, 1115), except when challenged on grounds which, if substantiated, infer that it contains a falsehood or a flaw in some essential particular (*ib.* s. 1119; see also *Clark and Macdonald*, 1895, 23 R. 102; *Whyte*, 1895, 23 R. 320).

Reddendo.—The name *reddendo* is applied primarily to the clause in a feu-right specifying the return to be made by the vassal to his superior. It is so called from its opening words in the Latin form—*Reddendo inde annuatim*. In a secondary sense the term is applied to the duty itself.

[See FEU-CHARTER; SUPERIORITY; Stair, ii. 3. 15; ii. 4. 7; Ersk. ii. 3. 24; Menzies, 551; Bell, *Lect.* i. 632; Bell, *Prin.* 762.]

Redhibitoria actio.—In the Roman law of sale the responsibility of the seller for defects in the thing sold rested partly upon the civil law, and partly upon the edict of the Curule Ædiles, who had the supervision

of the public markets. Under both these heads, the seller was answerable (1) for the absence of qualities which he had expressly or tacitly guaranteed; and (2) for the existence of defects known to him, which he intentionally concealed or failed to disclose. But the edict established the further rule, (3) that the seller was responsible for defects although he was ignorant of their existence, provided they were so serious as to destroy or diminish the utility of the thing, and at the same time not so obvious that an ordinary buyer must have detected them; the principle being, that the seller ought to have known of such defects, and ought to have pointed them out. The rule was originally limited to sales of slaves and beasts of burden, but the idea of an implied warranty of quality was extended by construction to sales generally.

When there was liability under the edict, the buyer had a choice of remedies, in addition to the ordinary action upon the contract (*actio empti*): (1) On discovering the faulty condition, he could challenge the contract and have it rescinded, either by way of exception to the seller's action for the price, or, if the price had been paid, by instituting within six months the *actio redhibitoria* (so called because it implied return of the subject sold) for recovery of the price. The buyer must not have been aware of the fault, and he was required to prove that it existed at the time of the contract; but it was immaterial whether the seller knew of its existence or not. The action also lay for breach of warranty (*dictum promissumve*). The object being to cancel the contract, and to restore parties as far as possible to their former position, the buyer was bound to restore the subject, with all accessions, fruits, and profits, in as good condition as he received it, or with compensation for deterioration due to his fault; the seller was bound to return the price with interest, to reimburse proper outlays, and to compensate the buyer for damages caused by the faulty condition of the subject. The action prescribed in six months. (2) For the buyer's alternative remedy by suing for reduction of the price, see ACTIO QUANTI MINORIS. *Dig.* 21. 1 (*De ædilicio edicto*) is the title specially devoted to these actions.

Reduction.—Actions of reduction, or, as they are sometimes called, rescissory actions, are of two kinds: simple reductions and reductions improbation. The latter action applies, in modern practice at least, only where the ground of reduction is forgery, or where the deed to be reduced is an execution by an officer of law (*Balfour*, 1839, 1 D. 458), the procedure in all other cases being by simple reduction. The object of the action is to annul a deed, decree, or other writing against which the pursuer alleges sufficient legal grounds of reduction. Where a decision either of the supreme or inferior Courts cannot, from any reason, be appealed against in one or other of the ordinary modes, it may sometimes be brought under review by an action to reduce the decree (Mackay, *Manual*, p. 620). This is often treated as if it were a separate branch of reduction, but it in no essential differs, either in procedure or effect, from a simple rescissory action. The cases in which it is appropriate will be found enumerated under the head of APPEALS.

Reduction is only necessary where an *ex facie* formal and regular document stands in the way and prevents the pursuer vindicating his right by the ordinary method of declarator or petitory action (*Rhind*, 1857, 19 D. 519; 1860, 22 D. (H. L.) 2). It is in this sense frequently an ancillary action, *e.g.* where one raising a declarator of right to property

is met by the production of an *ex facie* better title than his own, the principal action will, if he so desire, as a rule be sisted until he has an opportunity of reducing the deed in question (*Birrel*, 1856, 29 Sc. Jur. 56; *M'Intyre*, 1867, 5 M. 526). The cases in which reduction is the necessary and appropriate remedy are too numerous to be here recapitulated in detail. The subject of when it is and when it is not the proper or competent form of action will be found fully treated in Sheriff Mackay's *Manual*, p. 391, and in the present work under the heads of, *inter alia*, BANKRUPTCY; ERROR; FORCE AND FEAR; FRAUD; MINOR; WRIT.

Briefly, the principal instances in which reduction is used are where the grounds of objection resolve themselves into (1) essential error, (2) fraud, (3) force and fear, (4) facility and circumvention, (5) undue influence, (6) want of title or power to grant the deed questioned, (7) minority and lesion, (8) want of the requisite solemnities of execution, (9) that the deed was granted in prejudice of lawful creditors, whether the objection be based on common law or on the Acts 1621 and 1696.

Reductions are only competent in the Court of Session; and prior to 1877, whenever it was necessary in the course of proceedings in an inferior Court to cut down a deed or writ, recourse had to be had to the Supreme Court. The Sheriff Courts Act of that year (40 & 41 Vict. c. 50, s. 11), however, while still confining rescissory actions to the Court of Session, allowed the grounds which would have founded a reduction to be pleaded *ope exceptionis* in the inferior Court.

The principal peculiarity in summonses of reduction is that, differing therein from all other initiatory writs, the will precedes the conclusions (*Jurid. Styles*, iii. 76; Court of Session Act, 1850, Sched. A, No. 4), the order being: (1) the address; (2) the will, in which the defender is called on, as a preliminary step, to produce the writ impugned, and to appear and see it reduced; (3) the conclusions, viz. that the writ be reduced and declared null and void, and the pursuer reponed thereagainst, and for expenses; and (4) the certification that, in case of failure to produce or appear, decree will be pronounced. Under the old law—and the procedure is still competent in reduction improbation—the pursuer could call on the defender to "abide by" the deed, that is, at the outset of the action to judicially affirm the genuineness of the writ challenged. If the defender failed to abide by the writ, decree of reduction at once passed; and if he abode by the writ and it was afterwards found to be false, he incurred the criminal penalties for forgery (Shand, *Practice*, 642; Ersk. iv. 4. 69). This procedure is now in practice unknown, but the traces of it remain in the peculiarities of the summons and initiatory procedure in all reductions. The summons is signeted, called, and served in the ordinary way. Where the deed under reduction deals with heritage, it will also be necessary, whenever the summons is signeted, to prepare and register in the Register of Inhibitions a notice of it in the form prescribed by the Titles Act, 1868 (s. 159, Sched. RR). By so doing, the subject of dispute is rendered litigious, and cannot be effectually dealt with pending the suit. The further procedure is somewhat peculiar and complicated, although the tendency has of recent years been to assimilate it as far as possible to the procedure in ordinary actions. As already noted, the first call on the defender is to produce the document in dispute. Should he have any plea sufficient to bar the action at the outset, such as objection to the title to sue of the pursuer, or a title to exclude, or that all parties are not called, etc., he should enter appearance and, within ten days after calling, lodge defences confined to these points. The record will then be

made up, and the action proceed in the usual way until these pleas are decided, when, if repelled, it will then proceed as after noted, just as if no preliminary defences had been lodged (Court of Session Act, 1850, s. 7). Where there are no preliminary defences, the pursuer will enrol on the expiry of ten days after calling, and intimate the enrolment to the defender, that he may take an order to satisfy production, *i.e.* to produce the deed or writ in dispute (Court of Session Act, 1868, s. 22). If the pursuer fails to enrol within twelve days after calling, the defender may enrol and get the action dismissed (Act of Sederunt, 14th October 1868, s. 12). When the case comes up in the roll, the defender must move for an order to satisfy production by a certain day; and if he fails to take such an order, the pursuer may take decree in absence, or, more properly, decree *contra non producta*, in the undefended roll. If, however, he thinks it expedient, the pursuer may, as in undefended jury trials, lead evidence, and get decree thereon (*Eason*, 1863, 1 M. 1163). In the ordinary case the defender then lodges the deed, along with a special inventory. But he should not produce writings belonging to third parties, or which are not or should not be under his control (*Elder*, 1829, 7 S. 656); and if the writing called for be in the custody of either the Court of Session or the public registers, a note of the date, or date of recording, will be held sufficient implement of the order (Shand, *Practice*, 633). The records of inferior Courts, however, must be produced if called for, and the judge will grant the necessary order for this purpose. Extracts will usually be held sufficient, and, if parties consent, copies even may be used to satisfy the production. After satisfying the production, a defender cannot object to the jurisdiction of the Court (*Assets Co.*, 1894, 22 R. 178). The next step is for the defender to enrol the case and move the Lord Ordinary for an order to hold the production satisfied, and to lodge defences on the merits within a certain time. Where, as is now frequently the case, complete defences, namely, embracing both preliminary pleas and those on the merits, have been lodged at the outset, the interlocutor will hold the production satisfied, and the defences lodged as defences on the merits. After defences on the merits have been lodged, the subsequent procedure is the same as in an ordinary action.

In actions of reduction improbation the procedure is now precisely the same as in simple reduction, the summons only varying slightly in its terms (*Jurid. Styles*, iii. 92); and the concurrence of the Lord Advocate is no longer necessary (Court of Session Act, 1868, s. 17).

[Mackay, *Manual*, 391; Shand, *Practice*, 612.]

Referees, Court of.—The referees are the body by whom, under the system of private bill procedure in the House of Commons, questions of *locus standi* are determined before the bill comes before a committee for discussion on the merits. Referees were first appointed in 1864. In addition to deciding on the right of petitioners to be heard before committees, the referees had at first the duty of inquiring into the engineering details of all works proposed to be constructed, and in 1865 they were empowered by consent of parties to inquire into the whole subject-matter of a bill. Since 1868 they have been associated with ordinary committees on private bills, their functions as a separate body being confined to questions of *locus standi*.

The constitution of the Court of Referees is fixed by Standing Order 87 H. C., which provides for the appointment by the Speaker of not less than

three referees, in addition to the Chairman of Ways and Means. Those who are members of the House receive no salary. The referees may form one or more Courts, at least three being required to form a quorum, and the chairman must be a member of Parliament. In practice one Court only sits, composed of a member of Parliament of experience in private bill practice as chairman, of the Speaker's counsel and one paid referee as officials, and of three or four additional members of Parliament as ordinary members. Standing Order 89 H. C. empowers the Court to decide as to the rights of the petitioners to be heard upon all petitions against private bills and provisional orders and certificates. The procedure of the Court and the forms and notices required in their proceedings are regulated by rules which, by Standing Order 88, the Chairman of Ways and Means is authorised to frame.

When a referee is appointed to an ordinary committee, he may take part in all the proceedings thereof, but has no power to vote.

See LOCUS STANDI; PRIVATE BILLS.

Reference.—See ARBITRATION.

Reference to Oath.—See OATH ON REFERENCE.

Reformatory Schools.—See EDUCATION (vol. iv. p. 379).

Regalia is a word defined by Erskine (ii. 6. 13) as meaning "all rights that the king has in or over the estates or persons of his subjects"; and by Stair (ii. 3. 60), as "those things which the law appropriateth to princes and states and exempteth from private use, unless the same be expressly granted and disponed by the king." The *regalia majora* are such rights and possessions as cannot be communicated by the sovereign himself to a subject; in other words, which are inalienable by the Crown. To this class belong the several branches of the royal prerogative, the Crown's superiority over all the lands in the kingdom and the annexed property of the Crown. The annexed property of the Crown is now resigned to the absolute control of Parliament, in exchange for the civil list (*Officers of State for Scotland*, 1 D. 300; 2 & 3 Will. IV. c. 112; 3 & 4 Will. IV. c. 69; 1 Vict. c. 2; 35 & 36 Vict. c. 15). The *alveus* of a navigable river (*Lord Advocate*, 11 D. 391, and 1 Macq. 46; *idem*, 19 R. 174; *Wemyss*, 24 R. 216), the foreshore, free ports (*Magistrates of Edinburgh*, 14 S. 922, per Ld.-Pres. Hope, at p. 934; *Scrabster Harbour Trs.*, 2 M. 884), the property in highways (*Galbreath*, 4 Bell, 374; *Waddell*, 6 M. 690), are also *inter regalia majora* (Ersk. ii. 6. 17). See CROWN; CROWN DEBTS; CROWN LANDS; SOVEREIGN.

The *regalia minora* are such rights and property as the sovereign may confer on a subject by grant. To this class belong the rights to forfeited estate; to property which falls to the Crown as *ultimus hæres* when the owner dies intestate without leaving natural heirs (see SUCCESSION); to feudal casualties; and to unclaimed wreck. This last right was in former times frequently granted to the owner of property on to which such wreck might be washed; and though now of little practical value owing to the better organisation for tracing the proper owner, the right is still recognised

by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 523 to 529). See WRECK and SHIPPING.

Hidden treasure, stray cattle, and generally all ownerless subjects, belong to the Crown, but may be granted to a subject as *regalia minora* (Ersk. ii. 1. 12).

The most important rights connected with land which are *inter regalia* are the Crown's rights to gold mines, and to silver mines when they are of such fineness that three half-pennies of silver can be extracted from the pound of lead (Act 1424, c. 12), to salmon-fishing, and to deer forests. A Crown grant of land to which any of these things would naturally pertain, is held not to convey these rights unless they are expressly mentioned; or unless the grant be by a charter erecting the lands into a barony, followed by possession of the *regalia* in question for the prescriptive period (Ersk. ii. 6. 18; *Duke of Richmond*, 8 M. 530; *Nicol, etc.* (*Milne's Trs.*), 6 M. 972; *Wemyss' Trs.*, 24 R. 216; *D. of Montrose*, 10 D. 896). See MINES and FISHINGS.

Forests, by which are meant large tracts of ground, whether covered with wood or not, in which deer have been in use to be kept, are *inter regalia* in the sense that no Crown charter of land in which a forest lies carries the forest itself without express mention (Ersk. ii. 6. 14). The Crown might also confer on private lands the privilege of a royal forest, which was, briefly, that all cattle or sheep found straying within the forest were forfeited, two-thirds going to the Crown, and the remainder to the keeper of the forest (Acts 1535, c. 11; 1579, c. 84; and 1592, c. 130). These privileges became so burdensome on the lieges that in 1680 the Court made a representation to the Crown against granting of new forests (*M. of Athole*, Mor. 4653). Where the keeper of a forest was one of the co-proprietors of a common pasturage marching therewith, he was held entitled, in a question with his co-proprietors, to drive deer back into the forest which had strayed on the common (*Robertson*, 22 May 1810, F. C.). But it was held in a later case that the keeper of a royal forest was not entitled to enter on neighbouring lands for the purpose of driving back deer which had strayed from the forest (*D. of Athole*, 24 D. 673). The same case decided that, notwithstanding a dictum of Ld. Stair to the contrary (*Institutes*, ii. 3. 68), the right of killing deer is not *inter regalia*. The result is that forestry rights now are practically in desuetude, or at least are no longer distinguishable from the right of every man to kill the deer or other game on the lands possessed by him.

[Rankine on *Landownership*, 3rd ed., p. 148.]

Regality was the highest feudal dignity, and, in addition to all the privileges of barony, included a jurisdiction over the dwellers on the lands of the regality equal in civil matters to that of the Sheriff, and in criminal matters, other than treason, to that of the Justiciary Court. Where any person subject to the jurisdiction of a Lord of Regality was brought before the Sheriff or the Justiciary Court on a criminal charge, the Lord of Regality might reclaim him (or *repledge*, as it was termed) to his own Court on giving security (*cultrach*) that he would administer justice to him within a year. Failure to do so involved these consequences: that the repledger forfeited his right to hold Courts for a twelvemonth; that the accused might be tried by the Court from which he had been reclaimed; and if the accused did not appear to take his trial, the cautioner must answer for him. The right of repledging could competently be insisted in at any time before sentence was passed.

A Lord of Regality might appoint deputies or bailies, either during pleasure or in terms which made the office hereditary, and such bailies took all the emoluments of the office. Such an appointment seems, from the case of *E. of Bothwell* (Mor. 7658), not to have prevented the Lord of Regality from exercising the jurisdiction himself, though he could not appoint another bailie; but the point is not free from doubt (see Mackenzie, *Crim. Tr.*, 2. 11, s. 8). A Lord of Regality might pursue removings, non-entries, and recognitions before his own bailie (*A.* v. *B.*, Mor. 7658).

Regalities were of two classes, laic and ecclesiastical; the former being those which originally belonged to temporal lords, and the latter those which originally pertained to the Church. Shortly after the Reformation the Church lands were annexed to the Crown by the Act 1587, c. 29; and as no lands could fall under this jurisdiction except such as belonged in property or superiority to the grantee, the regality jurisdiction over the Church lands should in strictness have been annexed to the Crown with the lands. But as in most cases the jurisdiction was exercised by hereditary lay bailies who had bought the privilege from the Church, the Legislature continued their jurisdiction, with the exception that ecclesiastical regalities or bailiaries could not repledge prisoners from the Justiciary Courts.

By the Act for abolishing heritable jurisdictions (20 Geo. II. c. 43), all regalities and heritable bailiaries were abolished, and their powers transferred to the regular Courts. However, as article 20 of the Treaty of Union had reserved all heritable jurisdictions to the grantees as rights of property, the Act provided for compensation being made in respect of the abolished jurisdictions, and the amount was ultimately fixed at £150,000.

The subject is now merely of historical or antiquarian interest, but those wishing to pursue it further are referred to Ersk. i. 4. 7–11; Bank. vol. i. p. 569–572; Brown's *Synopsis*, p. 1144. See HERITABLE JURISDICTIONS.

Regiam Majestatem, so called from the opening words of the prologue, is a treatise on the laws of Scotland in four books, on the plan of Justinian's *Institutes*, purporting to have been made by the order of David I. of Scotland. Like all our older law books, this work was originally written in Latin, the earliest manuscripts now extant having been written about the end of the fourteenth century; but in 1609 there was published a translation by Sir John Skene of Curriehill, Clerk of the Register. The authenticity of the work has been the subject of a long and bitter controversy, in which every possible theory has been put forward and supported by one or other of the leading writers on Scots law. Craig (i. 8. 11) and Stair (i. 1, s. 16; iii. 4, s. 27) reject the book entirely; Bankton (vol. i. p. 28, s. 75) believes it undoubtedly part of our law, but obsolete since an early date; Erskine (i. 1. 32) believes it to be exactly what it purports, a compilation made by order of David I.; and Ross (*Lectures*, ii. p. 60) believes it to be a genuine Scottish book, written about the time of William the Lion, grandson of David I.; while others (among whom may be mentioned Sir Walter Scott) consider it an attempt on the part of Edward I. of England to impose by guile the English law on Scotland. In the first volume of the Acts of the Parliaments of Scotland published by command of the Queen in 1844, Professor Cosmo Innes examines the question very carefully, and prints in parallel passages the Regiam Majestatem and Glanvil's treatise on

the laws and customs of England (the Regiam Potestatem), written during the reign of Henry II. of England. From this it appears that almost the whole of the Regiam Majestatem is to be found in Glanvil's work, and almost in identical words. The prevailing opinion now is against the authenticity of the Regiam Majestatem.

By the Acts 1425, c. 54; 1487, c. 115; and 1633, c. 20, committees were directed to be appointed to examine *inter alia* the Regiam Majestatem and the Quoniam Attachimenta (another treatise bound up with the Regiam Majestatem in Skene's collection), in order to report on these and to suggest any needful alterations. No report seems to have been made by any of the committees, from which Erskine, though believing in the authenticity of the Regiam Majestatem, concludes "that none of these remains ought to be received as of proper authority in the Courts of Scotland. Nevertheless, they may be produced, not only for illustrating but even in proof of our ancient customs. They are also of excellent use towards understanding the history and gradual progress of our law; and consequently may furnish a lawyer with proper arguments where statute law is silent and the more modern practice doubtful" (Ersk. i. 1. 36). Even this modified use of the Regiam Majestatem has long been given up, and the interest possessed by the work is purely antiquarian. Those interested in such matters may consult, in addition to the authorities above quoted, Hailes, *Annals*, iii. 275; Scott, *Border Antiquities*; Thomson, *Report on the Records*.

Regimental Debts Act.—This Act, 1893 (56 Vict. c. 5), provides that on the death of any person subject to military law, the prescribed Committee of Adjustment shall secure the effects of the deceased and pay preferential charges (s. 1), which are—

"(1) Expenses of last illness and funeral;

"(2) Military debts, namely, sums due in respect of

"(*a*) Quarters;

"(*b*) Mess, band, and other regimental accounts;

"(*c*) Military clothing, appointments, and equipment, not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death";

to which shall be added, when the death occurs out of the United Kingdom,

(3) Servants' wages, not exceeding two months' wages to each servant; and

(4) Household expenses incurred within a month before the death, or after the last issue of pay to the deceased, whichever is the shorter period (s. 2).

Secs. 7, 8, 9, provide for the distribution of the surplus among the deceased's representatives, and sec. 10 for the application of the residue, when undisposed of after due publication during six years. Medals and decorations are not comprised in the personal estate of the deceased with reference to the claims of creditors, or for any of the purposes of administration under this Act or any other Act, but are to be disposed of according to regulations laid down by royal warrant (s. 11). The Act applies to India under certain modifications (s. 25).

Register, Lord Clerk and Depute Clerk.—The Lord Clerk-Register has been one of the High Officers of State in Scotland from the earliest times, and is appointed by commission from the Crown under

the Great Seal. The earliest commission on record is dated 12th March 1531, appointing the grantee "Clericum Registri Rotulorum et Consilie Supremi Domini Nostri Regis," but there is evidence of the office having already been in existence at a much earlier period. The holder of the office, who appears to have been not infrequently a judge of the Court of Session in early times, was originally Clerk of the Scottish Parliament and of the other great Courts and Councils of the nation, and was also Chief Clerk of the Court of Session, and consequently custodian of its processes and of the registers of deeds recorded in its books. A large variety of public registers were intrusted to his care by the statutes instituting them, such as the Registers of Sasines and the Adjudication and Inhibition Registers, and "as the King's Great Clerk he was the keeper of all records the custody of which was not otherwise provided for." He had also a general superintendence of the local registers established throughout the country, and issued the volumes employed in their compilation, duly marked by himself or his deputes. Of these, some were returnable, on completion, into the Lord Clerk-Register's department for preservation, while others remained at their local seats.

The Lord Clerk-Register in early times had duties to perform in the framing of certain of the records under his charge, but these duties were gradually intrusted to other officials, and the functions of the Lord Clerk-Register came to be confined to those of custody and control (see *Campbell*, 1773, Mor. 13531, and *Campbell*, 1795, Mor. 13140).

By the passing of the Lord Clerk-Register (Scotland) Act, 1879 (42 & 43 Vict. c. 44), the office has been made almost entirely a titular one. That Act transferred to the Deputy Clerk-Register "the whole rights, authorities, privileges, and duties in regard to the public registers, records, and rolls of Scotland, and the keepers and other officers thereof," formerly vested in the Lord Clerk-Register, reserving to the latter only his status and precedence as an Officer of State, his rights and duties in connection with the election of representative peers of Scotland, and the office of Principal Keeper of the Signet, which had been conjoined with the office of Lord Clerk-Register by the Statute 57 Geo. III. c. 64. No salary is now attached to the office of Lord Clerk-Register.

The office of Depute Clerk-Register was constituted by Royal Warrant under the Sign Manual, dated 19th June 1806, and appointments to the office were formerly made by commission from the Lord Clerk-Register. Under sec. 5 of the Lord Clerk-Register Act, 1879, the appointment is now in the gift of the Crown, and the person appointed must be an advocate of the Scottish Bar of not less than ten years' standing; the salary is fixed at £1200, and by sec. 7 there is conjoined with the office that of Registrar-General of Births, Deaths, and Marriages in Scotland.

Before the passing of the Act of 1879, the duties of the Depute Clerk-Register corresponded generally in description and extent with those of the Lord Clerk-Register, and the functions of the latter were in practice mostly discharged by his depute. By the transference of duties effected under the Act, the Depute Clerk-Register is now in name as well as in fact the practical head of the important department of the Public Records of Scotland. [The best account of the early history of the offices of Lord Clerk-Register and Depute Clerk-Register is to be found in the Second Report of the Courts of Justice Commissioners of 1815, pp. 2 *et seq.*; reference may also be made to the Report of the Committee on Land Registration, published in 1898, ss. 7 to 46, and to Mackay's *Practice of the Court of Session*, vol. i. pp. 147, 148.]

Registrar of Friendly Societies.—This office was created by 9 & 10 Vict. c. 27, under which it was provided that the name of "registrar" was in future to be given to the certifying barrister or advocate appointed by 10 Geo. IV. c. 56 to examine the rules of friendly societies and to certify as to their conformity with the statutory provisions. The office is now regulated by 59 & 60 Vict. c. 25, ss. 1 to 6, which practically re-enacts 38 & 39 Vict. c. 60, s. 10. The "chief registrar" and one or more assistant registrars constitute the central office in London, and there is also an "assistant registrar" for Ireland and Scotland respectively. The term "registrar," unless the contrary appears, means for England the central office, and for Scotland and Ireland the assistant registrar. They are appointed by the Treasury, during whose pleasure they hold office. The chief registrar must be a barrister of not less than twelve years' standing, and the assistant registrar for Scotland must be an advocate, writer to the signet, or solicitor of not less than seven years' standing.

The duties and functions of the registrar have been considerably extended by these later statutes, and he now exercises a certain amount of control over friendly societies which have been registered. His approval is necessary where a registered society wishes to change its name. Disputes are often referred to him for settlement under the rules. He may appoint inspectors and call special meetings, may cancel or suspend the registry, and has even the power, by award, to compulsorily dissolve a society.

In addition to the registrar's duties in regard to societies registered under the Friendly Societies Act, 1896, and the Collecting Societies and Industrial Assurance Companies Act (59 & 60 Vict. c. 26), there are also (as provided by secs. 2 (1) and 4 (1) of the 1896 Act, re-enacting sec. 10 (4) and (8) of the 1875 Act) vested in the central office and assistant registrars for Scotland and Ireland the functions and powers formerly vested in various registering authorities. So the duties of the office of "registrar of friendly societies" are extended in certain respects to trade unions by 34 & 35 Vict. c. 31; to building societies by the Building Societies Acts, 1874 to 1894; to benefit building societies by 6 & 7 Will. IV. c. 32; to loan societies by 3 & 4 Vict. c. 110 (which does not, however, apply to Scotland); and to societies instituted for the purposes of science, literature, or the fine arts by 6 & 7 Vict. c. 36. He may also be called on to certify the rules of Trustee Savings Banks (54 & 55 Vict. c. 21, s. 3 (6)).

Further, under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37, s. 3), any scheme to enable an employer to contract himself out of that Act must be certified by the Registrar of Friendly Societies. The registrar may give a certificate for a limited period of not less than five years, and on a complaint on behalf of the workmen, he may, if satisfied there is good reason for the complaint, revoke the certificate. In the event of a dispute as to the distribution of the moneys or securities held for the purposes of a scheme so revoked, they shall be distributed according as the registrar may determine. Sec. 8 (2) provides that where the Crown is an employer to whom the Act applies, the Treasury may frame a scheme to be certified by the registrar under sec. 3 of the Act.

The chief registrar has every year to make a report, to be laid before Parliament. This report, which is published annually, contains a great deal of information relating to friendly and the other kindred societies mentioned, and deals with all matters which come before the central office, including proceedings of the registrars under the Workmen's Compensation Act.

See FRIENDLY SOCIETIES; INDUSTRIAL AND PROVIDENT SOCIETIES; BUILDING SOCIETIES; TRADE UNIONS.

Registration.

I. Registration for Execution and Registration for Preservation.
- (1) Origin and History of Registration for Execution.
- (2) Development of Registration for Preservation.
- (3) Registration of Bills of Exchange, etc.
- (4) The Clause of Consent to Registration.
- (5) Books Competent for Registration.
- (6) Form and Authentication of Extracts and Warrants.
- (7) Borrowing and Production of Registered Writs.

II. Registration for Publication.
- (1) The Feudal Registers of Sasines.
  1. Early History and Present Position.
  2. Registration of Leases.
  3. Notarial Instruments.
  4. The Clause of Direction.
  5. The Warrant of Registration.
- (2) The Burgh Registers of Sasines and the Register of Booking.
- (3) Other Public Registers.

The public registers of deeds in Scotland form a remarkably complete system, and have always been a source of legitimate pride with Scots lawyers, who are in the habit of claiming that in no other country has the public registration of legal writs been so fully developed or so usefully applied. The registers are of various kinds and serve various distinct purposes, but in all cases deeds are recorded in them with a view to one or more of the three primary objects of registration, viz. execution, preservation, and publication.

I. Registration for Execution and Registration for Preservation.

(1) *Origin and History of Registration for Execution.*—The registration of deeds for execution, unlike registration for publication, from which it is entirely distinct, finds its origin in the common law and not in statute, though it has in the course of its development undergone considerable modifications at the hands of the Legislature. Registration for preservation is a direct outgrowth of the system of registration for execution, and as the more recent regulations generally refer to both together, it is convenient to consider these two forms of registration under one head. It is probable that the idea of registration for execution was derived from an early practice connected with the enforcement of obligations in pre-Reformation times, when the Church largely concerned itself with the administration of the law. The original sanction under which the debtor in an obligation bound himself to due performance was ecclesiastical in its nature. He took a solemn oath that he would observe his bond, and this oath was engrossed in the body of the deed of obligation, with the result that, on his making default, the consequent breach of his oath brought him at once under the ban of the Church, which pronounced upon him "the horrible sentence of cursing," and issued letters of excommunication against him (*cf.* the oath of performance taken by the debtor in an obligation under the old Roman law, the breach of which is thought to have brought the debtor within the reach of pontifical discipline; Muirhead's *Roman Law*, p. 50). The oath of performance taken by the debtor was soon superseded by the more direct method of his consenting in the deed to his own excommunication in the event of his default. The ecclesiastical

censure of excommunication with its accompanying disabilities, when not in itself effectual to secure the debtor's performance of his bond, came to be reinforced in time by the civil arm of the law, with the severe penalties of imprisonment, distraint, and horning imposed by a succession of statutes (1449, c. 12; 1535, c. 9; 1551, c. 7). A precedent was in this way created for taking a debtor bound to consent to execution against himself in the event of his failure duly to observe his contract; and after the Reformation had robbed excommunication of its terrors, it was most natural that a consent should be taken from the debtor to decree going out against him in the civil Courts in the event of his default, in substitution for the consent formerly taken to the issue of letters of excommunication, the authority of the secular Courts being invoked in place of that of the Church. The 13th Article of the Instructions issued in 1563 by Queen Mary to the Commissaries of Edinburgh (see Balfour's *Practicks*, p. 658) forms a link of connection between the two methods; for in providing for the registration of contracts, obligations, acts, and other writs in the Books of the Commissary Court, it authorises the issuing of letters of execution fifteen days after the term fixed for the fulfilment of the registered obligation, "as they were wont to be given upon persons who of before lay forty days under cursing."

A practice which is said to have obtained in early times may also perhaps have had something to do with the origin of registration for execution. It is said that before writing came to be a common accomplishment, it was not unusual for contracting parties to appear before the Court and strike their compact *in facie curiæ*. A record of the contract would naturally be kept in the books of the Court, and the Court's aid could be called in to compel fulfilment of the obligation which had been entered into before it.

The reason why the debtor's consent to decree going out against himself came to take the form of a consent to registration of the obligation for execution is easily seen. It is and has always been an inherent and essential incident in the procedure and constitution of every Court of Record that its decrees should be engrossed in the books of the Court, and that extracts thereof, authenticated by the Clerk of Court, should be effectual warrants for execution against person and property in satisfaction of the Court's decrees (see, *e.g.*, Balfour's *Practicks*, p. 389, art. cxv.). The creditor having provided by anticipation for the event of his debtor's default by taking from him a consent to decree, on default having occurred got the judicial authority, without which no executorial diligence can proceed, at once interponed to his obligation, and decree thereon granted in his favour, the debtor being barred by his consent from making any objection. The creditor thus secured all the "force and strength" of a decree of Court, to enable him to do execution in enforcement of his obligation, without incurring any of the expense and delay incidental to an ordinary action, which, in the absence of the debtor's consent to decree, would have been his only remedy. But this decree, granted of consent by the Court, had to be recorded in ordinary course in the Court books. It naturally narrated *ad longum* the whole principal deed, which was its warrant and which was retained among the ordinary records of the Court, and, just as in the case of any other decree, an extract thereof was given out to the creditor as his warrant for execution. As the debtor's consent to decree going out against himself had thus the effect of causing his bond to be recorded in the books of the Court granting decree, and as this recording, though really only incidental to the proceedings, was regarded as their most prominent and operative feature, it was natural that the debtor's consent to decree against himself

should take the form of a consent on his part to the registration of his obligation.

The proceedings in connection with the registration of a deed for execution were originally of a regular judicial character throughout, the process being simply an abbreviated action. The creditor presented himself in Court, personally or through his agent, with the deed which he desired to have registered in terms of his debtor's consent, and the debtor was represented by a procurator in conformity with the procuratory which he had granted, whose duty it was to appear and give in his constituent's consent to decree; the judge must be present, hear the contract read, and duly interpone his authority, granting decree of registration, which was recorded in the Court books, and an extract thereof issued to the creditor (see Queen Mary's *Instructions* referred to *supra*, Arts. xiii. and xiv., and Sir Thomas Craig's *Jus Feudale*, ed. 1732, p. 240). The registration of deeds for execution thus possessed, in its original form, all the essential features of an action in Court. But in process of time, as the system came to be more widely used and appreciated, these judicial features were one by one stripped from it, and the procedure became more and more abbreviated, till at the present day it scarcely retains any distinctive marks of its judicial origin. The first statutory enactment directly referring to the registration of deeds for execution is the Act of 1584, c. 4, which dispenses with the solemnity of sealing in the case of all writs, contracts, or obligations as to which the parties have agreed that they are to be registered in the books of our Sovereign Lord's Council or other ordinary judges, on the ground that registration is itself a "greater solemn act" than sealing, and thus indicates that registration was at that date conducted with full formality. In the course of the next century much of the solemnity of registration must have fallen into desuetude, for an Act of Sederunt of 9th December 1670 grants warrant to the Lord Register, and the Clerks of Session his deputes, to register such bonds, contracts, and other writs as shall be given in to him to be registered, and therein to insert the consent of advocates as procurators to the registration as they were in use to do formerly, and accordingly to give out extracts *notwithstanding that the advocates did not subscribe their consent.* The procedure, however, still retained so much of the semblance of an action in Court that registration of a deed could not take place after the death either of the granter or of the grantee, just as an ordinary action cannot proceed at the instance of a deceased pursuer or against a deceased defender; moreover, the mandate by the debtor to a procurator to consent to registration necessarily fell on the death either of the debtor himself or of the creditor, in conformity with the general law relating to mandates (this, however, is disputed by Erskine on the ground that the granter's mandate, being *in rem suam* of the grantee, was irrevocable), and what was called an action of registration was rendered necessary by the death of either debtor or creditor (*Shanks*, 1635, Mor. 14993; *Brown*, 1635, Mor. 14994; *Channell*, 1693, Mor. 839; Ersk. iv. 1. 63). To remove these impediments and facilitate the working of the system there were passed: (1) the Act of 1693, c. 15, authorising the registration of all registrable writs after the death of the creditor at the instance of his heir, executor, or assignee, on the production of a service, retour, confirmation, or assignation, as the case might be; and (2) the Act of 1696, c. 39, authorising the registration after the granter's death of all bonds, dispositions, assignations, contracts, and other writs registrable. The requirement that the heir, executor, or assignee of a deceased creditor should produce his title before registering was speedily disregarded, sufficient protection being

afforded by the fact that the heir, executor, or assignee could not do diligence on the extract without production of his title, and the procedure now in force was finally adopted, whereby any writ containing a clause of consent to registration is registered as of course, and an extract issued, no matter by whom the deed may be presented.

A close analogy to the Scottish form of consent to registration for execution is presented by the English warrant to confess judgment, as to which the following quotation may be given: "It is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some solicitor named by the creditor, empowering him to confess a judgment" [either by suffering judgment to go against him by default, or by confession or acknowledgment of the justice of the plaintiff's demand] "in an action to be brought by the creditor against the debtor for the specific sum due, which judgment, when confessed, is absolutely complete and binding" (Kerr's Blackstone's *Commentaries*, 4th ed., 1876, vol. iii. p. 400).

(2) *Development of Registration for Preservation.*—The protection which the system of registration for execution provided against the loss of important writs was found to be so valuable that preservation came to be regarded as an object in registration of quite as much importance as execution, and deeds on which execution was not desired, or was not competent to follow, began to be recorded for the purpose of preservation alone, or, as the old phrase ran, *ad futuram rei memoriam*. The books of Court were soon found to be surer and more satisfactory repositories for the preservation of documents than the monastic chartularies or the notarial protocol-books, which formerly were the only registers available. The convenience also of being able to obtain, in the form of extracts, as many copies of a registered writ as might be required, which were equally as authentic as the original except where forgery was alleged, formed another inducement to parties to avail themselves, for the purpose of preserving deeds, of the facilities which were already in existence for the registration of deeds for execution, and which scarcely required any readaptation to suit them to this new purpose. Thus the preservation of the original registered deed, which was formerly merely an incident of the process of registration for execution, came itself to be an express and important purpose of registration.

The Act of 1685, c. 38, indicates by its terms that "conservation" was by that date already a recognised object of registration. But no writs could be registered, either for execution or for preservation, which did not contain a clause of consent to registration, and many valuable deeds were thus excluded from the advantages of registration. Hence was passed the Act of 1698, c. 4, which, on the preamble that it would be of great ease and advantage to the lieges that probative writs should be allowed to be registered although wanting a clause of registration, provided that it should be lawful to register *for conservation* all charters granted by subjects, dispositions, bonds, contracts, tacks, reversions, and all other probative writs in any public authentic register that was competent, although the said writs should want a clause of registration; the principal was to be given back to the party, and the extract to make entire faith in all cases in the same manner as if the said writs had been registered by virtue of a clause of registration, except in the case of improbations. The only distinction which remained, after the passing of this Act, between the treatment of writs containing a clause of consent to registration and that of writs containing no registration clause at all, was that the principal deeds were in the former case retained by the registrar, whereas in the latter case they were returned to the ingiver. This sole remaining difference was done away with by sec. 2

of 31 & 32 Vict. c. 34, which, on the preamble that the giving back of the principal writs impaired the utility of the registers of probative writs as registers for preservation, and had been found to be of evil consequence, affording facility for fraud and for obstructing the course of justice, enacted that all probative writs registered under 1698, c. 4, should remain in the custody of the keepers of the registers in like manner and subject to the same control as any writ given in to be registered in virtue of a clause of registration therein contained. A clause of consent to registration for preservation alone is thus practically superfluous now. It is, however, still in common use, and appears in the authoritative and statutory styles. A clause of consent to registration for execution remains, of course, as indispensable as ever if registration is to take place as the foundation of diligence (see *Erskine*, 1710, Mor. 14997, a case in which a writ which, owing to an omission, contained no clause of consent to registration for execution, but merely a clause of procuratory, was held to be registrable only for preservation).

(3) *Registration of Bills of Exchange, etc.*—The desirability, from the point of view of business men, of obtaining for bills of exchange the advantages with regard to summary enforcement possessed by obligations containing a clause of consent to registration for execution, led to the extension of the privilege of registration for this purpose to instruments of protest on bills by the Act 1681, c. 20, which provided that protests of foreign bills should be registrable for execution within six months after the date of the bill if protested for non-acceptance, and within six months of the falling due thereof if for non-payment, and the Act 1696, c. 36, which made similar provisions for the case of inland bills, although of course by their nature bills of exchange contain no clause of consent to registration. The like privilege was also extended to promissory notes by 12 Geo. III. c. 72, s. 36, made permanent by 23 Geo. III. c. 18, s. 35, and to Exchequer Bonds by 19 & 20 Vict. c. 56, s. 38. The Transmission of Moveable Property (Scotland) Act, 1862 (25 & 26 Vict. c. 85), provides that assignations of personal bonds or conveyances of moveable estate under sec. 1 of the Act "shall be registrable in the books of any Court in terms of any clause of registration contained in the bond or conveyance so assigned," but it is doubtful whether this can be regarded as the constitution of an additional class of writs registrable for execution although containing no clause of registration, for it does not appear that execution could competently follow upon the form of assignation scheduled to the Act.

(4) *The Clause of Consent to Registration.*—In an anonymous Style Book published in 1702, and attributed to one Carruthers, there are to be found (*e.g.* pp. 6 and 42) very early examples of the form of the clause of consent to registration for execution. The following form is taken from the Style for a "Bond with Cautioners and Substitutions" (p. 6):—

> And for the more security, we, the said Principal and Cautioners, are content that thir presents be insert and Registrat in the Books of Council and Session, or in the Sheriffs Books, Commissars, Baillies of Burghs Royal and Regality, to bear the strength of any of their Decreets interponed thereto, that Letters of Horning and Poynding and other executorials needful on a simple charge of six days only may pass hereupon as effeirs. And for that purpose constituts . . . . . Our Procurators.

In addition to the debtor's consent to registration in the Books of Council and Session and others enumerated, for the more security of the creditor,—preferences on a debtor's estate being at that time regulated by priority of decree, not of diligence as now,—and a declaration of the equivalence of such registration to a judicial decree, it will be observed that the clause fixes the

induciæ of the charge to follow on the extracted deed at the shortened period of six days. The procuratory with which the clause concludes was probably originally constituted by a separate writ, as in the case of the English warrant to confess judgment already referred to. Prior to the Act of Sederunt of 9th December 1670, the powers of the procurator so appointed appear to have been enumerated in a clause thereafter generally represented by an "etc." According to Duff (*Moveable Deeds*, p. 39), the clause of registration before 1650 "specified the different Courts in which registration was authorised," and thereafter a general expression consenting to registration in the Books of Council and Session or others competent was introduced. The books competent for registration are, however, still to be found enumerated, as has just been seen, in Carruthers' *Styles*, published in 1702. Preservation as a purpose of registration is mentioned in the clause of consent to registration given by Carruthers in his Style of a Disposition and Tailzie (p. 165), and in later Styles is of constant occurrence as a recognised object of registration, either alone or along with execution, according to the nature of the deed. Another example of the early form of the clause is to be found in Spotiswood's *Styles* (1727, p. 7). For a full discussion of the details of the form given in Dallas' *Styles* (1697, p. 1), which differs little from those given by Carruthers and Spotiswood, reference is made to Ross (*Lectures*, vol. i. pp. 112 *seq.*) and Bell (*Lectures*, pp. 221 *seq.*). (For other early forms, see *Juridical Styles*, 1st ed., 1787, and 3rd ed., 1826; and Beveridge's *Forms of Process*, i. 138, where a clause of the year 1584 is quoted.)

The modern short form, "I consent to registration hereof for preservation [*or* for preservation and execution]," first appears in the Schedule A annexed to each of the since repealed Acts, 10 & 11 Vict. cc. 48 and 49, the former Act relating to the transmission of lands not held burgage, and the latter to the transmission of burgage subjects. The import of this short clause is, by sec. 3 of the former and sec. 2 of the latter Act, declared, when occurring in any disposition, conveyance, deed, or instrument necessary for the transmission of lands, to be, unless specially qualified, a consent to registration and a procuratory for registration in the Books of Council and Session, or other Judges' Books competent, therein to remain for preservation; and if for execution, that letters of horning and all other necessary execution shall pass thereon upon a charge of six days upon a decree to be interponed thereto (see also 10 & 11 Vict. c. 50, s. 2, and Sched. A). Sec. 30 of the Act 23 & 24 Vict. c. 143, also since repealed, declared that the short clauses of consent to registration for preservation, and for preservation and execution, should, when occurring in any deed or writing whatever, have the like meaning and import as is attributed to them by the Act 10 & 11 Vict. c. 48; and, finally, the Titles to Land Consolidation (Scotland) Act, 1868, authorised of new the use of the short clause of registration in conveyances and bonds (ss. 5, 7, 124, and Scheds. B, Nos. 1 and 2, and GG); and provided by sec. 138, that when occurring in any deed or conveyance under that Act, or in any deed or writing or document of whatsoever nature, and whether relating to lands or not, it should, unless specially qualified, have the signification already quoted. The short clause is now, accordingly, the one in universal use. Care should be taken to use the form of the short clause which consents to registration for both preservation and execution only in the case of deeds on the extracts of which execution can competently follow, and to use the form which consents to registration for preservation alone in all other cases. It is quite absurd, for example, to insert a clause of consent to registration for execution in a deed by which no obligation at all is

constituted. As to the deeds in which it is appropriate to insert a consent to registration for execution, Spotiswood (p. 397) says that such a clause is "requisite in all writings and obligations simple wherein the performance is not deferred to an uncertain time, but the obligation must certainly be fulfilled at the time prefixt in the writing; such are bonds of borrowed money and the like"; and he adds (p. 398) that "the two clauses of registration for preservation and execution, if needful, are conjoined and put together in writings of conveyance and others where the principal and direct purpose of parties is not to oblige one another, but to transfer *dominium* or terminate differences; but because in these writings there is ordinarily an oblidgement of warrandice adjected, therefore, in case it be incurred, execution upon the decreet of registration will become needful." See also *Hunter*, 1834, 13 S. 205, as to the competency of a charge on an extract registered feu charter, and the Fifth Report of the Law Courts Commission of 1868, pp. 39 and 40.

(5) *Books Competent for Registration.*—Up to the passing of the Act 49 Geo. III. c. 40, the books available for registration, whether for preservation or for execution, were the books of every public Court of Record in the country, viz., as enumerated in the clause given in Carruthers' *Styles*, already quoted: the Books of Council and Session, the Sheriffs' Books, the Books of the Commissaries, and the Books of the Bailies of Royal Burghs and of Burghs of Regality, except in the case of charters by subject superiors, which, by the Act 1693, c. 35, are registrable "only in the Books of Council and Session, and in no other record." But the Act 49 Geo. III. c. 40, in view of the irregularities and inconveniences arising from the multiplication of registers in Scotland, practically restricted the registration of writs to the Books of Council and Session and the Sheriff Court Books, reserving, however, to royal burghs the right of registering in their books bills of exchange and promissory notes, and also deeds or instruments where all the parties to the same should be burgesses or have a legal domicile within such burghs at the time that such deeds or instruments should be presented for registration; this is the state of the law on the subject as it at present stands.

If a writ specified the particular Court in whose books registration was to take place, then, of course, registration could only take place in the books of that Court, and the jurisdiction of the judge of that Court was thereby so far prorogated, though not to the extent of making him judge in all questions arising out of the registered deed (Menzies, *Lects.* p. 164). Where the clause was in the general form, execution could competently follow on the extract registered deed only when it was recorded for execution in the books of a Court to whose jurisdiction the debtor was amenable. Registration in the Books of Council and Session rendered execution competent against the debtor or his property anywhere in Scotland, but registration in the books of any inferior Court authorised execution only within its local jurisdiction. Even registration for preservation alone was directed not to take place in the books of the inferior Courts unless they had jurisdiction. (See 1685, c. 38; *Morris*, 1678, Mor. 7426; *Douglas*, 1674, 3 B. S. 47; *Borthwick*, 1677, 3 B. S. 347; *Campbell*, 1827, 5 S. 412.) The same rules apply to registration in terms of the short clause of consent to registration now in general use. Execution on a deed competently registered in the books of a Sheriff Court can now, however, be carried out beyond the Sheriff's jurisdiction by obtaining a warrant of concurrence in the Bill Chamber, for the whole of Scotland, or in the Court of the Sheriff having jurisdiction; and execution on a deed competently registered in the Books of Council and

Session or in a Sheriff Court may be carried out in England or Ireland by complying with the provisions of the Judgments Extension Act, 1868, and the Inferior Courts Judgments Extension Act, 1882.

Under sec. 12 of the Land Registers (Scotland) Act, 1868, deeds which it is competent to register in the General Register of Sasines for publication can also, when desired, be registered in that register for the further purpose of preservation or (provided they contain a clause of consent to registration for execution) of preservation and execution; and registration in the General Register of Sasines is then held to be, and to have all the legal effect of, registration in the Books of Council and Session. The warrant of registration, necessary in the case of all writs entering the General Register of Sasines, must, in such cases, specify that registration therein for such further purposes is desired, and the principal writ is not returned to the ingiver. Writs so registered are transmitted to the Record Office through the office of the Keeper of the Books of Council and Session, by whom they are indexed along with the other writs there registered. Provision is further made by the Statute 40 & 41 Vict. c. 40, s. 6, for registration in the General Register of Sasines, for the purpose of preservation and execution, of the extracts of writs containing a clause of consent to registration for these purposes, which have already been registered therein for preservation alone.

How close was the connection between decrees of registration and ordinary judicial decrees is evidenced by the fact that from the institution of the Court of Session in 1532 down to 1554, "deeds presented for registration were blended together in the same series of books with the judicial decrees of the Court and its Acts of Sederunt." After 1554 a separate register was kept for deeds, forming a single series till August 1659. In 1661, after the Restoration, the practice arose for each of the Principal Clerks of Session, then three in number, to keep a separate register of deeds in his own office. These registers, in any one of which, indifferently, a deed might be recorded, were called Dalrymple's, Durie's, and Mackenzie's, after the Clerks of Session who instituted them, and were continued down to 2nd January 1812, when, in accordance with the Act of Sederunt of 10th July 1811, No. I., the three registers were amalgamated to form one (see also 55 Geo. III. c. 70, s. 4). In the books formerly kept in each of the three offices, all the multifarious kinds of writings that might be presented for registration were recorded together without discrimination; but since the three former registers were conjoined on 2nd January 1812, protests on bills and promissory notes have been recorded in separate volumes, with separate minute-books and alphabetical indexes, all other writs being still recorded, minuted, and indexed together, whether registered as probative writs or in virtue of a clause of registration (see the Report of the Commissioners on Public Records, 1800–19, pp. 230, 281; 55 Geo. III. c. 70, ss. 1, 4, etc.; 1 & 2 Geo. IV. c. 38, s. 27). The record volumes and minute and index books are marked and issued to the Keeper of the Books of Council and Session by the Deputy Clerk-Register, into whose office they are returnable after completion, so that the compilation and the preservation of the registers are in different hands. The volumes in which the Sheriff Clerks and Clerks of Royal Burghs record the deeds, probative writs, and protests which can competently enter their registers are also marked and issued to them, along with minute-books, by the Deputy Clerk-Register, but these volumes are not returnable into the General Register House (see 49 Geo. III. c. 42, ss. 8 and 9, which Act also makes provision for supervision

of the Sheriff Court records and of the Royal Burgh records by the Sheriffs-Depute and the Magistrates respectively, who must report annually thereon to the Court of Justiciary). On the abolition in 1809 of the Registers of Deeds kept by the Commissaries, the Clerk of the Commissary Court of Edinburgh delivered his registers and warrants to the Lord Clerk-Register, to be deposited with the other public records of Scotland; and the Clerks of the inferior Commissary Courts delivered their registers and warrants to the Sheriff Clerks, from whose custody they were subsequently transferred to the General Register House (see 49 Geo. III. c. 42, ss. 4 and 5; 4 Geo. IV. c. 97).

(6) *Form and Authentication of Extracts and Warrants.*—The form in which extracts of registered deeds are issued has undergone a process of abbreviation parallel to that which has taken place in the whole procedure of registration, and has been gradually shorn of the distinctive characteristics of a decree of Court. An extract from the Books of Council, dated 20th July 1584, is quoted by Beveridge (*Forms of Process*, pp. 136, 137). It is under the hand of the Lord Clerk-Register, and is very full and elaborate in style. Bell (*Lectures*, 3rd ed., pp. 223, 224) gives the form of an extract from the Books of Council and Session of date 4th December 1665, and also (p. 226) the more modern form in use down to 1st October 1877, when the simple form scheduled to the Act 40 & 41 Vict. c. 40 came into use for extracts from both the Books of Council and Session and the Sheriff Court Books.

Extracts of registered writs, like extracts of ordinary decrees, were originally authenticated by the subscription of the Clerk of the Court in whose books the writs were registered, and this is still the case with Sheriff Court extracts. Extracts from the Books of Council and Session were authenticated originally probably by the signature of the Lord Clerk-Register himself, and afterwards by the signature of a Principal Clerk of Session. The Act 1 & 2 Geo. IV. c. 38, passed on 28th May 1821, superseded this practice, directing by sec. 26 that all extracts of deeds, probative writings, and instruments of protest recorded in the Books of Council and Session should, before the transmission thereof to the General Register House, be authenticated by the subscription of one or other of the Principal and Assistant Keepers of the Register, and that these keepers should be under the immediate control and direction of the Lord Clerk-Register and his deputy for the time.

As the Lord Clerk-Register was the titular chief clerk of the Court of Session, the authentication of extracts from the Books of Council and Session was thus still under the charge of the Clerk of Court. Sec. 5 of the Act 40 & 41 Vict. c. 40, after declaring that "extracts of all writs, deeds, or other documents of what nature soever which may be registered in the Books of Council and Session shall be equivalent to the registered writs, deeds, or other documents themselves, except where any writ, deed, or other document so registered shall be offered to be improven," directs that "such extracts shall be signed on the last page thereof by the Keeper or Assistant Keeper of the Register of Deeds and Probative Writs and Protests in the Books of Council and Session," and that "no further signature on any other page of such extracts shall be necessary." Each sheet is also to be impressed with the office seal of the keeper, and marginal additions are to be authenticated by the signature of the officer certifying the extract.

After the periodical transmission of the volumes of the Books of Council and Session, with their warrants, by the keeper to the Lord Clerk-Register, which is required by 49 Geo. III. c. 42, s. 12, similar provision is made by

sec. 7 of 40 & 41 Vict. c. 40 for the giving out and authentication of extracts by the Deputy Keeper of the Records, or any officer holding a commission to that effect from the Lord Clerk-Register. It must be borne in mind that the duties of the Lord Clerk-Register in all such matters were transferred to the Deputy Clerk-Register by the Lord Clerk-Register (Scotland) Act, 1879 (42 & 43 Vict. c. 44, s. 6). The regulations for the authentication of extracts of writs registered in the General Register of Sasines for preservation or execution, which are somewhat different, will be found in sec. 12 of the Land Registers (Scotland) Act, 1868, to which is scheduled a form of the extract to be issued in such cases. All extracts must now have upon them a certificate indicating the *cumulo* amount of stamp duty paid on the principal writ recorded and retained for preservation (31 & 32 Vict. c. 34, s. 3; 31 & 32 Vict. c. 64, s. 12).

Prior to the passing of the Act 1 & 2 Vict. c. 114, the extract of a writ recorded for execution was a warrant for the issuing of separate letters of diligence against the debtor's whole estate, heritable and moveable, but that Act, together with the relative Act of Sederunt of 24th December 1838, authorised the annexation to the extract itself, whether from the Books of Council and Session or from the Books of any Sheriff Court, of a warrant "to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment, and to arrest and poind, and for that purpose to open shut and lockfast places."

Separate letters of diligence remained and remain necessary, however, where diligence is to be executed against the debtor's heritable estate. Finally, secs. 1 and 2 of the Act 40 & 41 Vict. c. 40 directed the insertion in the extracts of all writs, deeds, or other documents containing a clause of registration for preservation and execution, whether recorded in the Books of Council and Session or in the Sheriff Court Books of any county in Scotland, of a warrant in the abbreviated form scheduled to that Act, which is the form now in use, viz: "And the said Lords grant (*or* the Sheriff grants, *as the case may be*) warrant for all lawful execution hereon." The long form of warrant given in Schedule B to the Land Registers (Scotland) Act, 1868, must still, however, be used in the case of writs registered in the General Register of Sasines for execution (see also 40 & 41 Vict. c. 40, s. 6).

It must be borne in mind that execution on an extract registered deed can only proceed against the party who has himself explicitly, or, in the case of bills of exchange, etc., implicitly, consented to registration for execution, and cannot proceed against his representatives without an action of constitution (see *Kippen*, 1822, 2 S. 105).

(7) *Borrowing and Production of Registered Deeds.*—All writs which have been registered either in virtue of a clause of consent to registration or as probative writs, are now retained in the custody of the keepers of the registers, and the principal writs are in no case returned to the ingiver or any other party (31 & 32 Vict. c. 34, ss. 1 and 2). Formerly all probative writs given in for registration in the Books of Council and Session under 1698, c. 4, were returned to the party registering; and all writs registered in virtue of a clause of registration were, under the Act 1685, c. 38, authorised to be given up, if desired, within six months of their being given in, and before actual booking had taken place (see *M'Leod*, 1841, 3 D. 1288; affirmed 1846, 5 Bell's App. 210). This Act of 1685 did not apply to deeds recorded in the Sheriff Court Books (*Brown*, 11 March 1809, F. C.). A valuable report by Mr. Thomas Thomson on the whole subject of the

registration and withdrawal of writs is printed in a note to *M'Leod's* case just cited, Mr. Thomson's view being that the Act of 1685, c. 38, authorised not merely the borrowing, but the absolute withdrawal, of writs given in for registration. This matter is now regulated by the Statute 31 & 32 Vict. c. 34, which enacts that no writ which has been given in for registration in the Books of Council and Session shall be taken out by the party or anyone employed by him, and that no such writ shall be given up by the keeper of the register for any purpose at any time, either before or after the same has been booked, excepting only when authority of the Lords of Council and Session has been expressly given thereto, and then only under such conditions and limitations as may be expressed in such authority (see *Caldwell*, 1871, 10 M. 99; *Leigh Bennett*, 1893, 20 R. 787). The Court will not grant such authority unless convinced that production of the principal writ is absolutely indispensable in the interests of justice, and that an extract, which is probative by the law of Scotland, will not suffice (see cases quoted in Menzies, *Lects.* pp. 170, 171, and Bell, *Lects.* pp. 230–232; also *Inglis*, 1882, 9 R. 761). The Acts of Sederunt of 24th December 1838, s. 15; 16th February 184 , s. 20; and 8th June 1850, s. 2, make provision for the production in processes depending before the Lords Ordinary of the originals of registered writs, on application by Note. Applications for exhibition of recorded deeds in Inner House proceedings must be made by printed petition in common form. Although the Court will grant warrant for the temporary removal out of the jurisdiction of registered deeds when the exigency of the case is proved to their satisfaction, it is doubtful whether they will authorise the transmission of public records out of the jurisdiction. (Application refused in *Kennedy*, 1880, 7 R. 1129; application granted in *Earl of Euston*, 1883, 11 R. 235. See *Juridical Styles*, vol. iii. pp. 764–767; Shand, *Pract.* pp. 1013–16; Mackay, *Manual of Practice*, pp. 50, 343, 344, 529.)

[*General Authorities.*—Ross, *Lects.* i. pp. 92–102; Duff on *Deeds*, pp. 37–41; Menzies, *Lects.* pp. 160–173; Bell, *Lects.* pp. 220–233; the Reports of the Commissioners on Public Records, 1800–19; the Second Report of the Commissioners of 1815 on the Courts of Justice in Scotland, pp. 1 *seq.*; the Fifth Report of the Law Courts Commission of 1868, pp. 39, 40.]

II. Registration for Publication.

(1) The Feudal Registers of Sasines.—1. *Early History and Present Position.*—The expediency of requiring evidence of the constitution and transmission of all heritable rights to be accessible to the lieges, by means of a system of public registration, was early recognised in Scotland. Property in land being by its nature incapable of the actual corporeal possession which, in the case of moveable property, is in general sufficient advertisement of the fact of ownership, it was necessary to devise some method of rendering the existence of proprietary and subsidiary rights in heritage not less matter of public knowledge. To this end resort was had to the expedient of requiring the constitution and transference of heritable rights to take the form of a public ceremony. Originally this ceremony probably consisted in a formal induction of the new vassal into the actual occupancy of the subjects by the superior in presence of the *pares curiæ*. On the adoption in early times of the legal device of symbolical delivery of heritage as an equivalent to the actual delivery necessary to the transference of moveables, sufficient publicity was thought to be attained by making this symbolical delivery the occasion for a more or less solemn public ceremonial of a character such as to attract the notice and impress

the memory of all persons in the district. The delivery to the new vassal of the earth and stone or other appropriate symbols representing the property transferred was technically called the giving of sasine, and the conveyancing ritual which regulated the ceremony required it to take place during daylight, on the ground in question, and in the presence of witnesses, all with a view to its due publicity. In order that a record of the proceedings might be preserved, the practice arose, probably in the fifteenth century, of requiring the attendance of a notary public, whose duty it was to draw up an instrument of sasine narrating and attesting the due fulfilment of all the requisite formalities. This instrument, together with the charter and the precept of sasine, which was the warrant to the superior's bailie to give sasine to the vassal, constituted the written title to the lands.

As heritable transactions increased in number and complexity, it was soon felt that the degree of publicity secured by the performance of the ceremony of taking sasine was quite inadequate, and that to put commerce in land upon a proper and secure basis it was essential that a more effective method of publishing land transactions should be instituted, such as to enable contracting parties to ascertain with reliability the position of the title of any heritable property. The creation of a public register in which all writs relating to land must be recorded in order to be effectual, was the most natural means of meeting this want.

Prior to the establishment of a regular public register of sasines it was the custom of notaries to enter in their protocol-books more or less complete notes of the instruments of sasine which they had framed, and various regulations were made for the preservation and authentication of these protocol-books, and for their transmission to the King's Register after the decease of the notaries to whom they belonged (1555, c. 43; 1587, c. 45; 1617, c. 22; A. S., 29th July 1680). But these protocol-books by no means provided a system of registration sufficient to meet the public requirements; their object was rather the preservation of evidence of the granting of sasines with a view to the private benefit of proprietors than the furnishing to the public of sources of information regarding heritable rights, and they were at the same time liable to be both incomplete and inaccurate.

The first mention of a conveyancing register is to be found in the Act 1469, c. 27, which authorised the registration of reversions in the King's Register, on account of the ease with which such reversions might be lost. This registration was optional, and evidently for the purpose rather of preservation than of publication (Ersk. ii. 8. 9). The Act 1503, c. 89, next required all sheriffs, stewards, or bailies to write in their Court books the day and year of the sasines which they gave on Crown precepts, and to bring the same to the Checker; and the Act 1540, c. 79, followed, ordaining the Clerk of Court of each Sheriffdom to come with the Sheriff or his deputes in every Checker and bring with him, subscribed with his own hand and sign manual, the book containing all the sasines given by the Sheriff, or at least the day and month of the giving of these sasines, and the names of the lands contained in them. This latter Act was ratified and approved by the further Statute 1587, c. 64 (see also 1540, c. 77; 1555, c. 34; 1563, c. 80). The Act 1555, c. 46, endeavoured to make this system of general application by extending it to sasines on precepts by subject-superiors, and ordained the takers of such sasines within year and day to present them to the Sheriff-Clerk of the shire where the lands lay, for insertion in the Court books of at least a note of their dates, and the lands affected, and the names

of the notary and witnesses, in order that the Sheriff-Clerk might bring with him in every Checker the said Court books, and give in a duplicate of the part thereof containing these particulars subscribed with his hand and sign manual, to remain in the register, together with the double of his own protocol kept under the Act 1540, c. 79, that all persons having interest might have recourse thereto.

These Acts, however, appear to have entirely failed to attain their object. In any case, they only provided for the registration of sasines alone, and made no provision for the case of other real rights; and even of sasines, required only the merest memoranda to be preserved, without any record of the conditions of tenure. Not much better success attended the institution, by Acts of 1599 and 1600, of a series of Particular Registers at various places throughout the country for writs relating to lands lying in the different districts. In this register, which was known as the "Secretary's Register," and which was the prototype of the present system, not merely all instruments of sasine, but also all reversions, regresses, bonds for giving of reversions or regresses, assignations to reversions and intimations of the same, renunciations of wadsets, and grants of redemption were to be registered within forty days, under pain of nullity, unless previously registered in the Books of Council and Session. The inefficient working and the general disregard of this system are amply evidenced by the terms of an Act of Sederunt of 6th January 1604, which, in order that the lieges might not be *wrackit altogether* by the failure to register their writs, ordained the insertion, at the end of all writs registrable in the Secretary's Register, of a clause of registration in these terms: "Ordaining the same to be registered within forty days, conform to the Act of Parliament." The final failure of this register is proved by its abolition in 1609 (1609, c. 40).

The Legislature was not daunted, however, by their repeated failures, and by the Act 1617, c. 16, endeavoured once more to remedy the evils attendant, in the words of the Act of 1599, upon there being no public records established wherein all parties might find resolution of the estate of any lands wherewith they meant to contract. This Act of 1617 proved a complete success, and the system of public registration of sasines, etc., which it established remains in force, with certain modifications and improvements, at the present day.

Under its provisions a General Register at Edinburgh, and various Particular Registers throughout the country, were established, in which all sasines, and also all writs relating to the constitution, transfer, and discharge of redeemable rights in land, required to be registered within sixty days of their dates, writs relating to burgage subjects alone excepted. Registration could take place optionally either in the Particular Register for the district in which the lands affected were situated, or in the General Register at Edinburgh. Failure to register timeously any registrable writ was declared to have the effect of causing such writ to make no faith in judgment, by way of action or exception, in prejudice of a third party who should have acquired a perfect and lawful right to the lands and heritages in question, but prejudice always to them to use the said writ against the party maker thereof, his heirs and successors,—a sanction which, as regards instruments of sasine, was by the case of *Young*, 1847, 9 D. 932, interpreted to mean that an unregistered sasine is absolutely null, such nullity not being pleadable, however, by the granter or his representatives. The register was put under the charge of the Clerk of Register and his deputes, who were directed to mark the volumes issued to the various keepers with a note of the number of leaves they contained; and the volumes were returnable, after completion, to

the Clerk of Register, to remain in his keeping and be patent to all the lieges. Writs were to be registered within forty-eight hours, and redelivered to the presenter, indorsed with a certificate by the keeper of the day, month, and year of the registration, and of the pages of the register where the same were engrossed. Provision was also made for the issuing of extracts by the Clerk of Register, which were declared to make as great faith as the principals, except in case of improbation. The Act 1669, c. 3, may be mentioned here, which added instruments of resignation *ad remanentiam* to the class of registrable writs; and also the administrative Act 1685, c. 33, regulating the transmission of the registers to the Clerk-Register for preservation in the General Register House.

The security afforded to the lieges by the publication of all heritable rights in the registers was for a time threatened by a provision in the Statute 1686, c. 19, which, proceeding apparently on the quite erroneous conception that the prime purpose of registration was the protection of the party registering the writ, rather than of the public at large, provided that sasines and other writs presented to the keepers of the registers, and redelivered to the party with a certificate of registration, should be sufficient and valid for the security of the party, even although the writ should not be actually engrossed in the register. The ill-advisedness of this statute was speedily recognised and remedied by the subsequent Act 1696, c. 18, which reaffirmed the fundamental principle that the great use and design of the registration of sasines and other writs and diligences is that the lieges may be certiorate thereof, and declared that no sasine or other writ or diligence should be of any force or effect against any but the granters and their heirs unless duly booked and inserted in the register. Finally, the Act of Sederunt of 17th January 1756 ordained that the notarial docquet appended to instruments of sasine must be recorded as well as the sasine itself, the practice having arisen of omitting it from the record.

The provision in the original Act of 1617, directing the registration of instruments of sasine to take place within sixty days of their dates, still left some opening for fraud and uncertainty, as a sasine of later date, for example, might cut down one of earlier date by being registered before it. To obviate this it was essential that the criterion of preference in real rights should be not the date of the instrument of sasine, but the date of its registration, and this was accordingly enacted by the Statute 1693, c. 13. The immediately subsequent Act 1693, c. 14, provided the requisite machinery for preserving evidence of the order in which writs were presented for registration, by ordaining the keepers of the registers to keep minute-books expressing the day and hour when, and the names and designations of the persons by whom, writs were presented for registration, the minutes to be immediately signed by the presenters of the writs and also by the keepers, and to be patent to all the lieges; and the Act further directed that all writs should be registered exactly conform to the order of the minute-book. The effect of this last enactment was to render the moment of the entry of a writ in the minute-book the moment of its registration. It may be mentioned, in passing, that minutes had already been directed to be framed by the keepers by the Act 1672, c. 16, s. 32, and the Act of Sederunt of 15th July 1692.

No further changes took place in the system of registration till the present century. For merely administrative regulations regarding the transmission and minuting of the registers and the framing of indexes of persons and places, reference may be made to 49 Geo. III. c. 42; A. S., 10th July 1811; and 1 & 2 Geo. IV. c. 38, s. 27. But in 1845 a course of legislation was begun which has fundamentally altered the character of

Scottish conveyancing, and has greatly affected the registration system. It began to be perceived that the continuance of both the public ceremony of giving sasine, and the registration for publication of all instruments of sasine, involved a quite superfluous duplication of the means of securing the publicity of land transactions, and proposals began to be made for the abandonment of the more ancient and less efficient means. The ceremony of taking sasine was first discarded, in the case of the transmission of heritable securities, in 1845 by the Act 8 & 9 Vict. c. 31, which authorised the direct registration of writs assigning or conveying such securities. The Act 10 & 11 Vict. c. 50 followed, which provided that the registration of a bond and disposition in security in the Register of Sasines should be as effectual and operative as if sasine had been taken upon it, and an instrument of sasine had been expede and recorded (see the Titles to Land Consolidation Act, 1868, s. 118).

The Act 8 & 9 Vict. c. 35, passed to simplify the form and diminish the expense of obtaining infeftment in heritable property, halted at a more or less illogical half-way position, for, while still retaining the necessity of obtaining sasine, it stripped the ceremony of the publicity which was one of the chief reasons of its existence, by providing that it should be no longer necessary to proceed to the lands in which sasine was to be given, or to perform any act of infeftment thereon, but that sasine should be effectually obtained by producing to a notary public the warrants of sasine and relative writs, and by expeding and recording an instrument of sasine in a shortened form prescribed by the Act. The consistency which this Act stopped short of realising was attained by the Act 21 & 22 Vict. c. 76, which finally abolished the necessity of expeding and recording an instrument of sasine on any conveyance of lands, and authorised the direct recording of the conveyance itself in the appropriate Register of Sasines as a sufficient completion of the disponee's real right, a provision repeated in the Consolidation Act of 1868, by which our present practice is regulated. The competency of the old forms of constituting, transmitting, completing, or extinguishing land rights, or securities affecting lands, is saved, but they are now never resorted to in practice.

Registration of writs may now take place at any time during the life of the person on whose behalf the same shall be presented for registration (the Titles to Land Consolidation Act, 1868, s. 142, following upon provisions to a similar effect in earlier Acts). The original requirement that all writs should be registered within sixty days of their dates was rendered superfluous by the Act 1693, c. 13, which made the date of registration, in place of the date of the writ registered, the criterion of preference in real rights, but it was not abolished till the present century.

The Land Registers (Scotland) Act, 1868, largely remodelled the system of registration of writs relating to lands and heritages in Scotland. In dealing with the feudal registers of sasines, it abolished the particular registers throughout the country (for the various dates at which these were brought to a close, see the table appended to this article), and directed registration to take place in the General Register alone. It further provided that the General Register should be divided into a series of separate divisions, one for each county, the Barony and Regality of Glasgow forming one registration county, and, after the passing of 54 Vict. c. 9, Orkney and Shetland together forming another. For each division separate presentment-books, minute-books, and register volumes are to be kept; and where lands lie in more than one county, provision is made for the registration of writs affecting such lands *ad longum* in the division applicable to one of the

counties, and by memorandum in the divisions applicable to the other counties. The transmission of writs by post to the General Register is authorised by sec. 6, and writs arriving by the same post are to be deemed to be registered contemporaneously, thus instituting a new method of creating *pari passu* securities over land (see also sec. 142 of the Titles to Land Consolidation Act, 1868). Regulations are also made for the printing of abridgments and indexes, and the transmission of copies thereof to the Sheriff-Clerks of the counties. By sec. 12, registration in the General Register of Sasines is declared equivalent in certain cases to registration in the Books of Council and Session (see *supra*). As to the authentication of registered writs, sec. 14 provides that the certificate of registration on every writ registered in the General Register of Sasines shall be signed by the keeper or his duly commissioned deputy, and that every folio of such writ shall be impressed with the office seal or stamp of the register. The regulation of the fees of registration is intrusted to the Commissioners of the Treasury, who are to lay before the Lord President, Lord Clerk-Register, Lord Advocate, and Lord Justice-Clerk any amended tables of fees which they may frame.

Although extracts from the Register of Sasines are declared to make equal faith with the originals, except in the case of improbation (see sec. 142 of the Titles Act of 1868), the same acceptance has never been accorded to such extracts as is accorded to extracts from the Books of Council and Session, partly, no doubt, for the reason that the originals of writs recorded in the Sasine Register are not retained at the Register House, but are returned to the ingivers, and ought themselves to be produced accordingly.

The Titles to Land Consolidation Act, 1868, contains, in sec. 143, an important provision, to the effect that "in case of any error or defect in any instrument, or in the recording of any deed or conveyance, or of any warrant of registration recorded or to be recorded in any Register of Sasines, or in any warrant of registration thereon, or in the recording of such warrant, it shall be competent of new to make and record such instrument, or of new to record the deed or conveyance, with the original or a new warrant of registration, as the case may require."

The Conveyancing Act of 1874 further declares (s. 53) that recorded deeds, instruments, or writings are not to be challengeable on the ground of any part of the record thereof having been written on erasure, unless fraud or disconformity between the record and the deed is averred. Reference may also be made to sec. 144 of the Titles Act of 1868, making applicable to all instruments the provision of the Statute 6 & 7 Will. IV. c. 33, that no challenge of any instrument of sasine or instrument of resignation *ad remanentiam* should receive effect on the ground of any part of such instrument being written on erasure, unless fraud or disconformity with the record was averred.

2. *Registration of Leases.*—By the Registration of Leases (Scotland) Act, 1857, 20 & 21 Vict. c. 26, long leases, as defined by that Act, assignations, assignations in security and translations thereof, had the advantage extended to them of being made registrable in the Register of Sasines and the Burgh Registers.

3. *Notarial Instruments.*—As the instrument of sasine which used formerly to be recorded narrated only those portions of its warrant which were essential to the infeftment, it was necessary, on the introduction of the direct recording of deeds constituting and transmitting heritable rights, to provide some means for keeping out of the record any irrelevant matter,

or matter which it might be undesirable to make public, contained in such deeds. This was effected by the institution of the device of expeding and recording, when desired, in place of the deed itself, a notarial instrument setting forth generally the nature of the deed, and containing at length its operative and relevant parts (see 8 & 9 Vict. c. 31, s. 1; 21 & 22 Vict. c. 76, s. 22; 23 & 24 Vict. c. 143, s. 4; the Consolidation Act, s. 17).

4. *The Clause of Direction.*—Another method of preventing the whole of a deed from entering the record, in lieu of employing a notarial instrument, was provided first by the 1858 and 1860 Acts, which made it competent to insert a clause of direction before the testing clause of any conveyance, specifying the part or parts of the conveyance desired to be recorded. The Consolidation Act of 1868, in re-enacting this provision (s. 12), requires express reference to be made in the warrant of registration to such clause of direction, and if it be not so referred to the deed will be recorded *ad longum*. A deed containing a clause of direction can always be recorded *ad longum* if desired.

5. *The Warrant of Registration.*—Under the old law sasine was only given on the requisition of the vassal or his attorney, and it was thus essential, on registration coming in place of sasine, that there should be some means of showing that such registration was authorised by the vassal. To this end the Act 21 & 22 Vict. c. 76 introduced the requirement of a warrant of registration on all conveyances presented for registration, specifying the person or persons on whose behalf registration was desired, to be signed by the party or his agent, and recorded along with the deed. The Act 23 & 24 Vict. c. 143 made a similar provision in the case of conveyances of burgage subjects.

The Land Registers (Scotland) Act, 1868, by sec. 4, required all writs presented for registration in the General Register of Sasines to have a warrant of registration thereon, specifying, in addition to the person or persons on whose behalf the writ was presented, the county or counties in which the lands to which such writ had reference were situated, and, doubts having arisen as to whether such a warrant could be signed by the firm-signature of the agents of the party, authorised and required the signing thereof either by the party or by his individual agent, or by the subscription of any firm of which such agent might be a partner. This provision was superseded and re-enacted by secs. 15 and 141 of the Consolidation Act of 1868, which, taken together with sec. 33 of the Conveyancing Act of 1874, require all conveyances and deeds, and all writings whatsoever, which may be recorded in any Register of Sasines, feudal or burghal, to have a warrant of registration thereon in one or other of the forms scheduled to the former Act. The 1868 Act also, by sec. 145, exempts from challenge warrants of registration under the 1858 and 1860 Acts in respect of certain disconformities to the terms of the schedules annexed to these Acts (see *Johnston*, 1865, 3 M. 954). If the warrant of registration on a writ applicable to lands lying in more than one county has omitted to mention all the counties in the registers of which it ought to appear, provision is made by sec. 5 of the Land Registers Act of 1868 for the presentation of such a writ, with a new warrant of registration thereon, directing registration to take place in the registers of the counties omitted, and such additional registration is effected by the insertion of a memorandum in these registers.

(2) The Burgh Registers.—Writs relating to heritable rights in subjects within royal burghs held by burgage tenure are expressly excepted

from the operation of the majority of the registration statutes which have just been considered. For the registration of such writs a separate course of legislation has provided, beginning with the Act of Sederunt of 22nd February 1681, and the Statute 1681, c. 11, and running practically parallel to the legislation applicable to the registration of writs relating to feudal subjects, so that it is unnecessary here to deal specially with this topic in any detail. By the original Act of 1581, the Town Clerk's Books of the respective royal burghs are made the appropriate registers for all deeds relating to burgage subjects; and this still remains the rule, despite the abolition of the other specialties of burgage tenure by the Conveyancing Act of 1874. Reference may be made to the Statutes 10 Geo. IV. c. 19, requiring the registration of the notarial docquets appended to sasines of burgh subjects; 8 & 9 Vict. c. 31, authorising the direct recording in the burgh registers of writs transmitting heritable securities over burgage lands; 10 & 11 Vict. c. 49, making provisions for the facilitation of the transference of burgage subjects similar to those contained in 10 & 11 Vict. c. 48 applicable to feudal subjects; 10 & 11 Vict. c. 50, providing for the constitution of heritable securities within burgh by direct registration thereof in the burgh register; 23 & 24 Vict. c. 143, abolishing instruments of sasine and of resignation and sasine, and authorising the registration of conveyances themselves in the burgh register; and, finally, to the relative provisions of the Titles to Land Consolidation Act of 1868, and the Conveyancing Act of 1874. For a discussion as to certain questions which have arisen under the last-mentioned Act as to the registration of writs relating to feu-rights of burgage subjects, and as to the burgh registers generally, see the articles on BURGAGE and SEARCHES.

There is also in Paisley a register of booking for writs relating to lands held by this peculiar tenure within the burgh, which is kept by the town clerk, and is on practically the same footing as the ordinary burgh registers

(3) OTHER PUBLIC REGISTERS.—In addition to the registers already considered, there are a number of other registers for the publication of writs which it is deemed expedient should be patent to the lieges.

The Register of Inhibitions and Adjudications is of almost as much importance in land transactions as the sasine registers, inasmuch as by its means it can be ascertained whether any diligence has been executed against any of the proprietors of any particular subjects such as would defeat the right which an intending purchaser or lender proposes to acquire. This register was instituted on 1st January 1869 by the Land Registers (Scotland) Act, 1868, superseding the previous system, under which there was a General Register of Abbreviates of Adjudications and a General Register of Inhibitions and Interdictions for the whole of Scotland kept separately at Edinburgh, and also a series of local Particular Registers of Inhibitions and Interdictions for the various counties (see the Statutes 1581, c. 119; 1597, cc. 268 and 269; 1600, c. 13; 1661, c. 31; 1672, c. 16, s. 32; 1672, c. 19; 1693, c. 14; and A. S., 10th July 1811).

The Register of Interruptions of Prescriptions (1696, c. 19) is now merged in the General Register of Sasines (The Land Registers Act, 1868, s. 15).

The Register of Entails was established by the Act 1685, c. 22.

A further description of these registers and of the writs which enter them is given in the article on SEARCHES and in the articles devoted to INHIBITION; ADJUDICATION; etc.

Public registers are also kept in various other public offices in the General Register House, such as the Register of Hornings, the Great Seal

Register, and many others; some registers are also kept at the seats of the local Sheriff Courts. (See article on RECORDS.)

[*General Authorities.*—Ross, *Lectures*, ii. 201–214; Duff, *Feudal Conveyancing*, pp. 119–132; Menzies, *Lectures*, pp. 580–597; Bell, *Lectures*, pp. 662–678; The Report of the Commissioners on Public Records, 1800–19; The Second Report of the Commissioners of 1815 on the Courts of Justice in Scotland, pp. 1 *et seq.*; The Third Report of the Law Commissioners, 1838; Report of the Committee on Land Registration, 1898; Millar and Bryce, *Handbook of Records.*]

TABLE OF THE PARTICULAR REGISTERS OF SASINES, ETC., in existence at the passing of the Land Registers (Scotland) Act, 1868, showing the dates at which they respectively terminated.

	SHIRE OR DISTRICT.	DATE OF TERMINATION.
1.	Edinburghshire and Constabularies of Haddington, Linlithgow, and Bathgate	6 February 1869.
2.	Aberdeenshire and Kincardineshire	Do.
3.	Inverness-shire, Ross-shire, Sutherlandshire, and Cromartyshire	Do.
4.	Orkney	Do.
5.	Shetland	Do.
6.	Banffshire	27 February 1869.
7.	Caithness-shire	Do.
8.	Elginshire, Forres, and Nairnshire	Do.
9.	Forfarshire	Do.
10.	Lanarkshire (exc. Regality of Glasgow)	17 March 1869.
11.	Berwickshire and Bailiary of Lauderdale	Do.
12.	Ayrshire and Bailiaries of Kyle, Carrick, and Cunninghame	30 September 1869.
13.	Dumfriesshire and Stewartries of Kirkcudbright and Annandale	Do.
14.	Roxburghshire, Selkirkshire, and Peeblesshire	Do.
15.	Wigtownshire	Do.
16.	Argyllshire, Dumbartonshire, Buteshire, Arran, and Tarbert	12 January 1871.
17.	Fifeshire	Do.
18.	Perthshire (exc. Stewartry of Menteith)	Do.
19.	Stirlingshire, Clackmannanshire, and Stewartry of Menteith	Do.
20.	Renfrewshire and Regality of Glasgow	30 March 1871.
21.	Kinross-shire	31 December 1871.

Registration of Births, Deaths, and Marriages.—The registration of births, deaths, and marriages in Scotland is now regulated by "The Registration (Scotland) Acts, 1854 to 1860," of which 17 & 18 Vict. c. 80 is the leading Act, the amending statutes being 18 Vict. c. 29, and 23 & 24 Vict. c. 85.

Prior to the year 1854 there was no legislative enactment dealing with registration, and the only record of births, deaths, and marriages was in the parish registers. These were introduced in the year 1551 by a provincial council of the clergy held in Edinburgh, and various Acts of Assembly dealing with them were passed at intervals between the years 1574 and 1816. The Act of the latter year recommended a system similar to that now embodied in the Registration Acts, but without uniform improvement resulting; and although the parish registers are competent evidence of the facts contained in them, the Court will pay little regard to them unless they are proved to have been regularly kept. For many reasons the parish registers are incomplete. In most cases baptisms only, and not births, were entered—even baptisms being ignored if administered by the dissenting clergy. There was no record of marriages other than those celebrated *in facie ecclesiæ* after proclamation of banns—in fact, in most cases it is the proclamation of banns which is registered, no record

existing of the actual celebration of the marriage. The register of deaths contained none but the names of persons interred in the parish burial-ground, and in some districts no record whatever was kept of either deaths or burials (Dickson on *Evidence*, ss. 1168 *et seq.*).

The Registration Acts put the matter on a very different footing, and their leading provisions may be conveniently considered under the following heads :—

I. Authorities and Districts.
II. Administrative and Miscellaneous Provisions.
III. Births—
  (1) *Legitimate.*
  (2) *Illegitimate.*
IV. Deaths.
V. Marriages—
  (1) *Regular.*
  (2) *Irregular.*

I. Authorities and Districts.

Registrar-General.—The Depute Clerk-Register is appointed Registrar-General of Scotland, with a suitable office in the General Register House in Edinburgh, and the necessary staff of clerks, officers, and servants (1854 Act, ss. 2–4; 42 & 43 Vict. c. 44, s. 7). He is empowered to frame from time to time, with the approval of the Secretary for Scotland, regulations for the Registry Office, and to arrange the duties of Parish and Assistant Registrars and other officials (1854 Act, s. 6; 48 & 49 Vict. c. 61, s. 5); and also to alter the scale of authorised fees and the forms of the schedules annexed to the Acts (1854 Act, s. 74). He must further prepare, once a year, an abstract of the number of births, deaths, and marriages, to be laid before Parliament (*ib.* s. 7).

The Acts further provide for the payment of expenses and salaries in the General Registry Office (1854 Act, s. 5); for the supply of suitable strong boxes, books, stationery, forms, etc. (*ib.* ss. 22, 23); for the accounting for all sums received by the Registrar-General under the provisions of the Acts (1854 Act, s. 59); and for the expense of the Registrar-General's correspondence relating to the Acts (*ib.* s. 67).

Parishes or Districts.—Scotland is divided into parishes or districts, each of which has its registrar. In the ordinary case each parish is a district, but the Sheriff may divide a parish into districts, or unite two or more parishes or portions of parishes into one district, each district so formed being a separate parish for registration purposes (Act 1854, ss. 8, 10; Act 1860, s. 5).

In construing the Acts, it is necessary to keep in view: (1) that by sec. 66 of the Act 1854, where any parish is situated wholly or partly in a burgh, the Town Council exercises the powers possessed, under the Registration Acts, in landward parishes by the Parochial Board; (2) that where a registration district consists of portions of parishes, the powers conferred on Parochial Boards and Town Councils are exercised by the Heritors (Act 1855, s. 4); and (3) that the powers given by the Acts to Parochial Boards are transferred by secs. 21 and 22 of "The Local Government (Scotland) Act, 1894," to Parish Councils. The words "Parochial Board" must, therefore, be construed as meaning Parish Council, Town Council, or Heritors, as the case may be.

District Examiners.—The Registrar-General is empowered to divide Scotland into districts, for each of which an examiner is appointed, who

must periodically carefully examine and compare the duplicate registers in his district, and authenticate and docquet them (Act 1855, s. 3). The examiners are five in number, their duties being defined by "Regulations," dated 1861, made by the Registrar-General.

Registrars.—(1) *Election.*—In a landward parish the registrar is elected by the Parish Council, and in a burghal parish by the Town Council; in a parish partly landward and partly burghal, the Parish Council would apparently appoint a registrar for the landward, and the Town Council for the burghal, part (1854 Act, ss. 8, 12, 66). But by sec. 5 of the Act 1860, the Sheriff is empowered to unite the landward part of the parish to the burghal, and to decide all questions as to assessment and the election of a registrar for the united district.

In cases of temporary vacancy through death or otherwise, the Sheriff, on the application of the Parish or Town Council, appoints an interim registrar, and intimates his appointment to the Registrar-General (Act 1854, s. 12). Within six days of the vacancy occurring, a time and place are appointed, either by the Sheriff or the chairman of the Council, for a meeting of the Parish Council to elect a successor (Act 1854, s. 9). In many small parishes the schoolmaster is the most suitable registrar, and provision is therefore made that in the event of the vacancy being caused by the death of a registrar who was also schoolmaster, the Sheriff—or, with his consent, the Parish Council or its chairman—may postpone the election for a period not exceeding four months, until the election of a successor to the schoolmaster (*ib.*). The Parish Council must intimate the election in writing to the Registrar-General and to the Sheriff (Act 1854, s. 12; Act 1860, s. 9).

In a burgh the election is made by the Town Council as nearly as may be in terms of the provisions made for elections by Parish Councils (Act 1854, s. 66).

(2) *Appointed ad vitam aut culpam.*—A registrar holds his appointment *ad vitam aut culpam.* In case of fault, the Parish or Town Council, or—in the event of their refusal or neglect—the Registrar-General may apply to the Sheriff for his removal (Act 1854, s. 15; Act 1855, s. 2).

(3) *Duties.*—A registrar must dwell in his district, and have his name displayed outside his house or place of business (Act 1854, s. 25). He must inform himself carefully of every birth and death within his parish or district, and must learn and register as soon as possible all the required particulars (Act 1854, s. 26). He may require parties to attend him, for the purpose of completing his register, at his place of abode or business; and if the parties fail to attend after a second intimation, he may apply to the Sheriff for a warrant compelling their attendance (Act 1854, s. 45).

A registrar may, with the approbation of the Parish Council, appoint and dismiss an assistant. The registrar must himself sign each page of the register, and initial each entry made by his assistant, unless unavoidably prevented, in which case the assistant's signature is sufficient (Act 1854, s. 14).

Registrars are under the control and superintendence of the Sheriff of the county (Act 1854, s. 21).

(4) *Remuneration and Assessment.*—A registrar is paid either by salary or by fees. The amount of the salary is fixed by the Parish Council, with the approval of the Registrar-General and Sheriff, and is paid out of an assessment levied for the purpose, and out of the fees recovered by the registrar, who must account for them to the Parish Council (Act 1854, s. 51).

The registrar must make out, half-yearly, an account of the number of births, deaths, and marriages registered in his district, and produce it to the

Parish Council. The council levies by assessment the sums required for the payment of the account so rendered, and for such further remuneration as may be necessary. If the registrar is paid by fees, he receives them according to the following scale:—For the first twenty entries of births, deaths, and marriages in each half-year, two shillings each, and one shilling for each subsequent entry; with such further sum as the Parish Council thinks fit (Act 1854, s. 50).

If the registrar is dissatisfied with his remuneration, he may apply to the Registrar-General, who may require the Parish Council to increase it (Act 1860, s. 18).

The assessment for registration purposes is levied in burghal parishes by the Town Council; in districts consisting of parts of parishes, by the heritors; in the landward parishes, by the Parish Council; and in parishes partly landward partly burghal, as the Sheriff may have determined. The assessment is levied along with, but must be kept separate from, that for the relief of the poor, and the sum required cannot be taken from the funds raised for poor relief (Act 1854, s. 50).

II. Administrative and Miscellaneous.

Duplicate Registers.—All registers are kept in duplicate, the contents of each page in the duplicates being the same, and each page being signed by the registrar. One of the duplicates is retained by the district registrar, and the other transmitted to the Registrar-General in each following year (Act 1855, s. 3).

If a duplicate register is lost, destroyed, or mutilated, or has become illegible in whole or in part, the fact must be immediately communicated to the Registrar-General, and the mutilated or illegible register transmitted to him. The Registrar-General must then present a petition to one of the Divisions of the Court of Session, setting forth the facts, and the Court may then order the register to be corrected or completed, or a new duplicate made, at the sight of the Registrar-General, the corrected or new duplicate having the same validity as the original (Act 1854, s. 55; *Dundas*, 1875, 3 R. 273; *Stair Agnew, Petr.*, 1890, 28 S. L. R. 164).

Indexes and Extracts.—Indexes of the registers are made and kept in the Register Offices, and every person is entitled to search them at all reasonable hours, subject to regulations by the Sheriff, and to obtain an extract of any entry under the hand of the registrar, on payment of these fees: For every general search, the sum of two shillings; and for every search for a particular register of birth, death, or marriage, the sum of one shilling; and for every extract of any entry, the sum of two shillings, and one penny stamp duty. Any registrar refusing or neglecting to make an extract for a month after being required to do so, is liable in a penalty of £10 (Act 1854, s. 56).

Indexes of the duplicate registers are kept, and may be searched between the hours of ten and four, at the General Registry Office, on the payment of twenty shillings for every general search, one shilling for every particular search, and two shillings for every extract of an entry, and one penny stamp duty. The Registrar-General, however, may permit searches to be made by, and extracts to be given gratis to, persons who are unable to pay the fees (Act 1854, s. 57).

Every extract of any entry, duly certified by the Registrar-General or parish or district registrar, is admissible as evidence without any further proof of the entry (Act 1854, s. 58). But the entries are not *probatio probata* of the facts which they record, and contradictory evidence is admissible (Dickson on *Evidence*, s. 1204).

Correcting Erroneous Entries.—If any error is discovered in any register, the person discovering it must forthwith inform the Sheriff, who is required to summon before him the person who made, and any person concerned in making or knowing of, the erroneous entry, and also any person interested in the effect of it, and to examine them upon oath. If the Sheriff is satisfied that an error has been committed, he directs a corrected entry to be made in a separate register book, called "The Register of Corrected Entries," an entry being also made on the margin of the original register, clearly referring to the "Register of Corrected Entries." These registers are kept in duplicate, and one of them is transmitted to the Registrar-General once a year, as in the case of the original duplicate registers (Act 1854, s. 63; Act 1855, s. 6). But any error may be corrected before an entry is signed, the correction being certified by the registrar's signature (Act 1854, s. 64); and district examiners are authorised to correct merely clerical errors discovered at the periodical examination of the duplicate registers (Act 1860, s. 19).

Any error in an old parochial register in an entry of a birth, etc., which shall have taken place after 31st December 1800 may be corrected, on the application of any interested person, on presenting a Sheriff's warrant to the Registrar-General (Act 1860, s. 3).

Register of Neglected Entries.—On producing a Sheriff's warrant and paying a fee of five shillings, any person may have recorded in "The Register of Neglected Entries" in the Registrar-General's office, any birth, death, or marriage which has taken place in Scotland between 31st December 1800 and 1st January 1855. If the event took place after 1819, a copy of the entry is transmitted to the registrar of the district in which the event occurred.

Penalties.—Any person knowingly and wilfully making a false entry in a register, or giving false information touching any of the particulars required to be registered, or giving a false certificate or falsifying any certificate, is liable to imprisonment for two years or penal servitude for seven years (Act 1854, ss. 60, 62; *Kinnison*, 1870, 1 Coup. 457; *Greig*, 1856, 2 Irv. 357; *Askew*, 1856, 2 Irv. 491). The same penalties are incurred by anyone wilfully destroying, obliterating, erasing, or injuring any entry in a register or any minute, notice, or certificate made or given in pursuance of the Acts (Act 1854, s. 62).

Any registrar refusing or omitting, without reasonable cause, to register any birth, death, or marriage, or to make any addition to or alteration upon a register, is liable in a penalty of £10 for each offence (Act 1854, s. 61).

All penalties may, unless otherwise directed, be recovered summarily upon the complaint of the procurator-fiscal to the Sheriff of the county within which the penalty is incurred, or within which the person complained against may be found. The warrant for imprisoning the offender until the penalty and expenses are paid must specify a period at the expiration of which he is to be discharged even if no payment has been made, and this shall in no case exceed two months. The Sheriff's decision is final, and not subject to review in any Court or by any process (Act 1854, s. 65).

The penalty imposed on parties failing to give the necessary notice is not exigible if *one* of the required parties has given the notice (Act 1854, s. 71). And no penalty is exacted if the Sheriff is satisfied that the failure to comply with the Acts has not been wilful, but occasioned by unavoidable accident, or by circumstances over which the offender had no control (Act 1854, s. 73).

Any notice required by the Acts may be given by post (Act 1854, s. 70).

III. Registration of Births.

(1) Legitimate.—(*a*) *Within Twenty-one Days.*—The parents or parent, or, in case of the death or inability of the parents, the person in charge of any child born, and the occupier of every house or tenement in which a birth takes place, must within twenty-one days of the birth, and under a penalty not exceeding twenty shillings, attend personally and give information to the registrar of the parish or district of the particulars required by Schedule (A) (*infra*), and sign the register (Act 1854, s. 27). The word "occupier" includes guardian, master, governor, keeper, steward, house surgeon, or superintendent of every gaol, prison or house of correction, workhouse, hospital, lunatic asylum, or public charitable institution. It must be noticed that no penalty for failure is exigible if *one* of the many parties has given the required notice (Act 1854, s. 71).

(*b*) *Within Three Months on Requisition of Registrar.*—In the event of failure to give information within three weeks, the registrar may either personally or by letter require the persons specified, or anyone else possessing the necessary knowledge, to attend and furnish the required particulars within three months of the birth, the penalty for failure not exceeding forty shillings (Act 1854, s. 27).

(*c*) *After Three Months with Sheriff's Authority.*—It is illegal for a registrar to register a birth more than three months after it has taken place, save by authority of the Sheriff. The parents or guardians may make a declaration before the Sheriff, who may then authorise the registrar to register the birth (Act 1854, s. 31). Every such entry must be signed by the district examiner. No register of births—except in the case of children born at sea (see *infra*)—is admissible in evidence to prove the birth of a child when it appears that more than three months have intervened between the day of birth and the day of registration, unless the entry is signed by the district examiner (Act 1854, s. 31; Act 1860, s. 11). For every such registration the registrar is entitled to a fee of two shillings, unless the delay has been caused by his fault (Act 1854, s. 31). Anyone knowingly registering, or causing to be registered, a birth after the expiration of three months otherwise than by authority of the Sheriff is liable in a fine of £5 (*ib.*).

(2) Illegitimate.—In the case of illegitimate children, the necessary notice must be given by the mother, whom failing by the persons specified in the case of legitimate births. The time-limits of twenty-one days and three months are the same (Act 1854, s. 27).

Registrars are forbidden to enter the name of any person as the father of an illegitimate child save at the joint request of the mother and father, who must both sign the register (Act 1854, s. 35). But if the paternity or legitimacy of a child is fixed by a decree of Court, the Clerk of Court must within ten days notify, in terms of Schedule F, the import of the decree to the registrar of the parish in which the birth was registered, whereupon the registrar adds to the register a note of the decree and its import (Act 1854, s. 35). If a child registered as illegitimate is legitimated per *subsequens matrimonium*, the registrar, upon production of an extract of the entry of the marriage in the Register of Marriages, notes the legitimation of the child on the margin of the register opposite to the entry of the birth (Act 1854, s. 36). But if the paternity of the illegitimate child has not already been registered as having been acknowledged or determined by decree, the registrar cannot note the legitimation save by warrant of the Sheriff, granted on the application of both parents and after due inquiry (Act 1854, s. 36).

Exposed Child.—Any person finding exposed a new-born child, or the dead body of a new-born child, must at once, under a penalty of £2, give notice to the district registrar, constable, or inspector of poor, who in turn, and under the same penalty, must give notice to the procurator-fiscal (Act 1854, s. 29).

If any doubt exists as to the sex or regarding the birth of a child, the registrar may require it to be produced, under a penalty of £2 (Act 1854, s. 28).

If the parish of the birth of a child is different from the parish of the domicile of its parents, the registrar of the birth parish must, within eight days of an entry in his register, transmit a copy of it to the registrar of the parish of domicile, if known to him, to be entered in the register of that parish (Act 1854, s. 26).

Birth at Sea.—Births at sea are recorded by the Registrar-General of Shipping and Seamen, Custom House, London, who issues certified copies of the events. In the case of Scottish subjects a return is made by him every month to the Registrar-General for Scotland, who enters the particulars in the "Marine Register" (57 & 58 Vict. c. 60, s. 254). Births on board Her Majesty's ships are, however, intimated directly to the Registrar-General (37 & 38 Vict. c. 88, s. 37).

Foreign Births.—The birth abroad of a child of Scottish parents, if certified by the British Consul of the place, and intimated to the Registrar-General within twelve months, will be registered in a book called "The Foreign Register" (Act 1860, s. 10).

Baptism.—A certificate of the registration of the birth of a child must be produced to the minister or other person officiating at a baptism. Failing this, the minister or other person must immediately intimate to the registrar the baptism of the child, with all the information he has concerning its birth and parentage (Act 1854, s. 34).

If a child whose birth only has been registered has a name given to it in baptism, or if the name by which a child has been registered is altered in baptism within six months of the registration of the birth, the parent or guardian or other person concerned in giving the name may procure from the minister a certificate of baptism in the form of Schedule D, and deliver it to the registrar who registered the birth. The registrar, on payment of a fee of one shilling, inserts the name in the Register of Corrected Entries, to which a reference is made on the margin of the original birth entry, and he then certifies on the certificate the fact that the name has been duly registered (Act 1854, s. 32; Act 1860, ss. 12, 13). If the name has been given or altered in baptism beyond six months after the registration of the child's birth, then the Sheriff's authority must be obtained for procuring the certificate of baptism and delivering it to the registrar (Act 1854, s. 32).

If a name has been given or altered after the registration of the birth of the child, but without baptism, the same course is followed, save that the certificate is in the form of Schedule E, and is signed by the parents or guardians instead of the minister (Acts 1854, s. 33; 1860, s. 12).

The registrar must give or send to the informant, within two days of the date of registration, an extract of every entry of a birth without payment of any fee (Act 1854, s. 37).

IV. Registration of Deaths.

(*a*) *Within Eight Days.*—The nearest relatives present at the death of any person, and the occupier of the house or tenement in which the death took place, or, if the deceased was the occupier, his nearest relatives and the inmates of the house or tenement, must within eight days after the death,

under a penalty of £1, attend personally and inform the registrar of the particulars required by Schedule B (*infra*) (Act 1854, s. 38).

(*b*) *Within Fourteen Days.*—In the event of failure or neglect to give information within eight days, the persons named above, and any others with a knowledge of the particulars, must, upon being required, attend within fourteen days, give the necessary information, and sign the register (Act 1854, s. 38).

Death not in a House.—If a person dies elsewhere than in a house or tenement, the occupier or inmates of the house or tenement in which the deceased was living must within twenty-four hours give notice of the death to the registrar of the parish in which the deceased resided, under a penalty of £2 (Act 1854, s. 39). If his residence is unknown, any person present at the death or finding the body, and any parish or public officer, or any person to whom the body is brought, must give notice to the registrar of the parish in which the body is found, and he must immediately communicate the notice to the procurator-fiscal. If the procurator-fiscal receives the notice from any other person than the registrar, he must within three days communicate the necessary particulars to the registrar (Act 1854, s. 39).

If a precognition is held touching the death of any person, the procurator-fiscal must inform the registrar of the result of it, and the particulars are entered in the register (Act 1854, s. 40).

The doctor in attendance during the last illness and until the death of any person must, under a penalty of £2, transmit to the registrar within seven days a certificate in the form of Schedule G (*infra*) (Act 1854, s. 41). If this is not done, the registrar must send to the doctor a form of the certificate, and require him to return it filled up within three days (Act 1860, s. 14).

Burial.—The registrar, immediately upon registering a death, or as soon as he is required to do so, must, without a fee, deliver to the informant, for the use of the undertaker, a certificate in the form of Schedule I that the death has been duly registered. This certificate must, under a penalty of £10, be delivered by the undertaker to the person in charge of the place of interment. If a dead body is buried without the certificate being produced, the person in charge of the burial-place must within three days, under a penalty of £1, give notice of the fact to the registrar of the parish in which the death happened, in the form of Schedule H (Act 1854, s. 44).

Death at Sea.—The provisions for the registration of a death at sea are the same as those regulating the registration of a birth at sea (*q.v.*). In cases of shipwreck the captain or any surviving officer or other person who has escaped must, on being required by the Registrar-General, comply to the best of his knowledge with the provisions of the Act so far as the case admits (1854 Act, s. 43).

Death Abroad.—The death of a Scottish subject in a foreign country will be entered in "The Foreign Register" if intimated to the Registrar-General within twelve months of its date, with a certificate from the British Consul of the district (Act 1860, s. 10).

V. Registration of Marriages.

(1) Regular Marriages.—The Marriage Notice (Scotland) Act, 1878, provides that a certificate of the publication of banns, and a registrar's certificate that due notice of intention to marry has been given under the Act, shall be of equal authority in authorising a minister, clergyman, or priest in Scotland to celebrate a regular marriage (41 & 42 Vict. c. 43, s. 11). See Banns and Registrar's Certificate. In all cases of regular marriages,

after the banns have been proclaimed or a registrar's certificate of notice obtained, the parties must procure from the registrar of the parish or district in which the marriage is to be solemnised a copy of Schedule C (*infra*). The schedule must be produced to the minister—or to the person solemnising any marriage according to the rites and forms observed by Jews and Quakers—either already filled up or to be filled up in the presence of the minister or other person officiating, and then signed by the contracting parties and the minister, and by not less than two witnesses, male or female, present at the ceremony. The contracting parties must within three days deliver or send the schedule to the registrar of the parish in which the marriage was solemnised, under a penalty on the husband, or failing him on the wife, of £10. The particulars in the schedule are entered by the registrar in the duplicate registers, and the schedules themselves are transmitted with the duplicate registers to the Registrar-General, for preservation in the General Registry Office (Act 1854, ss. 46, 52; Act 1860, s. 15).

Persons intending to contract a marriage may require the registrar of the parish to attend at the ceremony at any place within the parish. Upon forty-eight hours' written notice he must attend with the register book and make the proper entry, on payment of a fee of £1, with sixpence for every mile he is obliged to travel from his place of abode (Act 1854, s. 47).

(2) *Irregular Marriages.*—Persons convicted before a Justice of the Peace or Magistrate of having irregularly contracted a marriage, must register the marriage in the parish of conviction, and any marriage established by a decree of Court may be registered by either of the parties in the parish of their domicile or of their usual residence. Production to the registrar of an extract of the conviction or decree of declarator is sufficient warrant for the registration of such marriages, on payment of a fee of twenty shillings (Act 1854, s. 48). Proof must be submitted to the Justice or Magistrate that one of the parties had at the date of marriage his or her usual residence in Scotland, or had resided there for twenty-one days prior to it, and a registrar may not enter the marriage unless the conviction bears that proof to the above effect was adduced (19 & 20 Vict. c. 96, s. 3). In the case of either a conviction or a decree of declarator, the Clerk of Court must, under a penalty of £2, give notice in the form of Schedule K[1] to the registrar of the parish of conviction, or to the registrar of the parish of domicile or usual residence of the parties (Act 1854, s. 49).

The Act 19 & 20 Vict. c. 96, s. 2, provides another mode of establishing and recording an irregular marriage. Within three months of contracting the marriage the parties may make a joint application to the Sheriff for authority to register it, and the Sheriff, on being satisfied of the marriage, and that one of the parties had at the time his or her usual residence in Scotland, or had lived there for twenty-one days prior to it, grants warrant to the registrar to record the marriage, on payment of a fee of 5s. for an extract, which the registrar is "required and empowered to give."

Foreign Marriages.—If the marriage of a Scottish subject which has taken place in a foreign country is intimated to the Registrar-General within twelve months, duly certified by the British Consul of the country or district, it will be entered in "The Foreign Register" (Act 1860, s. 10).

The registers of marriages solemnised out of the United Kingdom among officers and soldiers of Her Majesty's land forces are to be sent to the Registrar-General, who shall cause the same to be preserved in a book called "The Army Register Book" (42 Vict. c. 8, s. 2).

The schedules annexed to the Act 1854 have, with one exception, been altered by the Registrar-General in terms of sec. 74 of the Act. The following are the forms now in use:—

SCHEDULE (A).

1895. BIRTHS in the Parish (or District) of in the County (or Burgh) of Edinburgh.

(1.) No.	(2.) Name and Surname.	(3.) When and Where Born.	(4.) Sex.	(5.) Name, Surname, & Rank or Profession of Father. Name, and Maiden Surname of Mother. Date and Place of Marriage.	(6.) Signature and Qualification of Informant, and Residence, if out of the House in which the Birth occurred.	(7.) When and Where Registered, and Signature of Registrar.
1786	John Thompson.	1895, March Twentieth, 6h. 10m. a.m. — 90 Broad Street, Edinburgh.	M.	James Thompson, Grocer. — Eliza Thompson, M. S. Bell. — 1892, June 14th, Edinburgh.	James Thompson, Father. (Present.)	1895, March 28th. At Edinburgh. — John Smith, Registrar.

SCHEDULE (B).

1890. DEATHS in the Parish (or District) of in the County (or Burgh) of Edinburgh.

(1.) No.	(2.) Name and Surname. Rank or Profession, and whether Single, Married, or Widowed.	(3.) When and Where Died.	(4.) Sex.	(5.) Age.	(6.) Name, Surname, and Rank or Profession of Father. Name, and Maiden Surname of Mother.	(7.) Cause of Death, Duration of Disease, and Medical Attendant by whom certified.	(8.) Signature and Qualification of Informant, and Residence, if out of the House in which the Death occurred.	(9.) When and Where Registered, and Signature of Registrar.
202	Robert Smith. — Tobacconist. — Married to Mary Jones.	1890, June First, 5h. p.m. — 80 North Street, Edinburgh.	M.	34	Charles Smith, Father. — Jane Smith, M. S. Black. (Deceased.)	Diphtheria—8 days. — As certified by John A. Scott, M.D	Charles Smith, Father. (Present.)	1890, June 4th. At Edinburgh. — John Smith, Registrar.

SCHEDULE (C).

1891. MARRIAGES in the Parish (or District) of in the County (or Burgh) of Edinburgh.

(1.) No.	(1.) When, Where, and How Married.	(2.) Signatures of Parties. Rank or Profession, Whether Single or Widowed, and Relationship (if any).	(3.) Age.	(4.) Usual Residence.	(5.) Name, Surname, and Rank or Profession of Father. Name & Maiden Surname of Mother.	(6.) If a regular Marriage, Signatures of officiating Minister and Witnesses. If irregular, Date of Conviction, Decree of Declarator, or Sheriff's Warrant.	(7.) When and Where Registered, and Signature of Registrar.
617	1891, On the Fourteenth day of February, at 93 South Walk, Edinburgh. — After Banns, according to the Forms of the Established Church of Scotland.	John Scott. — Clerk. — (Single.)	28	3 Trinity Place, Leith.	Peter Scott, Plumber, and Julia Scott, M. S. Forsyth.	John Roberts, Minister of South Church, Edinburgh.	1891, February 16th. At Edinburgh.
		Jessie Croall. — Type-writer. — (Spinster.)	23	93 South Walk, Edinburgh.	William Croall, Butcher, and Sarah Croall, M. S. Paton. (Deceased.)	James Scott, Witness. Mary Croall, Witness.	John Smith, Registrar.

SCHEDULE (D).

No. of Parish (or District) . . . .
No. of Entry in B. Reg. . . . .
Year ... ...

I, , Minister of , do hereby certify that on the day of , 18 , I Baptized by the Name of , a male Child, produced to me by as the child of and , and declared to have been born at in the of in the of on the day of 18 .

Witness my hand, this day of 18 ,

....., *Minister.*

SCHEDULE (E).

No. of Parish (or District) . . . .
No. of Entry in B. Reg. . . . .
Year ... ...

I, , do hereby certify that the male Child named was born at in the of in the of , on the day of 18 ; that and are the Parents of the said Child, and do not recognise the Sacrament of Baptism, and that the Name was given to the said Child on the day of 18 .

Witness my hand, this day of 18 .

.....

[*To be signed by Parent or Guardian of Child.*]

SCHEDULE (F).

No. of Parish (or District) . . . .
No. of Entry in B. Reg. . . . .
Year ... ...

To the Registrar of the of in the of .

Take Notice, that the upon the day of 18 , pronounced Decree in an Action before the said Court at the instance of against relating to the paternity of a male Child, named , born at in the of in the of on the day of 18 , finding that the said Child was the illegitimate Child of the said .

Witness my hand, this day of 18 ,

[*To be signed by the Clerk of Court.*] .....

SCHEDULE (G).

No. of Parish (or District) . . . .
No. of Entry in D. Reg. . . . .
Year ... ...

To the Registrar of the of in the of .

I hereby certify that I attended , who died on the day of 18 , at , that I last saw the deceased on the day of 18 , and that the Cause of Death and Duration of Disease were as undernoted :—

	Cause of Death.	Duration of Disease.		
		Years.	Months.	Days.
Primary Disease ... ... (*a*)				
Secondary Disease (if any) (*b*)				
... (*c*)				
... (*d*)				

Witness my hand, this day of 18 ,

Signature.....
Professional Title.....
Residence.....

SCHEDULE (H).

No. of Parish (or District) . . . .
No. of Entry in B. Reg. . . . .
Year ... ...

To the Registrar of the of in the of .

Take Notice, that upon the day of 18 , the Body of of was buried in the .

Witness my hand, this day of 18 ,

.....

[*To be signed by the Person having charge of the Place of Interment.*]

SCHEDULE (I).

No. of Parish (or District) . . . .
No. of Entry in D. Reg. . . . .
Year ... ...

I, , Registrar of Births, Deaths, and Marriages in the Parish (or District) of in the of , do hereby certify that the Death of of was duly Registered by me on the day of 18 .

Witness my hand, this day of 18 ,

....., *Registrar.*

[*This Certificate must be presented by the Undertaker or other person having charge of the Funeral to the Keeper of the Burial-ground, previous to the interment, under a penalty of* £10 *in case of failure.*]

SCHEDULE (K[1]).

To the Registrar of the* of in the of .

Take Notice that, after Proof had been adduced in terms of the Act 19 & 20 Vict. c. 96, s. 3, , a† for the‡ of convicted within the* of , of of having irregularly contracted a Marriage with of upon the day of 18 .

Witness my hand, this day of 18 ,

.....

* Parish or District.
† Justice of Peace or Magistrate.
‡ County or Burgh.

[*To be signed by the Clerk of Court.*]

SCHEDULE (K[2]).

To the Registrar of the of in the of .

Take Notice that the Court of Session upon the day of 18 , pronounced Decree in an Action of Declarator of Marriage before the said Court, at the instance of against , finding that on the day of 18 , the said and had intermarried.

Witness my hand, this day of 18 ,

.....

[*To be signed by the Clerk of Court.*]

[Dickson on *Evidence*, ss. 1168–1204, 1305, 1306; Fraser on *Husband and Wife*, i. 477, ii. 1575; Walton, *Husband and Wife*, 299, 451; Graham's *Poor Law and Parish Council Acts*; Seton's *Analysis of the Registration Acts.*]

See MARRIAGE; BANNS AND REGISTRAR'S CERTIFICATE.

Registration of Voters.—Prior to the passing of the Reform Act, 1884 (48 & 49 Vict. c. 3), the registration of parliamentary voters was regulated in burghs by the Burgh Registration Act, 1856 (19 & 20 Vict. c. 58), as amended by sec. 20 of the Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. c. 48), and in counties by the County Voters Registration (Scotland) Act, 1861 (24 & 25 Vict. c. 83), as

amended by sec. 21 of the Representation of the People (Scotland) Act, 1868. But by sec. 8 (6) of the Reform Act, 1884, it was enacted that "all enactments of the Registration Acts which relate to the registration of persons entitled to vote in burghs, including the provisions relating to dates, shall, with the necessary variations, and with the necessary alterations of notices and other forms, extend and apply to counties as well as to burghs; and the enactments of the said Acts which relate to the registration of persons entitled to vote in counties shall, so far as inconsistent with the enactments so applied, be repealed: Provided that in counties the valuation rolls, registers, and lists shall continue to be arranged in parishes as heretofore."

The Valuation Roll,

which is annually made up under the provisions of the Lands Valuation Acts in the form provided for by sec. 3 (3) of the Registration Amendment (Scotland) Act, 1885 (48 & 49 Vict. c. 16), is the basis of the register of voters. The valuation roll contains entries relating to all lands and heritages liable to be rated, and by the Registration Amendment (Scotland) Act, 1885, s. 6, the assessor who prepares the valuation roll is directed to specify therein "each dwelling-house within the meaning of the Representation of the People Act, 1884," that is to say, "any house or part of a house occupied as a separate dwelling" (s. 7 (4)). The assessor who is charged with the duty of making up the valuation roll, or one of such assessors specially appointed where there are more than one, is charged also with the duty of preparing the register of voters.

Assessor's First List.

By sec. 2 of the Burgh Registration Act, 1856, amended as before mentioned, he is directed, on or before the 15th day of September in each year, to make out, in the form provided by the schedule annexed to the Act, a list of all persons entitled to vote, arranged in wards or parishes and polling districts, and publish the same at the town hall, parish church, or other conspicuous place. The same section provides that a copy of such list shall be open to perusal at an advertised place by any person, without payment of any fee, at any time between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of each day except Sunday, from the 16th to the 21st days of September in each year.

Ordinary Claim.

By sec. 3 of the Burgh Registration Act, 1856, as amended, it is provided that every person whose name shall have been omitted in any such list of voters and who shall claim as having been entitled on the last day of July then next preceding to have his name inserted therein, and every person desirous of being registered for a different qualification than that for which his name appears in such list, shall on or before the 21st day of September in such year give a notice according to the form in the schedule annexed to the Act, and the assessor is directed to include the names of all persons so claiming in a list in the form prescribed. The claim must accurately state the qualification (*Falconer*, 1891, 19 R. 291). A claimant founding on successive occupancy of different premises must specify in the claim all the premises occupied within the statutory period (*Hill*, 1868, 7 M. 283; *Wilson*, 1878, 6 R. 21). A claimant may lodge an alternative claim, and it will be sufficient if he establish either qualification (*Wilson*, 1873, 1 R. 12). The onus lies upon an ordinary claimant to establish his claim.

Lodger Claim.

In the case of lodgers, no provision is made for their names appearing in the valuation roll, and it was provided by sec. 4 of the Representation of the People (Scotland) Act, 1868, which enacted the lodger franchise in burghs, since extended to counties by the Reform Act, 1884, that such lodgers must claim each year to be registered. By sec. 19 (3) of the 1868 Act it is provided that the claim of every person desiring to be registered in respect of the occupation of lodgings should be in the form set forth in the schedule annexed to that Act, and should have annexed thereto a declaration in the form and be certified in the manner mentioned in said schedule, and every such claim must be delivered to the assessor after the last day of July and on or before the 21st day of September in each year, and the assessor is directed to prepare a list of such claims in the form prescribed. The statutory form of claim and other requirements must be rigidly adhered to (*Meech*, 1892, 30 S. L. R. 64). The Registration Act, 1885, provides (s. 14), in the case of a person claiming to vote as a lodger, that the declaration annexed to his notice of claim shall, for the purposes of revision, be *primâ facie* evidence of his qualification. A lodger claim, accordingly, falls to be admitted unless such *primâ facie* evidence be rebutted by competent evidence (*Dalgleish*, 1894, 22 R. 198). If, however, the claimant be cited by an objector and fails to appear, and no satisfactory excuse for his absence is given, it has been held that the claim falls to be rejected (*Stirling*, 1895, 23 R. 120; *Andrews*, 1897, 25 R. 95).

Objections.

Objections are twofold: (*a*) objections to persons on the assessor's first list, and (*b*) objections to persons claiming to be registered. The former are regulated by sec. 4 of the Burgh Registration Act, 1856, which provides that every person whose name shall have been inserted in any list of voters for the particular constituency may object to any other person as not having been entitled to have his name inserted in the list of voters for such constituency, and every person so objecting must on or before 21st November give notice of such objection to the assessor and to the person objected to. The forms for such notices are given in the schedule annexed to the Act. Such notices are sufficiently given to the assessor if delivered to him or left or sent to him by post, postage paid, at his place of abode or at his place for transacting his official business, and to any other person if sent by post, postage paid, addressed with a sufficient direction to the person to whom the same ought to be given at his usual place of abode (s. 9). When these notices are sent by post they must be delivered within the statutory period (*Neilson*, 1891, 19 R. 301). The onus in this class of objections is upon the objector. Objections to persons claiming to be registered are regulated by sec. 22 of the same Act, which makes it competent for any person whose name shall have been included in any list of voters for the particular constituency to oppose the claim of any person to have his name inserted in the list of voters for such constituency; provided he shall, in the Court to be holden for the revision of the list, and before the hearing of the claim, give notice in writing to the Sheriff of his intention to oppose said claim. No previous or other notice is requisite.

Mandates.

By sec. 36 of the Burgh Registration Act, 1856, it is provided that any claim, objection, notice of appeal, or other writ may be signed by any

person as agent or mandatory for the party thereto, and any mandate bearing to be signed by such party shall be *primâ facie* a sufficient mandate, and that every such mandate shall have all the privileges attaching to any judicial mandate. A written mandate is not indispensable to prove authority which may be instructed by other proof (*Rutherford*, 1880, 8 R. 6), and the mandate may be in general terms (*Dinnell*, 1868, 7 M. 289), but mandate will not be presumed from the fact that the signatory was the authorised and recognised agent of a political party (*Burns*, 1891, 19 R. 287).

Sheriff's Registration Courts.

The assessor is directed by sec. 5 of the Burgh Registration Act, 1856, to publish the lists of claims and objections on or before the 25th day of September, and by sec. 19 provision is made for Sheriffs holding Courts for revising the lists. These Courts must be held between the 25th day of September and the 16th day of October. By sec. 37 it is provided that no written pleadings shall in any case be allowed in support of any claim, or objection, or title to be registered; and that it shall not be necessary for the Sheriff to make a note of any statement or plea submitted to him in the Registration Court. The decision of the Sheriff is final on questions of fact. For the mode of appeal on questions of law, see under Registration Appeal Court.

Amendment and Correction.

Besides the power given to the Sheriff of adjudicating upon claims and objections, he has a further power of revision in correcting errors. In the event of a claimant's name being omitted from the list of claimants, the Sheriff may add such claimant's name (s. 21); but such claim may be objected to. The Sheriff may also correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead (s. 23). It is also lawful to any Sheriff in his Registration Court, or to any Court of Appeal, if it shall appear to him or to such Court that there has been no wilful purpose to mislead or deceive, or that any misnomer or inaccurate or defective description of any person, place, or thing named or described in any schedule, or in any list or register of voters, or in any notice required by the Registration Acts, was not such as to mislead or deceive, to allow any verbal, clerical, or casual error in any such schedule, list, register, or notice to be corrected or supplied (s. 46). This power of amendment has received a very wide interpretation, and it is thought that any amendment which a Sheriff chose to make would be held to be competent which did not alter the character of the qualification (*Gray*, 1892, 20 R. 81; *Ross*, 1897, 25 R. 98).

Authentication of Register.

When the Sheriff has concluded his revision of the list of voters, his duty is forthwith, and at latest on the 16th day of October, to deliver the same as revised by him to the Town-Clerk in the case of a burgh, and to the Sheriff-Clerk in the case of a county, who cause the same to be printed, and authenticate them; and the lists so printed form the register of voters between the 31st day of October in the year of revision and the 1st day of November in the succeeding year.

UNIVERSITIES.

The special provisions for the registration of voters in the university constituencies need not be here set forth at length. They are contained in secs. 29 to 36 of the Representation of the People Act, 1868, and in sec. 2 (16 and 17) of the Universities Elections Amendment (Scotland) Act, 1881 (44 & 45 Vict. c. 40).

Registration Appeal Court. — The Court for hearing appeals from the judgments of Sheriffs in Registration Courts for counties and burghs, consists of three judges of the Court of Session named from time to time by Act of Sederunt of the said Court, one judge being named from each Division of the Inner House, and one from the Lords Ordinary in the Outer House. The junior Principal Clerk of Session is Clerk of the Court (Representation of the People (Scotland) Act, 1868, s. 23). Appeals to the said Court are regulated by sec. 22 of the said Act, which enacts as follows:—

"If any person whose name shall have been struck out of any register or list of voters by the Sheriff, or who shall claim or object before the Sheriff at any Court, shall consider the decision of the Sheriff on his case to be erroneous in point of law, he may, either himself, or by some person on his behalf, in open Court, require the Sheriff to state the facts of the case, and such question of law, and his decision thereon, in a special case; and the Sheriff shall prepare and sign and date such special case, and deliver the same in open Court to the sheriff-clerk or town-clerk, as the case may be; and such person, or some person on his behalf, may thereupon in open Court declare his intention to appeal against the said decision, and may, within ten days of the date of such special case, lay a certified copy thereof before the Court of Appeal hereinafter constituted, for their decision thereon; and the said Court shall, with all convenient speed, hear parties and give their decision on such special case, and shall specify exactly every alteration or correction, if any, to be made upon the register, in pursuance of such decision; and the register shall be, as soon as may be after the thirty-first day of October in each year, altered accordingly by or at the sight of the Sheriff: and if it shall appear to the Sheriff that his judgments respecting the qualifications of any two or more persons depend on the same question of law, he shall append to such special case the names of all such persons who have appealed against his judgment on their respective claims; and the decision of the said Court on such special case shall extend and apply to the qualifications of all such persons, in like manner as if a separate appeal had been taken in the case of each of them; and the said Court shall have power to award the costs of any appeal; and the decision of the said Court shall be final, and not subject to review by any Court or in any manner whatsoever: Provided always, that if the said Court shall be of opinion that the statement of the matter of the appeal in any special case is not sufficient to enable them to give judgment in law, it shall be lawful for the said Court to remit the said special case to the Sheriff by whom it shall have been signed, in order that the same may be more fully stated."

The Court of Appeal constituted as above mentioned is only for hearing appeals from the decisions of Sheriffs in regard to the registration of parliamentary and not municipal or other voters (*Wood*, 1897, 24 R. 382).

The provision of sec. 22 of the above Act for appending the names of those whose cases depend upon the same question of law, applies only to

claimants, a separate case being necessary in all other cases (*M'Gowan*, 1879, 7 R. 46; *Neilson*, 1891, 19 R. 301).

The Appeal Court will not interfere with findings in fact which ought to be stated as findings and not by reference to evidence, and the question of law should be specifically stated (*Miller*, 1863, 1 M. 306; *Pringle*, 1865, 3 M. 420; *Jardine*, 1865, 4 M. 138; *Anderson*, 1876, 4 R. 1; *Kellie*, 1897, 24 R. 379; *Hamilton*, 1897, 25 R. 94).

Registration appeals are directed by sec. 10 of the Court of Session Act, 1868 (31 & 32 Vict. c. 100), to be heard on Mondays during the sitting of the Court, but with power to the Court to continue the hearing on other days.

Regrating.—See FORESTALLING; ENGROSSER.

Rei interventus.—Prof. G. J. Bell, who first among our institutional writers elaborates this doctrine, thus briefly describes it (*Com.* i. p. 346): "*Rei interventus* is a doctrine qualifying the power to resile, and barring the exercise of it"; and similarly, in another place (*Prin.* s. 26), he associates it with *locus pœnitentiæ* ("a power of resiling from an incomplete engagement," s. 25), as raising a personal exception which excludes that plea. The basis for the operation of *rei interventus*—as of *locus pœnitentiæ*—is thus in his view, and in that of our law generally, the existence of some incomplete or informal obligation, which the intervention of certain proceedings or circumstances renders complete and binding. The character of these proceedings is thus defined by the same authority: "proceedings not unimportant on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract as if it were perfect, provided they are unequivocally referable to the agreement, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable" (*Prin. l.c.*; see *Com. l.c.*, for fuller statement, especially with regard to the element of knowledge). A comparatively recent judicial statement of the rule of *rei interventus* runs as follows: "Such acts can only receive effect as *rei interventus* as are important in their character, and are either known to the other party, or must necessarily be held to have been in the contemplation of the party when he entered into the agreement—actings which are in the proper pursuance of the agreement, and which the other party to the agreement would naturally expect should take place in regard to it" (per Ld. Shand in *Gardner*, 5 R. 638).

The sphere in which *rei interventus* operates is found principally in matters of heritable right. Thus the only mention of it in Erskine is in connection with the purchase of lands, the statement made being as follows: "If, after a verbal agreement about the purchase of lands, part of the price should be paid by the purchaser, the *interventus rei*, the actual payment of money, creates a valid obligation, and gives a beginning to the contract of sale, which gives no room for resiling" (*Inst.* iii. 11. 3). The case cited in support of this statement (*Lawrie*, 1697, Mor. 8425) shows that, before the application of the *rei interventus*, the agreement had to be proved by the proper evidence, viz., in that case, writ or oath of the party—a rule which continues to prevail. In sales of land, writ is now generally present in the shape of a preliminary missive or minute, preceding the formal conveyance; and that writ, though imperfect, constitutes a binding obligation if *rei interventus* follows on it (Bell, *Prin.* s. 889). Similarly, leases for more than a year require writing, or the oath of the

lessor, but such leases, under imperfect writing, may be made effectual for the specified period by acts or circumstances constituting *rei interventus*, such as serious expenditure on improvements, or other proceedings—beyond mere possession—distinctly referable to the imperfect contract and its provisions (Bell, *Prin.* ss. 1189–90, 1273; see *Gibson*, 3 R. 144). The case of *Duke of Hamilton*, 4 R. 328, 854, affd. 5 R. (H. L.) 69, was one where there was an actual tenancy for over two years, but where it was held that there was no *consensus in idem placitum* as to the lease, and that there was no contract under which *rei interventus* could operate. A recent decision (*Mowat*, 23 R. 270) illustrates the operation of this doctrine in the case of a unilateral deed, viz. an informal offer of heritage, and distinguishes, in relation to the question of *rei interventus*, between mere inquiries following on such an offer, and such acts as relinquishment of engagements, or renunciation of advantages, or the entering into other contracts on the faith of such offer. In *Smeaton*, the Court of Session judges deal at length with *rei interventus* in connection with a proposed settlement of questions (as to drainage and compensation) between a public body and a ratepayer, but the case was reversed in the House of Lords, and the matter of *rei interventus* was not dealt with (7 M. 206; 9 M. (H. L.) 24). With regard to questions of exclusive right in land, and limitation of such right, *e.g.* in questions of nuisances, it has been laid down that, wherever there is no previous contract or judicial proceeding, more than mere acquiescence is required to create the limitation, viz. some proper *rei interventus* in the shape of great cost incurred or knowledge and permission of something which manifestly cannot be undone (Bell, *Prin.* s. 946; Rankine, *Landownership*, 3rd ed., p. 348; *Bargaldie Coal Co.*, 3 Macq. 467, per Ld. Chan. Chelmsford; see *Kirkpatrick*, 8 R. 327, for observations on opinions in *Bargaddie Coal Co.*).

Rei interventus applies in matters also of moveable right. Thus, in *National Bank of Scotland Ltd.*, 19 R. 885, the giving of advances upon the faith of a letter of guarantee, which proved to be informal and invalid,—in respect of being neither holograph nor tested, under 1681, c. 5,—was held to be *rei interventus* to the effect of entitling the bank to sue the guarantor. Ld. M'Laren, in giving the leading judgment, thus states the law with regard to moveable and heritable rights: "But it is perfectly useless to plead the statute of 1681 against the demand of a creditor who has performed his part of the bargain and is seeking fulfilment of the counterpart, for there is nothing more certain in our law than that *rei interventus*, or part performance, will set up an informal obligation, or, what is the same thing, will bar the right to resile. Even in the case of a sale of heritable property, the objection of want of attestation can only be taken when the case is *in nudis finibus contractus*. . . ."

Professor Rankine, in his Erskine's *Principles* (17th ed., p. 380), founding upon Bell, *Prin.* s. 946, and Ld. Chancellor Chemsford's *dicta* in *Bargaddie Coal Co.*,—both above referred to,—distinguishes, generally, "two functions which it [*rei interventus*] performs in our law," according to "the emphasis of the requisite facts"—where, on the one hand, it is alone relied on to prove the obligation, and the law presumes an agreement or conventional permission as a fair ground of right, and where, on the other hand, it is pled only in bar of repudiation of an obligation informally instructed, in which latter case less important proceedings are said to be effectual as *rei interventus* to make the obligation complete and final.

See CONTRACT; HOMOLOGATION; LEASE; LOCUS PENITENTIÆ; OFFER and ACCEPTANCE; SALE (of Land).

Rejection in Transitu.—See Sale; Delivery of Moveables; Delivery Order.

Relationship; Relative.—See Degrees of Kinship; Agnate; Cognate; Heir; Succession: etc.

Release.—See Liberation.

Relevancy.—See Defences (vol. iv. p. 156); Actions, Ordinary Procedure in; Before Answer; Criminal Prosecution; Complaint; Indictment.

Relief.—See (1) Superiority; (2) Cautionary Obligations (vol. ii. p. 335); (3) Heir (vol. vi. p. 174).

Relocation.—See Lease.

Remembrancer.—See Queen's Remembrancer.

Re mercatoria.—See In re mercatoria.

Remissio injuriæ.—See Divorce.

Remit.—A remit is the transference of a cause, either in whole or in part, or for some specific purpose, from one Court or judge to another, or to a judicial nominee, to execute the purposes of the remit. A frequent example is a remit on the ground of contingency. See Contingency of a Process. In cases where the opinion or observation of skilled persons (such as accountants, engineers, etc.) is required, a remit to such a person, to report to the Court, may be made, either on the motion of a party or by the Court of its own motion. The subject remitted must be a matter of fact; a remit on a matter of pure law is not competent (*Mushet*, 1851, 13 D. 713, Ld. Fullerton, p. 715. See *Quin*, 1888, 15 R. 776; *Philp*, 1838, 16 S. 427). This does not apply, of course, to the case of a remit made to ascertain the law of another country (*Welsh*, 1844, 7 D. 213). Judicial remits, if made of consent, bind the parties to the conclusions of the report on the matter remitted, and no other proof will be allowed (Mackay, *Manual*, 275). But the report must be complete and conclusive (*Galbraith*, 1843, 5 D. 423). Where a remit has been made, the parties are liable, conjunctly and severally, to the reporter for the expenses of his report (Mackay, *Manual*, 278). The reporter is entitled to withhold his report, and to retain the vouchers and documents put into his hands, until his fee is paid (*Stewart and Curators*, 1828, 6 S. 591). [Dove Wilson, *Sheriff Court Practice*, 267, 67.]

Removal of Trustees by the Court.—The Court of Session has power, in the exercise of its *nobile officium*, to remove trustees from their office when it is satisfied that such a course is necessary for the safety of the trust estate. There is also a provision in the Trusts Act of 1891 (54 & 55 Vict. c. 44, s. 8) which enables the Court, and in some cases the Sheriff, to remove trustees who have become incapable of acting through physical or mental incapacity, or through absence from the United Kingdom. A petition to the Court invoking the exercise of its *nobile officium* must be presented to one of the Divisions of the Inner House (*Mitchell*, 1864, 2 M. 1378). An application under the 1891 Act, when it is made to the Court of Session, should be presented, like other applications under the Trusts Acts, to one of the Lords Ordinary (30 & 31 Vict. c. 97, s. 16; see *Campbell*, 1895, 3 S. L. T. 54; *Reid*, 1897, 5 S. L. T. 158), though, when the application is combined with one for the appointment of a judicial factor, it should perhaps be presented to the Junior Lord Ordinary (20 & 21 Vict. c. 56, s. 4). It does not appear, however, to be incompetent to present a petition at common law to the Inner House for removal on the ground of incapacity, but in dealing with such a petition the Court will be guided by the provisions of the Act of 1891, and will not act in virtue of its *nobile officium* (*Tod*, 1895, 23 R. 57).

The Court will not, in the exercise of its *nobile officium*, adopt the extreme measure of removing a trustee, unless there has been "something more than mere irregularity or illegality" in his conduct: there must have been "a decided malversation of office" (per Ld. Pres. Inglis in *Gilchrist*, 1883, 11 R. 22). When the circumstances are not such as to justify the removal of the trustee, the Court will frequently, if the administration is not satisfactory, take the course of sequestrating the estate and appointing a judicial factor (see JUDICIAL FACTOR ON TRUST ESTATES). This course is sometimes adopted where charges of maladministration are made which, if true, would justify the removal of the trustee, but where it is unnecessary to inquire into their truth (see *Henderson*, 1893, 20 R. 536; *Stewart*, 1892, 19 R. 1009; *Morris*, 1858, 20 D. 716).

The fact that trustees cannot act harmoniously together is not in itself a sufficient ground for their removal (*Hope*, 1884, 12 R. 27); but where the result is a deadlock in the administration of the trust, or where the administration has got out of gear, the Court may sequestrate the estate and appoint a judicial factor (*Henderson*, 1893, 20 R. 536; *Stewart*, 1892, 19 R. 1009; *Wyse*, 1881, 8 R. 983; *Forbes*, 1852, 14 D. 498). Where the trustees have acted in excess of their powers, or where they have failed to keep proper accounts, the Court will not upon such grounds alone, especially if there is no suggestion of *mala fides*, remove them from office (*Hay*, 1861, 23 D. 594; *Taylor*, 1876, 13 S. L. R. 268; *Gilchrist*, 1883, 11 R. 22; *Harris*, 1893, 21 R. 16; *Bannerman*, 1895, 3 S. L. T. 328); but where their irregular or illegal action seems to make it dangerous to leave the administration in their hands, the Court will sequestrate the estate and appoint a judicial factor (*Morris*, 1858, 20 D. 716). The bankruptcy of the trustee is not in itself a sufficient ground for his removal from his office (per Ld. Neaves in *Neilson*, 1865, 3 M. 561); but where there is also evidence of collusive dealing (*Soutar*, 1852, 15 D. 89), or where the trust estate has a claim against the bankrupt (*Whittle*, 1896, 23 R. 775), or where it is shown that he has wilfully failed to carry out the directions of the trustee, and is otherwise unfit to act as trustee (*White*, 1891, 28 S. L. R. 901; *Sawers*, 1881, 19 S. L. R. 258; *Jackson*, 1865, 4 M. 177; *Walker*, 1868, 6 M. 973), the Court may exercise its power to remove the trustee (but

see *Foggo*, 1893, 20 R. 273; *Thomson*, 1871, 8 S. L. R. 623). The mere fact that the trustee has an interest adverse to that of the trust is not in itself sufficient, especially if it appears that that interest was known to the trustee (per Ld. Neaves in *Neilson, ut supra*; see *Henderson*, 1893, 20 R. 536). But where the estate under a marriage-contract trust consisted chiefly of claims against another trust estate, and the majority of the marriage-contract trustees were also trustees in the other trust, and where there had been considerable remissness on the part of the marriage-contract trustees in calling the other trustees to account, the Court, in respect of this remissness, and of the conflict of duty arising from the position of those trustees who held office in both trusts, removed the marriage-contract trustees, and appointed a judicial factor (*Thomson*, 1865, 3 M. 336). Where the whole persons interested under the trust combine to ask for the removal of a trustee, considerable weight will be given to this fact by the Court, unless there should be any appearance of a conspiracy having been formed to compel the trustee to resign (see *White*, 1891, 28 S. L. R. 901; *M'Whirter*, 1889, 17 R. 68). Where it was shown that executors had entered into an agreement with a claimant upon the estate, binding themselves to use their powers as executors in her interest, and adversely to the interests of the estate, the Court removed them from office, and appointed a judicial factor (*Birnie*, 1891, 19 R. 334). Where a liferentrix and all the beneficiaries petitioned for the removal of a trustee, and it was shown that he had interfered "in a most unnecessary and unjustifiable manner" with the liferentrix in the enjoyment of the liferent, and had acted in such a way as to show his "incapacity to understand his duty, and unfitness to exercise the trust," the Court removed him, and appointed a judicial factor (*M'Whirter*, 1889, 17 R. 68). But where a petition was presented praying for the removal of trustees, all but one of whom were resident in England, on the ground that they were about to remove the trust estate from Scotland, to the prejudice of the petitioner, who further stated that she was about to bring an action of reduction of the trust deed, and the trustees disclaimed any intention of removing the estate from Scotland, or of acting in any way prejudicially to the petitioner's claim, the Court refused to remove them from their office (*Bowman*, 1891, 19 R. 205).

In *Smith* (1862, 24 D. 838), the Court declined, on the petition of a co-trustee who wished to assume new trustees, to remove a trustee who had permanently left the country. In *Walker* (1868, 6 M. 973), where two of four trustees, a majority of whom were a quorum, had become bankrupt and had left the country, and where their consent could not be obtained to enable a certain beneficial act of management to be performed, the Court, after certain intimation, removed the absent trustees from office. Cases such as the last two quoted would now fall to be dealt with under the provisions of the Trusts Act of 1891.

The Trusts Act of 1891 (54 & 55 Vict. c. 44, s. 8), which is retrospective in its application, provides that "in the event of any trustee being or becoming insane, or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six calendar months or upwards, such trustee, in the case of insanity or incapacity of acting by reason of physical or mental disability, shall, and in the case of continuous absence from the United Kingdom for a period of six calendar months or upwards, may, on application in manner hereinafter mentioned by any co-trustee or any beneficiary in the trust estate, be removed from office upon such evidence as shall satisfy the Court of the insanity, incapacity, or continuous absence of such trustee. Such application, in the

case of a *mortis causa* trust, may be made either to the Court of Session or to the Sheriff Court from which the original confirmation of the trustees as executors issued, and, in the case of a marriage-contract, may be made either to the Court of Session or to the Sheriff Court of the district in which the spouses are, or the survivor of them is, domiciled; and in all other cases shall be made to the Court of Session." It will be noted that in the case of insanity or incapacity, the statute makes it obligatory upon the Court, on the application of a co-trustee or beneficiary, to remove the trustee; while in the case of absence it is left to the discretion of the Court. It will be noted also that the power to remove a trustee, which is given to the Sheriff for the first time by this Act, can only be exercised by him in the cases of *mortis causa* and marriage-contract trusts, and when the application is made either on the ground of insanity or physical or mental disability, or on the ground of continuous absence from the United Kingdom for a period of six months or upwards. It has been held that, as in the case of an application for the appointment of a curator to an insane person, two medical certificates upon soul and conscience constitute sufficient evidence of insanity or incapacity by reason of physical or mental disability, to entitle the Court to remove a trustee under the Act (*Lees*, 1893, 1 S. L. T. 51). In another case, where the ground for removal was the absence of the trustee, the Court accepted as evidence affidavits made by a brother of the absent trustee and a co-trustee (*Dickson's Trustees*, 1894, 2 S. L. T. 59). In the case of absence from the United Kingdom, the Court will not remove the absent trustee until the six months required by the statute have expired (*Waugh*, 1892, 20 R. 57). In *Tod* (1895, 23 R. 36), a petition was presented to the Inner House praying for the removal of a trustee on the ground of old age and incapacity. The petition was presented at common law, and made no reference to the Act of 1891. The Court held that as it was a Court having jurisdiction to deal with the question of removal (1891 Act, s. 2), it was not entitled to deal with the application as an appeal to its discretion for the exercise of its *nobile officium*, but was bound to recognise the prescribed duty which was imposed upon any competent Court by the Act, and to remove the incapacitated trustee. See TRUSTEE.

Removing of Tenants.—See TENANT.

Remuneration.—See RECOMPENSE.

Rent.—Rent is the stipulated return in money, produce, or other moveables, due by a tenant for the use and possession of the subject of a lease. Rent is almost always payable in *money*, the amount being either a sum fixed in the lease, or a sum ascertainable in a stipulated way. But the tenant may be taken bound to deliver so much grain or other commodity (either alone or along with a money rent), in which case it is known as a *grain rent*, *kain rent*, or *produce rent*. As to *royalty* and lordship in the case of minerals, see MINES (vol. viii. 343). Rent is naturally periodical; payable for the possession of the subject from year to year, or term to term. But sometimes a part is paid by anticipation in GRASSUM (*q.v.*). The rule or doctrine of law is that rent is due "for the crop and possession of each year separately, where the possession is had solely or principally for the purpose of periodically rearing and disposing of produce, animate or inanimate";

and "where, as in the case of dwelling-houses, mills, factories, and the like, the rule does not apply in its entirety, it is followed as closely as possible" (Rankine, *Leases*, 318). In leases of farms, the year is regarded as ended with the reaping of the crop, by cutting or depasturing; and the term of Martinmas is generally taken as the end of the agricultural year. As rent is payable for each crop and year in two parts, the *legal terms* for payment are at Whitsunday after the crop has been sown, and at Martinmas after it has been ingathered (Rankine, *ib.*; Bell, *Prin.* s. 1230). Landlord and tenant may, however, agree on conventional terms for the payment of the rent—either anticipating the legal term by what is known as *fore* or *forehand rent*, or postponing the legal term by what is known as *back* or *backhand rent* (Bell, *Prin.* ss. 1204, 1230; Rankine, *Leases*, 319). As to the apportionment of rents, see APPORTIONMENT ACTS. The ordinary rules of extinction of obligations apply to payment of rent. The right to rent may be enforced by (1) summary diligence following on a clause of consent to registration for execution; (2) by an ordinary petitory action; (3) by an action of MAILLS AND DUTIES (*q.v.*); or (4) by procedure under a right of HYPOTHEC (*q.v.*), where that still subsists. See also LEASE; TENANT (*Removing*); IRRITANCIES, LEGAL AND CONVENTIONAL.

Repairs.—See LEASE; ENTAIL; AGRICULTURAL HOLDINGS ACTS; MELIORATIONS; LIFERENT AND FEE; SHIP; ETC.

Reparation.—Reparation is the pecuniary remedy given for loss which has been caused by a wrong. The word is also used sometimes to describe damages due on account of breach of contract; but here it is used in its primary and proper meaning, *reparatio injuriarum*.

I. GENERALLY.

The wrong which gives occasion for this remedy is in England called Tort, and in Scotland, Delict or Fault. Reparation, therefore, deals with a division of the law distinguished on the one side from breach of contract (see Common Law Procedure Act, 1852, Sched. B), and on the other from crime. It implies the breach of a private and not of a public duty, and that the private duty has been imposed by law and not created by consent of the parties. A crime, however, may involve, besides the breach of a public duty owed to the State, a breach of a private duty, as in the case of assault. As a crime the act meets with punishment at the hands of the State; as an offence against the individual assaulted, it gives rise to a claim of damages. The fact that the same act may give rise to both criminal and civil proceedings does not obscure the distinction between private and public duty. But it is sometimes difficult to say whether a wrong has arisen from breach of a private duty fixed by law, or one created by agreement—whether from delict or breach of contract. The difficulty occurs when the parties are in contractual relation with regard to the matter in connection with which the cause of action arises. The subject cannot be discussed here; but it may be pointed out that the duties may coexist, and that where such is the case the practical result is to render the duty imposed by law more strict than it otherwise would be. For instance, an owner of a carriage is under a common law duty to take care that it is not the occasion of injury to anyone liable to be affected by it. If a person passing on the street is injured through its breaking down by reason of some

defect, the owner will be liable if he is shown to have neglected to use ordinary and reasonable care to have the defect discovered or removed. But if a passenger is injured who was being carried in the vehicle for hire, the owner will be liable, not indeed absolutely, but unless he took all practicable precaution. He is answerable for the skill of tradesmen who have constructed the vehicle, and can hardly escape liability unless he can show that the defect was latent (*Smith*, 1895, 2 S. L. T. 536, and cases cited). Cases arising out of injury to a tenant's health from the insanitary condition of his house have raised the question whether the claim against his landlord was truly on contract or delict, but no direct decision has been given (*Maitland*, 1896, 34 S. L. R. 148; *Webster*, 1892, 19 R. 765; *M'Nee*, 1889, 26 S. L. R. 590). The claim, however, it has been held, should set forth fault on the part of the landlord (*Birrell*, 1866, 5 M. 20).

Liability for Breach of Contract and for Delict.—There are four points on which breach of contract and delict may be contrasted: (1) Since contract imposes an absolute duty, failure to perform it subjects the party in breach to liability. A pursuer only requires to show that defender's failure caused his loss. But where a claim is made on delict, it must be shown not only that the defender's act caused the damage, but that the act was wrongful (*Smith*, 1866, L. R. 2 C. P. 4, 10; *Moffat*, 1877, 5 R. 13; *Nichols*, 1876, L. R. 2 Ex. D. 1, 4; *River Weir Commissioners*, 1877, L. R. 2 App. Ca. 743, 750). (2) In delict, where loss is caused by the joint act of several individuals, there is liability *singuli in solidum*, while in contract liability may be only *pro rata*. In contract, therefore, all the parties to the obligation must be called as defenders (*Goldie*, 1868, 6 M. 541, 543), while in delict the plea of all parties not called is inapplicable (*Croskery*, 1890, 17 R. 697, 701; *Western Bank*, 1860, 22 D. 447, 476, 477). (3) There is no relief among joint-delinquents (*Western Bank*, 1862, 24 D. 859). But the application of this rule has been limited to cases involving fraud or other moral delinquency, and declared inapplicable to cases of mere negligence (*Palmer*, 1894, 21 R. (H. L.) 39, 46). Nor does the rule apply to a case where one is held liable for the fault of his servant, for that is not a case of joint-delinquency in a question between the master and servant. (4) In contract, the discharge of one co-obligant releases the others, unless a reservation is made. In delict, a discharge does not benefit any obligant except the one in whose favour it is made (*Western Bank*, 1862, 24 D. 859, 901, 912, 921; *Delaney*, 1893, 20 R. 506). But such a discharge will release the other delinquents if it can be shown to be a discharge of the subject-matter of the action (*Delaney, supra*; see *Campbell*, 1891, 19 R. 282).

Ground of Liability.—A pursuer in a claim for reparation must prove that the defender was in fault. Fault has hitherto been regarded as depending either on dole or malice, or on negligence. In other words, an act may be wrongful on account of the intention or motive of the doer, or apart from intention altogether. In the latter case it is absence of the attention which the law requires which makes the act wrongful. Malice is an act of commission, negligence of omission (*Brourage*, 1825, 4 B. & C. 247, 255; Austen's *Jurisprudence*, lect. 20). This view of the law has, however, been recently disturbed by certain *dicta* in a House of Lords case (*Allen*, [1898] App. Ca. 126). It was there said that malice was not a ground of liability: that an act, to render the doer liable, must have been otherwise wrongful, and that it did not become wrongful by the addition of malice. Cases in which malice requires to be proved were explained as exceptions applicable to privileged persons, who were entitled to commit injurious acts, if not done wilfully. The law of Scotland, however, as explained by the judges

in cases of slander, has not proceeded on this theory; and until the effect of *Allen's* case has been determined, the subject may continue to be treated under the heads of Malice and Negligence. This division exhausts the subject, for there is no other ground of liability (*Moffat*, 1877, 5 R. 13, 17; *Campbell*, 1864, 3 M. 12112; *Duncan*, 1894, 2 S. L. T. 230). There is no liability without, at least, negligence. In certain cases, however, such as interference with lateral or subjacent support of land and buildings, fault will be inferred from the fact of damage. As there is an absolute right to support, an operation which cannot be undertaken without removing it should not be undertaken at all, and is therefore wrongful (see *Chalmers*, 1876, 3 R. 461, 464; *Rylands*, 1864, 3 H. & C. 774; 1868, L. R. 3 H. L. 330; *Cleghorn*, 1856, 18 D. 664). But, subject to this explanation, however, the general rule remains, that a person does not act at his peril, but is entitled to the full use of his property without being liable for damage caused, unless he has been negligent (*Chalmers*, *Moffat*, *supra*; *Brown*, 1873, 16 Amer. Rep. 372).

Vicarious Liability.—Vicarious or secondary responsibility supplies an exception to the rule that there is no liability without fault. Whatever the origin of the liability (see Holmes, *Com. Law*, chap. i.), it is now well established that a master is liable for a wrong committed by his servant acting within the scope of his employment. The rule is expressed in the maxims, *Facit per alium facit per se* and *Respondeat superior*. See *infra*, *Liability of Master for Servant*.

Limits of Liability.—A fault or delict renders liable only its author (subject to the one exception above noted). Consequently a person is not liable for the act of a stranger, nor an employer, as a rule, for the act of a contractor, nor a landlord for a tenant. CULPA TENET SUOS AUCTORES, which see.

Remoteness of the loss suffered from the wrongful act—or, as it is called, Consequential Damage—is a limitation which depends on a different principle. A defender escapes liability not because the injury complained of has not been caused by his act, but because the injury has not been a result which was probable and to be anticipated. See DAMAGES, MEASURE OF.

Contributory negligence of the pursuer is a bar to his recovering damages, and thus operates a release from liability of a defender who has been in fault. See CONTRIBUTORY NEGLIGENCE.

Invitation and Licence.—Another limitation, founded on much the same principle as Remoteness of Damage, is expressed in the pleas of Trespass and Licence. A person is liable only to those who may reasonably be expected to be affected by his acts. One who is injured on the lands or premises of another must show that he came there under circumstances requiring the other to take precautions for his safety. A trespasser cannot discharge this burden. A person travelling in a railway train without a ticket has therefore no claim for damages in the event of an accident (*Thomson*, 1882, 9 R. 1101; *King*, 1833, 6 Sc. Jur. 42). But a trespasser does not lose all his rights, and may not be assaulted or wifully injured (*Bell*, 1870, 7 S. L. R. 267; *Bird*, 1828, 4 Bing. 628; *Barnes*, 1850, 9 C. B. 392, 420). The rule which absolves from liability to a trespasser also applies in the case of animals straying on to defender's lands (*Davie*, 1854, 16 D. 956).

But freedom from liability is not confined to cases of trespass. A person who comes on defender's premises, not by invitation, but for purposes of his own, in which the defender is not interested, is not entitled to have precautions taken for his safety. Miners holding a strike meeting in a

mine (*Brownlie*, 1854, 16 D. 998, 1001), and a person using an adjacent roof for drying clothes (*Ivay*, 1882, L. R. 9 Q. B. D. 80), were held not entitled to damages for injury caused by defects in the respective properties. An owner will not be liable to a mere licensee, unless the defect is of the nature of a trap (*Corby*, 1858, 4 C. B. N. S. 556; *Tolhausen*, 1888, 57 L. J. Q. B. D. 392, 394; *Tebbutt*, 1870, 40 L. J. Q. B. 78; see also *Caledonian Railway*, [1897] App. Ca. 216).

Public places appropriated to special uses, also, are understood to be used by the public subject to the risks of the business to which they are primarily devoted, and persons going there have to look after themselves. If the business is conducted in the usual way, the person engaging in it does not require to take special precautions in the interest of passers-by. This rule has been applied in the case of injury from battens piled on a canal bank (*Balfour*, 1857, 20 D. 238), shunting on a quay belonging to a railway company (*Smith*, 1888, 16 R. 57), and unloading a ship at a public quay (*Kelly*, 1890, 27 S. L. R. 707; but see *Messer*, 1897, 25 R. 7).

Where, however, the injured person has been invited to the defender's premises, he is entitled to precautions being taken for his safety. Invitation may be expressed or implied. It has been held to exist, and the defender to be liable, where a gasfitter went to repair a pipe on defender's premises, and was injured by falling through an unfenced opening (*Indermaur*, 1867, 1 C. P. 274, 2 C. P. 311; *Heaven*, 1883, L. R. 11 Q. B. D. 503); where a tenant's labourer in going from his house, which was on defender's lands, to the works leased by his master from the defender, fell into an unfenced quarry (*M'Feat*, 1879, 6 R. 1043); where persons visiting such a house on lawful business were injured by a defect in the way (*Gavin*, 1889, 16 R. 509); where servants of one railway company were injured by defects on the line of another company, over which the former had running powers (*Clark*, 1877, 5 R. 273), or to which pursuer required to go to shift points (*Waugh*, 1883, 20 S. L. R. 585). But a mason's labourer using without their permission a scaffold erected for joiners, was held not entitled to damages (*Nicolson*, 1888, 15 R. 854).

An occupier of a shop or warehouse is held to invite customers to his premises, and is bound to see to their sufficiency (*Chapman*, 1858, 27 L. J. Q. B. 315; *Brady*, 1887, 14 R. 783; *Dolan*, 1896, 23 R. 550); and a person who allows another to come to his house, although not in the occupier's interest, is bound to remove a danger which he knows the existence of (*Smillies*, 1886, 14 R. 150). Persons also giving or taking delivery under a contract are entitled to rely on due care being used by the other party. Accordingly, failure to use this care has involved defender in liability to a person trucking cattle (*Wyllie*, 1871, 9 M. 463), and to a person taking delivery of coals (*Holmes*, 1869, L. R. 4 Ex. 254, 6 Ex. 123; *Elliott*, 1885, L. R. 15 Q. B. D. 315, 320), at a railway station. Similarly, a person falling into a cellar while looking for a lavatory in a public-house was held entitled to damages (*Cairns*, 1879, 6 R. 1004). But a visitor in a hotel or public-house is not entitled to roam at his will through the premises, relying upon their being absolutely safe. He must on his part also use due care, especially if the place is dark (*Walker*, 1886, 2 T. L. R. 450). A guest in a private house, however, is said to be in a less favoured position. He may complain of wilful or reckless injury, but not of mere negligence (*Southcote*, 1856, 1 H. & N. 247). Each member of a domestic establishment is understood to take the risk of the negligence of the others in a question with their employer or host (*Woodhead*, 1877, 4 R. 469, 478, 505; *Wingate*, 1884, 12 R. 91, 101; *Abraham*, 1860, 5 H. & N. 143).

Title to Sue.—Only points special to reparation are here noticed; the general rules on this subject will be found under a separate article.

The rule as to an undischarged bankrupt not being entitled to sue without finding caution, or the trustee sisting himself, is relaxed in certain actions of damages. The Court may, for instance, allow him to sue an action for vindication of character (*Inglis*, 1884, 11 R. 418; *Scott*, 1885, 12 R. 1022). But it is a matter for the discretion of the Court; and delay in raising his action (*Collier*, 1884, 12 R. 47), or any other fact militating against its *bona fides* or success, will deprive the bankrupt of this privilege (*Scott*, 1886, 13 R. 1173). The privilege may be extended to actions other than those for slander, such as assault, or grossly illegal invasion of patrimonial right (*Thom*, 1888, 15 R. 780; *Buchanan*, 1880, 8 R. 220), but not to one for an ordinary poinding merely because it has been irregularly carried out (*Gray*, 1884, 21 S. L. R. 766). Any damages recovered go to the trustee in the sequestration, and not to the bankrupt (*Jackson*, 1875, 3 R. 130). It has been doubted, however, whether a trustee, without having the bankrupt associated with him, can sue for a claim so personal as that founded on slander or bodily injury (*Jackson*, *Scott*, 1885, 12 R. 1022).

A married woman, even apart from the provisions of the Married Women's Property Act, can sue for personal injury without the concurrence of her husband. It is so held where she sues in her own name for personal injury, whether of body or mind (*Auld*, 1874, 2 R. 191, 209), when her husband is abroad (*Gale*, 1857, 19 D. 665), or refuses to concur (*Finlay*, 1748, Mor. 6051; *Cullen*, 1833, 9 S. 31, 6 W. & S. 566), or having died before the raising of the action, his representatives refuse (*Smith*, 1850, 12 D. 1185; *Auld*, *supra*), or when he is bankrupt (*Horn*, 1872, 10 M. 295). In such cases a *curator ad litem* is not necessary (*Smith*, 1894, 2 S. L. T. 371).

An interest to sue must be set forth, which in this branch of the law means that the pursuer must show that his rights have been infringed. A wrongful interdict (*Jack*, 1875, 3 R. 35), or an unwarrantable eviction (*Macdonald*, 1883, 10 R. 1079; *Macdonald*, 1860, 22 D. 1075), will not sustain an action if there was no right to carry on the operations or to possess the subjects. Injury, also, which depended upon a contingent interest becoming real, was similarly treated (*Rae*, 1889, 15 R. 1033, 16 R. (H. L.) 31; *Ramsay*, 1860, 22 D. 1328). But a pursuer does not require to be actual owner of the subject damaged. A hirer (*Claridge*, 1892, 1 Q. B. 422) and a trustee (*Ross*, 1850, 13 D. 44) may sue for damage to property in their possession; and in one case a pursuer was held entitled to sue for damages by a third party to property (street sweepings) after the date of the purchase, but before the subject had come into existence (*Fisken*, 1850, 12 D. 757).

A claim of damages is personal, and does not pass with transference of the property which has been the occasion or the subject of the injury, to the transferee (*Burrell*, 1876, 4 R. 177, 180; *Simpson*, 1877, 5 R. (H. L.) 40). The purchaser of a ship (*Symington*, 1894, 21 R. 434), or of heritable estate (*Caledonian Rwy. Co.*, 1875, 2 R. 917), or of shares (*Gordon*, 1864, 2 M. 758; *Davidson*, 1860, 1 Paters. App. 930), has no action for injury to the subject before it belonged to him.

Plurality of Pursuers.—Persons aggrieved by the same act may sue the defender in one action, provided that there are separate conclusions for damages. The competency of the conclusions has been sustained where two persons were injured by a carriage accident (*Revey*, 1841, 3 D. 888), and were defamed by the same statement (*Mitchell*, 1894, 12 R. 367; *Harkes*,

1862, 24 D. 701). But a conclusion for a lump sum of damages will render an action incompetent, although the pursuers' claims are identical (*Gibsons*, 1866, 5 M. 113).

Corporation.—The consideration which determines the title to sue in this case is whether the injury has been done to the corporation or to its members (*Mayor of Manchester*, [1891] 1 Q. B. 94). A slander may appear to be directed only against individuals, as in a charge against bank directors, but the corporation may be injured thereby, and be entitled to sue (*North of Scotland Bank*, 1857, 19 D. 881; *Globe Sugar Co.*, 1866, 2 S. L. R. 9, 3 S. L. R. 33). But since a corporation has no feelings, a claim for *solatium* is not allowed, and injury to business, or business repute, must be set forth (*Society of Solicitors*, 1781, Mor. 13935; *Dumfries Fleshers*, 10 Dec. 1816, F. C.). Unincorporated bodies are allowed to sue through authorised office-bearers (*Renton Football Club*, 1891, 18 R. 670), or if small, by the members *nominatim* for themselves and as composing the body (*Kirk Session of North Berwick*, 1839, 2 D. 23). Those having distinct and separate shares in a property, as co-proprietors of a ship (*Lawson*, 1850, 13 D. 175) and debenture-holders in a company (*Dunnett*, 1885, 12 R. 400), can sue singly for their share in the damage caused.

Persons indirectly Injured.—A person may have a claim for damages where the wrongful act does not directly affect him, but primarily affects one in whose society or life he has an interest. For instance, a husband has an action against one who commits adultery with his wife, for the husband is thereby injured in his domestic relations (*Macdonald*, 1885, 12 R. 1327). It has been said that he will even have an action after her death for personal injuries received by her during life (Ld. Young, *Bern's Exr.*, 1893, 20 R. 859). Husbands and wives also have each a claim for the death of the other spouse against one who would have been liable to the injured had he or she survived the injury. In Scotland this claim (and the observation applies also to parents and children) arises at common law, and existed long prior to Lord Campbell's Act (*Guild*, 1605, Mor. 13903; *Dow*, 1844, 6 D. 534).

The claim of a parent or child for the death of the other (*Weems*, 1861, 4 Macq. 215) is, however, founded not on the right to the society of the deceased, but upon the mutual obligation to aliment which exists between these relations (*Eisten*, 1870, 8 M. 980, 984). For this reason neither parent of a bastard can sue for his death, nor can a bastard sue for the death of either parent (*Clarke*, 1891, 18 R. (H. L.) 63; *Weir*, 1889, 16 R. 614), nor a brother or sister for the death of the other (*Eisten, supra*). If both parents survive the deceased, the father alone has a title to sue (*Whitehead*, 1894, 20 R. 1045), and an action at the instance of both is incompetent (*Bell*, 1895, 4 S. L. T. 252). Where, however, the injured himself raises an action and dies during its dependence, a parent cannot raise a second action on account of his death, but as executor may proceed with the original action (*Darling*, 1892, 19 R. (H. L.) 31). But an executor has no title to institute an action for personal injuries to the deceased person whom he represents (*Bern's Exr.*, 1893, 20 R. 859).

Assignation and Transmission of Claim.—The right to damages is a moveable claim, is assignable by conveyance, and passes to representatives (*Neilson*, 1853, 16 D. 325, 329; *Gordon*, 1864, 2 M. 758). The maxim *Actio personalis moritur cum persona* does not apply (*Milne*, 1841, 3 D. 345), and a widow has been held entitled to raise an action founded on slander and illegal proceedings against her husband (*Auld*, 1874, 2 R. 191, 199; see also *Wight*, 1883, 11 R. 217, and *Bern's Exr., supra*).

The ways in which a claim of damages is extinguished are pointed out in the article on Damages.

Liability to be called as Defender.—All wrong-doers may be called as defenders, except the Crown, or Departments of State representing the Crown. These may not be sued in tort, unless in cases specially provided for by statute (*Henderson*, 1853, 15 D. 292, Ersk. *Prin.*, 19th ed., p. 97; *Poll*, 1897, 5 S. L. T. 219; *Smith*, 1897, 25 R. 112). For instance, the Board of Trade may be sued for illegal detention of ships (39 & 40 Vict. c. 80, s. 10).

As regards lunatics, want of capacity has been advanced as a defence; but while this may be valid in actions founded on malice, such as slander (*Emmens*, 1885, L. R. 16 Q. B. D. 354, 356; *Mordaunt*, 1870, 39 L. J. P. & M. 57, 59), it does not touch their liability for negligence, nor for injury caused by their property (Hale, *Pleas of the Crown*, 14; *Weaver*, 1617, Hob. 134; *Behrens*, 1867, 92 Amer. Dec. 428). Minors and pupils are of course equally liable in the latter case (*Mangan*, 1866, L. R. 1 Ex. 239). A minor will also be liable on the former (*Woolnoth*, 1804, 5 East, 463, 472). A corporation is also liable in actions founded on malice (*Gordon*, 1886, 14 R. 75, 83; *Kemp*, 1890, 7 T. L. R. 50).

Each of a number of joint wrong-doers may be called to answer for the whole loss (Ersk. iii. 1. 15; *The Avon*, [1891] P. 7; *M'Lauchlan*, 1823, 2 S. 590 or 506; *Smith*, 1800, Hume, 605).

A corporation may be called in the same way as it may sue (see *supra*); but when it is a public body divided in two distinct parts, with distinct duties and funds, like county and district trustees, the department causing the damage is the one answerable (*Revey*, 1841, 3 D. 888; *Creighton*, 1840, 1 Rob. App. 99; and see Local Government Act, 1889, s. 79). Joint owners of a ship may be sued separately on their individual interests (*Gibson*, 1849, 21 Sc. Jur. 331).

Association as husband and wife does not render one spouse liable for the fault of the other (*Barr*, 1868, 6 M. 651). A husband, for instance, is not liable for a slander uttered by his wife (*Mullen*, 1881, 18 S. L. R. 493), unless he joins in it (*Scorgie*, 1872, 9 S. L. R. 292). A husband is usually called for his interest, and as curator to his wife, but he may decline to act, and a *curator ad litem* may be appointed.

A bankrupt defender is in no worse position than a solvent, and does not require to find caution (*Robertson*, 1833, 6 Sc. Jur. 66, 12 S. 70). His trustee, however, may sist himself as a defender, as the estate must pay the damages (*Miller*, 1884, 21 S. L. R. 500).

As was pointed out under *Title to Sue*, a claim of damages does not attach to property, but to a person, and there is no transmission of liability with property, and no lien over property which may have occasioned the damage. Divestiture of ownership ends liability unless the property has been given over in a dangerous condition, which immediately causes hurt (*Dakers*, 1889, 27 S. L. R. 230). But mere divestiture of custody or possession of a thing in itself dangerous will not relieve the owner (*Harper*, 1886, 13 R. 1139; *Elliott*, 1885, L. R. 15 Q. B. D. 315; see also *Baillie*, 1894, 21 R. 498). On the other hand, possession without ownership may involve liability. The tenant of a heritable subject (*Weston*, 1839, 1 D. 1218), a liferenter (*Hay*, 1666, Mor. 13974), the custodier of a dangerous animal (*Cowan*, 1877, 5 R. 241; *Harper*, 1886, 13 R. 1139), and a game tenant (*Kidd*, 1875, 3 R. 255), were each held liable for damage caused by their respective properties. Public bodies to whom the charge of roads is entrusted, are responsible for their condition (*Strachan*, 1894, 21 R. 915).

The practice of calling several defenders in one action on different grounds of liability, which at one time was common (see Act of Regulations, 1696), is not now likely to be revived, and calling even two unconnected defenders in one action will probably be held incompetent. In any event, unless the defenders have been participant in the same act, they cannot be concluded against jointly for a lump sum (*Barr*, 1868, 6 M. 651; *Taylor*, 1885, 12 R. 1304; *Smyth*, 1891, 19 R. 81). But the existence of a common purpose prompting different acts, especially if alike in kind, will justify a joint conclusion (*M'Kenzie*, 1831, 10 S. 89; *Friend*, 1855, 17 D. 548). Where a pursuer is in doubt as to which of two parties is the one liable, or whether they are both liable, he may call both, and conclude against them conjunctly and, as an alternative, severally (*North British Rwy. Co.*, 1865, 3 M. 340; *Caledonian Rwy. Co.*, 1875, 2 R. 671).

Transmission.—Liability to make reparation being a civil debt, transmits to the representatives of the wrong-doer (Ersk. iii. 1. 15; *Auld*, 1874, 2 R. 191; *Davidson*, 1860, 3 Macq. 783, 790, 795). The maxim *Actio personalis moritur cum persona* has clearly no application to the case of a defender (*Macnaughton*, 17 Feb. 1809, F. C.; *Morison*, 25 May 1809, F. C.).

II. Malice.

The classes of wrongs which have usually been considered to depend on the intention of the actor, which in law is described as malice, are Assault, Slander or Defamation, Malicious Abuse of Civil and Criminal Process, Seduction, and Fraud. It is apparent, however, that this classification is not entirely accurate. Many actions for slander are allowed where there is not even a legal fiction of malice. A printer's slip in naming a bankrupt in a newspaper may land the paper in heavy damages, although there was not the slightest intention of defaming anyone. As was pointed out above, also, the recent decision in *Allen* v. *Flood*, [1898] App. Ca. 126, contained observations which lead to the disregarding of intention as material in fixing liability. In cases arising under the classes mentioned above, however, the question of the intention or *bona fides* of the defender usually emerges, and it is therefore suitable to treat these classes as one division of the subject. Detailed treatment of the several branches will be found under the titles above mentioned.

III. Negligence.

The duty to take care, of which negligence is the breach, is invariably found to arise in connection with the use of property of some kind. The nature and extent of the duty depend on the circumstances which call it into existence, and it may be best examined by classifying these. This may be done by treating of duties incumbent on proprietors of Heritage, of Moveables, and those employing servants and carrying on works. The last is a cross division, for it implies the occupation, and it may be ownership, of premises, and necessarily the ownership and use of moveables. But a division of the subject which is logically perfect has not yet been proposed, and, if practicable, would be of less value than one less perfect but more familiar. First, then, of the duties of proprietors of heritage.

Duty to Fence Dangers on Lands.—A person in the possession of lands is under an obediential obligation to fence surface dangers in the immediate vicinity of a highway or place of public resort (*Barnes*, 1850, 9 C. B. 392). The obligation depends on the proximity of the danger (*Monklands Rwy.*, 1861, 23 D. 1167, 1179). As accidents of this nature occur at night, the use has been laid down as being such proximity "that a slight deviation in

the dark would lead into the danger" (*Ross*, 1888, 16 R. 86, 90). A person is not entitled to go on after he is aware that he is off the path or road (*Prentice*, 1890, 17 R. 484); but mere deviation from a path will not create a bar to recovery (*Sinnerton*, 1886, 13 R. 1012, 1016; *Black*, 1812, 5 Pat. App. 567, Mor. 13905; *Neilson*, 1854, 16 D. 603). Where there is a danger that a few false steps will lead into a pitfall, it ought to be fenced (*Matson*, 1877, 5 R. 87, 94). A quarry twelve feet distant from a public road was held to require fencing (*M'Feat*, 1879, 6 R. 1043), but not a pit seventy yards off (*Neilson*, *supra*). Where the danger extends beyond a proprietor's lands, such as a yew tree (*Crowhurst*, 1878, L. R. 4 Ex. D. 5), or abuts on the highway, as a dangerous barbed wire fence (*Elgin C. C.*, 1886, 14 R. 48; see also 56 & 57 Vict. c. 32), it is illegal, and will involve liability.

Similar considerations apply to dangerous articles left in public places, which may therefore be mentioned here, though they properly belong to another division of the subject. The owner of a dangerous machine left in a public place requires to guard or secure it, so that it may not be set in motion to the danger of passers-by, or even of children playing with it (*Campbell*, 1873, 1 R. 149; *Findlay*, 1887, 14 R. 312). But only reasonably and not absolutely secure fastening or fencing is required (*M'Gregor*, 1883, 10 R. 725; *Kelly*, 1890, 27 S. L. R. 410), and the obligation does not extend to a thing, such as a hurley, not in itself dangerous (*Duff*, 1889, 16 R. 675).

The duty to fence pitfalls is on him who creates the danger (*Hurst*, 1885, L. R. 14 Q. B. D. 918; *Hawken*, 1887, 3 T. L. R. 557). He may either be the person making a road near an existing danger (*Barnes*, 1850, 9 C. B. 392, 420), or the person creating a danger near an existing road (*Kerr*, 1877, 4 R. 779, 786). A right of way is used subject to the risk of natural dangers (*Prentice*, 1890, 17 R. 484, 490; see also *Kerr*, 1858, 21 D. 169), but the proprietor of the land may not increase these (*Gallagher*, 1862, 10 W. R. 664).

A statutory duty to fence is laid on certain public bodies having the charge of roads (Roads and Bridges (Scotland) Act, 1878, s. 123; Burgh Police (Scotland) Act, s. 130, 156, 163, 186, 187, 190, 191; and see Irons' *Manual*), and in one case there is a statutory requirement with regard to pitfalls on private property. The Coal Mines Regulation Act, 1887 (s. 37 (1)), requires that the top of every shaft and every side entrance to a disused or abandoned mine shall be securely fenced for the prevention of accidents (see also sec. 37 (5)). The statutory duty to fence a going mine is owed only to workmen, and not to the public (*Sinnerton*, 1886, 13 R. 1012).

A railway company (whose line is constructed under statutory authority) is under the duty of fencing its line, but only for the protection of owners and occupiers of adjoining lands (Railway Clauses Act, 1845, s. 60; Deas on *Railways*, 2nd ed., p. 481 *et seq.*). Where cattle strayed from the lands of a proprietor which were not adjacent, and wandered on to the line through want of a fence, and were injured, it was held that the proprietor could not found on the Act (*Monklands*, 1861, 23 D. 1167; *Ricketts*, 1852, 21 L. J. C. P. 201). Where a railway is made, after 1845, across a road or right of way by means of a level crossing (Railway Clauses Act, 1845, s. 39), the company is bound to provide gates, and a gatekeeper to keep them safe for the public (s. 40; see also s. 52; *Russell*, 1879, 7 R. 148; *Barclay*, 1882, 10 R. 144; *Gilchrist*, 1850, 12 D. 979; *Stapley*, 1865, 35 L. J. Ex. 7). In the case of a railway constructed under a special Act after the

Railway Clauses Act of 1863, it is provided that crossings shall not be shunted over, nor are railway vehicles to stand there, that a lodge and gatekeeper shall be provided, and that the Board of Trade may make regulations as to speed (ss. 5 and 6). Apart from statutory restrictions, a railway may conduct its traffic as it pleases where it has exclusive use of the ground it occupies. But where it and the public come into contact, as at a level crossing, it must use reasonable care as to speed, signalling, or whistling, to secure the safety of persons using the way (*Cliff*, 1870, L. R. 5 Q. B. 258, 261; *Ellis*, 1874, 43 L. J. C. P. 304, 309; *Dublin, etc., Rwy. Co.*, 1878, 3 App. Ca. 1155, 1164; *Grant*, 1870, 9 M. 258). If those precautions are neglected, a railway company will be liable, provided always that the neglect is proved to have caused the accident (*Wakelin*, 1886, L. R. 12 App. Ca. 41). A crossing between platforms at a station requires to be safeguarded equally with a public level crossing (*Stubley*, 1865, L. R. 1 Ex. 13; *Thomson*, 1876, 4 R. 115). If the required precautions are omitted in either case, the company will have difficulty in setting up the plea of contributory negligence, as the precautions are called for in the interest of careless people (*Gilchrist*, 1850, 12 D. 979; *North-Eastern Rwy. Co.*, 1874, L. R. 7 H. L. 12). Where a statutory precaution is required, a company does not discharge its duty by providing a substitute (*Woods*, 1886, 13 R. 1118).

A private crossing, that is, one continuing the communication between lands severed by the formation of the line, is not subject to these statutory provisions, but ordinary precautions, which will vary with the circumstances, must be taken (*Cliff, Grant, supra*).

A railway on a public street or way is usually specially provided for in the Act authorising its construction. Where on private ground used by the public, common law requires that the rate of speed should be slow, and a good lookout kept. If these precautions are observed, there will be no liability (*Smith*, 1888, 16 R. 57; *Morran*, 1883, 11 R. 44).

Sufficiency of Fence.—As the use of a fence is to prevent people from inadvertently getting into danger, it is sufficient if it acts as an effective warning, and it does not require to be unbreakable (*Dublin*, 1878, L. R. 3 App. Ca. 1155) or insurmountable (*Ross*, 1888, 16 R. 86). But it should not be low enough to trip people (*Harris*, 1881, 8 R. 613), or weak enough to give way under an ordinary pressure of traffic (*Child*, 1874, L. R. 9 Ex. 176, 181, 183). There is a difficulty in reconciling the cases as to the duty to make a fence impervious to children (*Ross, supra*; *Greer*, 1882, 9 R. 1069); but it appears that if the place is not a haunt or playground of children, that a fence sufficient to warn is enough, and that it does not require to be adapted to defeating intentional passage (*Royan*, 1889, 27 S. L. R. 79; *Davidson*, 1855, 17 D. 1038). "It may be the duty of parents to point out that a fence at some particular place is not sufficient for the safety of their children" (*Murray*, 1888, 15 R. 737; but see *Greer, supra*, and CONTRIBUTORY NEGLIGENCE).

Duty to Keep Premises Safe.—The obligation in this case is exceedingly strict, but is not absolute, for there is no liability without negligence. In England it is said, *Res ipsa loquitur*, which means that the existence of a dangerous defect implies a neglect of duty (*Kearney*, 1871, L. R. 5 Q. B. 411, 414; affd. 6 Q. B. 759; *Tarry*, 1876, L. R. 1 Q. B. D. 314), but the Scotch cases have scarcely gone that length (*Weston*, 1839, 1 D. 1230; *M'Ewen* 1881, 19 S. L. R. 22; *Campbell*, 1864, 3 M. 121; *Moffat*, 1877, 5 R. 13, 17; *Laurent*, 1869, 7 M. 607, 610). A person discharges his duty if he exercises the amount of inspection which is expected of a prudent man, and is not liable for latent defects (*Paterson*, 1896, 24 R. 99; *Ross*, 1872, L. R. 7 Q. B.

661). In one case, however, the defender was held liable upon evidence of negligence which it is difficult to discover (*Dolan*, 1896, 23 R. 550). But if a defect is patent to an ordinary observer, it will be held to be negligent to allow it to remain. This rule was applied to cases where a door in a warehouse, having lost its hinges, was propped up by battens (*Beveridge*, 1883, 11 R. 387); where a gate at a school was insufficient to bear children swinging on it (*Cormack*, 1889, 16 R. 812); and a bannister was wanting from the railing on a common stair, so that a child could fall through (*M'Martin*, 1872, 10 M. 411). A proprietor may also be liable though he himself could not have discovered the defect complained of, since the circumstances suggest that he should have employed skilled assistance. On this ground defenders were held liable for the bursting of water pipes which were old and had previously given way (*Moffat*, 1877, 5 R. 13; *Campbell*, 1864, 3 M. 121); fall of a stair which was weak through wear and a peculiarity of construction (*Fulton*, 1884, 22 S. L. R. 100); and for the fall of a wall from which support had been removed (*Stark*, 1871, 10 M. 31; *Pollock*, 1870, 8 M. 615). In an earlier case a proprietor was held liable for the fall of a chimney-can which had been insufficiently erected by a tradesman admittedly competent; so that if that case is to be regarded as well decided it appears that a proprietor does not get rid of his responsibility by delegation (*Cleghorn*, 1856, 18 D. 664).

Operations on Property.—The duty incumbent on proprietors in carrying on operations on their property varies with the nature of the use taken. A division may be made between operations which are ordinary and involve a natural use, those which are extraordinary and involve a non-natural use, and those which amount to a nuisance and involve illegal use. The first two uses are both legal, but the duty of the proprietor is of different degrees. The third use, or misuse, being illegal, involves liability from that fact.

Natural Use.—In order to fix liability on a defender, the pursuer must prove that there has been a breach of the duty to exercise the care and diligence which a prudent man would observe in his own affairs and in the interest of his neighbours (*Mackintosh*, 1864, 2 M. 1357; *Filliter*, 1847, 11 Q. B. 347). If an ordinary operation, such as muir-burning (*Mackintosh*, *supra*) or tree-felling (*Linwood*, 14 May 1817, F. C.; 1821, 1 Sh. App. 20), is carried out in the usual way, there is no liability merely because damage has resulted. The maxim *Sic utere tuo ut alienum non lædas* does not restrict the lawful enjoyment of property (Ersk. ii. 1. 2; *Mayor of Bradford*, 1895, 1 Ch. 145). Drainage improvements were held non-actionable, although the result was to discharge water on to lower lands so as to cause some damage (*Murdoch*, 1887, 8 R. 855). But if there are two ways of doing a thing, that least injurious to one's neighbour is to be chosen (*Armistead*, 1888, 15 R. 814, 820).

A mineral owner is entitled to work his minerals although the enjoyment of his neighbour is thereby lessened (*Hurdman*, 1878, L. R. 3 C. P. D. 168, 174), but not so as to cause substantial injury (*Shotts Iron Company*, 1882, 9 R. (H. L.) 78, 85). In particular, he will be liable in damages if, through want of precaution, he withdraws support from a surface owner, to the injury of buildings thereon (*Hamilton*, 1867, 5 M. 1086; *Buchanan*, 1873, 11 M. (H. L.) 13, 16; *Bald*, 1854, 16 D. 870). On the other hand, it is the duty of a surface owner not to overburden the land so as to interfere with rights already acquired in the minerals underneath (*Hamilton*, 5 M. 1086, 1095, 1098; *White*, 1881, 8 R. 375, 388, 393).

Operations of construction or alteration belong to the ordinary use of property, and, though the cause of damage, are not actionable unless

negligently carried out (*Laurent*, 1869, 7 M. 607; *Campbell*, 1864, 3 M. 121; *M'Intosh*, 1859, 21 D. 363, 368). Causing damage which may be avoided, is held to be negligence (*Cameron*, 1881, 9 R. 26, 29), and the more difficult the work is the more care must be taken (*Laurent, supra*; *M'Intosh, supra*; *Miller*, 1885, 13 R. 309).

The duty of public bodies to whom the care of roadways and waterways is intrusted, is stated as being to keep them reasonably safe for those using them. The best and most expensive precautions are not required. For instance, the Court refused to hold harbour commissioners liable because the rails on a quay were somewhat old fashioned, and a newer and safer rail had been introduced elsewhere (*Wisely*, 1887, 14 R. 445, 446; *Scott*, 1894, 21 R. 466). But road trustees are bound to take such reasonable measures as removing heaps of road scrapings (*Nelson*, 1891, 19 R. 311), and removing or otherwise rendering safe any obstruction (*M'Fee*, 1890, 17 R. 764; *Stephen*, 1876, 3 R. 535; Burgh Police (Scotland) Act, 1892). A similar duty is incumbent on those bodies having charge of waterways. Injury to a vessel in a harbour (*Thomson*, 1876, 3 R. 1194, 1200, *Niven*, 1898, 35 S. L. R. 688) or canal (*Mersey Docks' Trs.*, 1866, L. R. 1 H. L. 93, 120; *Lancaster Canal Co.*, 1839, 11 A. & E. 223, 243) does not give a claim to damages unless reasonable care on the part of the commissioners would have discovered and removed the danger. But where a danger to navigation in the shape of an obstruction in the channel is known to exist, the commissioners must remove it, or indicate its whereabouts (*Young*, 1876, 13 S. L. R. 636), at least approximately (*Buchanan*, 1884, 11 R. 531). A stranded ship, however, which remains in the possession of the master, should be lighted by him, and not by the commissioners. A wreck also lying outwith the precincts of the dock does not fall under the power of the commissioners, and should be lighted or buoyed by the owners (*Kidston*, 1878, 5 R. 936; *Doward*, 1873, L. R. 5 P. C. App., 338). Wharfingers, who have no control over the *solum* of a waterway, are not responsible for its condition (*Tredegar Iron Co.*, [1891] L. R. App. Ca. 11, 21), but are for the condition of their berths (*ib.* p. 23; *The Moorcock*, 1889, L. R. 14 P. D. 64).

Non-natural Use.—The duty of a proprietor making a non-natural use of his lands is extremely strict, and negligence is presumed from the fact of damage (*Pirie*, 1891, 9 M. 412, note, 413). A person who brings on to or collects on his lands anything likely to do mischief if it escapes, is said to do so at his peril. If, therefore, a heap of blaes is made which takes fire (*Chalmers*, 1876, 3 R. 461), or a body of water is collected which bursts the dam and escapes (*Fletcher*, 1868, L. R. 3 H. L. 330; *Whally*, 1884, L. R. 13 Q. B. D. 131), the proprietor will be liable in damages. It is not a valid excuse for the escape of water that there has been an extraordinary rainfall, which has increased the pressure on the dam (*Kerr*, 1857, 20 D. 298). A person creating an *opus manufactum* must provide not only against ordinary but extraordinary occurrences (*Potter*, 1864, 3 M. 83; *Tennant*, 1864, 2 M. (H. L.) 22, 26). His only defence is that the occurrence was due to a *Damnum fatale*, which see. The rule, however, does not apply to use of a thing naturally present, as, for instance, the diversion of a running stream (*Smith*, 1874, L. R. 9 Ex. 64).

Nuisance.—This is a use which is in itself illegal, and therefore implies liability. For what constitutes a nuisance, see the article under that title.

Owners of Works.—The carrying on of industries involves special applications of the rule as to taking due care, which are susceptible of separate treatment. The general rule is that a person does not warrant

his premises or machinery as absolutely safe, but only that he uses reasonable and ordinary care (*Ovington*, 1864, 2 M. 1066; *Murdoch*, 1885, 12 R. 810, 817). Accordingly, the mere existence of a defect does not imply liability, and a pursuer must prove fault (*Gavin*, 1889, 17 R. 206, 210; *Weems*, 1861, 4 Macq. 215). In English law, however, and in two earlier Scotch cases, there is ground for supporting the maxim *Res ipsa loquitur* (*Scott*, 1865, 3 H. & C. 596, 601; *Byrne*, 1865, 2 H. & C. 722; *Fraser*, 1882, 9 R. 896; *Walker*, 1882, 9 R. 946). A defender will not be held to be in fault who uses the care that would ordinarily be taken in the circumstances, although some safer appliance or way of working can be pointed out (*M'Gill*, 1880, 18 R. 206; *Butler*, 1891, 7 T. L. R. 287; *Welsh*, 1885, 12 R. 590). An unprotected trap-door (*Moore*, 1890, 17 R. 796; *Daily*, 1885, 12 R. 841), an unfenced bridge (*Robertson*, 1862, 24 D. 1231), and a clip instead of a bag for raising moulds in a sugar refinery (*Dynen*, 1857, 26 L. J. Ex. 221), were each held on this ground not to imply fault. But if a slight alteration will render a dangerous thing safe (*Johnson*, 1885, 22 S. L. R. 698), or even render it less dangerous (*Edgar*, 1871, 10 M. 236, 240), it should be made. An obvious precaution, such as supplying an ash-pan to a furnace of a crane-engine overhanging blasts in a quarry, should certainly be taken (*Grant*, 1887, 10 R. 1159). Even a serious and expensive precaution may have to be taken, if work cannot be carried on safely without it (*Henderson*, 1889, 16 R. 633); or the work may have to be stopped and the workmen removed at the dangerous moments (*M'Guire*, 1890, 17 R. 540; *Sword*, 1839, 1 D. 493). If none of these precautions are possible, then a workman, being informed of the risk, must look out for himself (*Bruce*, 1890, 17 R. 811).

A person using plant or machinery is bound to inspect the same from time to time to see if it is in a safe condition (*Webb*, 1865, 4 F. & F. 608; *Murphy*, 1876, 35 L. T. N. S. 477), more particularly when the article is exposed to strains or use which tend quickly to impair its safety (*Fraser*, 1882, 9 R. 896; *Irwin*, 1885, 22 S. L. R. 379). But if reasonable inspection would not have revealed the defect complained of, a defender is not liable for not having it made (*Gavin*, 1889, 17 R. 206); nor for failing to take plant to pieces in order to inspect hidden parts, when he has no reason to suspect that anything has gone wrong (*Hanrahan*, 1887, L. R. Ir. 22 Ex. Div. 55). Want of inspection cannot, of course, be pleaded by a pursuer where there is a latent defect, as inspection would not have revealed it (*Sneddon*, 1849, 11 D. 1159; *Cargill*, 1848, 11 D. 216; *The Virgo*, 1876, 35 L. T. N. S. 519).

A pursuer must specify and prove the defect complained of. For want of specification in setting forth how danger should have been guarded against, cases were thrown out where pursuer simply alleged that a manhole in a ship was unprotected (*Forsyth*, 1890, 18 R. 1890; *Waterson*, 1884, 11 R. 1036), that a railway bridge was of insufficient width (*M'Ghie*, 1887, 14 R. 499), that there was a want of fencing round a spinning machine in a ropery (*Ross*, 1882, 20 S. L. R. 46), and round a brick moulding machine (*Little*, 1890, 28 L. S. R. 64). Still, it has been said that if a pursuer shows that there was some defect in machinery or plant which caused the accident, he does not require to show the precise defect, but that the *onus* is then on the defender to clear himself (*Macfarlane*, 1884, 12 R. 232). That *onus* is discharged by showing that all the usual precautions have been taken (*The Merchant Prince*, 1892, P. D.).

Master's Liability to Servant.—A master requires to use reasonable care to see that materials supplied to his servant for the purpose of his work are

fit and sufficient (*Wilson*, 1868, 6 M. (H. L.) 84; *Woodhead*, 1877, 4 R. 469), and that his fellow-servants are competent (*Stewart*, 1877, 4 R. 952). But having supplied these, a master's duty ends (*Bartonshill Coal Co.*, 1858, 3 Macq. 266, 296). Where a mine-owner provided pit props for his miners, he was held not responsible because some of his servants failed to convey the props to the working faces (*Stewart*, 1877, 4 R. 952). And if appliances turn out to be insufficient, a workman should inform his master (*Ramsay*, 1889, 10 R. 690), and ask for additional appliances (*Watt*, 1888, 15 R. 772), especially if he had a duty to see that they were sufficient (*M'Laughlan*, 1882, 20 S. L. R. 271). Where appliances are made by the workmen themselves, the defence of fellow-servant will of course be open to their master (*Matthews*, 1865, 3 M. 506; *Gordon*, 1891, 29 S. L. R. 178; 1892, 20 R. (H. L.) 23).

The duty of a shipowner towards the crew is the same as that of an employer on shore (*Hedley*, 1892, 14, B. 58).

An employer, besides supplying sufficient materials or plant for the work, requires to see that the work is carried on under safe conditions. Where machinery is apt to be dangerous to those working at it, a reasonable and necessary precaution is to have it fenced (*Darby*, 1861, 23 D. 529; *Edwards*, 1889, 16 R. 694). If children are employed near machinery, fencing is still more obligatory (*Sharp*, 1885, 12 R. 574; *Brady*, 1891, 9 S. L. R. 140). Revolving machinery should in that case be fenced off where practicable (*Gemmils*, 1861, 23 D. 425; *O'Byrne*, 1854, 16 D. 1025). Otherdangers besides machinery may require to be fenced, and each case must be considered on its merits, keeping in view the probability of accident and the amount of interruption fencing might cause to the work (*Murray*, 1890, 17 R. 815). Common law, however, has been largely superseded by statutes which require that all dangerous parts of the machinery in factories shall be securely fenced, or of such construction as to be as safe as if fenced (Factory and Workshop Act 1878, s. 5; 1891, s. 6; 1895, ss. 7, 8, 9. See also article on said Acts). These provisions are conceived in favour of all workmen, and not confined to children and young persons (*Britton*, 1872, L. R. 7 Ex. 130), or to workmen actually engaged at their duties at the time (*Kelly*, 1893, 20 R. 833). Failure to fence as required by these Acts will imply liability (*Milligan*, 1891, 29 S. L. R. 36). The Acts do not describe the kind of fencing to be used, but it has been decided that an employer is not liable if he has adopted the best means of fencing known at the time (*Schofield*, 1855, 24 L. T. 253). Whether machinery is dangerous and requires to be fenced, depends on the facts of each case (*Milligan*, 1891, 19 R. 18; *Robb*, 1892, 19 R. 971).

The precautions required for the safety of those working in mines are subject to the general rule of being ordinary and reasonable, but the character of the work necessitates precautions of a special kind. One of these is that there should be a bottomer in the mine to look after the raising and lowering of the cage (*Murdoch*, 1885, 12 R. 810; *Edgar*, 1871, 10 M. 236). Common law, however, has been supplemented on almost every point by statute (Coal Mines Regulation Act, 1887). The provisions therein contained are interpreted strictly as against the employer and favourably towards the miners. They must be complied with where practicable (*Wales*, 1885, L. R. 16 Q. B. D. 340): they are intended to protect miners against their own inadvertence (*Hogg*, 1886, 24 S. L. R. 14; *Pringle*, 1894, 21 R. 532); substantial as well as literal compliance is necessary (*Wilson*, 1883, 10 R. 1021); a substitute for the thing required is not compliance with the Act (*Nimmo*, 1872, 10 M. 477; *Foster*, 1887, L. R. 18 Q. B. D. 428; *Hughes*, 1891, 19 R. 343). Special rules, having the force of statute, are also made for each mine. Failure to comply with any of these is evidence of negligence (*Nimmo*, 1872,

10 M. 477; *Edgar*, 1871, 10 M. 236). The provision as to fencing the pit shaft has been held to be for the protection of workmen only, and not strangers (*Sinnerton*, 1886, 13 R. 1012).

Performance of the statutory obligation incumbent on an employer is not to be waived by a servant, and a master guilty of negligence in failing to comply with a statute will not readily be allowed to plead that the injured party had surrendered the protection which the statute said he should have (*Baddeley*, 1887, L. R. 19 Q. B. D. 423, 426; *Britton*, 1872, 41 L. J. Ex. 99, 101).

It follows from the rule of responsibility laid down, that a servant takes on himself the ordinary risks of the employment, as distinguished from those due to negligence (*Thomas*, 1887, L. R. 18 Q. B. D. 685, 697; *Cook*, 1857, 20 D. 137; *Douglas*, 1890, 27 S. L. R. 687). But it is necessary for this defence that the servant should know of the risk (*Saxton*, 1872, 26 L. T. N. S. 851; *Woodley*, 1877, L. R. 2 Ex. 384, 389); and an employer should inform him of any danger not obvious, and of which he might be ignorant (*Farrant*, 1862, 11 C. B. N. S. 553). If the risk also is not incidental to the service, it is not understood to be taken, as in the case of a savage dog being kept on a dressmaker's premises (*Mansfield*, 1876, 34 L. T. R. 696).

Where work is of an unusually dangerous character it should be superintended by a person of skill, who may take the precautions necessary (*Stark*, 1871, 10 M. 31, 34). Especially is this the case where unskilled labourers are employed, or the attention of a workman is diverted from the danger, and monopolised by his work. On account of the absence of such precautions, labourers injured by the fall of an embankment (*Pollock*, 1870, 8 M. 615, 617), by the fall of superincumbent earth into an excavation (*M'Inally*, 1886, 14 R. 8; *Dixon*, 1852, 14 D. 420), and by the fall of stones from a gable in course of demolition (*Stark*, 1871, 10 M. 31, 34), were found entitled to damages. But if a danger is equally obvious to both master and servant, the master will not be liable in the event of an accident (*Ogden*, 1863, 3 F. & F. 751), as in the case of a man hurt while engaged in the rough and risky work of pulling planks out of a wreck by means of a traction engine (*Bruce*, 1890, 17 R. 811), of an actor falling into a hole underneath the stage (*Seymour*, 1851, 20 L. J. Q. B. 327), and of a workman falling into a manhole in a ship under repair (*Forsyth*, 1890, 18 R. 21). If a danger is obvious, a pursuer must explain why he failed to notice it, otherwise his action will be dismissed (*Casey*, 1886, 23 S. L. R. 305; *Williams*, 1858, 3 H. & N. 258). A pursuer was held to have successfully accounted for his apparent want of care, where it appeared that being unskilled, he had been allowed to extract an unexploded charge in a rock with a steel jumper (*Cook*, 1886, 14 R. 1); and in another case, where he was also unskilled, that he had been sent to do a difficult piece of work out of the ordinary line of his employment (*Robertson*, 1876, 3 R. 652).

It is, as has been said, the duty of a workman who believes a danger or defect to exist, to report the same, and he is entitled to stop work until it is remedied. But if his master assures him that the thing is safe, and induces him to go on working, he is entitled to rely on that assurance, and will not be barred from recovering in the event of an accident (*Gallacher*, 1891, 28 S. L. R. 385; *Paterson*, 1854, 1 Macq. 748, 757; *Yarmouth*, 1887, L. R. 19 Q. B. D. 647; *M'Monagle*, 1881, 9 R. 364). Allowing a workman to continue working may be construed as giving an assurance of safety (*Bacon*, 1887, 3 T. L. R. 557). But the assurance must be relied on, and a workman who continues to work in face of a danger which he knows.

still to exist, does so at his own risk (*M'Neill*, 1853, 15 D. 818; *Stewart*, 1877, 4 R. 952, 956; *Crichton*, 1863, 1 M. 407; *Wilson*, 1889, 27 S. L. R. 57).

Seen Danger.—Where a workman goes on working, without any representation to mislead him, in face of a particular danger which he sees and appreciates, his employer is not liable. This rule is founded on the maxim *volenti non fit injuria* (*Smith*, [1891] App. Ca. 325). But it is to be observed that the maxim is *volenti*, not *scienti*, and a workman, to be debarred from his remedy, must have voluntarily undertaken to encounter the risk (*Yarmouth*, 1887, L. R. 19 Q. B. D. 647, 661; *Thomas*, 1887, L. R. 18 Q. B. D. 685, 696). Further, the particular risk must be known. Knowledge on the part of workman that stones were occasionally being swung over his head, did not bar him from recovering damages for injury from a stone falling on him, when his attention was taken up by his own work (*Smith*, *supra*; *Thrussel*, 1888, L. R. 20 Q. B. D. 359; see also *Pyner*, 1898, 14, L. T. R. 57). The plea of seen danger is not applicable in the case of injuries to seamen through a cause arising at sea, for he cannot refuse to go on working (*Rothwell*, 1886, 13 R. 463).

Servant Working beyond the Scope of his Duty.—A master's obligation is limited to taking precautions for a servant's safety when engaged at his work and in the proper place. On this ground damages were refused where a railway servant, employed to couple and uncouple waggons, went, at the request of the engine-driver, to shift points (*Sutherland*, 1857, 19 D. 1004; cf. *Matthews*, 1865, 3 M. 506); where a labourer on a railway bank went on the permanent way to clear earth from some signal lines, which he should have done from the bank (*Flood*, 1889, 27 S. L. R. 127); and where an engine-driver left his engine and, in walking to a signal-box to ask a question, fell over an unfenced bridge (*Clark*, 1877, 5 R. 273).

Fellow-Servant.—A master is not liable to a servant for injuries caused by the fault of a fellow-servant (*Bartonshill Coal Co.*, 1858, 3 Macq. 266), of whatever grade the servant may be (*Wilson*, 1868, 6 M. (H. L.) 84, 89; *M'Coll*, 1891, 28 S. L. R. 354, 355; *Woodhead*, 1877, 4 R. 469). That is a risk which he is understood to have taken in his contract of service (*Hutchison*, 1850, 5 Ex. 343, 352; *Howells*, 1874, L. R. 10 Q. B. 64, 65). The requisites for exemption from liability are that the injured and the injuring servants should have been engaged (1) under a common master, and (2) at a common work (*Bartonshill Coal Co.*, 1858, 3 Macq. 300, 307, 313). (1) In many of the earlier cases the defence was sustained where the servants were engaged at a common work, such as the erection of a house, but were under different masters; but these decisions have been overruled by the House of Lords (*Johnson*, [1891] App. Ca. 371; *M'Callum*, 1893, 20 R. 385). In order, however, to be in the same service in the sense of the plea, it is not necessary that the alleged master should be the person who has employed and pays the servant. Ld. Watson said, in the case last cited: "I can well conceive that the general servant of A. might, by working towards a common end along with the servants of B., and submitting himself to the control and orders of B., become, *pro hac vice*, B.'s servant in such sense as not only to disable him from recovering from B. for injuries sustained through the fault of B.'s proper servants, but to exclude the liability of A. for injury occasioned by his fault to B.'s own workmen" (see also *Wyllie*, 1871, 9 M. 463, 466; *Smyth*, 1890, 17 R. 877). In one case it was held that there was common employment where the servant of a carting contractor sued a storekeeper, through the negligence of whose servant he had been injured while delivering goods (*Congleton*, 1887, 14 R. 309), but this case

seems at variance with others which lay down that there must be control over the servant engaged in the common operation (*Abraham*, 1860, 5 H. & N. 143; *M'Credie*, 1865, 3 M. 539). This control was held to exist where a principal contractor at a work directed the whole work, and was entitled to dismiss sub-contractor's workmen, and paid them their wages. A sub-contractor's servant injured by a servant of the principal contractor was found to have no remedy (*Wigget*, 1856, 11 Ex. 832; *Rourke*, 1876, L. R. 1 C. P. D. 556). Servants of railway companies, though engaged in a common work, as in passing the train of one company over the line of another, are not in common employment, since each is doing the work of his own employer, and for the benefit only of that employer (*Calder*, 1871, 9 M. 833; *Adams*, 1875, 3 R. 215, 221). The same rule applies to servants of different companies employed at joint stations (*Vose*, 1858, 2 H. & N. 728; *Warburton*, 1866, L. R. 2 Ex. 30; *Swainson*, 1878, L. R. 3 Ex. Div. 341).

(2) Whether employment has been at common work is determined by reference to the object to which the work is directed (*Wright*, 1864, 2 M. 748, 756). Though the character of the work upon which the negligent and the injured servant are engaged differs, yet if the different departments of the work are intended to produce one result, those engaging in it are fellow-servants (*Reid*, 1858, 3 Macq. 295). A miner and the engineer who raises and lowers the cage (*Reid, supra*), a mine manager and working miner (*Wright*, 1864, 2 M. 748), a labourer shifting ballast and a platelayer on a railway (*Lovegrove*, 1864, 33 L. J. C. P. 329), a labourer laying cement flooring in a building in the course of erection and a plumber engaged thereon (*Maguire*, 1885, 12 R. 1071)—have been held to be fellow-servants. But a slater repairing the roof of a station and a railway servant storing sleepers below, were held not to be engaged at a common work (*Morgan*, 1865, L. R. 1 Q. B. 149, 155). In cases of joint employment at railway stations, where the joint servant is acting sometimes at the work of one company and sometimes at the work of another, it is essential to observe at which work he was engaged at the time of the accident (*Swainson*, 1878, L. R. 3 Ex. Div. 341; *Warburton*, 1866, L. R. 2 Ex. Div. 30).

Personal Fault of Master.—A servant is not understood to take the risk of his master's negligence—he does not relieve any actual wrong-doer of liability (*Robertson*, 1891, 18 R. 1221). If, therefore, he can show that his master's want of care has contributed, with that of a fellow-servant, to the accident, his master is liable. Allowing a servant to work while known to be intoxicated (*Wanstall*, 1841, 6 Cl. & Fin. 910; *M'Ternan*, 1890, 17 R. 368; *Gunn*, 1820, 2 Mur. 194), and keeping a servant of known drunken habits (*Donald*, 1862, 24 D. 295; *Cleghorn*, 1874, 15 Amer. Rep. 375), are acts of negligence on the part of the master.

It is to be observed that an employer cannot get rid of all liability to his servants by delegating all his functions. There are certain duties, such as seeing after the system of working, and supplying suitable materials, which are considered to be a master's duties, and immunity is not secured by handing these over to a manager (*M'Killop*, 1896, 23 R. 768; *Wright*, 1893, 20 R. 363; *Henderson*, 1892, 19 R. 954).

Employers Liability Act, 1880.—The effect of this Act is to abolish, in certain cases, the defence of common employment. The Act introduces no new ground of liability. There is simply conferred upon the workman "the same right of compensation and remedies against the employer as if the workman had not been in the service of the employer" (*Morrison*, 1882, 10 R. 271, 277).

Application of Act to Workmen.—The Act applies to railway servants and to those who are workmen in the sense of the Employers and Workmen Act, 1875 (sec. 8 of present Act, and sec. 10 of cited Act). By that Act domestic and menial servants (s. 10), apprentices who have paid more than a £25 premium (s. 12), and seamen (s. 13), are excluded. Those included are workmen engaged in manual labour. That expression has been construed so as to include a foreman of a shift of labourers in a foundry (*Hamilton*, 1885, 22 S. L. R. 709), the driver of a horse and trolly for a wharfinger (*Yarmouth*, 1887, L. R. 19 Q. B. D. 647), a tramway car conductor (*Wilson*, 1878, 5 R. 981); and to exclude an omnibus conductor (*Morgan*, 1884, L. R. 13 Q. B. D. 832) or driver (*Cook*, 1887, L. R. 18 Q. B. D. 683), and a grocer's assistant (*Bound*, [1892] 1 Q. B. 226). The Act only applies in cases between an employer and his employee. A workman has no right under the Act to sue a person with whom he has not a contract of service (*Nicolson*, 1888, 15 R. 854; *Sweeney*, 1892, 19 R. 870). A workman may relinquish his rights under the Act by contracting out (*Wright*, 1893, 21 R. 25; *Griffiths*, 1882, L. R. 9 Q. B. D. 357).

Causes of Action.—The Act enumerates five classes of cases to which its provisions are to be applicable:—

(1) Where injury has been caused by defect in the condition of ways, works, machinery, or plant, if the defect has been due to the neglect of a person intrusted with the duty of seeing that the same were in proper condition (s. 1 (1), s. 2 (1)). It is essential to prove that the person alleged to be in fault had this duty put on him (*Moore*, 1890, 17 R. 796; *Kiddle*, 1885, L. R. 16 Q. B. D. 605). The defect must be one in original construction or subsequent condition which renders the thing unfit for the purpose for which it is intended, when used with reasonable care and caution (*Walsh*, 1888, L. R. 21 Q. B. D. 371, 378, 379). A thing dangerous in itself will not give a cause of action, the danger must be due to negligence (*Mitchell*, 1885, 23 S. L. R. 207; *Seeley*, 1882, 20 S. L. R. 11; *Robinson*, 1892, 20 R. 144). But negligence will be held to exist where it is known that a machine or appliance, though suited for its work, is unnecessarily dangerous to those working at it (*Morgan*, 1890, 56 L. J. Q. B. D. 197; *Heske*, 1883, L. R. 12 Q. B. D. 30; *Weblin*, 1886, L. R. 17 Q. B. D. 122).

"Way" means a place for walking on, and may not include every open space in an employer's premises (*M'Shane*, 1890, 7 T. L. R. 58; *Willetts*, 1892, L. R. 2 Q. B. 92) "Condition" means something inherent in the way (*Bowie*, 1886, 13 R. 981), and not something external to it, as something lying on it (*M'Giffen*, 1882, L. R. 10 Q. B. D. 5; *M'Quade*, 1887, 14 R. 1039; *Pegram*, 1886, 55 L. J. Q. B. D. 447; but see *Mitchell*, 1885, 23 S. L. R. 108). "Machinery or plant" includes whatever apparatus is used by a business man for carrying on his business (*Yarmouth*, 1887, L. R. 19 Q. B. D. 647, 658). A horse used by a wharfinger (*Yarmouth, supra*), a tramway company (*Haston*, 1887, 14 R. 621), or a carting contractor (*Fraser*, 1887, 15 R. 178), is plant.

The machinery or other thing complained of must be used in or connected with the business of the employer. A partly built wall was held not to be part of the "works" of an employer, and machinery unused and not erected was held not to fall within the section (*Howe*, 1886, L. R. 17 Q. B. D. 187; and see *Brannigan*, 1892, L. R. 1 Q. B. 344). But an employer may be responsible for the condition of a thing used in his business although it is not his property, as, for instance, a hired crane (*Conway*, 1885, 2 T. L. R. 80); but not for a building (*Gray*, 1889, 11 R. 200) or ship (*Bacon* 1887, 3 T. L. R. 557; *Wilson*, 1887, 24 S. L. R.

541) on which his workmen are executing repairs, or waggons which are being loaded under a contract of carriage (*Robinson*, 1892, 20 R. 144).

(2) By reason of the negligence of any servant, not ordinarily engaged in manual labour, in the exercise of superintendence intrusted to him (s. 1 (2), s. 8). In an action brought on these sections the duties of the superintendent should be averred. If these duties are not inconsistent with his being engaged in manual labour, it should be averred that he is not ordinarily so engaged (*M'Leod*, 1893, 20 R. 381). It is not sufficient merely to describe him as foreman (*Moore*, 1890, 17 R. 796). A foreman who works manually with the men under him is not a superintendent (*Kellard*, 1888, L. R. 21 Q. B. D. 367; *Shaffers*, 1883, L. R. 10 Q. B. D. 356), but a superintendent may lend a helping hand without losing that character (*Osborne*, 1883, L. R. 11 Q. B. D. 619).

(3) By reason of the negligence of any servant to whose orders the workman was bound to conform, where injury resulted from conforming (s. 1. (3)). The negligent servant must have had authority to give orders (*M'Manus*, 1882, 9 R. 425; *Flynn*, 1891, 18 R. 554); but being himself under the orders of some higher servant is not inconsistent with his having this authority (*Dolan*, 1885, 12 R. 804; *Wild*, 1891, 8 T. L. R. 15). The obligation to conform to orders exists only during working hours, and applies only to such as are within the authority of the person giving them (*Snowden*, 1890, L. R. 25 Q. B. D. 193; but see *Sweeney*, 1886, 14 R. 105). Further, the orders must be special. A general order to attend to a particular job does not fall within the section (*Snowden, supra*), but an order to do it in a particular way does (*Kettlewell*, 1886, 24 S. L. R. 95; see *M'Coll*, 1891, 18 R. 507; *Flynn*, 1891, 18 R. 554). Lastly, a casual connection between the order and the injury must be proved (*Mitchell*, 1885, 23 S. L. R. 108; *Millward*, 1884, L. R. 14 Q. B. D. 68; *Kellard*, 1888, L. R. 21 Q. B. D. 367).

(4) By reason of the act or omission of any servant in obedience to any rules of the employer, or to the instructions of a person delegated with the authority of the employer, if the injury resulted from some defect in the rules or instructions (s. 1 (4), s. 2 (2)). Here also it must be shown that the act causing the injury was done in obedience to the rules or instructions, and not to the concurring negligence of the servant so acting (*Whatley*, 1890, 62 L. T. N. S. 639).

(5) By reason of the negligence of any servant who has charge or control of any signal, points, locomotive engine, or train upon a railway. Charge here means general charge, and not charge for a particular moment, or charge under the orders of a superior servant (*Gibbs*, 1884, L. R. 12 Q. B. D. 208; *Robertson*, 1891, 18 R. 1221). Railway means any way upon which carriages travel by means of rails, and is not confined to those made under statutory authority (*Doughty*, 1883, L. R. 10 Q. B. D. 258). Train includes trucks coupled together and moved by horse power or capstan actuated by a stationary engine, as well as those moved by a locomotive (*Cox*, 1882, L. R. 9 Q. B. D. 106).

Workman Aware of Defect.—When a workman knows of the existence of a defect, he is required to give notice to his employer or superior servant, unless he is aware that they already know (s. 2 (3)). The object is to enable the employer to remedy the defect and avoid injury (*Stuart*, 1883, 49 L. T. N. S. 138). In another view, it seems to preserve for the employer the common law defence of contributory negligence (*Weblin*, 1886, L. R. 17 Q. B. D. 122). In order that a workman may be barred from recovering under this subsection, it must appear that he knew of a particular defect which he could point out (*Sanders*, 1890, 6 T. L. R. 324), and that he

knew that the defect involved danger to him (*Brooke*, 1890, 63 L. T. N. S. 287). An employer may be presumed to know of the existence of a defect which is notorious, and notice will in that case not be required (*Haston*, 1887, 14 R. 621); but a proper averment must be made in the condescendence that the employer or superior servant knew (*Milligan*, 1891, 19 R. 18).

Amount Recoverable.—The amount of damages which may be recovered is limited to three years' wages (s. 3). Towards this amount is to be imputed any penalty paid to the workman in respect of any other Act of Parliament (s. 5).

Notice of Accident and Raising of Action.—Notice of the accident must be given within six weeks, and the action raised within six months of the date of the injury (s. 4). In the case of a fatal injury, want of notice may be excused by showing a reasonable cause. But the time-limit of six months is peremptory, and cannot be interfered with by the Court (*Clark*, 1885, 12 R. 1092; *Johnston*, 1883, 21 S. L. R. 246).

The notice must give the name and address of the person injured, the cause and date of the injury, and must be served on the employer (s. 7). Notice must be in writing (*Moyle*, 1881, L. R. 8 Q. B. D. 116), and a defective written notice may not be supplemented by reference to a note of an oral report taken down by the employer (*Keen*, 1882, L. R. 8 Q. B. D. 482).

Defect in a notice is not a bar to maintaining an action, unless the judge is satisfied that the defence is prejudiced, and that the defect was for the purpose of misleading (s. 7). This provision, coupled with that directing that a notice is to be in ordinary language, is sufficient to protect almost any form of writ. Notices have been sustained which omitted the address of the injured (*Thomson*, 1884, 12 R. 121), the date of the accident (*Carter*, 1883, L. R. 12 Q. B. D. 91), and its cause (*Stone*, 1882, L. R. 9 Q. B. D. 76). Insufficiency of notice is to be decided by the judge at the proof (*Traill*, 1887, 15 R. 4), and his decision will not readily be interfered with (*Traill, Thomson, supra*).

Notice may be served by delivery at the residence or place of business of the employer. It may also be served by registered letter, receipt being presumed in ordinary course of post, and service being proved by showing that the notice was properly addressed and registered (s. 7). Proof of receipt is always sufficient, although the notice may neither have been registered nor properly addressed (*M'Govan*, 1886, 13 R. 1033). The question of the receipt of notice may be reserved for the trial, if there are conclusions at common law as well as under the Act (*M'Leod*, 1893, 20 R. 381).

Action to be Brought in Sheriff Court.—An action, though it must be raised in the Sheriff Court, may be removed by either party for trial to the Court of Session (s. 6 (1) (3)). This may be done (1) under sec. 40 of the Judicature Act of 1825, and sec. 73 of the Court of Session Act of 1868 (*Paton*, 1885, 22 S. L. R. 345); or (2) under sec. 9 of the Sheriff Court Act of 1877. At action laid both at common law and on the Employers Liability Act, may be brought into the Court of Session on both branches by the one appeal under the Act of 1868 (*Morison*, 1882, 10 R. 271; *M'Avoy*, 1881, 19 S. L. R. 137).

Liability of a Master for his Servants.—A master is liable for the negligent act of his servant while in the discharge of the duties of his employment. He is, of course, also liable for any act of the servant which he has authorised, as in that case the maxim *facit per alium facit per se* applies (*Ellis*, 1853, 2 El. & Bl. 767; *Baird*, 1826, 4 S. 790 or 797). But the fact

that a master has not ordered, or has forbidden, the act complained of, does not free him from responsibility if it has been done within the scope of the servant's employment. In order to constitute the relation of master and servant so as to create this vicarious liability, it must appear (1) that the person alleged to be master had the power of selection, and (2) had the control of the servant.

Power of Selection Implied.—"A person who is compulsorily put upon you is not in the position of a servant" (per Ld. Esher in *The Guy Mannering*, 1882, 51 L. J. P. D. & A. 57, 59; *Martin*, 1843, 4 A. & E. 298, 312). Consequently the captain of a man-of-war is not responsible for the negligence of a lieutenant (*Nicolson*, 1812, 15 East, 384), nor the owners of a ship for a compulsory pilot (*The Guy Mannering, supra*; *Redpath*, 1872, L. R. 4 P. C. App. 511; *Clyde Navigation Co.*, 1876, L. R. 1 App. Ca. 790), nor police commissioners for constables whom they pay, but do not appoint (*Thomson*, 1840, 1 Rob. App. 162; *Young*, 1891, 18 R. 825; *Girdwood*, 1894, 22 R. 11). A master does not free himself, however, by delegating the power of selection to another servant (*Charles*, 1878, L. R. 3 C. P. D. 492), and the servant with the delegated power is not regarded as the master (*Stone*, 1795, 6 T. R. 411). A police superintendent, who acts for the public, the true employer, is not responsible for the acts of his subordinates (*Bain*, 1857, 19 D. 405). The same consideration protects a procurator-fiscal in employing a sheriff or criminal officer (*Munro*, 1845, 7 D. 500; *Beattie*, 1846, 8 D. 930, note 935), and all public officials having a staff under them (*Lane*, 1701, 1 Raym., Ld. 646; *Whitfield*, 1778, 2 Cowp. 754). But it has not been extended to the private employer of an officer executing diligence (*Beattie, supra*; see *Holman*, 1877, 4 R. 406, 410, 422). Persons, however, who would be free from liability on the ground that they were not masters in the meaning of the word here required, will become liable if their negligence has contributed to the injury (*The Strathspey*, 1891, 18 R. 1048).

Control of Work.—Where a person has not the control and direction of the wrong-doer, there is no liability for his fault (*Sadler*, 1855, 4 El. & Bl. 570; *Pendlebury*, 1875, L. R. 1 Q. B. D. 36). This rule excludes liability for the servant of an agent or contractor (*Quarman*, 1840, 6 M. & W. 499, 510; *Murray*, 1870, L. R. C. P. 24). Defenders were accordingly held not liable for the negligence of the servant of a person employed to drive cattle (*Milligan*, 1840, 12 A. & E. 737), and to execute repairs on a house (*M'Lean*, 1850, 12 D. 887). Nor is a railway company liable for the servants of a carting contractor (*Shiells*, 1856, 18 D. 1199), nor the hirer of a carriage for the driver (*Anderson*, 1893, 21 R. 318; *Laugher*, 182, 5 B. & C. 547; *Hobbit*, 1846, 6 Rail. C. 188), nor that of a tug for the crew (*Dalzell*, 1858, El. B. & E. 899). At common law a cab proprietor is not regarded as the master of a driver to whom he lets on hire a horse and cab (*Venables*, 1877, L. R. 2 Q. B. D. 279), but statute has made him liable for the fault of the latter (in England, 1 & 2 Will. IV. c. 22; 6 & 7 Vict. c. 86; in Scotland, Police and Improvement Act, 1862, s. 279 *et seq.*; Burgh Police Act, 1892, Sched. V. 18; see *Fowler*, 1872, L. R. 7 C. P. 272; *Powles*, 1856, 6 El. & Bl. 207; *Morley*, 1848, 11 L. T. O. S. 199). But where a cab only was let, the driver providing the horse and other accessories, the Act (Metropolitan Hackney Carriage) was held not to apply (*King*, 1881, L. R. 8 Q. B. D. 104).

A person is not liable for the negligence of another, even though directly employed, if the latter acts independently, and is not subject to control. A contractor who executes a piece of work which may be re-

jected by his employer, but the execution of which is not subject to supervision and interference, is not the servant of the employer (*Stephen*, 1876, 3 R. 535, 542). But if an operation is to be performed by a contractor under the supervision of the employer, the maxim *respondeat superior* applies (*Nisbett*, 1852, 14 D. 973; *Rankin*, 1847, 9 D. 1048; but see *Reedie*, 1849, 6 Rail. C. 184, 188). See *Culpa tenet suos auctores.*

Acting in the Course of the Service.—A master's liability for his servant's negligence extends to acts done in the course of the service (*Barwick*, 1867, L. R. 2 Ex. 259, 265; *The Thetis*, 1869, 2 A. & E. 365; *Storey*, 1869, L. R. 4 Q. B. 476, 480). The familiar illustration is negligent driving of a vehicle (*Baird*, 1826, 4 S. 790 or 797; *Gordon*, 1849, 4 Ex. 365). If the vehicle is taken out on the master's business, he will be liable although the servant uses it for business of his own (*Patten*, 1857, 2 C. B. N. S. 606; *Whatman*, 1868, L. R. 3 C. P. 422), as making a detour to call on a friend (*Joel*, 1834, 6 C. & P. 501), or if he races it for his own amusement (*Brown*, 26 Feb. 1813, F. C.), or leaves it unattended while getting refreshment (*Whatman*, 1868, L. R. 3 C. P. 425). The course of service has been held to cover cases of putting a master's horse, affected with glanders, into a stable amongst others (*Baird*, 1852, 14 D. 615), and whipping the horse of another person in order to extricate a master's carriage from an entanglement (*Croft*, 1821, 4 Barn. & Ald. 590).

The line between acting within and acting outwith the service is very fine. It has been held that a servant who takes out his master's van for his own purposes, continues throughout the journey to be outwith the service, although he may transact some of his master's business by the way (*Rayner*, 1877, L. R. 2 C. P. D. 357). A servant also, by a deviation for his own purposes from a journey begun for his master, if the deviation amounts to a new journey, may be held to be acting outwith the service (*Mitchell*, 1853, 13 C. B. 237, 246). Acts done out of working hours do not affect the master, as the relation of master and servant is then suspended (*Rohl*, 1890, 7 T. L. R. 2).

A servant engaged for a special department does not render his master liable for wrongs committed in a branch of the service which he has no authority to engage in. A shop salesman has no authority to drive the van for delivering goods (*Wilson*, 1885, L. R. Ir. 16 C. L. 225; *Martin*, 1887, 14 R. 814), nor a bargee to open locks at the request of another (*Gallagher*, 1883, 11 R. 53). Nor has a servant any implied authority to engage others to assist him at the master's work (*Lumsden*, 1856, 18 D. 468). But a servant may bind his master although performing an act outwith his usual employment. If it appears that the servant was the person provided for that work, and especially if there was no one else to discharge a duty in circumstances which were bound sometimes to arise, the master will be liable (*Giles*, 1853, 2 El. & Bl. 822, 829; *Little*, 1891, 7 T. L. R. 699). Certain servants of railway and other carrying concerns have statutory authority to use physical force in dealing with persons transgressing certain rules. These employers, by leaving their servants to determine when an act of that sort is to be done, render themselves answerable for mistakes made (*Smith*, 1891, 7 T. L. R. 459; *Bayley*, 1873, L. R. 8 C. P. 148; *Seymour*, 1861, 7 H. & N. 355). Thus the owner of a steamer was held liable for the mistake of the purser in apprehending a passenger accused of not paying his fare (*Lundie*, 1894, 21 R. 1085; Merchant Shipping Act, 1862, ss. 35 and 37). If the statutory authority is given to "master or owner," the owner will be liable for the mistake of the master (*M'Naughton*, 1847, 10 D. 236); but if to "master," then the owner will not be liable (*O'Neil*, 1873, 11 M. 538). But authority

is limited to acts which require it. An infringement of a bye-law of the company can be dealt with by a railway servant only by reason of the powers conferred on him, and on that account the employer is liable. But a common law offender, such as a thief, may be handed over to the police without any powers derived from an employer, and a servant does not represent his master in doing so (*Allen*, 1870, L. R. 6 Q. B. 65; *Edwards*, 1870, L. R. 5 C. P. 445). On the other hand, where an employer has no power to apprehend or use physical force, doing so cannot be within the scope of a servant's implied authority (*Poulton*, 1867, L. R. 2 Q. B. 534).

If a general authority is established, a master may not escape by proving that the particular act complained of was forbidden (*Bayley*, 1873, L. R. 7 C. P. 148, 152; *Fraser*, 1867, 5 M. 851: *Limpus*, 1862, 1 H. & C. 526, 539). But authority must be shown. A master was held not liable where injury was caused by his servants cutting down a tree which they were not empowered to do (*Linwood*, 1821, 1 Sh. App. 20); by his domestic servant cleaning a chimney by burning furze in it, when other servants were employed to do it otherwise (*M'Kenzie*, 1834, 10 Bing. 385); by his clerk leaving a tap running in a lavatory where he had no business to be (*Stevens*, 1881, L. R. 6 Q. B. D. 318).

A master is not liable for an act of his servant done to gratify the servant's malice, and not in his master's interest (*M'Laren*, 1827, 4 Mur. 381). Where a gamekeeper shot pursuer's dog and wounded pursuer (*Wardrope*, 1876, 3 R. 876), and where a rate collector assaulted a ratepayer (*Richards*, 1885, L. R. 15 Q. B. D. 660), the acts complained of were held to be personal, and not to have been done for the employer. An illegal act, however, if done in the interest of an employer, may render the employer liable (*Ward*, 1873, 42 L. J. C. P. 265; *Limpus*, 1862, 1 H. & C. 526).

[Addison, Pollock, on *Tort*; Glegg on *Reparation*.]

Repeating a Summons.—This form of procedure is still competent, but is no longer frequent. Where a defence is pleaded to give effect to which a cross action by defender against pursuer is necessary, leave may be obtained to *repeat a summons* in the original action. In this way the execution, calling, and enrolling of the summons are dispensed with. The summons must, however, be signeted, and the fee-fund dues must be paid. The Court interpones authority, and holds the summons repeated. Where necessary, the repeated summons is conjoined with the original action. A summons cannot be repeated except with consent of the opposite party (Mackay, *Manual*, 192). The effect of this procedure does not extend beyond removing the objection that a separate action is necessary. In modern practice it is not unusual for the pursuer to withdraw his objection to the defence being pleaded, and for this reason the procedure of repeating a summons is seldom resorted to.

Repetition is generally defined as a repayment of money which has been paid in mistake (Bell, *Dict.*; Wharton, *Dict.*), but this definition is too narrow, for the term is practically used as an equivalent for repayment. Claims for repetition, however, are usually based on the ground that money has, through mistake, been paid to a person not entitled to receive it. The success or otherwise of such a claim will depend largely upon whether the mistake was such as to give rise to the belief in the mind of the payer that he was under an obligation to pay the sum sought to be recovered to

the recipient. If it does, repayment will generally be required, though much depends on whether the mistake was in fact or in law, and whether the recipient has or has not an equitable right to retain it (see CONDICTIO INDEBITI and ERROR); if it does not, the claim will fail, for the payment will be regarded as a donation, and therefore irrevocable (*Masters and Seamen of Dundee*, 1869, 8 M. 278).

Money, however, which has been extorted by unfair means, can be recovered, although paid with full knowledge that no debt is due. For example, if money be paid by a person accused of a crime to another in order to induce him to refrain from giving false evidence, he can recover it from the recipient (Ersk. iii. 1. 10). So, too, with money paid in order to obtain release from illegal imprisonment, or to recover goods from a carrier, who refused to give them up except on payment of an exorbitant charge (*Jack*, 1661, Mor. 2923; *Pitt*, 1835, 2 A. E. 459; *Ashmole*, 1842, 2 Q. B. 837; and cases cited in note on *Hampton* v. *Marriot*, Smith, *L. Ca.* ii. 414). Where money has been taken by theft or violence, it can be recovered from the taker, but not from any third party who has *bonâ fide* acquired it, therein differing from the case of goods (Bankt. i. 8. 34. *Crawfurd*, 1749, Mor. 875; *Swinton*, 1799, Mor. 10105; see RESTITUTION). If a payment has been made subject to the recipient observing a certain condition, and he refuses to do so, repayment may be demanded (*Charteris*, 1749, Mor. 7283, 1 Pat. App. 463; *Semple*, 1889, 16 R. 790). Where money has been lent, an action may, of course, be brought for its recovery, and it may be pleaded in defence that the payment was a donation. In determining whether loan or donation was intended, regard will be had to the whole circumstances of the case, but some weight is attached to certain legal presumptions (Ersk. iii. 3. 92; *Drummond*, 1834, 12 S. 342; *M'Gaws*, 1882, 10 R. 157, etc.; see DONATION). Again, where a person has been in possession of an estate, or an office, to which he is not entitled, and has been receiving the profits, an action for repetition of the sums received may be brought by the person who should really have received them. Repayment, however, will not be required if the recipient was in *bonâ fide* (see BONA FIDES). Further instances of claims for Repetition are furnished in connection with Marine Insurance. Underwriters are bound to return the premium paid in connection with a policy of insurance whenever no risk has been run under the policy, either on account of the voyage never having been entered upon, or on account of the policy having been void owing to mis-representation or some other reason, and if they fail to do so an action may be brought by the assured for its repayment (*Feise*, 1812, 4 Taunt. 640; *Colby*, 1827, Moo. & M. 81, 1 Bell's *Ill.* 297; *Penson*, 1800, 2 B. & P. 330; *Oom*, 1810, 12 East, 225, 3 Bell's *Ill.* 143); unless the policy is void owing to his fraud (*Wilson*, 1762, 3 Burr. 1361). Where money has been paid as the result of a compromise, it cannot be recovered except upon the ground of fraud (Ersk. iii. 3. 54; *Assets Co. Ltd.*, 1885, 13 R. 281; and cases cited Bell, *Prin.* s. 535). Neither can money which has been paid in furtherance of an illegal or immoral contract be recovered. In such a case the maxim *melior est condictio possidentis* applies, "for the Courts will not assist an illegal transaction in any respect" (*Edgar*, 1802, 3 East, 221, per Ld. Ellenborough). In *Taylor*, 1869, L. R. 4 Q. B. 313, it was said: "The maxim *in pari delicto potior est conditio possidentis* is as thoroughly settled as any proposition in law can be. It is a maxim of law established, not for the benefit of plaintiffs, or defendants, but is founded on the principles of public policy, which will not assist a plaintiff, who has paid over money or handed over property in pursuance of an illegal or immoral contract, to

recover it back"; and in *Bruce*, 1839, 1 D. 583, per Ld. Fullerton, where an agreement is "so tainted with illegality as to exclude the right to demand performance of that which is unexecuted, it can as little afford a legal ground of action for recalling that part which has been performed." If, however, a person pays to another in order to effect an illegal purpose, the money can be recovered before the purpose is effected, for in such a case the plaintiff is not founding on the illegal contract, but, on the contrary, is repudiating it (*Wilson*, 1881, L. R. 7 Q. B. D. 548; *Taylor*, 1876, 1 Q. B. D. 291; *Herman*, 1835, 15 Q. B. D. 561). Possibly the Court would order repetition of money paid in pursuance of a contract, void under the Weights and Measures Acts, in the event of the second party refusing to perform his part, although it would not enforce the contract (*Cuthbertson*, 1870, 8 M. 1073).

Reponing.—If a decree has been pronounced against a party on account of absence or default, he may in certain circumstances, and subject to certain conditions, have the decree set aside, to the effect of placing him in exactly the same position as if the decree had never been pronounced. When this is done he is said to be reponed. The circumstances and conditions on which a party can be reponed differ in the Court of Session and the Sheriff Court.

I. In Court of Session.

(1) *Against Interlocutor allowed to become Final by Mistake.*—By the Administration of Justice and Appeals Act, 1808, 48 Geo. III. c. 151, s. 16, it is provided that "if the reclaiming or representing days against an interlocutor of the Lord Ordinary shall from mistake or inadvertency have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition to the review of the Division to which the said Lord Ordinary belongs; but declaring always that, in the event of such petition being presented, the petitioners shall be subjected in the payment of the expenses previously incurred in the process by the other party." In substance this enactment is still in force, but reclaiming petitions having been abolished by Geo. IV. c. 120, s. 18, the form of a reclaiming note is now used (*Bennet*, 1833, 11 S. 414; *Plock*, 1844, 4 D. 271, per Ld. Jeffrey).

To entitle a party to the benefit of the Act it is essential that the delay should be due to "mistake or inadvertency." In the case of *Gillespie's Reprs.* (1826, 4 S. 391, and 1827, 6 S. 90), a party was reponed on this ground, although the interlocutor against which he was reponed was partly in his favour, and had been granted on his own motion. Again, where delay was caused by the refusal of a reclaiming note as incompetent, the record not having been appended owing to accidental causes, and also where a reclaiming note had been refused, as not being marked by a Principal Clerk of Session or his assistant, it was held to be due to mistake or inadvertency in the sense of the Act (*Mills*, 1829, 7 S. 716; *Plock, supra*). On the other hand, where a party applied to be reponed on the ground that he had been under the mistaken belief that the proper time for reclaiming against the interlocutor, which contained special findings on the merits of the case, was when those findings should come to be applied by a subsequent interlocutor and decree, the application was refused (*Williams*, 1841, 3 D. 1014). If parties have shown by their conduct that they acquiesced in the interlocutor allowed to become final, they will not be reponed (*Ramsay*,

1823, 2 S. 238; *Gillespie's Reprs., supra*; *Brock*, 1826, 4 S. 815; *Ferrier*, 1829, 7 S. 349). Acquiescence would probably be inferred from lapse of time (Mackay, *Manual*, 302). In *Babbington* (1841, 3 D. 611) leave to reclaim was refused on the ground that the party had deliberately abandoned all further proceedings at law, but Ld. Jeffrey observed that he would "have been strongly tempted to have extended relief to a case in which the necessity for it had been brought about by any *mala fide* or deceptious proceedings of the opposite party."

Application to the Lord Ordinary for leave to reclaim is essential (*Mills, supra*), and it is generally thought that an interlocutor refusing such leave is not subject to review (*Babbington, supra*; *Forbes*, 1843, 5 D. 1212; *Magistrates of Leith*, 1875, 3 R. 152).

Parties can only be reponed on payment of expenses, the Court having no discretion in the matter (*Thom*, 24 May 1811, F. C.; *M'Ra*, 1831, 9 S. 582); but an exception to this rule arises where a wife seeks to be reponed in an action between her and her husband, for if she were ordered to pay expenses, she might demand that the husband be ordained to supply her with funds to enable her to obey the order of the Court, and the order would thus really be implemented by him (*Steedman*, 1887, 14 R. 682). In *Brumby* (1822, 2 S. 15) it was held that where a party was ultimately successful on the merits, he was entitled to repetition of the expenses paid by him on being reponed, but this case was overruled by a decision of the whole Court (*Stewart*, 1828, 6 S. 488). In *The Officers of State* (1864, 2 M. 1294) it was questioned whether the payment of expenses was a condition precedent to the hearing of the reclaiming note.

The Act applies to the Bill Chamber, and the expenses to be paid on being reponed are those in the Bill Chamber alone, and not those in the inferior Court (*Arnot*, 1826, 4 S. 427).

(2) *Against Decrees in Absence.*—By A. S., 11th July 1828, s. 72, any party wishing to be reponed against a decree in absence might, at any time before extract (*Scottish Union Insurance Co.*, 1836, 14 S. 1114), present a note accompanied by the defences, or other paper required by the Lord Ordinary, to the Inner House, who remitted to the Lord Ordinary to repone the party on payment of such expenses as might appear just. Reclaiming notes against decrees in absence were declared to be incompetent by the Court of Session Act, 1868, s. 23, and in lieu thereof it was provided that the defender might, at any time within ten days of the date of such decree, obtain its recall by lodging his defences and paying £2, 2s. of expenses to the pursuer. If the ten days have been allowed to elapse without any action having been taken, the party desiring to be reponed must, as a rule, proceed by way of suspension (1 & 2 Vict. c. 86, s. 5) or reduction (31 & 32 Vict. c. 100, s. 24). Where no proper intimation of the proceedings had been made to a party with an interest to appear, the Court have, notwithstanding the above-mentioned provision, held a reclaiming note to be still competent (*Lindsay*, 1879, 6 R. 1246; *Whyte*, 1891, 18 R. 469). An Inner House decree in absence can only be recalled by appeal to the House of Lords (*Tough*, 1832, 10 S. 619; Mackay, *Manual*, 212).

(3) *Against Decree by Default.*—By A. S., 11th July 1828, s. 72, parties desiring to be reponed against a decree by default might present a reclaiming note to the Inner House craving to be reponed. This procedure is still competent; but in consequence of sec. 51 of the Court of Session Act the note now contains no prayer, and is similar to an ordinary reclaiming note, except that the record does not require to be appended to it (A. S., 1828, s. 77; *Wilson*, 1844, 6 D. 692; *Young* 1859, 21 D. 1358; Mackay,

Manual, 293). It requires to be presented within the reclaiming days, and to be accompanied by any paper or papers which may have been ordered (A. S., 11th July 1828, ss. 57 and 112; *Lumsdaine*, 1834, 13 S. 215; *Falla*, 1851, 13 D. 482; *Thomson*, 1851, 13 D. 1260; *Arnold*, 1852, 14 D. 768 and 769). It is left to the discretion of the Court to determine the conditions on which a party will be reponed, and they may refuse the application (*Lumsdaine, supra*; *Aitken*, 1866, 4 M. 841; *Anderson*, 1875, 3 R. 254; *Morrison*, 1876, 4 R. 9; *Ferguson*, 1878, 5 R. 1016; *Halligan*, 1883, 10 R. 972; *Liquidator of Gael Iron Co.*, 1884, 12 R. 345). Suspension being incompetent (*Maule*, 1878, 6 R. 44), reduction is the only remedy open to a party who has allowed the reclaiming days to expire, unless the case falls under 48 Geo. III. c. 151, s. 16 (*supra*). The Court, however, may allow an exception to this rule on the ground of poverty (Mackay, *Manual*, 311). Inner House decrees can only be set aside on appeal to the House of Lords (*Tough*, 1832, 10 S. 619).

(4) *In Appeals.*—Any party who has been held to have abandoned his appeal in consequence of not printing in terms of sec. 3 of A. S., 10th March 1870, may under the same section, at any time within eight days, move the Court, or in vacation the Lord Ordinary on the Bills, to repone him. This motion will be granted by the Court, or the Lord Ordinary, only upon cause shown, and upon such conditions as to printing and payment of expenses as may seem just. As a general rule, the fact that verbal negotiations for a settlement were going on will not be held sufficient cause for reponing a party (*Robertson*, 1877, 5 R. 257). But applications to be reponed were successful, on the ground that communication between agent and client was difficult, and also on the ground that the papers were in the hands of the Crown Agent (*Macquian*, 1871, 9 M. 743; *Davie*, 12th Nov. 1880). For other grounds on which applications to be reponed would probably be successful, see *Young*, 1875, 2 R. 456; *Walker*, 1877, 4 R. 714; *Greig*, 1880, 8 R. 41; *Boyd, Gilmour, & Co.*, 1888, 16 R. 104. The amount of expenses required to be paid as a condition of being reponed will generally be £2, 2s.

(5) *Against Protestation for not Calling.*—Under the Court of Session Act of 1850 (13 & 14 Vict. c. 36 s. 23) a pursuer may be reponed against a prostestation for not calling at any time within ten days after the same has been given out for extract, whether extract has been issued or not, on lodging his summons for calling along with the relative documents, and producing a receipt by the defender's agent for the sum of £3, 3s. of protestation money, or consigning that sum in the hands of the clerk.

Provision is also made for reponing a party against a protestation for not enrolling and insisting, but this form of protestation is obsolete (Mackay, *Manual*).

(6) *Reponing of Paupers.*—The fact that a party applying to be reponed is on the poors roll, is not of itself sufficient to justify the Court in dispensing with payment of expenses as a condition of being reponed, for it is provided by A. S., 11th July 1828, ss. 72, 73, that although a party against whom decree in absence or upon failure has been pronounced, shall be on the poors roll, he shall not be reponed except upon payment of such expenses as shall seem reasonable, unless it shall appear that the decree has been pronounced from the inability of the party to furnish the necessary information, and not from the fault or neglect of the agent in the cause, or the wilful neglect of the pauper himself (*Ord*, 1861, 24 D. 25). No special provision is made with regard to the reponing of paupers against

decrees in absence under 31 & 32 Vict. c. 100, s. 23, but it is thought that the Lord Ordinary has power to remit the £2, 2s. of expenses required by that section as a condition of being reponed in special circumstances (Mackay, *Manual*, 212).

II. In Sheriff Court.

For the circumstances and conditions on which a party will be reponed in the Sheriff Court, see Absence (Sheriff Court) and Default (Sheriff Court), and for the special rules applicable to the Debts Recovery and Small Debt Courts, see under these heads.

[Shand, *Practice*; Mackay, *Manual*; Monteith Smith, *Expenses*; Dove Wilson, *Sheriff Court Practice*.]

See Absence; Default; Suspension; Reduction.

Report to Inner House.—The Lord Ordinary may, after intimation to the parties, report verbally to the Inner House any incidental matter which may arise in the course of a cause (6 Geo. iv. c. 120, s. 13; 13 & 14 Vict. c. 36, s. 51). The Junior Lord Ordinary may report petitions or applications to the Court, who may thereupon dispose of the same, or give such instructions thereanent to the Lord Ordinary as they may deem proper (20 & 21 Vict. c. 56, s. 5). These are the only reports now common. But see also Proving of the Tenor; Ranking and Sale; and Commonty.

[Mackay, *Manual*, 306, 307; *Practice*, i. 577.]

Representation.—*In Contracts.*—A representation is a statement of fact made by one party to the other before or at the time of the contract of some matter or circumstance relating to it. Where a contract is entered into on the faith of a false representation made honestly, and in innocence of its untruth, the contract is void *ab initio* on the ground of error (see Error). But where the false representation is made with intent to deceive the other party to the contract, the contract is voidable on the ground of fraud. It can only, however, be set aside while matters remain entire and no third party can be thereby prejudiced (see Fraud; Misrepresentation). Where a representation is incorporated in the contract, it becomes a warranty or an essential condition of the contract. Unless true and complied with, therefore, it will entitle the other party to reject the contract, or to bring an action of damages for breach.

Insurance.—Insurance is a contract of good faith in which the insurer, in calculating the risks to be run, has to rely very much on the statement of the insured. Where material to the risk, any representation made by the insured, not true, or not substantially complied with, avoids the policy. A warranty, on the other hand, whether material to the risk or not, if not fulfilled, avoids the policy.

[See Fire, Life, and Marine Insurance; Warranty.]

Sale.—A representation made in a contract of sale may be—(1) a mere expression of opinion or commendation by the seller of his goods, in which case it is entirely inoperative; (2) it may amount to a warranty, when failure to perform it will be deemed failure to perform a material part of the contract (Sale of Goods Act, 1893, ss. 11 and 62 (1)), and will entitle the other party either to reject the contract or to bring an action of damages for breach; (3) it may constitute part of the description of the

thing sold, and thus be an essential condition going to the root of the contract.

[See SALE; CONTRACT.]

Apart from its effect in contracts, no liability attaches by law to any representation made by one person to another, unless the party making the representation does so recklessly in ignorance of the facts, and with the intention that the other person should, or with the knowledge that he may, act on such representation; or makes the representation fraudulently. In either of these cases, *culpa* exists on the part of the person making the representation, and an action of damages will lie against him in the event of the other party relying upon his statement and thereby suffering loss.

[For representation as to character and credit, see CHARACTER; GUARANTY; LETTERS OF CREDIT.]

Reprisal.—Reprisal is a mode of terminating the difference between nations by forcible means short of actual war. "Reprisals are resorted to when a specific wrong has been committed, and they consist in the seizure and confiscation of property belong to the offending State or its subjects by way of compensation in value for the wrong; or in seizure of property or acts of violence directed against individuals, with the object of compelling the State to grant redress" (Hall, *International Law*, p. 381). Reprisals are *negative* where a State declines to fulfil an obligation; *positive* when effects or persons are seized to obtain satisfaction (Wheaton, *International Law*, 401). Acts of reprisal are *primâ facie* acts of war; and Ld. Stowell describes them as "equivocal," for if war breaks out, subjects seized may be confiscated, but if there is no war, the seizure becomes a mere civil embargo.

In modern times reprisal is resorted to not as revenge, but "only in cases and to the extent by which an enemy may be deterred from a repetition of his offence" (Hall, *International Law*, 432).

[Wheaton, *International Law*, 400; Hall, *International Law*, pp. 381, 432, 585. See the authorities referred to under PRIZE.]

Reputed Ownership.—See POSSESSION.

Res, in Roman law, denoted anything that could form part of a person's property. In the threefold division of Roman law, which is followed by both Gaius and Justinian, the *jus quod ad res pertinet* covers not only the law of property, but also the law of obligation. The division of *res* into *res corporales, i.e.* physical objects, *quæ tangi possunt*, and *res incorporales, i.e.* rights, *quæ in jure consistunt*, at once brings out the width of the field covered by the term (cf. the phrases in English law, CHOSE IN POSSESSION and CHOSE IN ACTION). The common characteristic of the various classes of *res* lies in the fact that whoever has a *res* is, actually or prospectively, so much the better off.

The division of *res* into *mobiles* and *immobiles* is much less fundamental in Roman law than in modern systems of law, which have been influenced by feudal doctrines. The main importance of the distinction in Roman law is in connection with prescription. See USUCAPIO.

The division of things into fungibles and non-fungibles is in its essence Roman, though the terms are not classical. *Res fungibles* are reckoned by

weight, number, or measure, *i.e.* in ordinary dealings they are not reckoned as having an individual character, but are dealt with in quantities and qualities, those of a certain quality being counted without distinction as equal (*tantundem ejusdem generis est idem*). Such are things like eggs or apples, as distinguished from things like horses or books. The classical term for fungibles is *quantitas* (*Dig.* 44. 2. 7 pr.). The term *res fungibles*, as used by the civilians, has its origin in the definition *res quæ vice mutuâ funguntur*, *i.e.* things which are naturally capable of mutual substitution. The distinction was important in the contract of loan. If fungibles were borrowed, the contract was *mutuum*, and the things were returned *in genere*; if non-fungibles were borrowed, the contract was *commodatum*, and the things were returned *in specie*.

The distinction between *res quæ usu consumuntur* and *res quæ usu non consumuntur* was practically important in connection with usufruct. A thing which was consumed by use could not be the subject of usufruct, since the usufructary had the *jus utendi* and the *jus fruendi*, subject always to the condition, *salva rei substantia*.

A divisible thing is one which can be divided into several parts without impairing the value of the whole, *e.g.* land or wine. An indivisible thing is one which cannot be divided without the value of the whole and the character of the parts being entirely changed by the division, *e.g.* a horse or picture. An indivisible thing can be held in property by several owners, only *pro indiviso*. A *res incorporalis* or right, being a purely intellectual entity, it follows that its parts are merely intellectual, *i.e.* it is susceptible of being held by different owners only *pro indiviso*.

The old distinction between *res mancipi*, which were capable of transference only by *mancipatio* or *in jure cessio*, and *res nec mancipi*, which could be transferred by delivery, was finally abolished by Justinian. See MANCIPATIO.

In the Institutes of Justinian the fundamental division is between *res in nostro patrimonio*, things which can be the objects of property, and *res extra nostrum patrimonium*, things which can be the objects of property. Following Justinian's classification, *res extra nostrum patrimonium* fall into four classes: (1) *res communes*, (1) *res publicæ*, (3) *res universitatis*, (4) *res nullius*.

Res communes are the air, running water, the sea, and the shores of the sea (*Inst.* ii. 1. 1). While in this passage Justinian classes the sea-shore as *res communis*, he lays it down in another place (*Inst.* ii. 1. 5) that *jure gentium* the use of the sea-shore is public. The sea-shore extends to the limit reached by the greatest winter flood. See SEA-SHORE.

Res publicæ were public roads, and all rivers and ports (*portus*). These things, being dedicated to public use (*publico usui destinatæ*), could not on principle be the objects of *dominium*. The banks of a river, though belonging to the riparian proprietors, were subject to the public use (*Inst.* ii. 1. 4). In Scots law *res publicæ*, including seas and shores, rivers and harbours, roads, bridges, and fairs and markets, being necessary for public use and intercourse, are vested in the Crown in trust for the subject (Stair, ii. 1. 5; Ersk. *Inst.* ii. 1, ss. 5 and 6; Bell, *Prin.* ss. 638 *et seq.*).

Res universitatis were things held by a corporation, such as a municipality, for the use of people in general, *e.g.* baths, theatres, or race-courses (*Inst.* ii. 1. 6).

Res nullius were either (1) things capable of being held in private property, but which do not happen to have an owner, or (2) things altogether incapable of being held in private property. To *res nullius* in the

former sense of the term the maxim applies: *res nullius fit occupantis.* See OCCUPATIO. It is only *res nullius* in the latter sense of the term that properly fall under the class of *res extra nostrum patrimonium.* In this latter sense *res nullius* were of three kinds: (*a*) *res sacræ*, things formally consecrated to the gods; (*b*) *res religiosæ*, burial-places; and (*c*) *res sanctæ*, things under the special protection of the gods, such as the walls and gates of a city. The only exception to the rule that *res sacræ* were inalienable, was that the moveables in temples could be sold or pledged for the redemption of captives, for the support of the famishing poor, and for the payment of the debts of the church (*Cod.* 1. 2. 21; *Nov.* 120. 10). *Res sanctæ* were protected from violation by severe penalties. By an extension of this idea, the part of a law by which a punishment is established against persons who transgress the law is termed a sanction (*Inst.* ii. 1. 10). In other words, just as a *res sancta* was protected against violation by a penalty, so the provisions of a statute are protected against violation by penalties. As a matter of fact, all laws are accompanied by a sanction, *i.e.* they imply, if they do not express, an intimation that disobedience will entail punishment.

RES COMMUNES.
„ CORPORALES.
„ INCORPORALES.
„ FUNGIBILES.
„ NULLIUS.
„ MOBILES ET IMMOBILES.
„ PUBLICÆ.
„ SACRÆ.
„ SANCTÆ.
„ RELIGIOSÆ.
„ UNIVERSITATIS.

} See RES.

Res gestæ. — The whole circumstances connected with an occurrence or transaction—"the whole thing that happened." Statements, otherwise inadmissible as hearsay, may be proved when they form part of the *res gestæ.* The ground of the admission of such evidence is "that words which accompany acts, or which are so connected with them as to arise from coexisting motives, form part of the conduct of the individual, which cannot be rightly understood unless his words as well as his acts are proved" (Dickson, *Evidence*, s. 254; Kirkpatrick, *Evidence*, ss. 13 *et seq.*; Macdonald, *Crim. Law*, 468, 478; Hume, ii. 406; Alison ii. 517). See BEST EVIDENCE; EVIDENCE.

Res judicata.—*Res judicata* is pleadable by a party to a suit who has formerly had the matter in controversy judicially determined by a competent tribunal in a question between the same parties, or with parties in the same interest, and proceeding on the same *medium concludendi* or cause of action.

The requisites of the plea are:—

1. *A previous judicium*, or proper judicial determination by a competent tribunal of the subject in question. The decree must have been pronounced in *foro contentioso* without fraud or collusion. Such a decree is final, unless brought under review within the time allowed and in a competent manner. A new action is not excluded by a decree of dismissal; and even where

such a decree has been pronounced after a minute of restriction, a second action with the same conclusions can be raised (*Stewart*, 1868, 6 M. 954). Where by inadvertence a decree of absolvitor has been pronounced after a competent abandonment, it will be held equivalent to dismissal, and a new action may be raised (*Shirreff*, 1836, 14 S. 825). Decree of absolvitor is not *res judicata* when pronounced in terms of a compromise (*Jenkins*, 1867, 5 M. (H. L.) 27). Nor is the dismissal of an action upon relevancy *res judicata* (*Menzies*, 1893, 20 R. (H. L.) 108). The opinion of the Court, expressed at advising on a question not argued by the parties and not referred to in the judgment of the Court, does not foreclose the parties from again raising the question for judgment (*Moubray*, 1896, 23 R. 809). In a question of *res judicata*, it is doubtful whether the collective opinion of the Court can be used for the purpose of controlling or limiting the effect of the decree. It is certain that the opinions of individual judges could not be used for such a purpose (*Marquis of Huntly*, 1896, 23 R. 610).

2. *The identity of parties, or at least representation of identical interests.* —As regards the parties, the question must be raised between the same parties, or their ancestors, authors, or representatives (*Marquis of Huntly*, 1858, 20 D. 374; *Earl of Leven*, 1861, 23 D. 1038; *Carmichael*, 1866, 4 M. 842; *M'Caig*, 1887, 14 R. 295). The principle has further been recognised, that it is enough if the parties represent the same interest (*Marquis of Huntly* and *Earl of Leven, supra*; *Gray*, 1862, 24 D. 1043; *Carmichael, supra*; *Jenkins, supra*; *Potter*, 1870, 8 M. 1064; *Mackie*, 1884, 11 R. 1094; and *M'Caig, supra*). In teind causes, a judgment against the common agent in a locality is *res judicata* against all the heritors (*Duke of Buccleuch*, 1868, 7 M. 95; *Earl of Mansfield*, 1880, 7 R. 552). A judgment in *foro contentioso* in one locality in which the issue is distinctly raised is *res judicata* in another subsequent locality in the same parish (*Elder*, 1869, 7 M. 341; *Bonar*, 1870, 9 M. 58; *Cheape*, 1871, 9 M. 377; *Thomson*, 1872, 10 M. 849; *Dundas*, 1880, 7 R. (H. L.) 19; *Maclachlan*, 1885, 12 R. 1107). A judgment against an heir of entail is *res judicata* against succeeding heirs (*Earl of Leven*, 1861, 23 D. 1038; *Padwick*, 1874, 1 R. 697).

3. *The subject-matter of the litigation must be the same* (*Robertson*, 1860, 22 D. 893; *Gardiner*, 1866, 4 M. (H. L.) 32).

4. *Identity of media concludendi*, or the real points of controversy between the parties (*Gillespie*, 1859, 3 Macq. 757; *E. of Perth*, 1877, 5 R. (H. L.) 26; *Scott*, 1885, 12 R. 1123; *North British Rwy. Co.*, 1897, 34 S. L. R. 415).

When decree is pronounced in terms of the libel, the whole conclusions of the libel are held to be *res judicatæ*, even although some of them have never been adverted to or discussed (*Glendinning*, 1699, Fount. ii. 76). The *exceptio rei judicatæ* can be successfully pleaded against an action raised in this country in order to obtain the reversal of a sentence by a competent foreign Court which has received full execution. See *Watson*, Bell's *Oct. Cases*, 92; *Brown*, 1830, 4 W. & S. 28; *Don*, 1837, 2 S. & M'L. 682; *Baird*, 1854, 16 D. 1088. A judgment in the Sheriff Court, if not appealed or reduced, constitutes *res judicata*, but it is still doubtful whether a judgment in the Small Debt Court has this effect (*Robertson*, 1860, 22 D. 893; *Crawford*, 1860, 22 D. 1064; *D. of Sutherland*, 1890, 18 R. 252).

[See Erskine, B. iv. tit. 3, ss. 1, 4, 7; Stair, B. iv. tit. 40, s. 16; App. s. 8; Kames, *Elucidations*, 173; Dickson on *Evidence*, s. 385; Mackay's *Practice*, i. 586.]

Res judicata in Criminal Cases.

Res judicata, either as to the relevancy of the libel or as to the evidence of the crime, may be pleaded in bar of trial. With regard to the libel, the judgment of the Sheriff-Substitute on relevancy is conclusive in the Sheriff Court, and it is incompetent to place the accused again on his trial before the Sheriff on a libel in precisely the same words (*Longmuir*, 1858, 3 Irv. 287, and 31 S. J. 33). But a judgment against relevancy in the Sheriff Court is not binding on the Court of Justiciary (*Fleming*, 1866, 5 Irv. 289, and 2 S. L. R. 271). As applied to the proof of the crime, this plea is usually termed the plea of having "tholed an assize." A person cannot be tried twice on the same charge (*Fraser*, 1852, 1 Irv. 66; *Dorward*, 1870, 1 Coup. 392). But this plea is only available when the first trial has been regularly conducted, and the *corpus delicti* charged in the second indictment is the same as that which has been the subject of the former trial (*Galloway*, 1863, 4 Irv. 444). When the nature of the crime is altered by an event transpiring after the trial,—where, for instance, an assault turns out, by the death of the victim, to have been murder or culpable homicide,—the plea of *res judicata* will not avail in bar of a new trial on the higher charge (*Cobb*, 1836, 1 Swin. 354; *O'Connor*, 1882, 10 R. (J. C.) 40). Again, if the previous trial was stopped by some unforeseen accident, such as the illness of a juryman (*Jackson*, 1854, 1 Irv. 347; *Smith*, 185, 1 Irv. 378) or of the accused (*Chambers and Henderson*, 1849, J. Shaw, 252; *M'Donald*, 1880, 4 Coup. 344), or proved to be a nullity in consequence of some defect for which the prosecutor was not responsible (*Sharp*, 1820, Shaw, 19; *Gleeman and Bradley*, 1839, 2 S. J. 382), the plea of *res judicata* will not be sustained.

[See Hume, ii. 465; Ersk. B. iv. tit. 4, s. 104; Alison's *Practice*, ii. 615; *Macdonald*, 431.]

Res noviter veniens ad notitiam.—By the Judicature Act, 1825 (6 Geo. IV. c. 120, s. 10), it was provided that the closing of the record in an action finally adjusted the pleadings, and that no amendment should thereafter be allowed; "Provided always that it shall be competent to either party in the course of a cause to state matter of fact *noviter veniens ad notitiam*, or emerging since the commencement of the action, if, on cause shown, leave shall be obtained from the Lord Ordinary or the Court so to do, the said party always paying, previous to stating such new matter on the record, such expenses as may be deemed reasonable by the Lord Ordinary or the Court; and if leave be granted, the new matter shall, within a time to be limited, be stated in the shape of a specific condescendence framed as above, accompanied by a note stating the plea in law arising therefrom; and the adverse party shall in such case be ordered within a reasonable time to put in his answer to such condescendence and plea, to be adjusted and made a part of the record as before directed." This enactment has never been repealed; but its provisions are seldom resorted to now, since by the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 29), the Court may at any time allow an amendment, upon such terms as shall seem proper.

The only amendments allowed as *res noviter* were facts which could not have been ascertained by the party by the use of ordinary care (*Campbell*, 3 M. 501, per Ld. Pres. M'Neill, at p. 504); and which might materially affect the judgment (*Longworth*, 3 M. 645). And though there is no definite judgment that in no case could *res noviter* be admitted after

a judgment, in practice it seems never to have been admitted so late (*Longworth, supra*; *Hansen*, 20 D. 1306).

Where a party desires to lead additional evidence after closing his proof, the only ground on which such evidence will be admitted is because it is *res noviter veniens ad notitiam* (per Ld. Justice Clerk, *Allan*, 20 R. 804).

Res noviter veniens ad notitiam has also been recognised as a sufficient ground for reducing a judgment. Erskine (iv. 3. 3) says: "In the opinion of Stair (iv. 1. 44) and of Mackenzie (s. 1, *Hoc titulo*), the Session may reduce their own decrees upon the emerging of new fact or voucher in writing, not pleaded formerly by the party, if it shall appear that it was not known to him before decree, or that he did not omit it wilfully with a view to protract the cause. Nor is this opinion in any degree inconsistent with the Act of Regulations, 1672; for a defence of which a party is ignorant, and which therefore it is not in his power to plead, cannot be called competent and omitted." Thus a decree of locality in favour of the Crown in 1794 was reduced in 1871 on fresh documentary evidence coming to light (*Cheape*, 9 M. 377, see per Ld. Benholme, 393). But in regard to parole evidence there must be very specific averments, both as to the evidence offered and the reason why it was not forthcoming earlier (Mackay, *C. of S. Practice*, ii. 504); see also *Stewart*, 9 M. 1057, where it was laid down that matter of law could not be *res noviter*. Of course this is also struck at by the rule that nothing can be put forward as *res noviter* which might have been known in good time by reasonable care.

By the Act 55 Geo. III. c. 42, which introduced into Scotland trial by jury in civil causes, it is provided (s. 6) that a new trial may be granted on the ground *inter alia* of *res noviter veniens ad notitiam*. This is still the Act regulating the grounds on which a new trial may be ordered, although by the Court of Session Act, 1850 (13 & 14 Vict. c. 36, ss. 36 *et seq.*), the Jury Court was merged in the Court of Session, and the procedure was further regulated by the Court of Session Act, 1868 (31 & 32 Vict. c. 100, ss. 34 *et seq.*). The Court has always been very careful never to grant a new trial on this ground if the evidence was within the power of the party at the time of the trial, and if the evidence is not material (*Paterson's Trs.*, 1 Murray, 78; *Bell*, 2 Murray, 135; *Paterson*, 1 Feb. 1817, F. C.; *Byres*, 4 M. 388). But where letters materially bearing on the question in dispute (the mental condition of a person whose will was sought to be reduced) were found after the trial to be in the possession of a party who had been examined as a haver without producing them, the Court granted a new trial on this ground (*Lannerman*, 9 D. 164).

Rescissory Action.—See Actions, Divisions or Classes of.

Reserve Forces.—The Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), was passsd to consolidate the various Acts providing for the establishment, regulation, and discipline of the reserve forces. Part I. of the Act treats of the army reserve; Part II. of the militia reserve; and Part III. is general.

The army reserve consists of two classes, the numbers of which are fixed from time to time by Parliament. The first class is liable, when called out on permanent service, to serve either in the United Kingdom or elsewhere, and consists of "men who, having served in any of Her Majesty's regular forces, may either be transferred to the reserve in pursuance of the

Army Act, 1881, or be enlisted or re-engaged in pursuance of this Act." The second class is liable, when called out on permanent service, to serve in the United Kingdom only, and consists of men who, "(*a*) being out-pensioners of Chelsea Hospital or (or on account of service in the Royal Marines) out-pensioners in Greenwich Hospital, or (*b*) having served in any of Her Majesty's regular forces for not less than the full term of their original enlistment, may be enlisted or re-engaged in terms of this Act" (s. 3). This latter class are practically extinct (*Manual of Military Law*, p. 274). Sec. 4 provides for the transfer, enlistment, and re-engagement of army reserve men. They may be called out to aid the civil power in the preservation of the public peace by a Secretary of State or by the Lord Lieutenant of Ireland; and men resident in any town or district may be called out for the same purpose by the officer commanding the town or district, on the written requisition of a justice of the peace (s. 5). Sec. 6 provides that for certain offences, such as not complying with the regulations in force under the Act, an army reserve man may be tried and punished by court-martial, or may be convicted by a Court of summary jurisdiction and sentenced to a "fine of not less than forty shillings, and not more than twenty-five pounds, and in default of payment to imprisonment, with or without hard labour, for any term not less than seven days and not more than the maximum term allowed by law for non-payment of the fine."

The militia reserve consists of such number of men as may be from time to time appointed by Parliament, and may be enlisted from the militia of any part of the United Kingdom, either for six years or for the rest of the man's militia engagement (ss. 8, 9). A man enlisted to the militia reserve remains for all purposes a militiaman until called out on permanent service, and when released from permanent service he returns to the militia (s. 10). Sec. 11 provides for the annual training of the reserve forces: "(1) All or any of the men belonging to the army reserve and the militia reserve respectively may be called out for annual training at such time or times, and at such place or places within the United Kingdom, and for such period or periods, as may be prescribed, not exceeding in any one year, in the case of a man belonging to the army reserve, twelve days or twenty drills, and in the case of a man belonging to the militia reserve, fifty-six days. (2) Every man called out may, during his annual training, be attached to and trained with a body of the regular or auxiliary forces. (3) The annual training under this section of a man belonging to the militia shall be in substitution for the annual training to which he is liable as a militiaman." Secs. 12, 13, provide for the calling out of the reserves on permanent service: (1) "In case of imminent national danger or of any great emergency, it shall be lawful for Her Majesty in Council, by proclamation, the occasion being first communicated to Parliament, if Parliament be then sitting, or declared in Council and notified by proclamation if Parliament be not then sitting, to order that the army reserve and the militia reserve, or either of them, shall be called out on permanent service." (2) Authority may be given by the proclamation to a Secretary for State to give all directions necessary for calling out the reserves. (3) Every man must attend at the time fixed, and from that time is deemed to be called out on permanent service (s. 12). When such a proclamation is made and Parliament is not sitting, it must be summoned to meet within ten days (s. 13). When called out on permanent service, a reserve man is liable to serve so long as the term of service in the reserve force to which he belongs is unexpired, and for a further period not exceeding twelve months. A man called out on permanent service forms part of the regular forces, is subject to the Army

Act, and may be appointed to any corps, or transferred to any other corps within three months in the same arm of the service (s. 14). Sec. 15 provides the punishment for non-attendance when called up. "When a man belonging to the army or militia reserve is called out for annual training or on permanent service, or when a man belonging to the army reserve is called out in aid of the civil power, and such man, without leave lawfully granted, or such sickness or other reasonable excuse as may be allowed in the prescribed manner, fails to appear at any time and place at which he is required upon such calling out to attend, he shall: (*a*) if called out on permanent service, or in aid of the civil power, be guilty, according to the circumstances, of deserting within the meaning of sec. 12, or absenting himself without leave within the meaning of sec. 15 of the Army Act, 1881; and (*b*) if called out for annual training, be guilty of absenting himself without leave, within the meaning of sec. 15 of the Army Act, 1881. (2) A man belonging to the army or militia reserve who commits an offence under this section, or under secs. 12 or 15 of the Army Act, 1881, whether otherwise subject to military law or not, shall be liable as follows, that is to say: (*a*) be liable to be tried by court-martial, and convicted and punished accordingly; or (*b*) be liable to be convicted by a Court of summary jurisdiction, and to be sentenced to a fine of not less than forty shillings and not more than twenty-five pounds, and in default of payment to imprisonment, with or without hard labour, for any term not less than seven days and not more than the maximum term allowed by law for non-payment of the fine; and may in any case be taken into military custody." Any person who induces or assists a reserve man to desert or absent himself without leave is liable on conviction by a Court of summary jurisdiction to a fine not exceeding £20 (s. 17). Subject to the provisions of the Act, Her Majesty may, by order under the hand of a Secretary of State, make, revoke, and alter orders with regard to the government, discipline, and pay of the army and militia reserve (s. 20), and regulations have been made for the re-enlistment of reserve men in order to provide for the increase of the army (see Royal Warrants, 1898; Army Annual Act, 1898). Notices which require to be sent under the Act may be sent by post or published in the manner prescribed by the Act (s. 20). The Reserve Forces Act, 1890 (53 & 54 Vict. c. 42, s. 2), provides that any man belonging to the army reserve may be attached to a volunteer corps for the purpose of drill or training, and when so attached shall be a volunteer of such corps, without prejudice to his position as a man belonging to the army reserve.

[See *Manual of Military Law* (War Office, 1894); Clode, *Military Forces of the Crown*: Pratt, *Military Law*; Tovey, *Military Law*.]

See ARMY; MILITIA.

As to *naval volunteers*, see Acts, 1852, 16 & 17 Vict. c. 73 (Naval Coast Volunteers); 1856, 19 & 20 Vict. c. 83, s. 10 (Coastguard); 1859, 22 & 23 Vict. c. 40 (Naval Volunteers); 1865, 28 & 29 Vict. c. 14 (Colonial Naval Defence).

The services of masters, mates, or engineers in the Merchant Service or in the Indian Naval Force, or of persons recommended by the Admiralty, may be accepted as officers of the Royal Naval Reserve (Acts, 1863, 26 & 27 Vict. c. 69, s. 1; 1872, 35 & 36 Vict. c. 73, s. 17).

Reset.—The crime of reset consists in knowingly receiving and feloniously retaining (*Clark*, 1867, 5 Irv. 437) articles taken by theft, stouthrief, robbery (Hume, i. 113; Alison, i. 328), breach of trust and

embezzlement or falsehood, fraud and wilful imposition (Criminal Procedure Act, 1887, s. 58). There must be guilty knowledge. It is not enough that the accused had suspicions (Hume, i. 114; Alison, i. 329; *Stark or Mould*, 1835, Bell, *Notes*, 46; Macdonald, 90). If the accused merely harbour a thief, etc., this is not enough to constitute the crime. The property must pass into his custody (Hume, i. 113); but it is of no consequence whether he receive it directly from the offender, or through other hands (Hume, i. 114). If a person receive property without at the time knowing that it was dishonestly come by, and afterwards comes to know that it was taken dishonestly, he commits reset if he continue to keep it (*Russell and Others*, 1832, Bell, *Notes*, 46). A wife is not held guilty of reset if she receive or conceal property in order to screen her husband (Alison, i. 338, 339; *Hamiltons*, 1849, J. Shaw, 149). Under an indictment for robbery or for theft, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, a person accused may be convicted of reset (Criminal Procedure Act, 1887, s. 59. See *Kennedy*, 1896, 2 Adam, 51; 23 R. (J. C.) 28; 33 S. L. R. 265; 3 S. L. T. No. 370). There may be reset of plagium, and a charge that accused "did detain and secrete a child, knowing it to be stolen," was upheld (*Cairney or Cook*, 1897, 5 S. L. T. No. 327). The punishment is penal servitude or imprisonment.

Residuary Legatee; Residue.—See Legacy; Vesting.

Resignation.—See Consolidation; Charter; Feu-Charter.

Resignation of Trustees.—Prior to the passing of the Trusts Act of 1861, a trustee, when he had once accepted the office, could not resign, unless either the trust deed under which he acted gave him power to resign, or he obtained authority to do so from the Court. That Act, however (24 & 15 Vict. c. 84, s. 1), reads into every deed or local Act of Parliament under which gratuitous trustees are appointed a power to such trustees to resign their office, unless the contrary is expressed in the deed. By the same Act (s. 3) a gratuitous trustee is defined as "any trustee who receives no pecuniary or valuable consideration for performing the duties of a trustee, and is under no obligation, without special acceptance of such office, to discharge the duties of trustee." By the Act of 1863 (26 & 27 Vict. c. 115, s. 2) the expression is extended to include gratuitous trustees who are appointed or who hold *ex officio*. A more extended definition is given by the Act of 1867 (30 & 31 Vict. c. 97, s. 1), which defines "gratuitous trustees" as "all trustees who are not entitled as such to remuneration for their services, in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*," and which provides that the definition "shall extend to and include all trustees, whether original or assumed, who are entitled to receive any legacy or annuity or bequest under the trust: provided always, that no trustee to whom any legacy or bequest or annuity is expressly given on condition of the recipient thereof accepting the office of trustee under the trust, shall be entitled to resign the office of trustee by virtue of this or of the said recited Acts, unless otherwise expressly declared in the trust deed." The question whether the acceptance of a legacy under the trust deed takes a trustee out of the category of gratuitous trustees is one which depends upon the terms of

the deed. Where it is clear that the truster intended the legacy to take effect whether the legatee accepted the office of trustee or not, the acceptance of the legacy does not take from him the privileges of a gratuitous trustee; but where the legacy was evidently intended as a recompense for the trouble involved in the office, the legatee, if he takes it, is not a gratuitous trustee in the sense of the Acts (see *Assets Co.*, 1896, 4 S. L. T. 185; *Henderson*, 1825, 4 S. 306; More's *Stair, Notes*, i. p. 37, and cases there cited).

Unless prohibited by the deed constituting the trust, a gratuitous trustee has therefore a statutory right to resign, a right which is absolute except in cases where the resignation would leave the trust without administration, as where a sole trustee or a whole body of trustees wishes to resign. This matter will be dealt with immediately. The fact that the trust deed confers upon the trustees discretionary powers—for example, in the apportionment of the fund, which the Court would not authorise assumed trustees or a judicial factor to exercise—will not entitle persons who might derive benefit from the exercise of these powers to object to the resignation of the trustees (*M'Connell*, 1897, 25 R. 330).

The prohibition in the deed must be express in order to prevent trustees from resigning. Where a limited power of resignation was granted to trustees in a trust constituted before 1861, it was held that this limited power was not equivalent to an express prohibition, and did not exclude the power granted by the statute (*Maxwell*, 1874, 2 R. 71). Non-gratuitous trustees can only resign when their deed gives them power to do so, or when they obtain authority from the Court to resign. They are thus in the position in which all trustees were prior to 1861. This authority will be granted by the Court in the exercise of its *nobile officium* upon good cause being shown. In cases occurring before 1861, ill-health has been considered a good reason for resigning (*Dick's Trustees*, 1855, 17 D. 835), as also residence in England or abroad (*Gordon*, 1854, 16 D. 844; *Watson*, 1844, 6 D. 687). In one case the Court sustained a resignation which had been challenged by a third party, chiefly upon the ground that it had been accepted and ratified by all the beneficiaries (*Hill*, 1846, 9 D. 239). In cases subsequent to the Acts, old age and consequent inability to attend to the affairs of the trust have been accepted as a sufficent reason, as also the professional duties of a soldier who might be sent abroad (*Alison*, 1886, 23 S. L. R. 362). Where the interests of the trustee directly conflict with those of the trust, he will be allowed to resign (*Guthrie*, 1895, 22 R. 870). In *Scott* (1894, 22 R. 78) the trustee averred that he had accepted office without realising the magnitude of the trust estate, and that he found that he could not, without neglecting his own affairs, bestow sufficient time and attention upon the trust. He offered to renounce his legacy if he were relieved of his office, but the Court, holding that no sufficient reason had been stated, refused his petition. In *Orphoot*, however (1897, 24 R. 871), where the petitioner also stated that he had accepted office under a misapprehension of the magnitude of the trust, and that his duties as a Sheriff-Substitute prevented him from giving the necessary time and attention to the affairs of the trust, the Court, on his undertaking to repay the legacy bequeathed to him, authorised him to resign. Where a non-gratuitous trustee had resigned on the ground of a conflict of interest between him and the trust, and his resignation had been accepted by his co-trustees, a doubt having afterwards arisen as to the validity of his resignation, the Court dismissed as incompetent a petition by him to authorise and confirm his resignation as at the date at which he

had resigned, expressing, however, no opinion as to the validity of the resignation (*Maclean*, 1895, 22 R. 872).

A clause in a trust deed declaring that upon any of the trustees resigning office, and accounting for their intromissions, the remaining trustees should be bound to discharge them, has been held to confer power to resign upon non-gratuitous trustees (*Bunten*, 1894, 21 R. 370). So also where legacies had been left to trustees, "but without prejudice to their powers as gratuitous trustees," it was held that a trustee was entitled to resign (*Assets Co.*, 1896, 4 S. L. T. 185).

Under the power given by the Act of 1861, a whole body of gratuitous trustees may resign, as well as a single trustee, "but it would be extremely improper and inconsistent with their duty if" a whole body of trustees "were *de plano* to execute a deed of resignation and hand it to the beneficiaries, leaving the trust without administration" (per Ld. Pres. Inglis in *Maxwell*, 1874, 2 R. 71). The proper course in such a case, where all the trustees wish to resign, and cannot find new trustees whom they might assume, is to apply to the Court for the appointment of new trustees or of a judicial factor (*Maxwell, ut supra*).

As has been already mentioned, gratuitous trustees who are appointed or who hold *ex officio* are entitled to resign. The question appears never to have come up for decision as to what would be the effect of the resignation of a body of *ex officio* trustees upon the rights of future holders of the office which entitles them to administer the trust. Where, for example, a truster has left funds in trust to such a body as a kirk-session for charitable purposes, the members of the kirk-session may at any time resign, either singly or in a body, but such a resignation could scarcely have the effect of preventing future members of the kirk-session from claiming the right to administer the trust (see *Mags. of Edinburgh*, 1881, 8 R. (H. L.) 140). The probable effect of the resignation of such a body of trustees would be the appointment of a judicial factor to administer the trust, which appointment could be recalled at any future time when new members of the kirk-session were willing to undertake the administration. That is to say, the resignation of a body of trustees holding *ex officio* would not be effective with regard to future holders of the office, or bar them from claiming their right to act as trustees. (See *M'Lean*, 1898, 6 S. L. T. 220.)

A sole trustee cannot resign until he has taken steps to provide for the administration of the trust. Before he can resign, he must either, with the consent of the beneficiaries under the trust of full age and capable of acting at the time, assume new trustees who accept office, or apply to the Court for the appointment of new trustees or of a judicial factor (30 & 31 Vict. c. 97, s. 10). The provisions of this Act do not affect the absolute statutory right of the trustee to resign, except in so far as it makes it necessary for him to provide that the trust shall not be left unrepresented, and when an application is made to the Court for the appointment of a judicial factor by a trustee who wishes to resign and who has complied with the regulations of the statute, the application will, as a matter of course, be granted (see per Ld. Adam in *M'Connell's Trs.*, 1897, 25 R. 332).

By the same section (sec. 10 of the 1867 Act) a trustee entitled to resign his office "may" do so either by a minute of the trust entered in the sederunt book and signed by him and by the other acting trustees, or by signing a minute of resignation in the form given in Sched. A of the Act, registering it in the Books of Council and Session, and intimating it to his co-trustees. The form given is as follows:—"I, *A. B.*, do hereby resign, as and from the date hereof, the office of trustee under the trust disposition and

settlement [*or other deed*], granted by *C. D.* in favour of *E. F.*, *G. H.*, and myself, dated the day of . [*If the trustee was assumed, add*, and to which office of trustee I was assumed by deed of assumption granted by the said *E. F.* and *G. H.*, dated the day of].—In witness whereof [*testing clause in the usual form*]." If this latter form is adopted, "the resignation shall be held to take effect from and after the expiry of one calendar month after the date" of the intimation to the co-trustees, if they are within Scotland, or, if they are not within Scotland, after three months, or if the address of any trustee to whom intimation should be made cannot be found, the intimation must be given edictally, "and the resignation shall in that case be held to take effect from and after the expiry of six months." It appears that, in spite of the words of the Act, the resignation practically takes effect from the date upon which the minute is signed, and the resigning trustee, during the currency of the period prescribed by the Act, cannot act in the trust (*M'Math*, 1896, 4 S. L. T. 20), nor can he revoke his resignation (*Fullarton's Trs.*, 1895, 23 R. 105).

The methods of resignation suggested by the Act both provide for intimation of the resignation to the co-trustees of the resigning trustee. It is not obligatory upon a resigning trustee to adopt either of these methods, but if he takes any other method he should see that his resignation is duly intimated to his co-trustees. Intimation of resignation should also be made to any public company in which the trustees hold shares, in order that the name of the resigning trustee may be taken off the register of shareholders. In several of the *City of Glasgow Bank* cases it was held that where a trustee had failed to intimate his resignation to the bank, his name was properly retained upon the list of contributories (*Sinclair*, 1879, 6 R. 571; *Tochetti*, 1879, 6 R. 789). So long as the company is not in liquidation, a trustee whose name is on the register, and who has resigned his office in terms of sec. 10 of the 1867 Act, and duly intimated his resignation to the company, has an absolute right to have his name removed from the register of shareholders (*Dalgleish*, 1885, 13 R. 223); but even where there is intimation to the company, it is doubtful if a sole trustee by resigning can divest himself of the stock standing in his name without investing someone else by an executed transfer (*Shaw*, 1878, 6 R. 332).

Where a trustee's resignation has been duly completed, either in terms of sec. 10 of the 1867 Act or otherwise, he is "thereby divested of the whole property and estate of the trust, which shall accrue to or devolve upon the continuing trustees or trustee, without the necessity of any conveyance or other transfer by the resigning trustee." This is declared in the Act of 1891 (54 & 55 Vict. c. 44, s. 7) with regard to a trustee who is not a sole trustee. But, as has been seen, a sole trustee cannot resign until he has provided for the future administration of the trust, and in his case also a duly completed resignation divests him of the property of the trust, which devolves upon the persons who take up the administration (see *Dalgleish*, 1885, 13 R. 223). Both the 1867 Act, s. 10, and the 1891 Act, s. 7, oblige the resigning trustee to execute, when required, at the expense of the trust, "all deeds necessary for divesting them of trust property, conveying the same to the trustees or trustee, or judicial factor acting in the execution of the trust." This obligation seems to be necessary only *ob majorem cautelam*, "in case any deed might be required by third parties, as, *e.g.*, in the transfer of Consols or rights in foreign stocks or property; or it may even be with reference to heritage in this country, where a title to satisfy the most anxious purchaser may be desired" (per Ld. Shand in *Dalgleish*, *ut supra*, 13 R. at p. 231).

Where a person who has been appointed trustee has also been appointed

executor of the truster, his resignation as trustee infers his resignation as executor, unless where otherwise expressly declared (30 & 31 Vict. c. 97, s. 18).

A *curator bonis* may obtain authority from the Court to resign trusteeships held by his lunatic ward, where the co-trustees of the ward consent (*Laidlaw*, 1882, 10 R. 130).

When a trustee has finally severed his connection with the trust by a duly completed resignation, he is not responsible for any subsequent acts done in the administration of the trust by those who succeed him in office. In a recent English case it has been held that retiring trustees are not liable for a breach of trust committed by new trustees appointed by them under a power in the trust deed, unless the breach of trust was not merely the outcome of the retirement and new appointment, but was contemplated by the former trustees when the retirement and new appointment took place (*Head*, 24 May 1898, W. N.). But a trustee who has resigned is entitled for his own protection to receive a discharge either from the other trustees, who have power, both at common law and under sec. 2 of the 1867 Act, to grant him a discharge, or from the beneficiaries, if they are of full age and capable of acting.

When from any cause the resigning trustee cannot obtain a discharge from his co-trustees, and when the beneficiaries "refuse, or are unable, from absence, incapacity, or otherwise" (as to capacity, see *Craigie*, 1837, 15 S. 1157; *Kirkpatrick*, 1853, 15 D. 734; *Adam*, 1861, 23 D. 859), to grant a discharge, he is entitled to apply by petition to the Court, who, after such intimation and inquiry as may be thought necessary, may grant him a discharge, and, if reasonable, allow the expenses of the application out of the trust estate (30 & 31 Vict. c. 97, s. 9). A discharge under this section will not be granted by the Court if it is possible for the trustee to obtain a discharge either from his co-trustees or from the beneficiaries (*Matthew's Tr.*, 1894, 2 S. L. T. 131; see *Mackenzie*, 1895, 22 R. 233). A discharge granted by the beneficiaries is, if it can be obtained, the most satisfactory from the trustee's point of view, for it practically affords him complete protection from liability for the past as well as the future administration of the trust. It is competent, however, to sue a trustee who has distributed the whole estate, and received a discharge from the beneficiaries, for the purpose of constituting a claim against the trust estate (*Assets Co.*, 1894, 22 R. 178). A discharge granted by his co-trustees frees the trustee from responsibility for acts done after his resignation has been completed, and would probably protect him from any claim made against him by them, but it does not appear to exonerate him from acts done while he was a trustee, for the results of which he and his representatives remain responsible (see *Duncan*, 1882, 20 S. L. R. 8). It is not likely that a discharge granted by the Court under sec. 9 of the 1867 Act would be held to do more to relieve the trustee than a discharge granted by his co-trustees.

In a recent case a body of trustees petitioned for authority to resign, for discharge, and for the appointment of a judicial factor. The authority was granted and a factor appointed. Before the trustees had been discharged, the judicial factor brought an action of count and reckoning against them in which he was unsuccessful, and in which the trustees were found entitled to their expenses. It was held that the trustees were entitled to retain the amount of their expenses out of the estate still in their hands, and to receive their discharge on handing over the balance to the factor (*Erentz's Trs.*, 1897, 25 R. 53).

A person who is appointed executor in a testamentary deed, but whose duties are in reality those of a trustee, and compel him to hold the estate

for a longer or shorter time, and not merely to realise and distribute it, is treated as a trustee, and is therefore entitled to the privileges conferred on trustees by the Acts, including that of resigning his office (see *Ainslie*, 1886, 14 R. 209; *Pettigrew*, 1890, 28 S. L. R. 14; 23 *Journ. of Jur.* 113). There is at present a Bill before Parliament by which it is proposed to put executors-nominate and executors-dative *qua* general disponees or universal legatees in the same position as trustees with regard to most of the powers and privileges conferred upon the latter by the Trusts Acts, and which would consequently confer upon them an absolute right to resign, whether they took benefit under the deed or not, so long as they received no express remuneration for their services as executors.

See TRUSTEE.

Resolutive Clause. — The clause in a deed of entail which resolves or forfeits the right of the heir who contravenes the prohibitions of the entail. See ENTAIL (*Irritant and Resolutive Clauses*).

Resolutive Condition. — A condition in a contract of sale which presumes that a sale has taken place, but provides that in a certain event the sale will be resolved or dissolved. Such a condition is personal to the buyer, and "has effect only against the party and his heirs, not against creditors" (Bell, *Prin.* 110; see Stair, i. 14. 5; Ersk. *Inst.* iii. 3. 11 (who gives a different statement of the law); Bell, *Com.* i. 259–260; Brown, *Sale of Goods Act*, 1893, 46).

See LEX COMMISSORIA; SALE.

Respondentia is a contract for a "loan of money secured upon the merchandise laden, or to be laden on board a ship, repayment thereof, with maritime interest, being made contingent on the arrival of the cargo at the port of destination." (Maclachlan, 53.) The early history of the contract is obscure, but it is of very ancient date, being well known to the Romans under the name of *nauticum fœnus*, or *contractus trajectitiæ pecuniæ* (Marshall, 575; *Dig.* 22. 2; *Cod.* 4. 33). In its nature it is similar to the contract of bottomry, the difference being that in bottomry the ship, or the ship and freight, is hypothecated instead of the cargo. The rules applicable to respondentia are determined by the same principles as apply to bottomry, but in some respects they are special.

Any person who has a vested assignable interest in the cargo may grant a bond of respondentia (Bell, *Com.* i. 578), and in certain circumstances the master of the ship. At one time it seems to have been not uncommon for merchants, desirous of raising funds to enable them to engage in foreign trade, to borrow money on the security of the cargo, laden and to be laden, on a ship on the outward and homeward voyages, repayment to be dependent on her safe return; but such contracts are now obsolete, possibly because the lender had really only the personal security of the borrower as a guarantee of repayment (Marshall, 576; Abbott, 165). It is improbable that any question will now arise in regard to a bond of respondentia granted by the owner of the cargo, but an owner might grant a valid bond in such circumstances as would justify the master in doing so (*Duke of Bedford*, 1829, 2 Hag. 304).

The master of the ship can only hypothecate the cargo in the event of

an urgent necessity for funds arising in the course of the voyage, and there being no other means of procuring them; and before doing so he must, if possible, communicate with the cargo-owners (*Gratitudine*, 1801, 3 Rob. A. 240; *Jacobsen*, 1850, 12 D. 762; *The Hamburg*, 1864, 33 L. J. A. & E. 116; *The Lizzie*, 1868, L. R. 2 A. & E. 254; *Kleinwort, Cohen, & Co.*, 1877, 2 App. Ca. 156; *Dymond*, 1877, 5 R. 197; *The Pontida*, 1884, L. R. 9 P. D. 177), unless there is no prospect of his receiving an answer within a reasonable time (*Cargo ex Sultan*, 1859, Swa. Ad. 504). In communicating with the owners it is not sufficient to state merely the circumstances of the case, leaving them to draw their own inferences (*The Oriental*, 1851, 7 Moo. P. C. C. 398). They must actually receive notice of the intention to raise money by respondentia (*The Panama*, 1870, L. R. 3 P. C. 199; *The Onward*, 1873, L. R. 4 A. & E. 38). Where, however, the owners of the cargo failed to reply to a communication fully informing them of the circumstances, and specially asking their advice as to what should be done in the circumstances, the bond was sustained (*The Bonaparte*, 1852, 8 Moo. P. C. C. 459).

It is essential to the validity of a bond of respondentia that it should have been granted for the benefit of the cargo. It may be granted for the benefit of the cargo alone, as in the case of *The Sultan* (*supra*), where a master, his ship having been wrecked, granted a bond to the salvors on condition of their allowing the cargo to be transhipped and forwarded to its destination; or it may be granted for the benefit of both ship and cargo, as in the case of *The Gratitudine* (*supra*), where it was held that a master might hypothecate the cargo in order to provide funds for the repair of the ship, provided such repairs produced some benefit, or prospect of benefit, to the cargo; and this case has been regularly followed (*The Lord Cochrane*, 1844, 2 Rob. W. 320, and cases already cited). Since the foundation of the master's authority to hypothecate the cargo for the benefit of the ship is the prospect of benefit to the cargo, it follows, that unless there is a reasonable prospect of benefit accruing to the proprietors of the cargo, the bond will be invalid (*The Onward*, *supra*; *Jacobsen*, *supra*). Where a master, in order to raise money for the repairs of the ship, granted a bond over the cargo payable at a port short of that to which the cargo was consigned, the validity of the bond was questioned by the Court, on the ground that the cargo would derive no benefit from reaching an intermediate port (*Anderston Foundry Co.*, 1879, 7 M. 836). A master can only grant a bond over goods which have actually been shipped, as till then he has no control over them (*Jonathan Goodhue*, 1858, Swa. Ad. 355). In granting a bond of respondentia the master only hypothecates the cargo, and does not transfer the property; it would therefore be incompetent for him to agree to deliver it to a person nominated by the lender at the port of destination (Abbott, 155). The onus of proving the validity of the bond lies on the lender (*Jacobsen*, *supra*, at p. 71, per Ld. J.-Cl. Hope). Where cargo has been shipped in a foreign ship, the validity of any bond granted over it by the master will be determined by the law of the flag (*The Gactano and Maria*, 1882, L. R. 7 P. D. 137; *Loyd*, 1865, L. R. 1 Q. B. 115). To entitle the lender to the maritime interest stipulated for in a bond of respondentia, it is essential that the cargo should have been exposed to sea risk; and where part only of the goods covered by a bond had been so exposed, it was held to be valid only as regards that part (*Cargo ex Sultan*, *supra*).

The lender's right to repayment arises on the safe arrival of the goods, even though the ship should have been lost (Bell, *Com.* i. 584); but,

if part only of the goods hypothecated arrive at their destination, he can only recover a proportional part of the money secured by the bond (*Cargo ex Sultan, supra*). Where goods, over which a bond of respondentia had been granted, were subsequently necessarily transhipped, it was held, that the master of the ship to which they were transferred had a lien for freight, and general average sustained in the course of the voyage, which was preferable to the right of the holder of the bond whose claim is also, in accordance with the general rule applicable to bottomry contracts, posterior to that of the holder of a subsequent valid bond (*Cargo ex Galam*, 1864, 33 L. J. A. & E. 97). Where a bond has been granted over ship, freight, and cargo, the ship and freight are primarily liable; and this is the case even when the cargo alone has been pledged, notwithstanding that an earlier bond over the ship alone may in consequence go unpaid (*The Constancia*, 1845, 2 Rob. W. 401; *The Priscilla*, 1860, 1 L. T. 272). Moreover, if cargo has been hypothecated for the benefit of the ship, the shipowners, although such hypothecation was also for the benefit of the cargo, are liable to indemnify the owners of the cargo in the event of it being attached and sold by the holders of the bond (*Benson*, 1848, 18 L. J. Ex. 169; *Anderston Foundry Co., supra*). It was formerly stated as a distinction between bottomry and respondentia, that the former gave the lender a real security over the ship, while in the latter he was entirely dependent on the personal security of the borrower, for the reason that the goods must necessarily be sold or exchanged in the course of the voyage (Bla. *Com.* ii. 457). This argument does not apply to the bonds of respondentia granted in modern times, and it is held that they create a maritime lien over the cargo, in favour of the lender, whenever the goods are expressly pledged (Bell, *Com.* i. 583; Abbott, 175); but if a bond were granted by a cargo-owner in a home port, it would still confer no remedy on the lender against the goods (Maclachlan, 53). In almost all other respects the rules applicable to bottomry and respondentia are the same.

[Marshall, *Marine Insurance*; Maclachlan, *Merchant Shipping*; Carver, *Carriage by Sea*; Abbott, *Merchant Ships and Seamen*; Bell, *Com.* i. 578 and 583.]

See BOTTOMRY.

Restitutio in integrum, in Roman law, was an act of the praetor, whereby in particular cases he, in virtue of his *imperium*, rescinded an injury which had resulted from the operation of the law. It was recognised that the rules of law could not provide prospectively for all possible circumstances, and that in certain states of fact the strict application of a rule involved an *iniquitas*. The relief afforded by *restitutio in integrum* against the consequences of law, in cases where the operation of a rule of law was inequitable in practice, was granted only after the praetor had personally inquired (*causâ cognita*) into the special circumstances which gave rise to the prejudice. The remedy might involve the restoration either of a thing or a cause. Thus Paul observes: *Integri restitutio est redintegranda rei vel causæ actio* (*Sent.* i. 7. 1). If the prejudice suffered by the applicant consisted in the loss of a right of action, the *restitutio* resulted in the granting of a *formula*, on which followed the trial of the action which had thus been restored (*actio restitutoria*). The *restitutio in integrum* was an extraordinary remedy (*extraordinarium auxilium—Dig.* 4. 4. 16 pr.), and was not vouchsafed where the applicant could obtain redress by the ordinary processes of law.

In order to entitle a person to this remedy, he must have suffered some injury in consequence of the contract or act for whose rescission he applied. Further, it was necessary that there should be some ground of restitution (*justa causa*) recognised by the prætorian edict, or which was deemed by the prætor sufficient to justify the extraordinary relief in the particular case (*Dig.* 4. 6. 44). According to the law of the classical jurists, the application had to be brought within an *annus utilis*. In the time of Justinian the application for the *restitutio* must be brought within four years (*quadriennium continuum*) of the time of the injury being discovered, and of the party being capable of bringing his action.

The chief ground of restitution recognised in the edict was minority (*restitutio minorum XXV annorum*). The *Lex Plætoria* imposed a penalty on anyone circumventing and overreaching persons under the age of twenty-five, and gave the minor relief against the consequences of an act done, or contract entered into, under the influence of such fraud. This statute first fixed twenty-five years as *legitima ætas*. Subsequently the prætor in his edict promised to give *restitutio in integrum* to minors wherever it appeared that advantage had been taken of his inexperience, although actual fraud could not be proved. Any transaction concluded with a minor could thus be set aside by the prætor, where the practical result was prejudicial to the minor. A minor was not prevented from applying for this remedy by the fact that his curator had assented to the transaction in question. In certain circumstances, *e.g.* where the minor fraudulently held himself out as being of full age, or where he subsequently confirmed the transaction, the minor could not claim *restitutio* (*Dig.* 4. 4. 1 pr.; 4. 4. 24. 1).

The grounds recognised in the edict as entitling persons of full age to this remedy were: (1) *Vis et metus* or *dolus*. When a man was induced to enter into a legal transaction or act through force and fear, or through fraud, he was bound according to *jus strictum*; but he might obtain *restitutio in integrum*. In such cases, however, the preferable remedy generally was to bring either the *actio quod metus causa* or the *actio de dolo*.

(2) An important case of the application of the remedy was where a person had suffered some prejudice through absence from home (*restitutio propter absentiam*). Where a person was prevented by absence from protecting his right, whether the absence were due to State service (*causa rei publicæ*), or to his capture by the enemy, or to some other reasonable cause, relief could be got by *restitutio* (*Dig.* 4. 6. 26. 9; 4. 6. 28 pr.).

(3) Error might in certain circumstances furnish ground for *restitutio in integrum*. The most common instance of *restitutio* being granted on this ground was in cases of mistakes in procedure (Gaius, iv. 57).

The effect of *restitutio in integrum* was to reinstate the parties, as completely as was possible, in the earlier conditions (*Dig.* 48. 19. 27; 4. 1; *Cod.* 2. 20–55).

For *restitutio in integrum* in Scots law, see MINOR.

Restitution is the duty incumbent on one who is in the possession of goods which are truly the property of another, or who has through error received payment of money not legally due to him. This duty rests on one who has acquired stolen goods, although he has bought them *bonâ fide* for value and in open market (Stair, i. 7; More, *Notes*, xlviii; Ersk. iii. 1. 10; Bell, *Prin.* s. 527). In England and Ireland the purchase of goods in market overt, which has a special and restricted meaning there (see Ben-

jamin on *Sale*, 4th ed., p. 8; *Benjamin*, 5 C. B. N. S. 299), gives a good title to the *bonâ fide* purchaser, though the goods have originally been stolen (*Todd*, 9 R. 901; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 22)). In Scotland the law is different; a *vitium reale* is there held to attach to stolen goods, which can only be purged by the goods returning to the possession of the lawful owner. Therefore the lawful owner may demand delivery of the goods wherever and in whose hands soever he may find them, even though the party in possession has purchased the goods in *bonâ fide* and for value in a public market (Bell, *Prin.* s. 527; *Bishop of Caithness*, 1629, Mor. 9112; *Ferguson*, 1639, Mor. 9112; *Henderson*, 1806, Mor. "Moveables," App. 1; *Todd*, 9 R. 901). But where the owner of a horse, which had been stolen from him in Ireland and sold at a public market there, demanded restitution from the purchaser in Scotland, the Courts held that the title of the purchaser being good according to the law of the place where the purchase was made, restitution was not due (*Todd*, 9 R. 901). The Scots law on the subject of open markets has been left unaltered by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 22).

This obligation to restore to the true owner goods which have come into the possession of another without the true owner's consent, does not entirely cease with the loss of possession. For though one who has *bonâ fide* given the goods away, or sold them for no more than he paid for them, has no longer any obligation towards the true owner (*Scot*, 1704, Mor. 9123; *Walker*, 1765, Mor. 12802); yet one who has parted with the goods fraudulently remains liable to make restitution according to the maxim *qui dolo desiit possidere pro possessore habetur*: and one who has *bonâ fide* resold the goods at a larger price than he paid for them must account to the true owner for the surplus (Ersk. iii. 1. 10; Bell, *Prin.* s. 527: *Faulds*, 23 D. 437).

By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 12): "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods." This is in accordance with the common law of Scotland (Brown, *Law of Sale*, 227 *et seq.*); and it follows that where the *bonâ fide* purchaser has to make restitution to the true owner, he has a good claim against the seller under this implied warranty, although the seller was also in *bonâ fide*; and there seems no reason to doubt that the seller would then have a claim against the person from whom he purchased, and so on, so long as the chain of sellers and buyers lasted.

The duty of restitution, however, is not confined to the case of stolen goods; all goods which are possessed on a bad title must be restored to the true owner. Thus if the decree on which a poinding has proceeded is reduced, the purchaser of the poinded effects, although he bought in perfect good faith at a sale regular and fully warranted at the time it proceeded, must restore the goods or the price thereof (*Beveridge*, 1583, Mor. 9111): a finder of lost property must make restitution to the true owner if he can be found (see LOST PROPERTY; and also *Kinniburgh*, 9 S. 153); and restitution may be demanded in all cases where the goods have been lawfully in the possession of a person on a limited title, and have been disposed of by him against the limits of that title: as in the case of the tenant of a furnished house selling the furniture (*Wright*, 1662, Mor. 9112); of a trustee selling for his own benefit the articles held by him in trust (*Ramsay*, 1666, Mor. 9113; *Pringles*, 1710, Mor. 9123); a borrower selling the subject of the loan (*Forsyth*, 1680, Mor. 9120); and the case of a widow having

sold heirship moveables belonging to her deceased husband (*Semple*, 1672, Mor. 9117; *Hog*, 1679, Mor. 9119).

Where a mare for which her owner had a peculiar affection, as she had been his charger in the Crimea, was lent to one of his tenants for a little light work, and the tenant sold the mare, he was held bound, on failure to discover the present possessor of the mare, to pay her owner a *pretium affectionis* (*Lockhart*, 8 S. L. R. 151).

An exception to the usual principle that stolen goods must be restored, though in the possession of a *bonâ fide* holder for value, occurs in the case of money and negotiable instruments. Though a thief upon conviction may be required to give up money which he has stolen, one who has received it from him *bonâ fide* and for value cannot be called on to make restitution. This is the natural result of the theory that money is a fungible, since restitution is based on possession, and there can be no possession of what has already in theory been consumed. Negotiable instruments, being equivalent to money, follow the same rule where they are not vitiated by, *e.g.*, a forged indorsement (*Crawford*, 1749, Mor. 875; *Swinton*, 1799, Mor. 10105; *Lambton & Co.*, 21 June 1799, F. C.; *Scott & Co.*, 27 Feb. 1812, F. C.) This rule in regard to fungibles appears to be of general application, though there are no cases exactly in point. Perhaps the case of *Walker* (Mor. 12802) is the nearest. It was there held that where cattle had been slaughtered and sold before citation in the action by a *bonâ fide* purchaser, who was not thereby *lueratus*, the true owner had no claim upon anyone for the value of the cattle. Though in somewhat similar circumstances an opposite result was reached in the case of *Faulds* (23 D. 437), the decision there was expressly rested on the ground that the purchaser had shown negligence amounting to *culpa*.

Restitution is also due by one who has received delivery of a larger quantity of goods than he was entitled to (*Pride*, 16 S. 1376); and by one who has through error received payment of an account already discharged, or of a larger sum than his proper claim; and in this case also the error must be one of fact, not law (*Wilson & M'Lellan*, 4 W. & S. 398; *Dixons*, 5 W. & S. 445). For the cases on this point, see *supra*, CONDICTIO INDEBITI.

In order to preserve his claim for restitution, the true owner must have done nothing to mislead the person possessing in *bonâ fide*. "Hence it has been held that where a merchant has sent goods to an agent or factor so as to vest the ostensible ownership in such person, he will be bound for the repayment of such advances as the agent or factor may have obtained on the security of such goods; or at least he cannot demand restitution of the goods without repaying such advances (*Colquhoun*, 15 Nov. 1816, F. C., etc.)" (More, *Notes to Stair*, xlviii). This rule of common law is reproduced in the Factors Act, 1889 (52 & 53 Vict. c. 45, s. 2, applied to Scotland by 53 & 54 Vict. c. 40). This enacts that a mercantile agent in possession of goods with the consent of the owner may sell or pledge the goods validly, provided that the purchaser or pledgee is in good faith, and has no knowledge of the agent's want of authority. By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 25), if a seller of goods continues in possession of the goods, or documents of title to the goods, a sale by him, or by a mercantile agent on his behalf, to a *bonâ fide* purchaser without notice of the previous sale, shall be regarded as a sale expressly authorised by the owner of the goods. This principle applies at common law to all cases of reputed ownership (*Hewat's Tr.*, 19 R. 403; *Mitchell's Trs.*, 21 R. 586; *Mitchell*, 21 R. 600; *Edmond*, 7 M. 59). See POSSESSION.

Restraints on Liberty.—"As a rule, a man may bind himself to do or omit, or procure another to do or omit, anything which the law does not forbid to be done or left undone" (Pollock, *Principles of Contract*, 334). The leading exceptions to this principle are in regard to restraints on marriage (as to which, see MARRIAGE); RESTRAINTS ON TRADE (*q.v.*); and restraints on testamentary disposition (for which see TESTAMENTARY WRITINGS; WILL). It is, however, unlawful to bind oneself to perpetual banishment or to perpetual service to another,—at least if the incidents are servile. But a mutual contract of service for wages for a long term of years, and even for life, has been sustained (Bell, *Com.* i. 3, 322). But servile incidents, or unlimited control of the servant's person or property must not be adjected (cf. *Wallis & Day*, 1837, 2 M. & W. 273; and per Bowen, L. J., in *Nordenfeldt* [1893], 36 Ch. Div. 393).

A contract by A. to work for nobody but B. for a certain time will only be binding if there be a reciprocal obligation, express or implied, on B. to employ A. (Pollock, p. 349).

In general, obligations in restraint of personal liberty in contracts of service will not be specifically enforced. This rule suffers exception, however, in certain cases, *e.g.* apprentices (Employers and Workmen Act, 1875), and merchant seamen (Merchant Shipping Act, 1894, Part II.).

Restraints on Trade.—From very early times contracts tending "to prohibit or restrain any to use a lawful trade at any time or at any place" were treated as being *primâ facie* against public policy and therefore void—as tending to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves,—to prevent competition and enhance prices,—and to expose the public to the evils of monopolies (cf. *Mitchell*, 1711, 1 P. Wms. 181; *Alger*, 1837, 19 Pick. 51, 54). At first the mere fact of a contract containing a restraint on trade was sufficient for its avoidance. But experience showed that in certain circumstances it might be more for the public good to recognise than to avoid the agreements of parties on such matters. "It is a principle of law and of public policy that trading should be encouraged, and that trade should be free; but a fetter is placed on trade, and trading is discouraged, if a man who has built up a valuable business is not to be permitted to dispose of the fruits of his labour to the best advantage" (per Ld. Macnaghten in *Nordenfeldt*, [1894] App. Ca. 535 and 566). Accordingly, in a number of cases, chiefly arising out of sales of GOODWILL (*q.v.*) and contracts of service, it was recognised that there was room for a distinction between general restraints of trade and such as were partial only. Restraints might be partial by limiting freedom in regard (1) to the persons with whom the party restrained should deal (*Rannie*, 7 M. & G. 969); (2) his mode of trading (*Jones*, 1856, 1 H. & N. 189); (3) the branch of business prohibited (*Nordenfeldt, supra*); or (4) the area within which the restriction should operate; cf. *Watson*, 1863, 1 M. 111. Mere limitation of time did not make the restraint partial. Such partial restraints would be upheld if it appeared that there was consideration for them and that they were reasonable, looking to the whole circumstances of the parties, and were not on other grounds contrary to the interests of the public. There has been much diversity of view whether, in the case of an unlimited or general restraint, such considerations might be regarded. The whole of the earlier cases are fully considered in *The Maxim-Nordenfeldt Gun Co.* v. *Nordenfeldt* ([1893] Ch. 630; [1894]

App. Ca. 535), which authoritatively fixes the present state of the law. It may be stated thus: "The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual action in trading and all restraints of trade, of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in *reference to the interests of the parties concerned*, and reasonable *in reference to the interests of the public*—so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public" (per Ld. Macnaghten, L. R. [1894] App. Ca. 565). "It seems to me that if there be occupations where a sale of the goodwill would be greatly impeded, if not prevented, unless a *general* covenant could be obtained by the purchaser, there are grounds of public policy which would countervail the disadvantage which would arise if the goodwill were in such cases rendered unsaleable" (per Ld. Chan. Herschell, *ib.* p. 548). The *onus* is on the party seeking to avoid the condition (*ib.* pp. 566 and 573). Inadequacy of consideration is not *per se* sufficient to avoid the condition. It is sufficient, even in England, if there be a legal consideration of value; though of course the *quantum* may enter into the question of the reasonableness of the contract (*ib.* 566 and 573; cf. *Meikle*, 1895, 3 S. L. T. 323).

In a sale of a trade secret the obligation not to divulge it need not be qualified, and such an unqualified obligation may support a general restraint from engaging in a manufacture which would involve the use and disclosure of the process which is the subject of the transaction. "Sales of secret processes are not within the principle or the mischiefs of restraints of trade at all" (per Bowen, L. J., in *Maxim-Nordenfeldt* case, [1893] 1 Ch. 630, 660; and see *Leather Cloth Co.*, 9 Eq. 345, 353).

It follows from what has been said as to the criterion of reasonableness in the circumstances of the parties, that if by supervening change of circumstances (as, *e.g.*, by the retiral of the creditor in the obligation from business without transferring his rights to another) the creditor ceases to have a reasonable interest to enforce it, the stipulation originally conceived for his protection will be avoided.

Appended to the report of the case of *Avery*, 1854, 23 L. J. Ch. 837, is an interesting list of the cases in which conditions have been sustained and rejected; and this is incorporated and brought down to 1894 by Sir F. Pollock in his *Principles of Contract* (1894 ed.), p. 345. It is not merely restraints in engaging in trade at all that are subject to the presumption of inconsistency with public policy: restraints, too, on the method of conduct of business are to be similarly tested. "*Primâ facie* it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his mode of carrying his trade on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion" (*Hilton*, 1855, 6 El. & Bl. 74. 75). Accordingly, agreements between groups, whether of masters or men, regulative of wages, hours of work, output, etc., are, in general, restraint of trade, as depriving each of the control of his own business, and they are therefore not enforceable (*Hilton, supra*; cf. *Mogul Steamship Co.* [1892] App. Ca. 25; *Allan & Flood*, L. R. [1895],

2 Q. B. 21, and [1897], App. Ca. 1; *Mineral Water Bottle Co.*, 1887, 36 Ch. D. 465; *Collins*, 1879 (J. C.) 4 App. Ca. 674, 688; *Woolcombers of Aberdeen* and other cases, cited Bell's *Prin.* s. 40 (9)). The Trade Union Act of 1871, while taking from trade union purposes which are in restraint of trade the brand of illegality in the eye of the criminal law, does not permit of the enforcement in a Court of law of any stipulation or condition in the articles of a trade union, however laudable in itself, with the exception of those expressly permitted by the Act (34 & 35 Vict. c. 31, ss. 2–5; *M'Kennan*, 1874, 1 R. 453; *Shanks*, 1874, 1 R. 823; *Amalgamated Ry. Servants*, 1880, 7 R. 867). On the whole subject, reference may be made to Pollock's *Principles of Contract*, pp. 337–349, and Anson's *Law of Contract*, pp. 249–253.

Retention.—The word retention indicates a right, the origin and extent of which have been the subject of much controversy. Without entering on the question of the origin of retention, it would appear that the right of a creditor, in certain circumstances, to retain a subject belonging to his debtor, was a principle derived from the civil law, and was recognised in the law of Scotland prior to the Act 1592, c. 41, by which the principle of compensation was introduced (*Harper*, 1791, Bell, *Oct. Cas.* 440). There would seem, however, to be three different rights which are alike denoted by the word retention, a fact which has led to some confusion in the decisions on the subject. Retention may imply (1) a right to retain a subject held by a title of property; (2) a right to retain a subject in the possession of the party asserting it; and (3) a right to refuse or delay payment of a debt admittedly and presently due, in security of an illiquid claim. The second of these subjects has been considered under LIEN, to which article reference may be made on the question of the possibility of a distinction between the terms "retention" and "lien." There remain the right of retention founded on a title of property, and the right to retain a debt.

Retention on a Property-Title.—The general law of retention of property may be expressed in the statement that where A. has a *jus in re* in, or title of property to, a subject, and is under a personal obligation to convey or transfer it to B., he has a right to retain it in security for the payment of any debt, or the performance of any obligation, in which B. may happen to be his debtor; in other words, he has a right to refuse to perform his personal obligation until all personal obligations in which B. is debtor to him are performed (Bell, *Com.* i. 724; *Melrose*, 1850, 12 D. 655; *Robertson*, 1840, 2 D. 279; *Hamilton*, 1856, 19 D. 152; *National Bank*, 1858, 21 D. 79; *Nelson*, 1874, 1 R. 1093; *Distillers' Co.*, 1889, 16 R. 479). This is a right dependent on property and not on possession, and may therfore be exercised by A. over any property to which he has a formal title of property, even although it is not in his actual possession (*Nelson*, 1874, 1 R. 1093, per Ld. Deas). The rule is applicable whether the subject is heritable or moveable, and whether the parties are solvent or bankrupt. As a right flowing from the form of a title, retention may be sustained even in cases in which it may be against the good faith of the contract between the parties. Its general scope and effect have been explained by Ld. Ivory as follows: "The formal title being thus absolute, the legal right follows by force of law. The property has passed on absolute title, but on the other side there is a personal obligation to reinstate. This precisely comes within the category of cases with which we are familiar. It is the same as a disposition in security *ex facie* absolute, but with a back-bond apart; or an absolute intimated assignation of a bonded or other debt with back-titles;

or an absolute vendition of a ship; or a trust constituted by absolute deed; or a seller's retention for a separate debt; or a cautioner's retention for a separate debt, or, in the case of a purchase under mandate, of the purchaser's refusal to convey; or a wadsetter's right to apply rents; or a refusal to purge incumbrances. These are cases in every one of which decisions have been pronounced by this Court; and in one and all of them the creditor's right of retention has been held to arise by force of law. It thus arises from the shape of the title, from its character as an absolute divestiture of the party granting it, and out of the very circumstance that the formal or legal title is absolute in him, with a mere personal obligation to apply it only in a particular way." . . . "But objections are raised that this is against the good faith of the contract; and it may at once be conceded, that at first the intention of the parties here was of a limited character. But so it was in all the cases to which I have referred, and never was held to be a good answer. The ruling principle is the absolute character of the title, and the intention to operate as against such a title. This leaves it open to presume an extension of purpose, where there is an extension of debt to the party having the absolute right" (*Hamilton*, 1856, 19 D. 152, at p. 162).

Contracts resulting in Right of Retention.—Sales.—While any contract resulting in an *ex facie* absolute title, subject to an obligation to convey, may, if the circumstances admit of it, give rise to a claim of retention, the cases which have most frequently come before the Court have been cases of retention on a contract of sale or on a security-right. By the common law of Scotland the property in corporeal moveables does not pass by the contract to transfer them, but by delivery. Therefore where goods were sold but not delivered, they remained the property of the seller, subject to a personal obligation on his part to transfer them to the purchaser. The seller therefore had a right of retention, that is, a right to refuse delivery of the goods to the purchaser, his trustee in bankruptcy, or anyone deriving right from him, until all debts due by the purchaser to him were paid. The application of this rule led to various questions between the seller of goods and parties who had obtained rights from the purchaser, and to whom delivery-orders had been indorsed. In the first case in which the principle of retention as applicable to the seller of undelivered goods was fully developed, it was held that the seller could retain the goods in security of the price, on the bankruptcy of the purchaser, and in a question with a sub-purchaser who had paid the purchaser for the goods (*M'Ewan*, 1847, 9 D. 434; affd. 1849, 6 Bell's App. 340). In later cases it was held that the right of retention was not limited to a security for the price, but extended to secure a general balance due by the purchaser. Thus where A. sold goods to B., who paid for them and resold them to C., it was held that A. could exercise a right of retention, in a question with C., for any debts which might be due to him by B. (*Melrose*, 1850, 12 D. 655), even although these debts were not contracted by B. until after he had re-sold the goods to C., and had therefore ceased to have any interest in them (*M'Naughton* (*Baird's Tr.*), 1852, 14 D. 1010). In a more recent case it was held that where, without delivery being taken, the purchaser's right to the goods is transferred, the seller, on the sub-purchaser's bankruptcy, is entitled to retain the goods to secure any debt which the sub-purchaser may be due to him (*Distillers' Co.*, 1889, 16 R. 479).

Statutory Restrictions on Retention by a Seller of Goods.—The common law right of retention, as exercised by a seller of undelivered goods, has been much limited by legislation since the cases mentioned in the last paragraph

were decided. By the Mercantile Law Amendment (Scotland) Act, 1856, it was provided (s. 2) that a sub-purchaser should be entitled to demand delivery of the goods on intimation of the sub-sale, and that the seller should not be entitled to exercise a right of retention, in a question with the sub-purchaser, except for the price of the goods, or in respect of any right of retention arising from express contract with the original purchaser. By sec. 3 of the same Act the seller was given the right to arrest or poind goods in his own hands, and such arrestment or poinding was declared to have the same effect in competition as an arrestment or poinding by a third party. The effect of the second section was confined to the case of a competition with a sub-purchaser, and therefore, where the right of the sub-purchaser was excluded by the bankruptcy of the purchaser before the sub-purchase was completed, the seller's right of retention remained in full force (*Wyper*, 1861, 23 D. 606). Secs. 2 and 3 of the Mercantile Law Amendment (Scotland) Act, 1856, are now repealed by the Sale of Goods Act, 1893; and by the provisions of that Act the seller's right of retention, so far as resting on an undivested title of property, is in most cases abrogated. Under the provisions of that Act delivery is no longer necessary to transfer the property of moveables under a contract of sale, as it is enacted that the property in the goods is transferred at such time as the parties to the contract intend it to pass, and, in the case of a sale of specific goods, in a deliverable state, in the absence of any indication of a contrary intention, at the date when the contract is made (ss. 17, 18). In the case of an ordinary sale, therefore, the seller cannot now plead retention on the ground that he remains the undivested owner of the goods, because, as a rule, the property in the goods will pass to the purchaser on the completion of the contract of sale. As this, however, would have resulted in depriving the seller of goods of the right to retain them even if the price were unpaid, it has been provided that an unpaid seller has, by implication of law, a lien on the goods, or right to retain them for the price, if he is in possession of them (s. 39). This provision, however, extends only to a right to retain for the price, and the right of general retention is therefore abrogated in contracts of sale where there is no provision such as to prevent the property in the goods passing to the purchaser at the date of the contract. In contracts of sale where the passing of the property in the goods is postponed, it would seem clear that the seller, as long as he remains the undivested owner, has a right of retention for any debts due to him by the purchaser; and the provision of the Sale of Goods Act, whereby an unpaid seller in such a position has, "in addition to his other remedies, a right of withholding delivery similar to, and co-extensive with, his rights of lien and stoppage *in transitu* where the property has passed to the buyer," is therefore, in Scotland, merely declaratory of a portion of the rights of a seller in such a position. It may, however, be noted that if the seller has granted delivery-orders, or other documents of title, in respect of the goods sold, he cannot exercise his right of lien or retention in a question with the indorsee of such orders or documents (Sale of Goods Act, s. 47; Factors Act, 1889, ss. 9, 10).

Retention under Security-Rights.—A right of retention may be exercised by the holder of a security where the security-right takes the form of an absolute transfer of the property, or *jus in re*, of the subject of the security, subject to the obligation of the holder to reconvey. This is a common form of security over heritable subjects, or moveable property held by written title, and the obligation to reconvey is usually expressed in a back-bond. A form of security, producing a similar result in point of title, is sometimes also granted over corporeal moveable subjects. Thus where a security was

constituted by granting to a creditor a delivery-order for goods lying in a warehouse, and the creditor intimated the order to the warehouse-keeper, and got the goods transferred to his own name in the warehouse books, it was held that the result of this procedure was not to constitute a pledge, but an *ex facie* absolute transfer (*Hamilton*, 1856, 19 D. 152). And where corporeal moveables are sold, subject to an obligation to re-sell, the security thereby constituted, if a valid security at all, is one by absolute title (*M'Bain*, 1881, 8 R. 360; affd. 1881, 8 R. (H. L.) 106; *Darling*, 1887, 15 R. 180; *Roberston*, 1896, 24 R. 120). In securities of this character, if there is no back-bond, or nothing in the back-bond to limit the creditor's right of retention, it is a well-established principle that the grantee has, in a question with the grantor or his general creditors, a right to retain the subject until all debts due to him by the grantor are paid (*Hamilton*, *supra*; *Nelson*, 1874, 1 R. 1093; *National Bank*, 1885, 13 R. 380; rev. 14 R. (H. L.) 1). An express contract in a back-bond, limiting the security to a particular debt, would exclude a right of retention; and the opinion has been expressed that if a security is granted for a new advance by a party who is already the debtor of the grantee, and there is no arrangement, in the back-bond or otherwise, that the prior debts are to be covered, the security-holder cannot plead retention in respect of such prior debts after the debt for which the security was granted is paid (*Robertson*, 1840, 2 D. 279, per Ld. Fullerton at 293). A right of retention, moreover, can only be exercised while the debtor is, so far as the creditor's knowledge goes, still the party entitled to enforce a right to a reconveyance. Thus where the grantor of the security is sequestrated, the creditor cannot retain the subject of the security to cover any advances he may have made to the bankrupt after the date of the sequestration, on the principle that the bankrupt's estate, including the right to demand reconveyance of the subject conveyed in security, is vested in the trustee (*Callum*, 1885, 12 R. 1137). And if the debtor sells the estate subject to the security, and the sale is intimated to the security-holder, the latter cannot retain for any advances made after the intimation (*National Bank*, 1885, 13 R. 380; rev. 14 R. (H. L.) 1). In like manner, if the debtor grants a second security over the estate by assigning his right to a reconveyance, and the assignation is intimated to the holder of the *ex facie* absolute security, the latter, in respect of advances made after the intimation, will be postponed to the assignee, although he may exercise a right of retention in a question with the debtor or with his general creditors (*National Bank*, *supra*).

Retention on other Contracts.—Sales and security-rights are not the only contracts which lead to a right of retention, which is admitted in all cases of absolute rights. Thus where a mandatary was instructed to purchase a heritable subject, and take the debt in his own name, it was held that he was entitled to retain the subject until certain obligations due to him by the mandant were fulfilled (*Brough's Creditors*, 1793, Mor. 2585); and a trustee, in a case where the trust is constituted by an *ex facie* unqualified conveyance, may refuse to denude until all debts due to him by the person entitled to demand a reconveyance are paid (*Robertson*, 1840, 2 D. 279). Again, where a tenant made erections on the premises which fell under the description of trade fixtures, and which therefore, as *partes soli*, became the property of the landlord, subject to the right of the tenant to remove them at the end of the lease, it was held that the trustee in the tenant's bankruptcy could not exercise this right without satisfying the landlord's claim for rent (*Smith*, 1893, 21 R. 330).

The retention implied in a title of property does not justify the party in

right of such a title in disregarding the conditions of the contract upon which that title was granted, and converting the subject into a security for any debts that may be owing to him. Thus if A. is invested with a subject by B., in trust to convey it to C., A. cannot refuse to convey to C. on the ground that B. is otherwise indebted to him (*Stewart*, 1770, Mor. App. *voce* "Compensation" No. 2).

Retention of Debts.—The right of retention, as applicable to debts, may be regarded as an equitable extension of the principle of compensation, as established by the Act 1592, c. 41. Under this statute debts, to be compensable, must be of the same kind (*i.e.* both exigible in money, or in the same substance), and must both be liquid. A plea of retention, on the other hand, may be in respect of debts payable in different substances, or in respect of liquid and illiquid debts. The result of a successful plea of retention may often be to compensate the debt which is demanded with the present value of the debt in respect of which the plea is taken. In theory, however, compensation and retention are distinct; the former being a plea that the debt demanded is extinguished, the latter a plea that the debt, though due, may be retained in security.

General Principles of Retention of Debt.—As a general rule an illiquid debt will form no defence to an action on a liquid debt. Where on one side there is a debt constituted by a definite agreement, or by decree, and instantly payable, and on the other side there is only a claim which is either not yet payable, or which consists in a claim of damages, or requires to be cleared up by a proof, the debtor in the liquid claim must, if the debts arose out of different transactions, and both parties are solvent, pay his debt, and establish his counter-claim separately. Thus where a man was sued for the price of three stots sold to him, and did not dispute his liability, it was held that he could not plead retention on the ground that he had an illiquid claim of damages against the pursuer in respect of a filly which he had purchased from him, and which had turned out unsound (*Mackie*, 1874, 2 R. 115). And a banker cannot refuse to honour a cheque drawn upon him, on the plea that he is the holder of bills upon which, when they become due, the customer may incur a liability to an amount in excess of his balance in the bank at the time when the cheque was presented (*Paul & Thain*, 1869, 7 M. 361). Both Erskine and Bell lay down the rule that if a debt, though undisputed, is not yet payable, retention cannot be pleaded in respect of it against a party suing in respect of a debt instantly payable (Ersk. iii. 4. 15; Bell, *Com.* ii. 122). Retention may, however, be pleaded in respect of a debt which admits of instant verification, for instance, if it is put to the oath of the opposing party (Ersk. iii. 4. 16; *Stuart*, 1869, 7 M. 366). This principle has been held to justify a landlord, who was liable to his tenant in an ascertained amount for the crops and unexhausted manure at the end of a lease, in retaining that debt until a claim at his instance for arrears of rent and interest on improvement expenditure had been cleared up by a proof (*Lovie*, 1895, 23 R. 1). Again, in certain exceptional cases, the Court has relaxed the rule that an illiquid cannot be set against a liquid debt, in order to meet the justice of a particular case. In one instance a servant sued the executors of his employer for a legacy left to him. In their defences they admitted liability, but pleaded retention on the ground that the servant was largely indebted to the executry estate, and they brought a counter action to establish this liability. The first action came up for hearing a week before the date at which the second action was set down for jury trial, and it was held that, in these circumstances, the executors were entitled to have the action sisted until

the counter-claim was liquidated by the result of the jury trial (*Munro*, 1866, 4 M. 687). Again, in the recent case of *Ross*, it was held that an heir of entail, who was sued by his mother and tutor-at-law for arrears of an annuity admittedly due to her, was entitled to delay payment until an action at his instance, concluding for large sums as due to him for legitim and for the profits of the estate during the tutory, was heard (*Ross*, 1895, 22 R. 461). Here, however, there was a *primâ facie* case for the counter-claim; and the Court refused to apply the same principle where an employer who had taken a cautionary obligation from his grieve for the fidelity of a fellow-servant, proposed to retain his wages until a claim under the cautionary obligation could be established (*Logan*, 1850, 13 D. 262.

Cases of Retention.—Apart from such special circumstances, the two cases in which a debt may be retained in security of an illiquid claim are (*a*) where both the debts in question arise out of the same contract, and (*b*) where one or other of the parties is bankrupt. The latter comprehends the cases dealt with in Bell's *Commentaries* under the head of Balancing of Accounts in Bankruptcy. In order to found retention there must be a *concursus debiti et crediti* between the two debts, and difficult questions may arise on this point, especially in questions of agency and of debts of a company and its partners. As, however, the rules on this point in retention are the same as those in cases of compensation, and are detailed in the article COMPENSATION, they are not specially dwelt upon here.

Retention in Mutual Contracts.—It is a general rule that the stipulations on either side in a mutual contract are the counterparts and consideration given for each other; that a failure to perform a material part of the contract on the part of one will prevent him from suing the other for performance; and that when one party has refused or failed to perform his part of the contract in any material respect, the other is entitled either to insist on implement, and claim damages for the breach, or to treat the contract as rescinded, except so far as it has been performed (Stair, i. 10. 15; Bell, *Prin.* s. 71). Applying this general rule to the case in which the obligation on the one side is to pay a sum of money, it follows that the party whose obligation is to pay is entitled to refuse to do so if the other party fails to perform the obligations incumbent on him. And it is a necessary consequence of this right that he should be entitled to retain the sum of money due by him until the obligations due by the other party have been performed. It has further been established that where the obligations on the one side have either not been performed at all, or have been performed in so negligent or defective a manner as not to satisfy the conditions of the contract, and thus give rise to a claim for damages, the other party may retain a debt due by him in security of the claim of damages thus arising. Thus where corn was damaged in transit, it was held that its owner might retain the freight in security of his claim for damages (*Taylor*, 1830, 9 S. 113). The rule has been applied in a considerable variety of circumstances (*Johnston*, 1861, 23 D. 646; *Barclay & Co.*, 1856, 18 D. 1190; *Kilmarnock Gas Light Co.*, 1872, 11 M. 58; *Turnbull*, 1874, 1 R. 730; *Macbride*, 1875, 2 R. 775; *Gibson & Stewart*, 1876, 3 R. 328; *Kelman*, 1878, 5 R. 816), but its application and limits are best shown in the questions of retention that have arisen between landlord and tenant and between superior and vassal.

Retention between Landlord and Tenant.—In a contract of lease the main obligation of the tenant is to pay the rent, the main obligation of the landlord is to give possession of the subjects. Apart from all questions of retention, it is established that if the landlord fail entirely to give posses-

sion, the rent is not due, or if he fail to give possession of a part of the subjects, rent is only due for that part of which possession is given (*Murr*, 1887, 14 R. 470; *Duncan*, 1894, 21 R. 760). Questions of retention arise where the tenant, admitting that possession has been wholly or partly given, seeks to retain the rent in security of a claim of damages arising either from failure to give complete possession, or from a breach of some other obligation incumbent on the landlord under the lease. The principle in these cases would appear to be, that if the claim of damages arise from the breach of any material condition of the lease, rent may be retained, and the question as to what is a material condition must depend largely on the terms of the particular lease. Certain of the earlier cases in which it was held that a farmer could not retain his rent in respect of a failure of the landlord to execute certain stipulated repairs (*M'Rae*, 1843, 6 D. 302; *Dods*, 1854, 16 D. 478), and that the tenant of a quarry could not retain the rent on the ground that a stipulated and necessary access had not been made (*Johnston*, 1832, 10 S. 260), are of very doubtful authority. For it has in more recent cases been held both that a farmer was entitled to retain his rent when repairs which had been agreed upon had not been performed (*Munro*, 1888, 16 R. 93; *Stevenson*, 1890, 17 R. 917), and, in direct conflict with the case of *Johnston*, that the failure to make an access to a quarry would justify retention of the rent (*Guthrie*, 1873, 1 R. 181). Where a shop was let under the condition that the next shop should not be used in the same trade, and the landlord himself carried on the same trade there, it was held that the condition was, in the circumstances, a material stipulation of the lease, and that the tenant was entitled to retain his last half-year's rent in security of his claim of damages for the breach (*Davie*, 1876, 3 R. 1144). And where a gas company had let a piece of ground, with a right to all the ammoniacal liquor produced at their works, it was held that the tenant was entitled to oppose, to an action for rent, a defence based on averments of damage sustained by the ammoniacal liquor not having been supplied to him (*Kilmarnock Gas Light Co.*, 1872, 11 M. 58). On the other hand, it was held that averments of inconvenience and loss (not amounting to actual loss of possession), due to repairs of the subjects executed by the landlord, did not amount to a breach of any material condition of the lease and did not justify retention of the rent (*M'Laughlan*, 1892, 20 R. 41; cf. *Sutherland*, 1895, 23 R. 284; *Johnstone*, 1892, Guthrie's *Sheriff Court Cases*, 2nd series, p. 253 (damage by voles)). The same result was arrived at, on a consideration of the circumstances of the case, where the tenant's averment, in answer to a claim for rent, was that the landlord had interfered with the water-power of a mill which formed part of the subjects let (*Humphrey*, 1883, 10 R. 647). The plea of retention at the instance of a tenant is more favourably considered when stated at the end of a lease (Baron Hume, note to *Bower*, 1807, Hume, 839); and, as a rule, a tenant would then be entitled to retain his last half-year's rent in security of a claim for meliorations made by him (*Walpole*, 1780, Mor. 15249; *Stewart*, 1834, 13 S. 4; *Herial*, 1825, 3 S. 479); though in one case, where the claim for meliorations depended on a submission between the outgoing and incoming tenant, which had been going on for three years, the plea of retention was repelled (*Dickson*, 1852, 15 D. 1). Where, however, the tenant had not insisted on repairs, which had been stipulated for as a condition of entering on the lease, for five years during which he had occupied the subjects as tenant from year to year, it was held that a plea of retention of the last half-year's rent, after he had removed from the subjects, in respect of the non-execution of the repairs in

question, could not be sustained (*Stewart*, 1889, 16 R. 346; contrast *Munro*, 1888, 16 R. 93).

A landlord may be entitled to exercise a right of retention, in the case where a fixed sum is due by him to the tenant for agricultural improvements at the end of a lease, and he has a claim of damages against the tenant for miscropping, or an account against him for interest on money expended under the lease in improvements (*Lovie*, 1895, 23 R. 1; *Jaffray's Tr.*, 1897, 24 R. 602). But if the landlord purchases the crop at a price fixed by arbiters at the end of the lease, the account for this purchase is a separate debt, not arising under the lease, and a claim of damages cannot be set against it (*Sutherland*, 1895, 23 R. 284). And if the tenant is bankrupt, or conveys his estate to a trustee for the benefit of his creditors, and the trustee in the bankruptcy carries on the lease under an arrangement with the landlord, the latter cannot set any claims, liquid or illiquid, which he may have against the tenant, against a claim by the trustee for the value of the outgoing crop, because it is incompetent to set a claim arising before bankruptcy against one arising after it (*Taylor's Tr.*, 1888, 15 R. 313; cf. *Davidson's Tr.*, 1892, 19 R. 808; and *Jaffray's Tr.*, 1897, 24 R. 602).

Retention between Superior and Vassal.—In the relation of superior and vassal, the principle of retention gives the vassal the right to retain the feu-duty in security of any material obligation on the part of the superior. Examples of this have occurred where a superior undertook to relieve the vassal of public burdens (*Hope*, 1871, 9 M. 865); where he contracted that neighbouring houses should not exceed a certain height (*Cockburn*, 1825, 4 S. 128); and where he agreed to make an access to the feu and to provide sewers (*Arnott's Trs.*, 1881, 9 R. 89). Retention may be pleaded even although the demand for payment is made by a heritable creditor (*Arnott's Trs.*, *supra*), unless, possibly, where the vassal has received formal intimation (as by an action of maills and duties) of the assignation of the superior's rights to the creditor, and the intention of the latter to put that assignation in force (*Chambers' Judicial Factor*, 1893, 20 R. 257).

Retention in Bankruptcy.—In bankruptcy the rule that a liquid debt cannot be met by an illiquid claim is not applicable, as it is held to be unjust that a creditor should be forced to pay a debt to a bankrupt, and content himself with a ranking for a counter debt. Thus at common law a party who was debtor to a bankrupt in a debt instantly payable, and his creditor in a future or contingent claim, had a right of retention over the debt due by him (Bell, *Com.* ii. 122). Conversely, if a party is debtor to a bankrupt in a future or contingent debt, and his creditor in a debt instantly payable, he is not bound to accept a ranking for his own debt, and thus leave himself liable for the whole of the contingent debt (*Forthwick*, 1864, 2 M. 595). The principles and rules applicable to these two cases are different, and the ordinary case, where the bankrupt is creditor in the debt instantly payable, may be first considered.

The general rule is clear that a debtor to a bankrupt may set against the liability a future or disputed debt due by the bankrupt to him, and that, under the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, ss. 52, 53), the future or contingent debt may be valued, so as to enable compensation to take place between it and the debt due to the bankrupt (Ersk. iii. 4. 20; Bell, *Com.* ii. 122; Goudy on *Bankruptcy*, 2nd ed., p. 582; *Mill*, 1825, 4 S. 219; *Anderson*, 1876, 3 R. 608; *Davidson's Tr.*, 1892, 19 R. 808). The debt on which retention is claimed must, it is supposed, be one on which the creditor is entitled to rank, and which is capable of valuation, and therefore the plea would not be sustained on a debt contingent on an event which might

never happen. There would appear to be no case in which a claim of damages against a bankrupt has been sustained as a ground for retention, but as such a claim, if established after the sequestration, ranks as a debt due before it (*Miller*, 1884, 11 R. 729) it is probable that retention would be sustained (Bell, *Com.* ii. 122). The retention of a liquid in security of an illiquid claim in bankruptcy is, however, subject to important limitations. It is not competent if (*a*) the *concursus debiti et crediti* arose after the bankruptcy, or (*b*) if it involves a double ranking on the bankrupt estate, or (*c*) if the contingent or future debt is acquired *mala fide*.

Where the concourse of debit and credit has arisen after bankruptcy, neither compensation nor retention can be pleaded (Bell, *Com.* ii. 132; *Mill*, 1825, 4 S. 219). The determining point would seem to be the date at which the debtor is deprived of his estate, *i.e.* in a sequestration, the date of the first deliverance (Bankruptcy Act, 1856, ss. 42, 102); in a cessio, the date of the decree (Debtors (Scotland) Act, 1880, 43 & 44 Vict. c. 34, s. 9); in a private trust deed, if the question is with an acceding creditor, the date of the constitution of the trust (*Meldrum's Trs.*, 1826, 5 S. 122). Thus where a tenant of a farm executed a trust deed for the benefit of his creditors, and the landlord entered into an arrangement by which the trustee, though refusing to adopt the lease, undertook to carry on the farm until the ensuing term of Whitsunday, it was held that a sum due by the landlord for certain articles left on the farm was a debt due to the trustee after the bankrupt had been divested, and therefore that the landlord was not entitled to plead compensation in respect of a debt independently due by the bankrupt to him (*Taylor's Tr.*, 1888, 15 R. 313). In contrast to this case, it has been held that where the lease is irritated at the date of the bankruptcy, and the trustee merely enters on the farm for the purpose of winding up the estate, the value of articles left on the farm is a debt due by the landlord before the bankruptcy, and that compensation or retention is accordingly competent (*Davidson's Tr.*, 1892, 19 R. 808; *Jaffray's Tr.*, 1897, 24 R. 602). Where the debtor is not divested of his estate, but is merely notour bankrupt at the time when the creditor's claim is acquired, it is probable that retention would be allowed, provided that the creditor was acting in good faith (Bell, *Com.* ii. 124; *Lawrie*, 1783, Mor. 2581; *Hannay & Son's Tr.*, 1875, 2 R. 399; affd. 4 R. (H. L.) 43). It may be noted that if the debt on which retention is pleaded arises on a bill, on which the bankrupt is the debtor, and the other creditor an indorser, the competency of retention depends upon whether the indorser became a party to the bill before the bankruptcy, and is not affected by the fact that the indorser was not the actual holder of the bill at the date of the bankruptcy, because the indorser is always a contingent creditor of the true debtor on the bill until it is paid (*Hannay & Son's Trs.*, *supra*).

The claim on which retention in bankruptcy is pleaded must be acquired by the creditor in good faith, and its assertion must not involve a breach of the contract or fair understanding between the parties. The mere fact that a party has acquired a claim with a view to pleading compensation upon it would not seem to infer *mala fides* (*Dickson*, 1830, 1 B. & Ad. 343); but if such a claim were acquired within sixty days of the bankruptcy of the debtor therein, a plea of retention founded thereon would probably be regarded as a fraudulent preference, and the purchase of the claim would be reducible under the Act 1696, c. 5 (Bell, *Com.* ii. 124). If the claims were acquired after bankruptcy, retention would be incompetent not only on the ground that there was *mala fides*, but also that there was no *concursus debiti et crediti* (*Lawrie*, 1783, Mor. 2581). Several instances have occurred where a

plea of compensation or retention has been repelled on the ground that it was contrary to the good faith of the transaction between the parties. Thus such a plea was disallowed as an answer to a claim for an alimentary annuity (*Reid*, 1884, 12 R. 178); and where a party bought goods at an auction, on the condition that they were to be paid for by cash or bill before delivery, it was held that he was not entitled to retain the price in security of an illiquid claim against the exposer (*Finlayson*, 1829, 7 S. 698; see also *Lawson*, 1831, 9 S. 478; *Campbell*, 1823, 2 S. 484).

A plea of retention in bankruptcy may be successfully met by the answer, that to admit it would involve a double ranking on the bankrupt's estate, contrary to a cardinal principle of bankruptcy law. The case in which this is likely to happen is where two estates are bankrupt, and a plea of retention (or compensation) is made in respect of a cautionary obligation on a bill undertaken by one bankrupt for the behoof of the other. Thus if A. and B. are both parties to a bill, and are both bankrupt, the holder may rank for the bill on both estates, provided that he does not draw in all more than twenty shillings in the pound. If, however, *inter se*, A. is the real debtor, it is clear that B.'s estate has a claim against A.'s estate for relief for the amount it has been compelled to pay to the holder. This, however, is not a claim which can be allowed a ranking, as to allow it would result in ranking the debt on A.'s estate twice, and therefore such a claim cannot be set off against a debt otherwise due by the estate of B. to the estate of A. (*Anderson*, 1876, 3 R. 608). This rule does not apply unless the real debtor on the bill has been deprived of his estate under the Bankruptcy Statutes (*Mackinnon*, 1881, 9 R. 393). And if, in the bankrupt estates of A. and B., a claim for a general balance due by B. to A. is met by a plea of compensation on a separate debt due by A. to B., this plea may be answered by a claim of retention or recompensation in respect of dividends paid by A., on a bill on which he is cautioner and B. principal debtor, even although the holder has already been ranked for the bill on B.'s estate (*Christie*, 1838, 16 S. 1224).

Where a party who is debtor in a liquid and creditor in an illiquid debt becomes bankrupt, the debtor in the illiquid debt may exercise a right of retention, which entitles him to refuse an ordinary ranking for his liquid debt, and to keep it up in order to compensate his illiquid obligation when it becomes due. The practical result of this was shown in the case of *Borthwick* (1864, 2 M. 595). A., who was a policy-holder in an assurance company, from whom he had borrowed money, became bankrupt. At his bankruptcy he was thus debtor to the company in a liquid debt, in respect of the money borrowed from them, and a creditor of theirs in an illiquid debt, in respect of the policy of which he was the holder. It was held that the company was entitled to a right of retention, with the practical result that they were enabled to set off the present value of the policy against the debt due to them by A., and thus free themselves from their liability under the policy, at the expense of deducting its value from a debt for which, as the debtor was bankrupt, they could otherwise have obtained only a dividend.

[Bell, *Com.*, (M'L. ed.) ii. 118 *seq.*; More, *Notes to Stair*, cxxxi; Goudy on *Bankruptcy*, 2nd ed., pp. 580 *seq.*; Gloag and Irvine, *Rights in Security*, pp. 303 *seq.*]

Retour.—See SERVICE OF HEIRS.

Retoured Duties.—See SUPERIORITY; ENTRY WITH SUPERIOR.

Return, Clause of.—A clause of return is one by which the granter makes a particular destination of a right, providing that in a certain event it shall return to himself and his heirs (Bell, *Prin.* s. 1705; Ersk. iii. 8, s. 45). In general, and in the line of succession, it has no stronger effect than a simple destination. "The effect of a clause of return in a destination of lands or bond of provision for money is different in different circumstances. Sometimes it is held to be nothing better than a simple destination, defeasible of course even gratuitously. Sometimes it is held to bar gratuitous alienation or conveyances, so that a clause of return may have a higher effect than a mere substitution. The law on this subject may be laid down in the following propositions:—(1) If the conveyance or grant be onerous, fulfilling a legal obligation, a clause of return is considered gratuitous, without any just consideration, and may be defeated gratuitously. (2) If the grant is gratuitous, without any antecedent or obligation, a clause of return is held to be a condition of the grant, so that the grant must be taken and held *secundum formam doni*, and cannot be defeated by any gratuitous grant of the donee. (3) If the clause of return be not in favour of the granter himself, but to a third party, it is held to be gratuitous in his person, without any due consideration given by him for it, and of course is defeasible by the grantee or substitute. (4) If the clause of return, even in a gratuitous grant, does not immediately follow the grant to the grantee and his heirs, but there are other substitutes prior to the clause of return, it may be defeated gratuitously by the grantee or his heirs, as the substitutes have no sufficient *jus crediti* to prevent the alienation, and of course the granter and his heirs have no right, as their interest has been by his own act still further postponed" (per Ld. Medwyn in *Mackay*, 1835, 13 S. 246). See also SUBSTITUTE.

Reversion.—See HERITABLE SECURITIES.

Review.—In Scots law this term is applied to the reviewing or reconsideration of an interlocutor, decree, or sentence against which a party or accused person has appealed. It covers all appellate procedure. In this work the subject is considered under the various articles on APPEAL (*q.v.*); RECLAIMING NOTES; SUSPENSION; ADVOCATION; ETC.

Revocation is the recalling of an authority formerly granted, or a gift formerly made, or a deed formerly executed by the revoker. Revocation may be either express or implied: and where it is competent to revoke at all, revocation may be inferred from actings as well as from writings. Thus a revocable gift may be revoked by the donor making over the subject of the gift to another, absolutely: but revocation will not be inferred from the donor merely granting a security over the subject of the gift (Ersk. i. 6. 31; *Kinloch*, Mor. 11345); or, at least, the gift will remain good as regards the reversion. But, in accordance with the rule that the effect of a written deed cannot be excluded by parole evidence, a gift made or an authority granted by writing should be revoked, expressly or by implication, by means of another writing (Ersk. i. 6. 31). A deed executed during minority to the prejudice of the minor, can only be revoked by him after attaining his majority, by means of an action in Court concluding for

the reduction of the deed in question. The reason for this is that only such deeds can be revoked as are to the prejudice of the minor, and it is therefore necessary that there should be some independent person to judge of this fact. (See MINOR.)

The acts or deeds which may be revoked fall under one or other of the following five classes, viz.: (1) Mandates, for which see MANDATE; PRINCIPAL AND AGENT; and POWER OF ATTORNEY; (2) donations between husband and wife, for which see DONATIONS INTER VIRUM ET UXOREM; (3) DONATIONS MORTIS CAUSA, which see; (4) deeds granted in minority to the prejudice of the minor, for which see MINOR; and (5) testamentary writings. Only the last of these will be treated of here, as each of the others has been fully dealt with under the headings to which reference has been made.

Testamentary Writings.—Under this head are included contracts of marriage, whether antenuptial or postnuptial, and generally all deeds which regulate the succession to the estate or property of a person after his or her decease. The general rule, the exceptions to which will be noted later, is that all testamentary deeds may be revoked, in whole or in part, by the maker of them at any time before his or her decease, either expressly or by implication, and this whether the deed be declared *in gremio* to be irrevocable or not. Of express revocation it is unnecessary to say more than that there is no particular word or form of words which must be used; effect will be given to any clear and unequivocal expression used in a writ probative according to the law of Scotland if relating to heritage, and, if relating to moveables, according to the law of the place of execution, or of the granter's domicile (*Cameron*, 7 W. & S. 106; *Brack*, 5 W. & S. 61; *Bankes*, 9 R. 1046; *Stirling Stuart*, 12 R. 610; *Connell's Trs.*, 13 R. 1175; *Maclean*, 18 R. 874; *Purris' Trs.*, 23 D. 812).

Formerly it was the law of Scotland that a will executed within sixty days of his death by a person ill of the disease of which he subsequently died was ineffectual to affect heritage to the prejudice of the heir-at-law. But this did not apply to revocations; and, consequently, though a will was reduced *ex capite lecti*, the clause revoking former wills would be effectual, and the result would be intestacy (*Cranfurd*, 5 Pat. 73). But the Act 34 & 35 Vict. c. 81, by abolishing the law of deathbed, has rendered this point of no practical importance now.

Revocation, where not expressed, may be implied from a variety of circumstances. Of these the most common is the execution of a later will or codicil or settlement, the provisions of which are inconsistent with the deed sought to be reduced. In deciding whether revocation is to be implied, the ruling principle is the intention of the testator, as it is in the construction of testamentary deeds for any purpose whatever. Each case must therefore be judged by its own circumstances, but the following cases may be referred to as illustrations: *Mellis*, 25 R. 720; *Sutherland's Trs.*, 20 R. 925; *Rae's Trs.*, 20 R. 826; *Dalglish's Trs.*, 19 R. 170; *Logan's Trs.*, 17 R. 425; *Campbell's Trs.*, 16 R. 1007; *Clouston's Trs.*, 16 R. 937; *Wright's Trs.*, 16 R. 677; *Dalglish's Trs.*, 16 R. 559; *Bertram's Trs.*, 15 R. 572; *Stirling Stuart*, 12 R. 610; *Tronsons*, 12 R. 155; *Reynolds*, 11 R. 759; *Brander's Trs.*, 10 R. 1258; *Best*, 8 R. 66; *Kirkpatrick's Trs.*, 1 R. (H. L.) 37; *Glendonwyn*, 11 M. (H. L.) 33; *Low's Exors.*, 11 M. 744; *Sibbald's Trs.*, 9 M. 399).

Revocation of a will is also implied, under the *conditio si testator sine liberis decesserit*, where a child is born after the date of the parent's will. The absolute rule of the Roman law was, that in every case in which a child was born after the date of a parent's will, the will was *ipso facto*

revoked. In the law of Scotland, however, "the question whether the testament of a parent is revoked by the subsequent birth of a child is one wholly dependent on the circumstances of the case" (per Ld Watson in *Hughes*, 19 R. (H. L.) 33); the presumption being in favour of revocation (*M'Kie's Tutor*, 24 R. 526). See also *Elder's Trs.*, 21 R. 704; *ib.* 22 R. 505; *Millar's Trs.*, 20 R. 1040; *Adamson's Trs.*, 18 R. 1135; *Munro's Exors.*, 18 R. 122; *Dobie's Trs.*, 15 R. 2; *A's Exors.*, 11 S. L. R. 259; *Colquhoun*, 7 S. 709. Those children of the testator whose interests are affected by the settlement are alone entitled to take advantage of this condition and maintain that the will was revoked, and this right does not transmit to their representatives (*Watt*, 1760, Mor. 6401; *Colquhoun*, 7 S. 709).

Another method by which a will may competently be revoked is by destroying or cancelling the deed itself, or, what is tantamount to the destruction of the deed, removing from it a portion necessary by law or by the testator's directions. Thus a testator who had prescribed sealing as an essential formality to his will, was held to have effectually revoked the will by cutting off the seal (*Nasmyth*, 1 Sh. App. 65). If the testator has given express authority in a probative writ to another person to cancel or destroy the will, that will be sufficient whether the mandatary has executed his mandate or not (*Logie*, 2 S. 253; *Chisholm*, 1673, Mor. 12320; *Buchanan*, 1704, Mor. 15932; *Renthrew*, 10 R. 779; cf. *Widdrington*, 4 S. 323; *Leslie*, 11 R. 1088). The subject of cancellation of a will was exhaustively dealt with by Ld. M'Laren in a case in the Outer House (*Pattison's Trs.*, 15 R. 73). He there laid down four general propositions. (1) If a will or codicil be found with the signature cancelled or lines drawn through the essential clauses, then, on proof that the cancellation was done by the testator, or by his order, with the intention of revoking, the instrument will be held revoked; otherwise it will be treated as subsisting. (2) If a will be found with one or more of the particular clauses, e.g. legacies, scored out, a question is raised, not as to the testator's intention to revoke the whole deed, but only as to the particular clause so treated, which will be held revoked only on evidence that the cancelling was done by the testator, or on his directions, with the intention of revoking. If the cancellation be initialled by the testator, that will be sufficient evidence of his intention to revoke. (3) Marginal or interlineal additions, apparently in the testator's handwriting, will not be held part of the instrument, except in so far as they are authenticated by the signature or initials of the testator. (4) When the will or codicil contains words scored out, and others inserted in their place, the cancellation of the words in the original writing is conditional on the substituted words taking effect. If, therefore, the substituted words are rejected on the ground that they are unsigned, the deletion is also to be rejected, and the will read in its original form. See also *Douglas*, 21 D. 1066; *Winchester*, 1 M. 685; *Donald*, 3 Pat. 105.

The *ademption* of special legacies, by which is meant the failure of a legacy through the specific subject bequeathed being no longer in existence, or at least no longer subject to the testator's disposal, and the satisfaction of special legacies by equivalent gifts *inter vivos*, are sometimes treated under the head Revocation; but as this subject has been fully dealt with under LEGACIES, *supra*, it will be sufficient here to refer to that article, and to chap. xxi. of M'Laren on *Wills and Succession*.

The exceptions to the rule that testamentary writings are revocable at any time by the testator are chiefly based on one of two principles: (1) Delivery and (2) Contract. The first of these may be stated in general terms thus: Where a testator has put the testamentary writing beyond

his own control, by delivery to the beneficiary or to someone on his behalf, the beneficiary thereby acquires a vested right, which cannot be defeated by revocation (*Turnbull*, 1 W. & S. 80; *Spence*, 5 S. 18, N. E. 16; *Napier*, 3 M. 57; *Gilpin*, 7 M. 807; *Tennent*, 7 M. 936; *Robertson*, 19 R. 849; *contra*, *Fernie*, 17 D. 232; *Murison*, 16 D. 529; *Mackenzie*, 5 R. 1027). Constructive delivery, as by recording in the Register of Sasines, is equivalent to delivery (*Smitton*, 2 D. 225; *Wright*, 9 D. 1151; *Tennent*, 7 M. 936). An exception to this exception has been recognised in certain cases in which deeds, though delivered, were held revocable on the ground that they dealt with the *universitas* of the testator's estate (*Sommerville*, 18 May 1819, F. C.; *Miller*, 4 S. 822, N. E. 829).

Where a testament has been made in pursuance of, or as part of, a contract or agreement, obviously it is not revocable by one party without the consent of the other party to the contract; and this is so whether the contract be expressed in a mutual settlement or in a contract of marriage (*Hall's Trs.*, 19 R. 567; rev. R. (H. L.) 88; *Murray*, 22 R. 927; *Eliott's Trs.*, 21 R. 975; *Paterson*, 20 R. 484; *Williamson*, 17 R. 927; *Buchanan's Trs.*, 17 R. (H. L.) 53; *Mackie*, 11 R. (H. L.) 10; *Wightman*, 6 R. (H. L.) 13; *Greenoak*, 8 M. 386; *Graeme*, 7 M. 1062; *Hogg*, 1 M. 647). But in both cases the settlements, in order to be sustained as irrevocable, must be contractual; settlements not containing the element of contract being revocable by the granter (*Hagart's Trs.*, 22 R. 625; *Nicoll's Exors.*, 14 R. 384; *Stiven*, 11 M. 262; *Traquair*, 11 M. 22; *Davidson*, 8 M. 807; *Nimmo's Trs.*, 2 D. 458). In the case of certain antenuptial contracts of marriage, constituted for the wife's protection or for the protection of the issue of the marriage, even the consent of parties is insufficient to revoke the provisions (*Eliott's Trs.*, 21 R. 975; *Menzies*, 2 R. 507). But where the trust purposes have failed, the deeds are revocable (*Laidlaws*, 11 R. 481; *Ramsay*, 10 M. 120). On the whole subject, see M'Laren on *Wills and Succession*, chap. xxii.; More, *Notes on Stair*, cxci; Ersk. iii. 3. 90; Bell's *Prin.* ss. 1617, 1866.

Rhodia (Lex) de jactu, in Roman law, denoted those portions of the maritime code of Rhodes which were adopted into the Roman law (*Dig.* 14. 2). The main principle of the *lex* was that where cargo was thrown overboard to ensure the safety of the ship and remainder of the cargo, the loss thus sustained should be borne by the owners of the ship and cargo *pro ratâ*. This equitable rule has been borrowed by the law of Scotland from the Roman law. Indeed, it has been adopted, under several modifications, by all the commercial countries in Europe. Ship and cargo together are regarded as a combined adventure; and the right which the owner of the part of the combined adventure which was sacrificed to secure the preservation of the remainder, has to demand contribution from the other owners, whose property has been saved, is "general average." The rules for valuing and apportioning the contribution of the different owners may be found in Bell's *Prin.* 437 *et seq.*; Bell's *Com.* i. 629; and in the text-books on this department of maritime law, Lowndes on *General Average*; Abbott on *Shipping*; Arnould's *Marine Insurance*. For the history of the *Lex Rhodia*, see Schryver, *Sur la loi Rhodia de jactu*, Brussels, 1884.

See Average Contribution; Salvage.

Riding Claims.—See Multiplepoinding (vol. viii. p. 382).

Right.—See Heritable and Moveable; Corporeal and Incorporeal; Jus in re; Obligations.

Right of Way.—A right of way must be distinguished, on the one hand, from a public road vested in trustees for the use of the public, and regulated in its use by statute; and on the other from a servitude right which is private to the owners of the dominant and servient tenements. The law on the subject divides itself easily into four heads: (1) the nature of the right and its essentials; (2) the manner in which it is acquired; (3) who may enforce, and the procedure appropriate to vindicate the right; (4) the effect of a judgment duly pronounced. It is thought that under these heads may be collected all the cases upon the subject.

(1) *Of the Nature and Qualities of the Right.*—The way in question must run from one public place to another. This has been settled by a long train of decisions (*Young*, 1854, 1 Macq. 455: *Rogers*, 1826, 3 W. & S. 251; *Campbell*, 1851; *Jenkins*, 1866, 7 M. 739). It must also run in a definite and ascertained track (*Mackintosh*, 1877, 9 M. 574). What is a public place is a question of fact, but it has been defined as "a place to which the public resort for some definite and intelligible purpose" (*Duncan*, 1871, 9 M. 855). An averment that a path terminated in the seashore was held irrelevant to support the right (*Darrie*, 1865, 3 M. 496). As the right must be exercised subject to the rights of the proprietor, the public may not complain if he erect swing-gates, so long as these do not cause serious inconvenience (*Sutherland*, 1876, 3 R. 485); and it is thought that the proprietor would be entitled to offer to the public a substitute road, or to divert the established right of way for purposes beneficial to himself, provided he put no inconvenience upon the public thereby (*Hozier*, 1884, 11 R. 766; cf. *Neale Thomson's Trs.*, 1898, 25 R. 407).

(2) *Of the Manner in which a Right of Way is acquired.*—The right is acquired either by consent of the proprietor, or by uninterrupted use for the prescriptive period of forty years as a matter of right and not of tolerance (*Duke of Roxburgh*, 1713, Mor. 10883; *Cuthbertson*, 1851, 14 D. 300; *Burt*, 1861, 24 D. 218; *Jenkins*, 1866, 4 M. 1046). In the earlier cases it was laid down that "the foundation of the rule of law which gives the public a right to traverse the lands of a proprietor is substantially presumed grant, not the presumption of a formal grant, but the presumption of a gift from long-continued possession, the origin of which cannot otherwise be explained" (Ld. J.-Cl. Hope, *Napier's Trs.*, 1851, 13 D. 1404); and it was held that if the possession has been clearly of an illegal character, no right is thereby acquired for the public. So when a public road was shut up by road trustees, it was held that all right of passage for the public ceased, and that subsequent use, in the face of resistance on the part of the proprietor of the land, would not establish a right of way (*Glasgow and Carlisle Road Trs.*, 1854, 16 D. 531; *M'Kerron*, 1876, 3 R. 429; *Winans*, 1888, 15 R. 540).

The case of *M'Kerron* raised the question sharply. A public road having been shut up in 1815, the proprietor of the solum dug up and planted the ground, and fenced it round about. Members of the public forced their way through the fences and over the cultivated land; and this course was persisted in till 1876, when cross possessory actions were presented in the Sheriff Court. On appeal, the rights of the proprietor were upheld. Ld. Ormidale said: "In *Shearer*, 1871, 9 M. 456, it was held that, a road having been shut up or declared to be shut up by the road trustees under their statutory powers, the public were not, by subsequent seven years'

use of it, entitled to a possessory judgment. It is true that, in the latter case, the road belonged to the road trustees, while here it reverted to the owner of the solum after it had been declared to be shut up, but I cannot see how that can affect the question of a possessory judgment. There, as here, it was pleaded, by the party claiming the benefit of a possessory judgment, that it was enough that he, as a member of the public, had been allowed to use the road uninterruptedly for a period of seven years; but the answer to this, that the road had been declared to be shut up by the lawful authority, which rendered any subsequent use of it by the public wrongful and illegal, was held to be good and sufficient."

From this judgment Ld. Gifford uttered a vigorous dissent. He was clearly of opinion "that even although it were absolutely and completely established that the road was well and effectually shut up in 1815, so as to make the solum the unburdened property of the proprietor, this would not prevent the public from acquiring a right of way over it or any other portion of his estate by possession claimed as of right, and actually enjoyed, for any period of forty years subsequent to 1815. The shut-up road cannot be in a better position than any other part of the estate over which there never was a road at all. The statute does no more than give the solum to the proprietor unburdened. The proprietor may do what he likes with it. He might undoubtedly make a grant of public road, and the law declares that forty years' possession as of right is equivalent to a grant."

In this view it would seem that Ld. Watson concurred in giving his opinion in the case of *Mann*, 1885, 12 R. (H. L.) 52. His lordship said: "According to the law of Scotland, the constitution of a right of public road does not depend upon any legal fiction, but 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 am aware that there are dicta to be found in which the prescriptive acquisition of a right of way by the public is attributed to implied grant, acquiescence of the owner, and so forth, but these appear to me to be mere speculations as to the origin of the rule."

The measure of the right is the possession enjoyed by the public (*M'Farlane*, 1865, 4 M. 257). Illustrations of this rule occur in *Mackenzie*, 1868, 6 M. 936; *Mitchell*, 1826, 5 S. 56; *Forbes*, 1829, 7 S. 441. But in *Napier's Trs.*, 1851, 13 D. 1404, it was held that forty years' use by the public of a road which had been made by the proprietor for his own convenience, would not instruct a public right of way.

(3) *Who may vindicate the Public Right, and the Appropriate Procedure.*—Any member of the public (*Greig*, 1851, 13 D. 975), or town councils, district committees, or county councils (Local Government (Scotland) Act, 1894, s. 42), may take steps to maintain the public right. In one case, where an individual had raised the action, he moved for and obtained a sist to enable the local county council, if so advised, to come forward and defend the claim with him (*Alston*, 1895, 23 R. 273).

The form of action is one of declarator in the Court of Session (*Torrie*, 1852, 1 Macq. 65), and the question is one for trial by jury, unless special cause to the contrary be shown (*Hope*, 1898, 25 R. 678). Examples of "special cause" may be given. Where an alternative of right of way or servitude was involved, it was held that the question was too complicated for a jury, and proof was allowed. Where, too, it was shown that the minds of the class from whom the jury would be chosen were likely to be prejudiced in the trial of the cause, proof allowed (*Scottish Rights-of-Way and Recreation Society*, 1886, 14 R. 7; *Fraser Tytler*, 1890, 17 R. 670). Parties

may, however, invoke the jurisdiction of the Sheriff in a possessory action for the vindication of the right, preservation of the *status quo*, or regulation of the use (*Sutherland*, 1876, 3 R. 485).

That was a case where the proprietor had placed swing-gates across the path, then a member of the public broke them down, and the proprietor applied to the Sheriff for interdict. The Court held that he had jurisdiction. Lord Gifford said: "Has the Sheriff jurisdiction, as in a possessory question, to authorise or confirm swing-gates across a public right of footpath where such gates or wickets have not existed for a period of seven years? Now on this point I am of opinion that the Sheriff has jurisdiction. He can regulate interim possession, he can say and determine how and in what manner the right of footpath is to be enjoyed in the meantime, his judgment being always possessory and *ad interim*, leaving either party, if they think the interim possession fixed by the Sheriff is inconsistent with their legal and permanent rights, to have these rights finally fixed and determined by the Supreme Courts. It is a mistake to say that in such possessory judgments the Sheriff has mere ministerial duty to look to. What was the state and manner of possession during the last seven years? and to continue that precise state of possession by an interim possessory judgment till the matter of right be fixed . . . Where the parties are at issue as to the mode in which they may use and enjoy their respective rights, the Sheriff has undoubted jurisdiction to regulate *ad interim* the mode of possession, and this apart altogether from the usage during the last seven years."

(4) *The effect of a judgment on the question of a right of way*, when properly raised and decided, is to conclude the matter and found a plea of *res judicata* against anyone subsequently raising it (*Macfie*, 1884, 11 R. 1094, per Ld. Colonsay in *Jenkins*, 1867, 5 M. (H. L.) 27; *Greig*, 1851, 13 D. 975). "Such questions as the present are of the nature of popular actions, so that perhaps the plea of *res judicata* in a strict technical sense cannot be urged by the defenders against new litigants who repeat the pleas of former parties. But Courts of justice will not allow the holders of property or valuable rights to be constantly harassed by a repetition of the same pleas. If the objection of *res judicata* is not pleadable against a new litigant, we are at least bound to consider a right fairly tried as an adjudged question in which the decision is binding on the Courts, at all events as a precedent directly in point. Any other interpretation of the law would be oppressive in the extreme" (per Ld. Cunninghame, *Greig, supra*).

Riot.—See Mobbing.

Risk or Periculum may be defined as meaning the chance of injury or destruction occurring without fault or negligence on the part of any responsible person. Where any responsible person can be proved in fault, he must of course make good the damage he has caused; but an occurrence caused by the fault of a responsible being is not a risk in the strict sense in which the word is here used. An occurrence properly raising questions of risk must either be the result of pure accident—so far as can be proved—or of *vis major*; such as a gale of unprecedented violence, or a flood which ordinary prudence could not have foreseen. In almost every case it is open to the parties to make what contract they please as to the incidence of the risk. The exceptions are in cases in which it would be

against public policy to allow the stronger party to contract himself out of the risk. These exceptions belong to two classes: (1) employments in regard to which statutes have laid on the employers the risk of injury to the workmen, specially providing that no contract to the contrary shall be valid, *e.g.* The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37, s. 3); (2) cases in which special privileges or a monopoly have been conferred on an individual or company, with a corresponding limitation of the power of contracting out of the risks. The most common example of this is the limitation of a railway company's power of contracting out of the risk contained in the Railway and Canal Traffic Regulation Act, 1854 (17 & 18 Vict. c. 31, s. 7). But see *supra*, CARRIERS and RAILWAY.

Cases where the risk is expressly fixed by special agreement or statute call for no further mention. In cases where the incidence of the risk must be ascertained by principles of common law, the rule of most general application is the Latin maxim, *Res perit suo domino*. This maxim has been interpreted by the House of Lords to mean, "as applied to accidents, that all should bear the loss according to their interests." This will appear plainer when the facts are stated. The case was an action by the tenant of a farm, the house on which had been accidentally destroyed by fire during the currency of the lease, to have it declared that the landlord, as *dominus* of the subject, was bound, by the maxim quoted, to rebuild. The Lords, however, interpreted the maxim as above stated, and granted absolvitor (*Walker*, 3 Dow, 233). It has been subsequently decided in similar circumstances, where the whole of the subjects let were destroyed, that the tenant was entitled to abandon the lease (*Drummond*, 7 M. 347; *Duff*, 8 M. 769); and it appears that the tenant might competently have demanded an abatement of rent. An undertaking by the tenant to keep the subjects in repair, does not import an obligation to rebuild in case of fire (*Duff*, 8 M. 769).

This maxim disposes of all the questions where the fact of ownership is not complicated by some anterior contractual relation of the contending parties. It will be convenient to divide the remainder of this article under the headings of the usual contracts under which such questions are raised. These are: (1) Sale; (2) Hiring or Lease: (3) Loan; (4) Carriage; (5) Deposit and Consignation: (6) *Locatio operarum*, including all contracts by which the subject is intrusted to another than the owner for construction, repair, alteration, or, in the case of live stock, training; and (7) Insurance.

(1) *Sale.*—Prior to 1893, property, according to Scots law, could not pass without delivery; but there was a separation of risk from property where goods were sold but not yet delivered, in which case the buyer took the risk. The maxim *periculum rei venditæ nondum traditæ est emptoris* limited the application of the general rule *res perit domino* (*Dunlop*, M'L. & Rob. 663; *Hansen*, 21 D. 432; *Beesley & Co.*, 12 R. 384). Stair (i. 14. 7) gives as the foundation of this principle, the Latin maxim *ejus est periculum cujus est commodum*. The limitation, however, applied only to the sale of a specific subject or of fungibles specially appropriated to the purchaser and which required no further measuring, weighing, or testing to prepare them for delivery. If the goods had not been so individualised and set apart as to mark them out for the very things sold, or if the quantity had still to be ascertained, the risk remained with the seller (*Anderson & Crompton*, 9 M. 122; *Walker*, 11 M. 906; cf. *Kennedy's Tr.*, 25 R. 252). Of course, as above noted, the parties might make what stipulation they pleased as to the passing of the risk (*Brewer & Co.*, 20 R. 230). Where the

purchaser of a horse tendered it back under a clause enabling him to do so, and the seller improperly refused to take it, the risk subsequent to the date of the tender was held to be with the seller (*Graham*, 1 D. 407).

The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), by providing that delivery should no longer be essential to transfer the property (ss. 16, 17, and 18; see SALE, *infra*), altered the theory of Scots law in this matter without really changing the practical result. Sec. 20 of the said Act provides as follows: "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer; but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not: Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault: Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party." This practically puts an end to the old exception to the general rule *res perit domino*.

No case under this section has yet been reported, and the solution of any question likely to arise would in most cases be found under the rules for ascertaining when the property has passed, contained in secs. 16, 17, and 18, which are more fittingly dealt with in the article on SALE (*q.v.*). But see also *Kennedy's Tr.*, 25 R. 252.

(2) *Hiring or Lease.*—The maxim *res perit domino*, as interpreted in the case of *Walker* (3 Dow, 233) above referred to, which overrules *Swinton* (16 Jany. 1810, F. C.), regulates the risk in the general case. A purely accidental injury to a hired subject, say a horse, while being properly used for the purpose for which it was hired, is a loss falling on the lessor, the lessee being entitled to an abatement of the hire, but not to any damages for ejection (Ersk. iii. 3. 15; Bell, *Prin.* s. 141). It is in accordance with this principle that the hirer of a horse is not liable for the fault of an ostler at an inn, to whom he properly intrusts it (*Smith*, 8 D. 264). But any use of the subject hired not in accordance with the declared purpose for which it was hired, will put on the lessee the risk of any damage or loss which may be suffered in consequence (*Seton*, 8 R. 236; *Shaw*, Hume, 297; *Gardners*, Hume, 299). In any case, however, the *onus* is on the lessee to show that he was not in fault (*Wilson*, 7 R. 266; *Pullars*, 20 D. 1238; *Pyper*, 5 D. 498; *Marquis*, 2 S. 386 (N. E. 342); *Robertson*, 23 June 1809, F. C.). See HIRING; LEASE.

(3) *Loan.*—The risk under this contract is regulated by the maxim *res perit domino* (*Bain*, 16 R. 186). Loan may be of two kinds: (1) the loan of fungibles, *i.e.* goods for consumption, which can therefore be used only once, in which case the actual property of the thing lent passes to the borrower, who thereby comes under an obligation to restore another of the same species to the lender. This kind of loan is called *mutuum*, and the risk is with the borrower. The deposit of money (which is a fungible) in a bank is one example of *mutuum* (Ersk. iii. 1. 19). (2) Where the loan is of a specific article, the property remains with the lender, the borrower having the use of it only. This species of loan is called *Commodate*, and the risk is with the lender (Ersk. iii. 1. 20; *Bain*, 16 R. 186). See LOAN; COMMODATE; MUTUUM.

(4) *Carriage.*—At common law all persons carrying goods for hire, and holding themselves out as common carriers, undertake the risk of the goods they carry being lost or damaged unless they can prove a different contract, the act of God and the Queen's enemies alone excepted. The law of Scotland on this point is founded on the Roman Edict, *Nautæ*,

caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo. Though *nautæ* strictly applies to one kind of carriage only, viz. carriage by water, yet the law is held to apply to all common carriers. The common law liability has been modified by the Carriers Act, 1830 (11 Geo. IV. and 1 Will. IV. c. 68); the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 502 and 503); and by sundry private Railway Acts. But as the subject of risk in the carriage of goods has been fully discussed in the article on CARRIERS, no good purpose will be served by repeating here what is there stated.

(5) *Deposit and Consignation.*—Deposit or depositation, being a contract for gratuitous storage, the risk is with the depositor, and the depositary is liable only for fraud or gross negligence (Ersk. iii. 1. 26; opinion of Ld. J.-Cl. Moncreiff in *Anderson & Crompton*, 9 M. 122). Trusts are in theory examples of deposit, and the liability of trustees is regulated by this principle. Accordingly, all the cases in which trustees have been found liable proceed on the ground of *culpa lata*, either in act or omission, which takes them out of the definition of risk given at the commencement of this article. See TRUSTS. So called deposits of money with a bank are more properly examples of the contract of MUTUUM (*q.v.*). Where money is paid for the care of the subject deposited, the contract is one of *locatio operarum*. See HIRING OF CUSTODY.

Consignation is placing in neutral custody money claimed by different competitors, or money which a creditor refuses to receive, pending a judgment of the Court, as a full settlement of his claims. As between the competitors and the consignatory, the risk is with the latter, as in the case of *mutuum* (Ersk. iii. 1. 31). But as between the competitors themselves, in the event of the consignatory becoming bankrupt or absconding, the risk is with the consigner in three contingencies: (*a*) if the consignation turns out to have been unnecessary and without sufficient reason; (*b*) if the consignation was made in an irregular manner, which irregularity caused the loss of the money; and (*c*) if the consigner has voluntarily chosen a manifestly unsuitable person with whom to consign the money. The result of the risk resting on the consigner in these cases is, that the consigner must make good to the successful claimant the amount consigned (Ersk. iii. 1. 31; *E. of Dunmore*, 13 S. 116). If the consignatory has been the choice of both parties, the risk is with them equally, and should the consignatory fail, the loss must fall on the parties equally (*Scott*, 14 S. 574). But where the consignation is made with just cause, in a proper manner, and to a consignatory either appointed by the Court or properly chosen by the consigner, the risk is with the party whose conduct made a consignation necessary (Ersk. iii. 1. 31; *Scot*, Mor. 10118). See DEPOSITATION OR DEPOSIT and CONSIGNATION.

(6) *Locatio operarum.*—Under this head are included all contracts for executing any work on a subject belonging to another, such as a calenderer undertaking to print a manufacturer's cottons, a horsebreaker undertaking to break a young horse for its owner, a warehouseman undertaking to store and safely keep the goods belonging to an absent person, and all other contracts of the like nature. The risk that the goods may be accidentally destroyed while in the tradesman's custody is on the tradesman. The edict *Nautæ, caupones, stabularii*, above quoted (see *Carriage*), is a foundation for this rule as regards innkeepers and stablemen (*Master of Forbes*, Mor. 9233; *Chisholm*, Mor. 9241; *Hay*, Mor. App. "*Nautæ, caupones, stabularii*"). It has also been held that a householder in a town who lets lodgings comes under the edict (*May*, Mor. 9236). The application of the rule to cases

not under the edict is sufficiently established by a series of decisions (*M'Lean*, 10 R. 1052; *Robertson*, 13 D. 779; *Laing*, 12 D. 1279; *Melrose*, 6 S. 241; *Hay*, 13 Feb. 1801, F. C.). A contractor was engaged to build the brickwork of a house in course of erection on the employer's ground. Before the work was completed one of the brick walls was blown down by an unusually violent gale, which was held to be *vis major*. In an action by the contractor to recover the price of the work destroyed, the Court by a majority granted decree, holding that the risk was on the employer, as he was owner of the ground, and the wall, as it was built, became his property *accretione*. Ld. Ardmillan pointed out the distinction, as to incidence of risk, between work done by a contractor on his employer's ground and work done within the contractor's premises on the goods of his employer. Ld. Deas strongly dissented, holding that till the completion of the work the risk was with the contractor (*M'Intyre*, 2 R. 278). Besides the risk of destruction by accident or *vis major* while in the custody of a tradesman, there is a risk of damage or destruction of the goods from the operation which the tradesman has undertaken to perform. In such a case the risk lies on the tradesman, who will be liable for the loss unless he can show that the injury was due to an inherent defect in the goods. The reason is shortly stated by Ld. Neaves: "Every tradesman carrying on a known trade, undertakes to his employer that he will perform the particular operation successfully" (*Hinshaw*, 8 M. 933). See Location; Hiring of Custody.

(7) *Insurance.*—The central idea underlying every contract of insurance is the existence of a risk, which by the contract is transferred from the person on whom it naturally falls (the insured) to another (the insurer) in consideration of a payment (the premium). This is true even of life insurance, the risk there undertaken being the early or premature death of the assured. The law will not recognise an insurance by one who has no interest, *i.e.* by one who underlies no risk. It is necessary, therefore, before entering on a contract of insurance, to ascertain who has an insurable interest, or, in other words, who has any risk. For that purpose what has already been said on the subject of risk will be useful, but to go further into the subject here would simply be to repeat what has already been fully discussed in the articles on Accident Insurance; Fire Insurance; Life Insurance; and Maritime Insurance.

River.—In considering the law applicable to rivers and watercourses in general, a distinction must be made between rivers that are navigable, frequently termed in our law public rivers, and those which are non-navigable, frequently termed private rivers. The distinction is useful, inasmuch as it points to essential differences in certain legal aspects; it is apt to be misleading, if the many similarities of rights are not carefully regarded. The more general statement of riparian rights and duties is set forth in treating of Non-Navigable Rivers. Much that is there stated, however, will be found to be also applicable to the case of navigable rivers. On the other hand, in dealing with the law of navigable rivers, attention has been largely confined to the points in which these differ from non-navigable streams. What is here said of navigable rivers cannot therefore be generally predicated of the other class.

A. Navigable Rivers.

There are two classes of navigable or public rivers, the incidents of which are different—those in which the tide ebbs and flows, and those in

which there is either no ebb and flow of the tide, or which have a navigable course beyond the point to which the ebb and flow extends. The common element in these two classes is navigability. Whether a particular river is fit for navigation,—that is, navigation of any kind, not merely by vessels of large burden, but also by boats and light vessels,—is a pure question of fact. In the case of tidal rivers, navigability is, in general, presumed; in the case of non-tidal rivers, navigability must, if this character be controverted, be established by proof.

1. *Tidal Navigable Rivers.*—The flux and reflux of the tide is *primâ facie* evidence of a river being navigable (*Miles*, 1814, 5 Taunt. 705; Bayley, J., *R.* v. *Montague*, 1825, 4 B. & C. 598, pp. 601, 602). This, however, is a mere presumption, the strength of which will largely depend upon the size of the stream, and so forth. So far as tidal, a river and its estuary are treated in law upon the same footing as the sea itself, and are subject to like public rights of navigation and fishing. See SEA; SEASHORE; FISHINGS. In the present connection, and apart from questions as to salmon-fishings (see *Duke of Athole*, 7 March 1812, F. C.; affd. 1816, 5 Dow, 282; *Earl of Kintore*, 1826, 4 S. 641; affd. 1828, 3 W. & S. 261; *Mackenzie*, 1838, 16 S. 1286; rev. 1839, Macl. & R. 977; *Duke of Sutherland*, 1844, 6 D. 425; affd. 3 Bell's App. 315), the question of the seaward limit of the river is of little importance. The inland limit of the tide, on the other hand, is a determining factor in any question involving conflict between the Crown or the public and a private proprietor. No definite rule has been laid down for determining the point at which the line of this inland limit of tidal influence is to be drawn. In the case of large rivers with estuaries at the mouth, the line will apparently be drawn at that farthest point inland at which the influence of the average of the medium of high tides between the spring and the neap is perceptible (Rankine, *Landownership*, p. 250; *A.-G.* v. *Chambers*, 1854, 23 L. J. Ch. 662; but see Bell, *Prin.* s. 648; *Colquhoun's Trs.*, *v.i.*; *Bowie*, *v.i.*). In smaller rivers, on the other hand, the fact that the freshness of the water at the mouth of the stream is affected, and that its current is penned back by the flow of the tide, is not such proof of "tidal influence" or navigability as will support rights therein on the part of the public or the Crown (*Bowie*, 1887, 14 R. 649).

From this line seawards the *alveus* or bed of all navigable rivers and all estuaries and arms of the sea is by law vested *primâ facie* in the Crown (*Ld. Advocate* v. *Hamilton*, 1849, 11 D. 391; 1852, 1 Macq. 47; Ld. J.-Cl. Inglis, *Duke of Buccleuch*, 1866, 5 M. 214, at 215; *Colquhoun's Trs.*, 1877, 4 R. 344; rev. 4 R. (H. L.) 116; Ld. Blackburn, *Bristowe*, 1878, 3 App. Ca. 641, at 666). The Crown holds as trustee for the public, and must exercise its rights of ownership so as not to derogate from or interfere with the public rights of navigation and fishing therein which are *primâ facie* common to all (Craig, i. 16. 5; Ld. J.-Cl. Inglis, *Duke of Buccleuch*, *v.s.*; Ld. Chan. Westbury, *Gann*, 1864, 11 H. L. Ca. 192, at 207; *Malcomson*, 1862, 10 H. L. Ca. 593). No use or allegation of use of these public rights is necessary to constitute or maintain them (Ld. Deas, *Colquhoun's Trs.*, *v.s.* 4 R. at 354). Within these limits the Crown is entitled to deepen the river, or perform any other operation upon the *alveus*, if conducive to the improvement of navigation (Ld. J.-Cl. Inglis, *Colquhoun's Trs.*, *v.s.* at 349). *Per contra*, the Crown, or a statutory body coming in its place and intrusted with the protection of public interests, may resist any encroachment by *opus manufactum* or otherwise upon the *alveus* of a navigable stream (*A.-G.* v. *Lonsdale*, 1868, L. R. 7 Eq. 377; *A.-G.* v. *Terry*, 1874, L. R. 9 Ch. 423; see Ld. Meadowbank, *Todd*, 1840, 2 D. 357, at 374). As to the title of

members of the public, see *Cameron*, 1848, 10 D. 446; *Moncreiffe*, 1886, 13 R. 921.

Within the tidal limits, the foreshore or that part of the bank left dry by the tide at ebb is governed by the rules applicable to the seashore proper (see *Smart*, 1797, 3 Pat. App. 606; *Kerr*, 1840, 3 D. 154; affd. 1842, 1 Bell's App. 499; *Hunter*, 1869, 7 M. 899; *Hagart*, 1870, 9 M. 127; see SEASHORE). The foreshore of navigable rivers, like the *alveus* itself, is vested in the Crown subject to certain public uses connected with navigation and the like. It is nevertheless alienable by the Crown, subject to these uses (Bell, *Prin.*, s. 650; *Ld. Advocate* v. *Hamilton, r.s.*; *Lord Blantyre*, 1879, 6 R. (H. L.) 72; 1880, 7 R. 659; see *Agnew*, 1873, 11 M. 309). The right of passing over the foreshore of a navigable river, and of fixing moorings therein for boats, is a necessary incident to the exercise of the right of navigation, and follows from it, or may be supported as founded on a presumed grant from the Crown, or immemorial user (*A.-G.* v. *Wright*, [1897] 2 Q. B. 318; see also *Marshall*, 1871, L. R. 7 Q. B. 166, p. 172).

The banks of a navigable river, beyond the foreshore and above the reach of the water, are not vested in the Crown, but belong to the owner of the lands bordering on the river, as in the case of private or non-navigable rivers (Ersk. ii. 1. 5; *infra*, s. 4). The proprietors of the banks have an exclusive right of access, on which neither the public nor other proprietors can encroach (Bell, *Prin.* s. 650; *Lyon*, 1876, 1 App. Ca. 662; *A.-G.* v. *Conserv. Board of Thames*, 1862, 1 H. & M. 1). It has been held in England that the public have at common law no right of access to these banks, or to set up a towing-path for tracking vessels (*Ball*, 1789, 3 T. R. 253; cf. Bayley, J., *Blundell*, 1821, 5 B. & A. 268, at 291), and the same would probably hold with us. Such a right, with its necessary incidents, such as mooring-posts, etc., may of course be acquired by prescriptive possession (*Colquhoun*, 1793, Mor. 12827; rem. 1801, 4 Pat. App. 221; *Colquhoun's Trs., r.s.*; *Carron Co.*, 1806, 5 Pat. App. 61). Unless, therefore, grant, immemorial custom (see *Ball, r.s.*), or prescription can be appealed to in support of such a claim, the proprietors of the banks can maintain an exclusive right of access thereto.

The right of navigation extends over the whole of the navigable channel (*A.-G.* v. *Terry, r.s.*; *Colquhoun's Trs., r.s.*), and includes all such rights as are necessary for its convenient exercise, such as the right of stopping to unload (*Original Hartlepool Collieries*, 1877, 5 Ch. D. 713), and of grounding and anchoring (*Gann, r.s.*; see *Mayor of Colchester*, 1845, 7 Q. B. 339).

Subject to the controlling public right of navigation, the rights of riparian owners on tidal navigable rivers are similar to those of riparian owners on non-navigable streams (*A.-G.* v. *Lonsdale, r.s.*; *Lyon, r.s.*; see *Hamelin*, [1895] App. Ca. 237; *Ross*, 1891, 19 R. 314). Damages may be recovered by the proprietor if he be deprived of his rights therein (see *Duke of Buccleuch*, 1872, L. R. 5 H. L. 418; *Metropolitan Board of Works*, 1874, L. R. 7 H. L. 243); and even without proof of damage, action will lie for injury to these proprietary rights (*Lyon, r.s.*; cf. *Rose*, 1843, 5 M. & G. 631: *Dobson*, 1837, 9 Q. B. 991). So, a proprietor of salmon-fishings in a tidal river may, in respect of his interest therein, interdict dredging or removal of sand from the *alveus* of the river within the bounds of his fishing rights, as being an interference with his legal rights which may possibly result in injury thereto (*Marquis of Zetland*, 20 July 1898; cf. *Moncreiffe*, 1886, 13 R. 921—injury to salmon-fishings from sewage pollution).

2. *Non-Tidal Navigable Rivers.*—Above the limits of the tide different considerations apply. As already pointed out, the *alveus* and banks of the

stream are here the property of the riparian owners; the Crown has no property title. The right of navigation which the public has in non-tidal waters rests, therefore, upon a different basis. It is more akin to a right of way (Ld. Pres. Inglis, *Colquhoun's Trs., v.s.* 4 R. at 350; Ld. Hatherley, *ib.* 4 R. (H. L.) at 121; see *Bourke*, 1889, 44 Ch. D. 110). It is doubtful how far use is necessary to constitute and to determine the extent of the right of navigation (cf. Ld. Pres. Inglis and Ld. Shand, *Colquhoun's Trs., v.s.* at 350, 359, with Ld. Deas, *ib.* at 354). It is submitted that user is not necessary, and that, if navigability be proved, the public would be entitled to vindicate the right to use the stream as a natural highway for transport. The degree of navigability is of no importance; whether the river is capable of being navigated by vessels of large or small dimensions, the same rules apply (Ld. Pres. Inglis, *Colquhoun's Trs., v.s.* at 350). The rafting of timber down stream in times of flood (*Grant*, 1776, 3 Pat. App. 679; 1781, Mor. 12820; 1782, 2 Pat. App. 582; see also *Baillie*, 1821, Hume, 523); or the transmission of light goods in small scows or gabbarts (*Colquhoun*, 1793, Mor. 12827; rem. 1801, 4 Pat. App. 221; *Colquhoun's Trs., v.s.*), has been held sufficient to instruct a right on the part of the public. The right extends over the whole of the navigable channel (*Colquhoun's Trs., v.s.*). The right of the public in non-tidal rivers, however, is restricted to that of navigation. A public right of fishing cannot be claimed (*Smith*, [1891] 2 Ch. 678; *Hargreaves*, 1875, L. R. 10 Q. B. 582; *Musset*, 1876, 35 L. T. N. S. 486; *Hudson*, 1863, 4 B. & S. 585). So far as the right of navigation is concerned, there seems to be little difference whether it rests, as in tidal rivers, upon a right of property in the Crown, or, as in fresh waters, upon an incorporeal right analogous to that of right of way. In either case, no obstruction *in alveo* which interferes with the exercise of the right is permissible (see *Grant, v.s.*). But actual interference with the right of navigation must be shown, or at least that the act complained of must necessarily result in some interference therewith (*Colquhoun's Trs.*, 1877, 4 R. (H. L.) 116). The principle of *Morris* (*infra*, s. 8) is not applicable here. The Court may, as in other cases of riparian interests, where the act complained of is not necessarily inconsistent with the full exercise of the right of navigation, interfere by way of regulation, so as to reconcile the conflicting rights (*Grant, v.s.*; see *infra*, s. 7). The public right of navigation may be determined or brought to an end under the authority of statute. It may even be lost by natural causes, such as the receding of the sea, or the silting up of the channel by accumulation of mud (see *R.* v. *Montague*, 1825, 4 B & C. 598; *Earl of Breadalbane*, 1881, 18 S. L. R. 607).

B. Non-Navigable Rivers.

3. *Natural Rights in Non-Navigable Rivers: Introductory.*—In considering the law which regulates the rights of parties in rivers and streams, attention is here confined to the natural rights arising to proprietors through or past whose lands the water flows, and the natural restrictions placed upon such proprietors by the similar rights of others therein. These rights and restrictions are incidental to and spring from ownership; they are to be sharply distinguished from conventional rights or servitudes, which are the creatures of contract or agreement, express or implied (Ld. Pres. Inglis, *Hunter*, 1880, 7 R. 510, at 514). Broadly stated, the respective spheres of action of these distinct rights may be thus delimited. The natural right which is incidental to property entitles to the flow of the stream in its accustomed course, undiminished in quantity, and undeteriorated in quality. It goes no further. On the other hand, a right to interfere with its natural

course, to transmit it altered in quantity, quality, and so forth, can only stand upon grant, express or implied. The latter must be appealed to only when the limits of the former have been transgressed (see Gale, *Easements*, p. 212; *Sampson*, 1857, 1 C. B. N. S. 590).

Questions as to the extent of these natural rights can, of course, arise only where there are competing rights in the persons of other parties which lay a restriction upon the indefinite exercise of his right by any one proprietor. The rules which regulate the rights of parties where there is a community of interest have therefore obviously no application to certain cases. Thus, where a stream rises, has its course, and falls into the sea wholly within the same property, the owner of the lands has an uncontrolled right therein, and no use of the stream had by him can be questioned (see Ld. J.-Cl. Hope, *Lord Blantyre*, 1848, 10 D. 509, at 529). The same result, of course, would follow from agreement of the whole body of riparian owners (Ld. Cockburn, *Ferguson*, 1844, 6 D. 1363, at 1374; Ld. Chan. Cairns, *Lyon*, 1876, 1 App. Ca. 662, at 673), or might be effected by statute, vesting the property and control of the stream in any given body (*Medway Co.*, 1861, 9 C. B. N. S. 575).

Again, the peculiar rights arising from the community of interest of riparian heritors only apply to waters which run in defined watercourses. The law respecting water which follows no definite channel is treated elsewhere. See WATER. What constitutes a stream or watercourse, using the word as denoting not merely the bed or channel (see 39 & 40 Vict. c. 75, s. 20), but also the running water flowing therein, has not in our law been formally determined. The essential factors seem to be (1) a definite channel, which to a certain extent at least implies retaining banks, and (2) that the water flowing therein must be related to a natural source, and, though not necessarily constant, be a flow of a higher character than that arising from mere surface drainage. Size is unimportant (Angell, *Watercourses*, p. 2; Coulson and Forbes, *Waters*, p. 51; see Rankine, *Landownership*, p. 463). Stress has also been laid upon capability of diversion as affording a test (Jessel, M. R., *Taylor*, 1877, 6 Ch. D. 264, at 273). The word river or stream will be here used throughout as conveniently representative of the whole class under consideration.

4. *Nature of Rights in the Bed and Banks.*—The bed and banks of a stream are, in general, the property of the owner of the adjoining lands. Where a stream passes through a particular property, the same proprietor owning both banks, the *solum* of the bed of the river is also in general his property. Where there is not unity of ownership on both sides of the stream, each heritor is owner of the bank upon his own side, and is also proprietor of the *alveus usque ad medium filum aquæ* (Ersk. ii. 1. 5). This, at least, is the presumption (*Wishart*, 1853, 1 Macq. 389; *Wright*, 1823, 1 S. & S. 190; *Ecroyd*, [1897] 2 Ch. 554; *Micklethwait*, 1886, 33 Ch. D. 133; *Duke of Devonshire*, 1887, 20 Q. B. D. 263; see *M'Intyre's Trs.*, 1867, 5 M. 780). As regards the question how far a riparian owner whose titles exclude him from any right of property in the *alveus* is entitled to exercise the full rights of a riverain owner, see *Lord*, 1859, 12 Moo. P. C. 473; Ld. Chan. Cairns, *Lyon*, 1876, 1 App. Ca. 662, at 673. There is no common property in the *alveus* of a stream (Ld. J.-Cl. Inglis, *Morris*, 1864, 2 M. 1082, at 1087; *Gibson*, 1869, 7 M. 394). Opposite heritors are "conterminous proprietors whose march lies in the *medium filum fluminis*, and, accordingly, if anything can be done which does not affect the state of the water, it may be done by each. . . . This ordinary right of property is precisely the same when the river is there as if it were to disappear and the channel become

dry" (Ld. Neaves, *Morris*, 1864, 2 M. 1082, at 1092; Ld. Cranworth, *ib.* 4 M. (H. L.) 44, at 50). Any operation *in alveo* must, however, affect in some degree the flow of the stream, and, through this, the common interest of other riparian heritors. As encroachment upon these interests determines the legality of these operations, it becomes necessary to first ascertain what is the nature of a riparian owner's right in and to the running water of a stream.

5. *Nature of Rights in the Water of a Stream.*—The right of a riparian owner in the water of a stream is not of the nature of a right of property, but of something less than property (*Lord Blantyre*, 1848, 10 D. 509). It is a right incidental to the ownership of the lands through or past which the stream flows (*Embrey*, 1851, 6 Ex. 353; Ld. Blackburn, *Orr Ewing*, 1877, 4 R. (H. L.) 116, at 126). "Riparian owners have each a right in the water, not of property, for certainly *aqua profluens* is not the subject of property as long as it is running. When you get it into your pitcher or pipe, it becomes your property, just as game or fish, when they are caught, become the property of the person who catches them; but while it is flowing and in its channel, no portion of the water, either on one side of the *alveus* or the other, belongs to one party or the other. . . . Each heritor, as it passes, has a right of an incorporeal kind to the usufruct of the stream. . . . This right in the current of the stream gives him a right in the whole of the *alveus*; and for this obvious reason, that no operation can, by the nature of things, be performed upon one side of the *alveus* that shall not affect the flow of the water in the whole. . . . This common interest, therefore, amounts to a right of preventing anything that shall palpably affect the water" (Ld. Neaves, *Morris*, *v.s.*). On similar grounds, this common interest extends not only to the whole *alveus* over which the water runs, but also to operations upon the banks of the stream, although those may be the sole property of the parties whose estates they adjoin (Ld. J.-Cl. Inglis and Ld. Neaves, *Morris*, *v.s.* at 1087, 1093). The right being an incident to the ownership of property, it follows that user of the water is not necessary to constitute, nor continued user to maintain it (*Bannatyne*, 1624, Mor. 12769; *Mason*, 1833, 5 Barn. & Adol. 1; Lds. Hatherley and Blackburn, *Orr Ewing*, 1877, 4 R. (H. L.) 116, at 120, 127; see Gale, *Easements*, pp. 220 *seq.*). It also follows that, the right being one not of property but of interest in a subject which is common to all, no one proprietor has the right to use or affect the flow of the water to the prejudice of others having similar rights in the common subject. Any user, of course, implies a certain diminution, retardation, or acceleration of the stream, but such user may be reasonable and consistent with the common rights of the others who are interested therein (see Story, J., *Tyler*, 4 Mason, U. S. R. 397, quoted in Gale, *Easements*, pp. 213 *seq.*). "Each proprietor of adjacent land has the right to the usufruct of the stream which flows through it, and this right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state, but is a right only to the flow of the water and the enjoyment of it, subject to the similar natural rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same stream. It is only, therefore, for an unreasonable and unauthorised use of this common benefit that an action will lie (*Embrey*, *v.s.* p. 369; see *Sampson*, 1857, 1 C. B. N. S. 590; *Chasemore*, 1859, 7 H. L. Ca. 349, at 382). This principle applies equally whether the question arises between opposite or successive heritors (see *Palmer*, 1877, Ir. R. 11 Eq. 616).

6. Injuria *the Basis of Right to Challenge: Necessity for Proof of Damage.*

—It remains to consider what constitutes such prejudice as shall confer upon one heritor the right to challenge the acts or operations of another. And, first, in no case does actual damage require to be proved. In questions relating to operations which immediately affect the bed or banks themselves, this is sufficiently obvious. The complainer can stand upon a right of property in his person, and any invasion of or encroachment upon this constitutes *injuria*, against which the law will protect him whether damage be proved or not. Again, the effect of the act complained of may be such as to prejudice only the user or the power of user of the water by another heritor. It has been thought that there is a distinction between these two cases as regards the necessity of proving damage. This, however, is not so. Indeed, as proof of user is not essential to instruct the right, it would seem to follow that damage need not be proved in order to establish prejudice (see *Embrey*, *r.s.*; *Sampson*, 1857, 1 C. B. N. S. 611). For every act done by a heritor affecting running water, whether it be an operation *in alveo* or an act of simple user, has some effect, however small, not only upon the water itself, but also, of necessity, upon the proprietary rights of other heritors, opposite or successive. The stress which has been laid upon proprietary right (Ld. Chelmsford, *Morris*, 4 M. (H. L.) at 47; Lds. Hatherley and Blackburn, *Orr Ewing*, 4 R. (H. L.) at 121, 126, 130) means no more than this, that in cases of alleged encroachment upon property, *injuria* may be more obvious and more readily established than the *injuria* which arises from the unreasonable use of a common subject. Thus, an operation *in alveo* objected to by an opposite heritor as injuriously affecting his proprietary right (*Morris*, *r.s.*), and diversion of the stream in whole or in part from its natural flow past the lands of an opposite or inferior proprietor (*Hood*, 1861, 23 D. 496), both illustrate a case in which *injuria* to the complainer's rights is either obvious or will be presumed to follow: the effect in both cases being to throw the *onus* of disproving its injurious character upon the defender, who is by his operations innovating upon the former condition of things. In the first of these cases the element of proprietary right is present; in the second it is not; yet the legal result is the same. The stress which has been laid upon proprietary right, in short, points not to any difference in principle, but rather to difficulties of proof. The right arising from a common interest in the stream is as much a legal right as a right of property, and as fully entitled to protection. The foundation in each case is *injuria* to a legal right in the complainer's person: but provided that some interference be shown (*Kensit*, 1884, 27 Ch. D. 122), proof of actual damage is not in any case necessary to entitle the complainer to his remedy. It may be that in many cases proof of *injuria* to the complainer's right will also incidentally instruct damage. Thus, in cases of diversion, the loss of water-power to an inferior heritor will, in general, carry with it deterioration in the value of the premises (Gale, *Easements*, p. 244). But this is accidental, not essential. A further and an important principle may be noticed in connection with this question of establishing *injuria*, namely, that in many cases an undisturbed continuance of the act challenged may in turn become evidence of a right to continue to do it. (See Gale, *Easements*, p. 244. and authorities there quoted; *Bankier Distillery Co.*, 1893, 20 R. (H. L.) 76; *Embrey*, 1851, 6 Ex. 353; James, L. J., *Swindon Waterworks Co.*, 1874, L. R. 9 Ch. 451, at 458).

7. *Equitable Jurisdiction of Court.*—Another and a perfectly distinct principle must be kept in view in considering the cases. This has reference to the grounds upon which the equitable interference of the Court

may be invoked; and it applies in all cases, whatever be the nature of the right alleged to be infringed. This principle is shortly expressed in the maxim *de minimis non curat prætor*. Even assuming *injuria* to be shown, it does not follow that the Court will feel itself called upon to interfere. *Ubi jus ibi remedium* is not universally true; and if the injury complained of be slight or trivial, a Court of equity will refuse to intervene (Ld. Blackburn, *Orr Ewing*, 1877, 4 R. (H. L.) 116, at 126; *Cooper*, 1882, 20 Ch. D. 589). In certain cases, also, the Court may exercise its equitable jurisdiction by regulating the exercise of the right in dispute in such a way as to reconcile conflicting interests, while securing to each party the enjoyment of the common subject.

These being the general principles which regulate the rights of parties, the cases for examination will be found to fall into three classes, according as the operation complained of is *in alveo*, upon the banks, or affects merely the water of the stream.

8. *Operations in alveo.*—Questions as to the legality of such operations may arise as between opposite or successive riparian proprietors. As already indicated (*supra*, ss. 5, 6), these cases differ in this only, that, in the first case, where encroachment upon a proprietary right in the complainer can be founded on in addition to a common interest in the stream itself, *injuria* may be more readily inferred, or held to be proved. In every other respect the principles which govern questions between opposite and successive riparian heritors are identical.

At common law no proprietor is entitled to build any erection or place any obstruction upon the *alveus* of a stream, although the building or obstruction be confined to his own side of the *medium filum* (*Morris*, 1864, 2 M. 1082; affd. 4 M. (H. L.) 44; *Duke of Roxburghe*, 1879, 6 R. 663; *Ross*, 1891, 19 R. 314; *Magistrates of Aberdeen*, 1748, Mor. 12787; *Lanark Twist Co.*, 1810, Hume, 520; *Edleston*, 1868, 18 L. T. N. S. 15; *Palmer*, 1877, Ir. R. 11 Eq. 616). Present damage need not be shown: it is enough if it be impossible to predicate of the operation complained of that it may not at some future time be productive of damage (*Morris* and other cases, *supra*; see Cotton, Ld. J., *Kensit*, 1884, 27 Ch. D. p. 131; cf. *Belfast Rope Co.*, 1888, 21 L. R. Ir. 560). If the encroachment be so slight that it does and can produce no sensible effect, the Court will, upon a principle already stated (*supra*, s. 7), refuse to intervene (Lds. Chelmsford and Cranworth, 4 M. (H. L.) at 48, 50; Ld. Neaves, 2 M. at 1093; Ld. Trayner, *M'Gavin*, 1890, 17 R. 818, at 824). It is therefore open to the defender to plead that his operations are *innocuæ utilitatis* (Ld. J.-Cl. Moncreiff, *Jackson*, 1872, 10 M. 913, at 917); but the *onus* of proving this lies upon him (Lds. Chelmsford and Cranworth, *v.s.*; Ld. Hatherley, *Orr Ewing*, 1877, 4 R. (H. L.) 116, at 117). The principle which strikes against the erection of artificial obstructions *in alveo* (see *Duke of Roxburghe*, 1879, 6 R. 663) applies with equal force to the removal from the bed of the stream of natural obstructions (*Robertson*, 1879, 6 R. 1290), or any excavation of the *alveus* so as to deepen the flow of water upon one side or the other (*Duke of Roxburghe*, 1821, Hume, 524). This restriction upon operations *in alveo* extends to the ordinary flood channel of the river, so as to prevent building or encroachment thereon which may have the effect of throwing the burden of the water upon the opposite heritor's ground (*Jackson*, 1872, 10 M. 913; *Menzies*, 1828, 3 W. & S. 235).

Apart from questions as to fishing rights, the only interest of an upper heritor in a question with a lower proprietor is that the latter shall not, by the erection of any *opus manufactum* or other operation

in alveo, cause regorging or restagnation, or decrease the freedom of the flow of the stream *ex adverso* of the upper heritor's property (Ld. Neaves, *Morris*, *v.s.* at 1092; see *Hope*, 1878, 15 S. L. R. 400), or, conversely, accelerate the flow, as where the lower heritor deepens the channel farther down (see *Duke of Roxburghe*, 1821, Hume, 524). Of any operation by the lower heritor not having such effects, he cannot complain (Ld. Blackburn, *Orr Ewing*, *v.s.* at 127). Accordingly, the construction of a dam-dyke by an inferior heritor (*Fairly*, 1744, Mor. 12780; *Baillie*, 1821, Hume, 523; *Burgess*, 1790, Hume, 501), or the heightening of such (*Saunders*, 1818, 1 B. & A. 258; *M'Glone*, *c.i.*), which causes restagnation to the prejudice of the superior heritor, will be restrained at the instance of the latter. In these cases damage was shown to be caused to an existing mill of the superior heritor, but the result would have been the same even had no such mill existed. For the superior heritor has a right to the natural water-power of the stream whether he has in point of fact used it or not, and loss of this is *injuria* against which he is entitled to be protected (*M'Glone*, 1888, 22 L. R. Ir. 559; see the question raised in *Mason*, 1832, 3 Barn. & Adol. 304; 5 Barn. & Adol. 1). This right, being *res meræ facultatis* can be lost only by express abandonment or by adverse prescriptive possession (*Burgess*, *c.s.*). Where, however, regorging is caused by the silting up of the stream at a point lower down, from causes for which the lower heritor is not responsible, and not by an *opus manufactum*, the lower heritor will not be ordained at the instance of the superior heritor to clean out the channel, and restore it to its former condition (*Hope*, 1878, 15 S. L. R. 400).

From the point of view of a lower heritor, operations *in alveo* conducted by a superior heritor practically resolve into questions as to interference with the flow, and will be considered under that head. They cannot, of course, be objected to if the flow of the stream as it enters the complainer's lands is not affected thereby (Ld. Blackburn, *Orr Ewing*, *v.s.* at 128; see *Cuningham*, 1713, Mor. 12778).

9. *Operations on the Banks.*—As the *alveus* denotes that which is covered by the stream in times of ordinary flood, so the banks or shores of a stream are the outermost parts of the bed in which the river naturally flows (*Menzies*, 1828, 3 W. & S. 235). Any *opus manufactum* upon the banks which has the effect of diverting the stream in times of flood from its natural channel, and throwing it against an opposite heritor's lands, will not be permitted (*Menzies*, *v.s.*; *Jackson*, *v.s.*). Operations for the purpose of strengthening the bank, so as to protect it against the encroachment of the stream, cannot be challenged (Ld. Benholme, *Morris*, *v.s.* at 1090; *Magistrates of Aberdeen*, 1748, Mor. 12787; cf. *Duke of Gordon*, 1735, Mor. 12778; *Farquharson*, 1741, Mor. 12779); but the operation must be conducted so as to avoid injury to an opposite proprietor (*Menzies*, *v.s.*; Ld. J.-Cl. Inglis, *Morris*, *v.s.* at 1088; Ld. Chelmsford, *ib.* 4 M. (H. L.) 49; see *Rex* v. *Trafford*, 1831, 1 Barn. & Adol. 874, at 887; 8 Bing. 204, at 210, 211; and cases cited in Gale, *Easements*, p. 412). "When a river threatens an alteration of its present channel, by which damage may arise to the proprietor of adjacent or opposite ground, it is lawful for him to build a bulwark *ripæ muniendæ causa* to prevent the loss of ground which is threatened by that encroachment; but this bulwark must be so executed as to prejudice neither the navigation, nor the grounds on the opposite side of the river" (Ersk. ii. 1. 5).

10. *Operations directly Affecting the Water.*—Such questions may be conveniently grouped under three heads: (1) operations interfering with

or causing an alteration in the flow of the stream; (2) questions of consumption and user of the water; and (3) operations which affect the quality of the water of the stream. Under the first head, in addition to cases of simple diversion, those cases will be considered in which the natural flow of the stream is altered by the introduction of alien water.

11. *Diversion or other Interference with the Natural Flow of the Stream.* —A diversion which has not the effect of altering the flow, *e.g.* diversion by mill-lade, the water being returned within the diverter's own property in undiminished quantity, cannot of course be objected to. Any other view would destroy all use of water as a motive-power (see Ld. J.-Cl. Inglis, *Cowan*, 1865, 4 M. 236, at 240). In such a case no prejudice can be qualified. But, unless he be fortified by express grant or prescription (see *Marquis of Abercorn*, 1791, Hume, 510), a riparian proprietor cannot divert the natural flow of the stream, whether in whole or in part, to the prejudice of the other heritors upon the stream (*Cowan*, 1865, 4 M. 236; *Lord Melville*, 1842, 4 D. 1231; *M'Lean*, 1857, 19 D. 1006). He may be restrained from so doing at the instance of another heritor, and this without proof of any user, or of any present damage resulting from the diversion (*Bannatyne*, 1624, Mor. 12769; *Hay*, 1667, Mor. 1819). So, diversion of the whole or the part of a stream by means of a cut for the purpose of supplying power to a mill or other work (*Bannatyne, v.s.*; *Marquis of Abercorn, v.s.*): or for agricultural (*Cowan, v.s.*) or manufacturing purposes (*Hamilton*, 1793, Mor. 12824; as to consumption for such purposes, see *infra*, s. 12); or the erection of a dam-dyke or cauld to divert water to a mill (*Hay, v.s.*; cf. cases in sec. 8, *supra*), or to compel a greater flow towards one side or the other (*Duke of Roxburghe*, 1821, *v.s.*), are clearly inadmissible. For similar reasons, alteration of an existing mill-lade will not be permitted, if such alteration will have the effect of returning the water at a lower point of the river, although still within the opposite heritor's grounds (*Lanark Twist Co.*, 1810, Hume, 520; see *Buchanan*, 1869, 7 S. L. R. 88). Where the water of the stream which has been diverted is, after serving the heritor's purpose, not returned to the stream at all, but finds its way into some other channel, the case is *à fortiori* of the preceding. Such permanent diversion is of obvious prejudice to the use, or, at least, to the power of user, of other heritors, and cannot be maintained in a question with another riparian heritor, opposite or successive (*Hood*, 1861, 23 D. 496; see L. J.-Cl. Inglis, at 502). This applies equally although the diversion extends, and can extend, only to what is in excess of the usual flow of the stream (*M'Lean*, 1857, 19 D. 1007). As regards diversion to the prejudice of a lower heritor by local authorities exercising statutory powers, see *Commissioners of Peterhead*, 1895, 22 R. 852.

A further illustration of alteration upon the flow of a stream is found in cases in which the water is impounded or stored by an upper heritor, and returned to the stream in times and in quantities suited to his convenience. No general rule can be laid down as to the legality of such storage, beyond that which has already been indicated (*supra*, s. 5). Here, as in other questions of riparian rights, the question comes to be, whether the use of the stream had by the one party is such as is reasonable and consistent with the enjoyment of corresponding rights by the other parties having a common interest therein (see *Lady Willoughby D'Eresby*, 1884, 22 S. L. R. 470; *Hamilton, v.s.* at 12827). Where this limit is exceeded impounding will not be permitted, and the upper heritor will be prohibited from using his works to this effect (*Lord Glenlee*, 1804, Mor. 12834). Indeed, such actings differ from a case of simple diversion only in this,

that the loss of power may be only temporary and intermittent. It is none the less on that account an interference with the legal rights of the inferior heritor (Ld.-Pres. Inglis, *Hunter*, 1880, 7 R. 510, at 514).

Questions of user of water for agricultural purposes, of which irrigation is the most familiar example, are closely akin to these cases of diversion or alteration of the flow. For in such cases the actual consumption of the water is incidental and secondary. Where the water is not returned to the stream after serving the purpose of irrigation (see *Mackenzie*, 1854, 16 D. 381), or *intra fines* of the diverter (*Kelso*, 1768, Mor. 12807), there is clear ground for complaint. But if these conditions be satisfied, the question of the lawfulness of the act again becomes one of circumstances, and dependent upon the reasonableness of the use had (see *Sampson*, 1857, 1 C. B. N. S. 590; *Embrey*, 1851, 6 Ex. 353; Ld.-Chan. Cairns, *Swindon Waterworks Co.*, 1875, L. R. 7 (H. L.) 697, at 704; Bacon, V.-C., *Earl of Sandwich*, 1878, 10 Ch. 707, at 712, 713). If the use had be unreasonable it will be restrained, and this without proof of actual damage (*Sampson, v.s.*). A right to use the stream in excess of this limit may, of course, be conferred by grant, or acquired by prescriptive possession (*Bates*, 1670, Mor. 10912; *Sampson, v.s.*). Similarly, the right to object to an unreasonable use may be extinguished.

Where it is possible to reconcile conflicting interests by so doing, the Court may here also, in the exercise of its equitable jurisdiction, whilst refusing to interdict the operations complained of, give directions for their regulation; and as to the time and manner in which these shall be exercised, see *Marquis of Abercorn, v.s.*; *Hunter, v.s.*

Again, the flow of a stream may be altered by the introduction of alien water, that is, of water which would not, but for artificial means, have found its way into the channel. The stream is the natural conduit for the drainage of the adjoining lands, but the case is different if water from other sources is introduced into it. There is little decision in our law upon the point. If the introduction of such water be a common benefit, no question is likely to arise; on the other hand, if prejudice can be qualified by a lower heritor, it seems clear upon principle that artificial increase of the flow is *in pari casu* with artificial diminution, and can be restrained (*Bankier*, 1892, 19 R. 1083; 1893, 20 R. (H. L.) 76—introducing into a stream water pumped from a mine: Ld. Moncreiff, *Lord Blantyre*, 1848, 10 D. 509, at 541, 547). If a heritor introduces a quantity of alien water into a stream, this will not entitle him to withdraw a quantity of the river water equal in amount to that so introduced (*Stevenson*, 1892, 30 S. L. R. 86), at least where the source of supply of the added water is precarious, *e.g.* drawn from the draining of a stagnum (*Cowan*, 1865, 4 M. 236). Where several heritors, by agreement, supplemented the flow of a stream by means of water from a foreign source, a heritor, not a party to the agreement, is entitled to enjoy the benefit of the increased flow, although he refuses to contribute to the expense incurred in obtaining and continuing it (*Orr*, 1831, 10 S. 135). For the principle upon which the parties agreeing to introduce such a supply are to be assessed *inter se*, see *Orr*, 1839, 1 D. 1138).

12. *Questions as to User and Consumption of Water: Primary and Secondary Purposes.*—This class of case differs from the preceding in respect that, in the former, the primary object is user of water without consumption, the water being thereafter returned into the stream; while, in the present case, the consumption of the water taken from the stream is the end in view. The same general principles, however, regulate the rights of parties.

Each heritor is entitled to a reasonable use of the water consistently with the enjoyment of similar rights by the other riparian owners.

How far this rule is applicable to consumption for primary purposes has not been expressly determined in our law. It appears to be generally assumed that, so far as primary uses are concerned, the rights of a superior heritor are paramount, even where the result is to prevent an inferior heritor from exercising a similar use (see *Ogilvy*, 1791, Hume, 508, note at p. 509; Ld. Kinloch, *Hood*, 1861, 23 D. 496, at 499); that is to say, that in a competition as to user for primary purposes, and upon a deficiency, the natural position of the superior heritor prevails. This view has been authoritatively stated in England (Ld. Kingsdown, *Miner*, 1858, 12 Moo. P. C. 131, at 156); but it may be permitted to doubt whether, if such a question were to arise, this view could be maintained, at least upon the existing classification of primary and secondary purposes. It is difficult to see why the same test—user consistent with the similar exercise of the right by others—should not also apply here: why, for instance, the washing of a superior heritor should rank above the drinking use of his neighbour lower down, and so forth. In this connection it may be noticed that the classification into primary and secondary uses, introduced by Ld. Braxfield into our law, and since generally adopted, was not originally *hujus loci* at all, but had reference to a distinction of quality merely, and as affording a criterion to which a question of nuisance by pollution should be referred; a question obviously raising totally different considerations (*Russell*, 1791, Bell's Oct. Ca. 338, at 346; see *Dunn*, 1837, 15 S. 853).

Amongst the primary uses, whether preferential or not in the sense above referred to, have been reckoned, in addition to the ordinary use of the stream for drink for man and beast (Bell, *Prin.* s. 1105; *Russell*, *v.s.*; *Ogilvy*, 1791, Mor. 12824), user for cooking, washing, and other proper domestic purposes (Ld. J.-Cl. Inglis, *Duke of Buccleuch*, 1866, 214, at 217; see *Bouthrone*, 1878, 6 R. 324, at 331), including use for home brewing (*Johnstone*, 15 Feb. 1822, F. C.; 1 S. 327). For such purposes the water may be taken from the stream by means of a cut or pipe (*Ogilvy*, 1791, Hume, 508; *Johnstone*, *v.s.*), the heritor returning the surplus within his own lands (*Hood*, 1861, 23 D. 496). If water so diverted is not returned to the stream, the *onus* is upon the diverter to prove that it is consumed, not upon the complainer to prove waste (*Hood*, *v.s.*).

As regards consumption for secondary purposes, such as manufactures, the general principles above laid down (*supra*, s. 5) regulate the rights of parties. In each case the question, which is really one for a jury, is whether the particular use complained of is reasonable and compatible with the similar exercise of rights by those jointly interested. What will be held to be a lawful user of the water when tried by this test depends entirely upon circumstances and the extent to which the enjoyment, or the power to enjoy, by other riparian owners is affected thereby (see *Hamilton*, 1793, Mor. 12824, at 12827); this, in turn, depending largely upon the size of the stream, the velocity of the current, the nature of the soil, the proportion of the water consumed, and the like (Gale, *Easements*, p. 247 *n.*). If the limit of lawful user be exceeded, an action will lie at the instance of any riparian proprietor whose user or power of user is affected, and without the necessity of proving actual damage (Rankine, *Landownership*, p. 486; Gale, *Easements*, p. 243; *Swindon Waterworks Co.*, 1874, L. R. 9 Ch. 451). In such cases, however, as in other questions of an alleged infringement of rights in water, some interference with the pursuer's right must be shown (*Kensit*, 1884, 27 Ch. D. 122); and the defence that the operation complained of is

innocuæ utilitatis is always open. It has been suggested that, in our law, a somewhat strict view of riparian rights obtains, so as to render illegal any consumption of water for secondary or extraordinary purposes, and the cases of *Ogilvy* (1791, Mor. 12824, Hume, 508) and *Hamilton* (1793, Mor. 12824) have been referred to in support of this view. It will be observed, however, that, in the first case, prejudice to the inferior heritor's right was established; while in both cases the operation complained of was open to attack upon various other grounds, as being a permanent diversion of part of the stream, and for the use of non-riparian lands. The view here adopted is consistent with the law laid down by Ld. Neaves in *Morris* (4 M. at 1093), and is in harmony with the views taken in England upon this question (*Earl of Sandwich*, 1878, L. R. 10 Ch. 707; see Bacon, V.-C., at 711, 713; *Ormerod*, 1883, 11 Q. B. D. 155; Ld. Chan. Cairns and Ld. Hatherley, *Swindon Waterworks Co.*, 1875, L. R. 7 H. L. 697, at 704, 709; Ld. Kingsdown, *Miner*, 1858, 12 Moo. P. C. 131, at 156).

The cases of user of water for agricultural purposes, of which the most familiar example is irrigation (see *D'Eresby's Trs.*, 1873, 1 R. 35), are more nearly related to questions of diversion or alteration in the flow, than to questions of consumption, and have been already adverted to (*supra*, s. 11).

13. *Operations which Affect the Quality of the Water.*—The quality of water in rivers is strictly protected at common law and also by statute (see Rivers Pollution Prevention Acts). At common law, the general rule is that no heritor is entitled to pollute water which passes through and leaves his lands. A proprietor may in certain cases be under no obligation to transmit water which is upon his property, but if he allows it to leave his lands and find its way into a stream, he must take care that it does so in an unpolluted condition. There is no abstract standard by which the law judges in questions as to interference with the quality of water in a stream. The condition to which in each case it has regard is the natural state of the stream prior to the act complained of (Ld.-Pres. Inglis, *Rigby*, 1872, 10 M. 568, at 572). The obligation which has been said to be imposed upon a riparian proprietor to transmit the water of a stream "unimpaired in quality" must, like the correlative obligation upon him to do so "undiminished in quantity," be reasonably construed: and the same general principles already referred to will be found, *mutatis mutandis*, to apply also to questions of quality. The law as to pollution forms an important chapter of the general law of nuisance, and is elsewhere treated. See Nuisance.

14. *Rights of Non-Riparian Owners and Grantees from Riparian Owners.*—In the foregoing statement of legal rights in non-navigable rivers and streams, the legal position has been considered as between parties who are both riparian owners. To entitle a person to the rights of a riparian owner he must *de facto* be the proprietor of lands adjoining the stream. The purchase of land fronting a stream sufficient to lay a pipe, by which the water of the stream is to be conveyed away for the use of non-riparian subjects, is a mere colourable device, and will not constitute riparian ownership (*Marquess of Breadalbane*, 1895, 22 R. 307). For the question how far ownership in the *alveus* as well as in the banks proper is necessary, see *Lord*, 1859, 12 Moo. P. C. 473; Ld. Chan. Cairns, *Lyon*, 1876, 1 App. Ca. 662, at 673.

As regards the right of a grantee of a riparian owner, there is little authority in Scotland; but it seems adverse to the view that persons who are not *de facto* riparian proprietors can by grant or licence from a riparian owner acquire the rights with which the law has invested the owners of

lands so situated (see Ld. Fullerton, *Lord Melville*, 1842, 4 D. 1231, at 1241; Ld. Shand, *Bonthrone*, 1878, 6 R. 324, at 331; *Marquess of Breadalbane, v.s.*). In England it has been decided that, in a question with other riparian proprietors, no one but a *de facto* riparian owner has a right to the water of the stream (*Stockport Waterworks Co.*, 1864, 3 H. & C. 300). "There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water rights, and at the same time transfer these rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant. It seem to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor, and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is, that he can have them against the grantor, but not so as to sue other persons in his own name for infringement of them" (Pollock, C. B., and Channell, B., *Stockport Waterworks Co., v.s.* at 311). To the same effect are several subsequent cases (*Crossley*, 1867, L. R. 2 Ch. 478; *Wilts and Berks Navigation Co.*, 1874, L. R. 9 Ch. 451; *Ormerod*, 1883, 11 Q. B. D. 155; cf. *Whaley*, 1857, 2 H. & N. 476; 1858, 3 H. & N. 675, 901). But a riparian owner cannot upon merely academic grounds challenge such a grantee's right. He must be in a position to show some interference with his own right (*Kensit*, 1884, L. R. 27 Ch. 122).

For the law of servitude rights in rivers and streams, see SERVITUDE; WATER; AQUÆDUCTUS; AQUÆHAUSTUS.

Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75).—This Act was passed, as stated in the preamble, in order "to make further provision for the prevention of the pollution of rivers, and, in particular, to prevent the establishment of new sources of pollution." The "streams" which come under the scope of its provisions include "the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined" by the Secretary for Scotland, by order published in the *Edinburgh Gazette*, and "rivers, streams, canals, lakes and watercourses, other than watercourses at the passing of this Act mainly used as sewers, and emptying into the sea or tidal waters which have not been determined to be streams within the meaning of this Act by order as aforesaid" (ss. 20 and 21). A "watercourse mainly used as a sewer" means a watercourse which has been converted into a sewer, and of which the main and primary use is that of a sewer, although water may still run in it (per Ld. J.-Cl. Moncreiff in *Local Authority of Portobello*, 1882, 10 R. 130). In that case a watercourse mainly used as a sewer (the Pow Burn) joined a larger stream (the Braid Burn), the water of which above the junction was fit for primary purposes, and the combined streams, under the name of the Figgate Burn, flowed into the sea about three miles below the junction. In their natural condition the Braid Burn contained nine times the amount of water in the Pow Burn, but if the sewage poured into the Pow Burn was included in the flow, the proportion was reduced to three to one. During the summer, in dry seasons, the Braid Burn was diminished one-half, while the Pow Burn received a constant supply of liquid from the

drains. The Court held that the Figgate Burn was not a watercourse mainly used as a sewer in the sense of the Act.

Solid Refuse.—Under sec. 2 an offence against the Act is committed by every person who by one act or repeated acts "puts or causes to be put or to fall, or knowingly permits to be put or to fall, or to be carried into any stream, so as either singly or in combination with other similar acts of the same or any other person, to interfere with its due flow or to pollute its waters, the solid refuse of any manufactory, manufacturing process, or quarry, or any rubbish or cinders, or any other waste, or any putrid solid matter." The word "person" in this and the following sections includes "any body of persons, whether corporate or unincorporate." "Solid matter" does not include "particles of matter in suspension in water" (s. 20).

Sewage Matter.—Under sec. 3 an offence against the Act is committed by every person who "causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream, any solid or liquid sewage matter." But if the channel along which the sewage flows was used or constructed wholly or partly for the conveyance of sewage at the date of the passing of the Act, then the person causing or permitting the flow does not commit an offence under the Act if he can show the Court that he is using "the best practicable and available means" to render the sewage matter harmless. A certificate granted by an inspector appointed for the purposes of the Act by the Secretary for Scotland, subject to appeal to the latter, and renewed every two years, is conclusive evidence, both in this case and those mentioned in the following sections, that the best or only practicable or available means are being used (s. 12). If a local authority were at the date of the passing of the Act discharging sewage into the stream through a wholly or partly constructed channel, the Secretary of State may postpone the operation of the Act, so far as regards their case, in order to enable them to adopt the best practicable and available means for rendering the sewage matter harmless (s. 3). Where proceedings were taken against a local authority for committing an offence under sec. 3 of the Act, it was held that it was not a good defence that they had not materially altered the nature of the sewers since the date of the Act, and had done nothing to increase the flow of sewage matter from these sewers into the stream (*Yorkshire West Riding Council*, [1894] 2 Q. B. 842). Where a person, with the sanction of the local authority, passes sewage matter into a stream along a drain communicating with any sewer belonging to or under the control of the local authority, he is not guilty of an offence in respect of the passage of such sewage matter: the local authority is alone liable (s. 3). A local authority who were in default in having made no provision for dealing with the sewage in their sewers, were held not to be entitled to succeed in proceedings taken by them under the Act against a person whose drains were connected with the local authority's sewers, and who was entitled to so connect them, although the local authority had not sanctioned their so doing, both parties being offenders under the Act (*Kirkheaton District Local Board*, [1892] 2 Q. B. 274).

Polluting Liquid from Factories.—Under sec. 4 an offence against the Act is committed by every person who "causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process." The adjective polluting does not include "innocuous discoloration" (s. 20). But if the channel along which such liquid flows was used or constructed wholly or in part at the date of the passing of the Act, or is a new channel substituted therefor, and having its outfall at the same spot,

then the person causing or permitting the flow does not commit an offence under the Act if he can show the Court that he is using "the best practicable and reasonably available means" to render the liquid harmless (s. 4).

Polluting Matter from Mines.—Under sec. 5 an offence against the Act is committed by every person who "causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream any solid matter from any mine in such quantities as to prejudicially interfere with its due flow, or any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine, other than water in the same condition as that in which it has been drained or raised from such mine," unless in the case of poisonous, noxious, or polluting matter he can show the Court that he is using "the best practicable and reasonably available means" to render such matter harmless.

Those entitled to Prosecute.—Proceedings in respect of any offence under the Act may be taken by any person aggrieved by the commission of such offence, or by the local authority, except in the case of offences under secs. 4 and 5. Proceedings against offenders under these sections can only be taken by the local authority with the consent or at the direction of the Secretary for Scotland, who, in giving or withholding his consent, must have regard to the industrial interests and the circumstances and requirements of the locality. Before consenting to any proceedings by the local authority of any district which is the seat of any manufacturing industry, the Secretary for Scotland must satisfy himself that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures, are reasonably practicable and available, and that no material injury will be inflicted on the interests of such industry (s. 6). In addition to the public health local authority, the county council, in terms of sec. 55 of the Local Government Act, 1889 (52 & 53 Vict. c. 50), can enforce the provisions of the Rivers Pollution Prevention Act within the bounds of their county; and on the application of the council of any county or burgh concerned, the Secretary for Scotland may by provisional order appoint a joint committee, representing all the counties and burghs through which or by which a river or part of a river flows, to enforce the provisions of the Act in like manner.

Legal Procedure.—Before proceedings can be taken, written notice of intention to do so must be given to the offender, and two months must have expired from the date of such notice (s. 13). Proceedings are brought before the Sheriff, who, if he thinks the offence made out, may by summary order require the person offending to abstain from committing the offence, and to perform such duties as are necessary to bring the offence to an end (ss. 10 and 21). The making of this order is discretionary on the part of the Sheriff (*Kirkheaton District Local Board*, [1892] 2 Q. B. 274). Before pronouncing decree, the Sheriff may remit to a man of skill to report on the nature and cost of the necessary works, and also on the "best practicable and available means," in cases where the Act specifies such a restriction on the total cessation of the pollution (s. 10). An appeal from the Sheriff's decree is allowed to the Court of Session in the form of a special case (ss. 11 and 21). If the offender is ordained to stop the pollution, and does not obey the decree, he is liable in a penalty of £50 *per diem* as long as he persists in disobeying; and if he does so for more than a month, or for more than such period less than a month as may be prescribed in the decree, the Court may order any person to carry the decree into effect at the expense of the offender (s. 10).

Road.—See Roads and Bridges; Highway; Right of Way; Road, Rule of the.

Road, Rule of the.—The rules of the road are: "In *meeting* a carriage or horse, etc., to keep to the left hand; in *passing*, to keep to the right, the foremost bearing to the left; in *crossing*, to bear to the left, and pass behind the other carriage. But these rules will not hold invariably in crowded streets, or where the street or road is broad and there is no fault chargeable on the coachman, or where there are tramway cars" (Bell, *Prin.* 170; *Turley*, 8 C. & P. 103; *Wayde*, 2 Dow. & Ry. N. P. 255). "If the driver of any sort of carriage shall not keep to the left or near side of such road on meeting, or being overtaken by any other carriage or any rider, or shall wilfully prevent any other person passing him or his carriage; such driver shall, for every such offence, forfeit and pay a sum not exceeding five pounds, over and above the damages occasioned thereby" (1 & 2 Will. IV. c. 43, s. 97, incorporated in Roads and Bridges (Scotland) Act, 1878 (41 & 42 Vict. c. 51, by sec. 123)). Where there are tramways, the rule is altered, and a carriage overtaking a tramway car should pass it on the left-hand side (*Ramsay*, 1881, 9 R. 140; *Jardine*, 1887, 14 R. 839). Foot-passengers are entitled to walk on the roadway even though there be footpaths. "There is no doubt as to the relations between wheeled vehicles and persons on the road. . . . There is no doubt that it lies on the driver to keep clear of foot-passengers. If a person is guilty of such fault as to increase the burden of that obligation, that is another matter: but the primary obligation is undoubted—to keep clear of foot-passengers" (per Ld. J.-Cl. Moncreiff, in *McKechnie*, 1887, 14 R. 345; *Gibson*, 1879, 6 R. 890; *Anderson*, 1885, 13 R. 443; *Williams*, 3 C. & K. 82. [See Addison on *Torts*, 26, 631; Beven on *Negligence*, 955; Taylor on *Evidence*, 7; Guthrie Smith on *Damages*, 136.]

Road at Sea, Rule of the.—Regulations for the prevention of collisions at sea, enacted by Order in Council under the authority of sec. 418 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), as modified by special rules made by local authority for the navigation of any harbour river, or inland navigation, constitute the rule of the road at sea. In case of a collision, the ship infringing the regulations is deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulations necessary (s. 419 (4)). The latest regulations were made by Order in Council, 27 Nov. 1896, and will be found detailed in Marsden, *Collisions at Sea* (4th ed., 1897).

[Abbott, *Law of Merchant Ships and Seamen*; Guthrie Smith on *Damages*.] See Collision.

Roads and Bridges.—In this article the subject is considered under the following heads:—

I. Road Authorities (County).

County Council—

Area of the County.

Composition of Council for the Purpose of the Administration of Roads and Bridges.

County Road Board—
Powers of the County Road Board.
Districts and District Committees.

II. Management of Roads and Bridges.
Road Surveyor and District Road Surveyor.
List of Roads and Bridges.
Highways.
Closing Roads.
Temporary Closing.
Power to get Materials.
Construction of Roads.
Regulation of Traffic. Nuisances.
New Roads and Bridges.
Bridge not wholly in one County or Burgh.
Joint Bridge Committee.
Cost of Maintaining Joint Bridges.
Bye-Laws.
Extraordinary Traffic.

III. Finance.
Borrowing. Debt. Assessments.

IV. Burgh Roads and Bridges.

I. Road Authorities.

By the Roads and Bridges (Scotland) Act, 1878, the management and maintenance of roads and bridges in each county was vested in a body of *Road Trustees*, but their executive duties were largely delegated to a *County Road Board*, appointed by them.

County Council.—The powers of the Road Trustees under the Roads and Bridges Act, 1878, are now transferred to the County Council (L. G. Act, 1889, s. 11 (2)), and the Roads and Bridges Act, 1878, became the statute which governed road management in all the counties of Scotland (L. G. Act, 1889, s. 16 (1)).

Area of the County.—The area of county local government for the purpose of the management of highways and bridges includes the county, except Royal Burghs and Parliamentary Burghs, and those Police Burghs of which the population has, within three months after the Roads and Bridges Act came into force, had its population ascertained and declared by the Sheriff to exceed 5000, in the manner prescribed in the General Police Act, 1862, s. 7 (R. and B. Act, ss. 3, 11). The area of administration may also include the roads and highways of any burgh or police burgh containing a population under 10,000, of which the Local Authority have devolved the management of the roads and bridges upon the County Council (R. and B. Act, s. 47).

County Council for the Purpose of the Administration of Roads and Bridges.—The County Council for the purpose of the administration of roads and bridges is composed of all the councillors except (*a*) the representatives of Royal and Parliamentary Burghs, (*b*) the County Councillors for Police Burghs which have had their population ascertained to exceed 5000. Where a burgh has devolved the management of its highways on the County Council, it is represented only on the District Committee (L. G. Act, 1889, s. 78).

The County Road Board.—The County Council annually, at their

meeting in December, appoint from among their number a committee not exceeding thirty in number, called *The County Road Board*, which takes the place of and exercises the powers and duties of a County Road Board under the Roads and Bridges Act, 1878. The Road Board, subject to the orders and instructions of the County Council, is *the executive of the County Council in all matters relating to roads and bridges*, and it may exercise all the powers and privileges exercised by the County Council in regard to the management of highways, *except the power of making an assessment* (L. G. Act, ss. 16 (2), 6). Being a committee of the County Council, it will conform to such regulations respecting its quorum and proceedings as the County Council may see fit to make; but subject to such regulations, the direction of its proceedings and quorum is in the hands of the Road Board (L. G. Act, s. 74 (1)). The Road Board may elect its own chairman, and its clerk is the clerk of the County Council (L. G. Act, ss. 16 (2)(6), 83). The Road Board fixes the time and place of its meetings (R. and B. Act, s. 22). An annual meeting must be held between the 15th April and 15th May to deal with the reports and estimates of the district committees. At the annual meeting, held between the 15th April and the 15th May, the Road Board considers the reports, specifications, and estimates of the various district committees of the county, and their deliverances thereon. The Road Board has the power of reviewing these, and it may deliver orders concerning them (R. and B. Act, s. 50).

Powers of the County Road Board.—1. To decide appeals by persons aggrieved by the decisions of a District Committee (R. and B. Act, s. 27). The decision of the Road Board is final (*Robertson*, 24 S. L. R. 24).

2. To make, and if made to maintain, footpaths on the side or sides of any highway, subject to the approval of the County Council (R. and B. Act, s. 45).

3. To close a highway for repair, on a written report from the county surveyor or district surveyor to the effect that it is necessary to do so. Advertisement of intention to close must be previously made (R. and B. Act, s. 51).

4. Two members of the Board, on a written order, may close a dangerous highway without previous advertisement, on a written report by the surveyor to the effect that the road is dangerous. Advertisement must, however, afterwards be made (R. and B. Act, s. 51).

5. The Board, at a meeting called for the purpose by special advertisement or circular, may resolve to construct a new road or bridge, and they may enter into an agreement with any person or corporation for the construction of the new road or bridge. The approval of the County Council is required (R. and B. Act, s. 58).

Districts and District Committee.—For the purpose of road administration, as a rule, the county is divided into districts in which the roads and bridges are administered by a District Committee (L. G. Act, ss. 16 (2), 77 (1)). The District Committee consists of the County Councillors for the electoral divisions in the district; County Councillors for Police Burghs the population of which has not been ascertained and declared to exceed 5000; one representative from the Parish Council of each parish comprised in the district, and one representative from each burgh which has, in terms of sec. 47 of the Roads and Bridges Act, devolved the management of its highways upon the county (L. G. Act, s. 78). The District Committee is the executive body for the management of roads and bridges in their district. Its decisions may be reviewed by the County Road Board on appeal (R. and B. Act, s. 27). A District Committee may appoint a clerk and treasurer and, with the consent of the County Council,

a district road surveyor and a district collector, but the approval of the Council is required in fixing their salaries (R. and B. Act, s. 29; L. G. Act, 16 (2) *c*, and 80). Reports and estimates of the road surveyor on the district roads must be considered by the committee and transmitted to the County Road Board on or before 15th April in each year (R. and B. Act, s. 49). A District Committee is charged with the vindication of rights of way (L. G. Act, 1894, ss. 42, 43). For general powers of a District Committee, see COUNTY COUNCIL, *District Committee*.

II. MANAGEMENT OF ROADS AND BRIDGES.

Road Surveyor and District Road Surveyor.—A County Council may appoint a county road surveyor, who shall perform the duties prescribed by the Council or the Road Board (L. G. Act, s. 83). A District Committee may also appoint a district surveyor, and, subject to the approval of the County Council, may fix his salary (R. and B. Act, s. 29). A district surveyor must, before the 30th of March in each year, make up and deliver to the Road Board and the District Committee a report of the condition of the highways in his district, a specification of the works and repairs proposed to be executed, and an estimate of the sums required for the purposes of the highways within the year (R. and B. Act, s. 49).

List of Roads and Bridges.—The County Road Board, as the executive of the County Council, keeps a record of the roads, highways, and bridges which fall under their administration and control (R. and B. Act, s. 41).

Highways.—Highways, in the sense of the Roads and Bridges Act, include all existing turnpike roads, statute labour roads, and all roads maintained under the provisions of the Highland Roads and Bridges Act, 1862, and all bridges and the accesses thereto forming part of any highway, and all other roads when declared to be highways under the provisions of the Act; but a highway does not include a road or bridge which any person is, at the commencement of the Act, bound to maintain at his own expense (R. and B. Act, s. 3). The County Council, on a report from the County Road Board recommending it, may declare that a highway shall cease to be a highway for the purposes of the Roads and Bridges Act, and any road or bridge not previously maintained out of the public funds may, with the consent of the owner, become a highway for the purposes of the Act, but the County Road clerk must give notice by special advertisement of the proposed change (R. and B. Act, s. 41). Three ratepayers may appeal to the Sheriff against the determination of the County Council within fourteen days. The Sheriff's decision is final (R. and B. Act, s. 43).

Closing Roads.—After a road has ceased to be a highway, the County Council may resolve to shut it. Thirty days notice of a resolution being brought forward to that effect must be given; and when a closing order is made, it must be advertised for six months on the church doors of the parishes in which the road is situated, and on conspicuous places at both ends of the road. When the six months have expired, the closing order comes into force. Within the six months three inhabitants may appeal to the Sheriff against a closing order, and the Sheriff's decision in the matter is final (R. and B. Act, s. 43; *Dalrymple*, 1894, 21 R. 1063).

Temporary Closing.—On a written report from the surveyor that it is necessary to shut up for a limited period any highway for the purpose of repair, the Road Board or a District Committee may authorise the shutting up of a highway for such period as they may deem necessary; provided that notice shall be given by advertisement in a newspaper circulating in the county within which the highway is situated at least fourteen days

before the highway is shut up (R. and B. Act, s. 51). Upon a written report by the surveyor or district surveyor that a highway has become, or is about to become, dangerous, it may be shut up by the written order of any two members of the Board or District Committee without any previous notice; but notice by advertisement must immediately afterwards be given that it has been shut up (R. and B. Act, s. 51).

Power to get Materials.—By sec. 80 of the Turnpike Roads Act (1 & 2 Will. IV. c. 13), which is incorporated in Sched. C of the Roads and Bridges Act, a road authority is empowered to search for, dig, and carry away materials for repairing or making roads, and to carry the same through the ground of any person without payment, except in the case of stone used for building. Payment must be made for damage done in going over enclosed land. Where it may appear to the Secretary for Scotland, on the application of the proprietor, that it is desirable to preserve lands or grounds intact on the ground of national, public, or historical interest, they may be exempted from the right to take materials (Road and Bridges (Scotland) Amendment Act, 1892, s. 5; opening a quarry in a field: *Guild's Trs.*, 1849, 3 S. L. Rev. 282; taking stone: *Graham*, 1887, 11 D. 682; taking chips of stone: *Yeats*, 1863, 1 M. 221; stones from bed of a river: *Lyell's Trs.*, 1882, 9 R. 792; taking material over an avenue: *Ramsden*, 1881, 6 Q. B. D. 583; power to set up machinery: *Henderson's Trs.*, 1896, 23 R. 727; sufficient identification of place of search: *Whitson*, 1897, 34 S. L. R. 395; 1888, 4 S. L. T. 426).

Construction of Roads.—A road authority may lease adjoining land as a temporary road, while an old road is being repaired or widened (General Turnpike Act, 1 & 2 Will. IV. c. 43, s. 83). It may maintain drains at the side of roads, and may cause them to empty into any adjoining land, ditch, or watercourse (G. T. Act, s. 84: *Rochead's Trs.*, 1834, 13 S. 220; *Baird*, 11 S. L. R. 24). The consent of the road authority is required to the erection of houses, walls, or other buildings, or the making of any new enclosures or plantations, within a distance of twenty-five feet from the centre of any turnpike road (G. T. Act, s. 91; parapet wall: *Partick Police Commissioners*, 1886, 13 R. 500; barbed wire fences: *Elgin County Road Trs.*, 1886, 14 R. 48; *Macdonald*, 1895, 22 R. 551). A road authority must erect sufficient parapet walls, mounds, or fences, or other adequate means of security, along the sides of bridges, embankments, or other dangerous parts of the roads under their administration (G. T. Act, s. 94; insufficient fence: *Green*, 1882, 9 R. 1069; *Nicoll*, 2 S. L. Rev. 261; *Fraser*, 1892, 19 R. 817: *Strachan*, 1894, 21 R. 915).

Regulation of Traffic—Prevention of Nuisances.—Powers are given in the Roads and Bridges Act, s. 123, Sched. C, to regulate traffic and prevent nuisances. Powers are given in regard to seizing timber left on roads; lopping hedges and trees; cutting weeds; encroachments; erecting buildings within certain distances of road; nuisances; regulation of drivers: repair of roads by those opening to lay pipes; leaving material on roads; fencing pits near roads; pasturing animals on roads; gates; windmills; steam-engines near roads. (As to steam-engines, see 57 & 58 Vict. c. 37, s. 2.) Where barbed wire fence, bordering on a highway, is a nuisance, a road authority may serve a notice on the proprietor of the fence to remove it,—failing removal, an application may be made to the Court to order removal (Barbed Wire Act, 1893, s. 3).

New Roads and Bridges.—The Road Board, subject to the approval of the County Council, to be given at their annual general meeting, may, at a meeting to be called for the purpose by special advertisement, or by special

circular sent through the post to every member of the Board, stating the object of the meeting, resolve to construct any new road or bridge that they may think requisite, or they may enter into an agreement with any person or corporation (including the County Council of any adjoining county or the Local Authority of any burgh) for the construction of any new road or bridge, and may require such person or corporation to provide the whole or any part of the expense of such new road or bridge as a condition of the construction of the same (R. and B. Act, s. 58). A resolution to rebuild a bridge may be approved at any meeting of a County Council called by special advertisements and circulars (R. and B. (Scotland) Amendment Act, 1892, s. 1). It is to be noticed that no works involving capital expenditure can be undertaken without the consent in writing of the Standing Joint Committee (L. G. Act, s. 18 (6) (7)). Where a new bridge is not situated wholly within one county or burgh, the agreement for its construction must provide for the proportions in which the expense of the future maintenance of the bridge is to be divided between the counties or county and burgh or burghs within which the bridge is partly situated, as the case may be. No resolution for the construction of any new road or bridge in any insular district can be carried into effect without the consent of the District Committee of the district (R. and B. Act, s. 58).

Bridge not wholly in one County or Burgh.—Where a bridge is not situated wholly within one county or burgh, the expense of maintaining, and if need be of rebuilding the same is, failing agreement, a charge equally against the County Council of the county or counties and the Local Authority or Authorities of the burgh or burghs within which it is partly situated. The management of the bridge, failing agreement, is vested in a Joint Bridge Committee, appointed by the County Council or Local Authorities chargeable with the cost of maintenance and rebuilding (R. and B. Act, s. 37; *Lower Ward of Lanarkshire Road Trustees*, 1887, 14 R. 890).

Joint Bridge Committee.—The following provisions regulate the appointment, powers, and duties of a Joint Bridge Committee :—

1. A Joint Bridge Committee is appointed annually at a date agreed upon by the road authorities interested, and each road authority may appoint not more than five members to the committee.

2. A Joint Bridge Committee appoints its own chairman, and appoints and remunerates such officers as are necessary for the management of the bridge, such officers, as far as possible, being already officers of the road authorities by whom the committee is appointed.

3. In the event of a difference of opinion, the representatives of each road authority have jointly one vote, and if there is an equality of votes, the question is referred to a standing arbitrator to be named annually by the committee, or, failing such nomination, by the Sheriff of any adjoining county (R. and B. Act, s. 39).

Cost of Maintaining Joint Bridges.—In the case of bridges which accommodate the traffic not only of the county or counties or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county, or of other counties and burgh or burghs, or one or more of them, the County Council of the counties and burgh authorities may agree as to the proportions in which the debt (if any), and the cost of maintenance, and, if need be, of rebuilding such a bridge shall be borne. The county clerk or the town clerk of any burgh may apply to the Secretary for Scotland to determine that the bridge belongs in common to the county or counties, and burgh or burghs. The Secretary for Scotland may order an inquiry to be held, and after hearing parties, and evidence if necessary,

the Secretary for Scotland may determine that the burden of managing, maintaining, and repairing, and, if need be, rebuilding the bridge mentioned in the application, and of paying the debt affecting it, should be borne proportionally by the counties or burghs using the road (R. and B. Act, s. 88; *Mags. of Glasgow*, 1885, 13 R. (H. L.) 110; *Lanarkshire Road Trs.*, 1886, 14 R. 890).

Bye-Laws.—A County Council has a general power to make bye-laws as they may think fit for the administration of the affairs of the county (L. G. Act, s. 57). Under the Roads and Bridges Act, 1878, s. 104, special powers are given to make bye-laws with regard to roads and traffic thereon. These bye-laws must be approved by the Sheriff, and must be published in some newspaper circulating in the county at least ten days before the sitting of the Sheriff for their consideration (bye-laws as to locomotives). (Locomotives on Highways Act, 1896, 59 & 60 Vict. c. 36, s. 104; locomotives: *Smart*, 1894, 22 R. J.) See Bye-Law.

Extraordinary Traffic.—Where extraordinary expense has been caused to the County Council in repairing a highway by reason of the damage caused by excessive weight passing along the same, or by extraordinary traffic thereon, the person by whose order this is done is liable to pay the amount, as ascertained in a summary manner by the Sheriff, unless an agreement is made for payment of a composition (R. and B. Act, s. 57). In construing similar provisions in England, it has been held that the expressions "excessive weight" and "extraordinary traffic" relate, not to an extraordinary amount of traffic of the usual sort, caused, for instance, by carriage of materials for building an ordinary dwelling-house, but to weight and traffic which are abnormal and beyond the ordinary traffic on the road,—that is, not the amount of use to which the road is subjected, but the weight and character of the traffic; that the fact of the weight of the locomotive being within the legal standard is no answer; and that a comparison of the cost of repairs with the average expense of repairing highways is an important element, though not conclusive, in determining the amount of extraordinary expenses (*Lord Ardeland*, 1879, 5 C. P. D. 211, 351). Regard must in every case be had to the sort of industry prosecuted in the place, and to the recognised mode in which it is carried on; so that if quarrying be a recognised business in the district, and the loads complained of are of the usual weight in such traffic, it will not do to contrast the tear and wear caused in this way with that which results from ordinary agricultural traffic, as founding an obligation to repay extraordinary expenses (*Wallington*, 1881, 6 Q. B. D. 206). If the traffic does not materially differ in character from that which is usually carried over roads of the same nature in the neighbourhood, or from that which the road in its ordinary and fair use may be reasonably subjected to, there will be no claim, though the aggregate weight and quantity was extraordinary as compared with the usual use of the road (*Pickering Board*, 1881, 8 Q. B. D. 59; *Raglan Board*, 1881, 46 J. P. 498; *Tunbridge Highway Board*, 1885, 33 W. R. 306; *Lapthorn*, 1888, 49 J. P. 709; *Sutherland Road Trustees*, 1886, 2 Sheriff Court Rev. 252; *Ayrshire Road Trustees*, 1886, 2 Sheriff Court Rev. 254). The effect of the 57th section of the Roads and Bridges Act, taken with the interpretation clause, is the exemption of the road trustees of a neighbouring county from liability for the expense caused through extraordinary traffic (*Forfarshire Road Trustees*, 1884, 11 R. 1070: carriage of timber: *Berwickshire Road Trustees*, 1885, 1 S. L. Rev. 387; mineral traffic: *Ayrshire Road Trustees*, 1886, 2 S. L. Rev. 254; locomotives: *Kirkcaldy District Committee of Fife County Council*, 1893, 1 S. L. T. 208).

III. Finance.

Borrowing.—A County Council may borrow for the purpose of roads and bridges on the security of the rates, but they cannot borrow (1) without the consent in writing of the Standing Joint Committee; (2) loans must be repaid within a period not exceeding thirty years; and (3) the County Council must annually furnish to the Secretary for Scotland a return regarding the amount of the loan still outstanding (R. and B. Act, s. 75; L. G. Act, ss. 16, 17). See County Council; Borrowing.

Debt.—Provision is made in the Roads and Bridges Act, 1878, for the valuation and allocation of debt, and the debt so valued and allocated becomes a charge upon the Road Trustees, and now by the Local Government Act is a charge upon the County Council (R. and B. Act, s. 69; L. G. Act, s. 11). Until the debt is paid off, all assessments for repayment of principal and interest are payable by proprietors only, and are included in the owners' consolidated rate (R. and B. Act, s. 74; L. G. Act, s. 16 (2) *d*). In a detached part of a county a proprietor is liable only for assessments for road debts affecting the county of which such detached part was originally a portion, and not for road debts affecting the county or counties by which such detached part is surrounded. The provisions above stated apply to debts incurred *before* the Local Government Act came into operation, and which have been taken over by the County Council.

Assessments.—*Assessments for Management and Maintenance of Highways.*—Under the Local Government Act the former system of levying assessments for the maintenance and management of roads and bridges is preserved. The amount required for the maintenance and management and repairs of the highways is levied, in the option of the County Council, within a district or within a parish as may be determined, or, where a county is not divided into districts, within the whole county, and is payable by owners and occupiers equally (R. and B. Act, s. 52; L. G. Act, ss. 26 (4), 27). A proprietor is still liable for half assessment if premises unlet: *Russell*, 1884, 12 R. 298. Where a county is not divided into districts, the assessment for the maintenance and management of roads and bridges is imposed upon the whole lands and heritages within the county, in the same manner and subject to the same conditions in and under which they are entitled to be imposed upon the lands and heritages within a district (R. and B. Act, s. 52; L. G. Act, s. 26 (4) (27). Assessments levied in an insular district must be expended for the maintenance and repair of the highways and bridges in the district, and no part of the assessment in the rest of the county is expended within the insular district (R. and B. Act, ss. 18, 58). See County Council, *Rating*.

Assessment for New Roads and Bridges.—Where the County Road Board, with the approval of the County Council, have resolved to construct a new road or bridge, the cost is provided for in the same manner as the cost of maintenance of existing roads and bridges. This applies to rebuilding bridges (R. and B. Act, ss. 58, 76; sec. 3, Roads and Bridges Act, 1892; L. G. Act, s. 16 *c*). The above provision in so far as applying to the cost of constructing and rebuilding bridges is repealed by sec. 3 of the Roads and Bridges Act, 1892, and it is provided that any assessment leviable under sec. 58 of the Roads and Bridges Act, 1878, for the construction or rebuilding of a bridge may be imposed and levied, as the County Council may determine, either on the county (subject to the provisions as to insular districts contained in sec. 58) or on the district or districts within which such bridge is situate or partly situated, or partly on the county and partly

on such district or districts, and such assessment shall be paid one half by the proprietor and the other half by the tenant or occupier of the lands and heritages on which the same shall be imposed.

Assessment for Roads and Bridges situated in two Counties or Districts.—Where a Road Board of a county have entered into an agreement with a County Council or Road Board of an adjoining county for the construction of any new road or bridge under sec. 58 of the Roads and Bridges (Scotland) Act, 1878, and the portion of the new road or bridge situate in the latter county is made and maintained for the benefit of the former county, an assessment for defraying the expense of the construction and maintenance of the portion of the new road or bridge in the latter county may be levied from the persons liable to assessment in the former county, as if the whole road or bridge were situated in the former county (R. and B. (Scotland) Amendment Act, 1892, s. 4).

In an insular district (any island or group of islands forming at the date of the Act a separate highway district) the District Committee has a veto, and the district is alone liable for its own new roads and bridges, and for no others: and no assessment can be levied there for the expense of the construction of any new road or bridge in any part of the county (R. and B. Act, ss. 18, 58).

IV. Roads and Bridges in Burghs.

The maintenance of roads and bridges in all Royal and Parliamentary Burghs is vested in the Local Authority (Town Council or Commissioners) of the burgh. This applies also to Police Burghs whose population has been ascertained by the Sheriff to exceed 5000 (R. and B. Act, ss. 11, 47). A Police Burgh may resolve to undertake the management and maintenance of highways, and the County Council of the county in which the burgh is situated may require the Commissioners of a Police Burgh to undertake the management and maintenance of the highways within the Police Burgh (Roads and Streets in Police Burghs (Scotland) Act, 1891, s. 2). In the event of the Commissioners of any Police Burgh not undertaking the management and maintenance of highways, the Commissioners may claim from the County Council a fair and reasonable contribution towards the expense of managing and maintaining such streets and roads (R. and S. Act, 1891, s. 16). The Local Authority in a burgh possesses the same powers in reference to roads and bridges in the burgh as the County Council possesses in the county (R. and B. Act, s. 47). This applies to the construction of new roads and bridges, streets, and the permanently widening or improving roads, bridges, or streets (R. and B. Act, s. 58; Roads and Bridges (Scotland) Act, 1878, Amendment Act, 1888). The Commissioners of a burgh have the sole charge and control of the carriageway of all the streets, foot-pavements, and footpaths maintained by them, and they may cause any of the streets, foot-pavements, or footpaths to be lowered and altered, and formed in such manner and with such materials as they may think fit (Burgh Police (Scotland) Act, 1892, ss. 128, 129). The assessment for the maintenance and repair of roads and bridges is levied on all lands and heritages in the burgh, and is paid one half by the proprietor and one half by the tenant and occupier (R. and B. Act, s. 54). For joint bridges, etc., see *Bridge not wholly in one County or Burgh, supra.* If the burgh possess funds which may be lawfully applied to roads and bridges, these funds may be applied in aid of assessments (R. and B. Act, s. 87).

Robbery.—The crime of robbery consists in the taking of property by violence—forcible theft "committed by invasion of the person" (Hume, i. 104). The terms Robbery and Stouthrief are nowhere clearly distinguished. Hume (*ib.*) indeed says that the crime which is now termed robbery "formerly passed under the name of stouthrief, which was applicable, generally, to every sort of masterful theft or depredation" (cf. Ld. Mackenzie, in *Smith and Others*, 1848, Ark. 473). In the case of *Lary and Mitchell*, 1817 (Hume, 109), the prisoners were convicted of "Stouthrief as also Robbery," where they had obtained entry of a house in the night, by means of violent threats to pull down the house, and to kill those within, and fire their pistols through the windows; and when admitted they had presented a pistol at the master of the house, and compelled him and his wife to surrender their money. In Bell's *Notes* (44 and 45) four cases of charges of stouthrief are given, in all of which the crime consisted in entering into houses in a violent and masterful manner, and carrying off property (cf. *Handley and Others*, 1842, 1 Br. 508; *M'Gavin*, 1844, 2 Br. 145; *Murray*, 1879, 4 Coup. 315; Macdonald, 52). The term stouthrief is now seldom used, and the taking of property forcibly or by menaces is now termed *Robbery*.

It is not essential to the crime that the property taken should be upon the person at the time. It is sufficient if it is "under the immediate care and protection of the person invaded,—so that, unless by force or terror applied to him, it cannot be taken away" (Hume, i. 106). Thus it is robbery forcibly to take a horse from a person, or goods from a waggon, or sheep from a flock, or goods from a ship.

To constitute robbery there must be violence; but actual application of violence to the person is not necessary. What is requisite is only the taking against the will of the owner, as distinguished from that which is done stealthily, or by surprise (as by suddenly snatching a watch), and without any application to his will or fears (Hume, *ib.*). By violence in such a case is understood such behaviour as justly alarms for the personal and immediate consequences of resistance or refusal. "The mere display of force, and preparation of mischief, whether these appear in the weapons shown, in the number and combination of the assailants, or in their words, gestures, and carriage, if, in the whole circumstances of the situation, they may reasonably intimidate and overcome, are therefore a proper description of violence, to found a charge of robbery" (107). Any holding of the owner of property, in order to admit of its being taken from him (*Melville*, 1892, Bell, *Notes*, 43), or anything approaching to a struggle between the accused and the victim for this purpose, amounts to robbery.

The property must be actually taken; and must be taken feloniously (Hume, 108) with the purpose to appropriate it.

A charge of robbery may now be tried before the Sheriff (Crim. Procedure Act, 1887, s. 56). Previous conviction of any crime inferring dishonesty may be libelled as an aggravation in a charge of robbery (*ib.* s. 63). The punishment is penal servitude or imprisonment, a capital sentence being no longer competent (*ib.* s. 56).

Rogue Money.—Rogue money—a county assessment formerly levied for the purpose of defraying the expense of the apprehension, maintenance, and prosecution of malefactors—was abolished by 31 & 32 Vict. c. 32, by which the Commissioners of Supply were authorised to levy a "County General Assessment." (See now Local Government Act, 1889, 52 & 53 Vict. c. 50, s. 12.) See COUNTY COUNCIL.

Rolls of Court.—See Procedure Roll; Debate Roll; Single Bills; etc.

Roman Law.—The Roman law, or, as it is generally designated, the civil law,—a term which came into use in mediæval times to distinguish the law of Rome from the Canon law,—represents, in the final form in which it has been handed down in the *Corpus Juris Civilis*, the finished result of a long period of historical development. Roman law, in the course of this development, which continued during a period of more than a thousand years, underwent a process of transformation from the local law of the city of Rome to the universal law of the later empire. As Rome grew from a little Italian city into an empire coextensive with the civilised world, the Roman law underwent an uninterrupted and continuous process of amelioration and expansion, in course of which the harsh and highly technical law of the early times developed into the great equitable system of the *Corpus Juris*, grounded on principles of reason and justice, and covering the whole region of human activity. While it is usual and convenient to divide the history of the law into separate periods, there were no real breaks in the continuity of the growth, each age being a preparation for, and an introduction to, the next.

The *first* period extends from the foundation of the city to the publication of the Twelve Tables in 450 B.C. During this time the law consisted of a large body of unwritten rules, sanctioned by usage and of unquestioned authority, which defined the rights of the citizens and regulated public and private order. An analysis of this mass of customary law shows three main elements:—*Fas*, the rules of religion representing the will of the gods, breach of which was a sin, followed by religious penalties; *Jus*, rules with a human sanction, breach of which was an offence against the State, punished by the civil tribunals; *Boni mores*, the rules of honourable conduct, prescribing *fides*, *pudicitia*, and other virtues, which were at this date specially under the guardianship of the family tribunal.

The *second* period begins with the publication of the Twelve Tables, and ends with the fall of the republic and the establishment of the imperial system. With the compilation of the Tables the law of Rome became, for the first time, in great measure a system of written law. The Tables, besides remedying the indefiniteness, uncertainty, and arbitrariness of the old customary law, brought the knowledge of the law within reach of all, and, at the same time, did much to establish, at least in the department of private law, the principle of the equality before the law of all citizens, whether patricians or plebeians. During the republican period the Roman dominion was being constantly extended, and at the end of the period the greater part of the civilised world was regularly organised in Roman provinces under the direct rule of Roman magistrates. The law, too, during this period underwent a corresponding expansion, growing with the growth and strengthening with the strength of the people. The main features of the constitutional history of the city during this long era of conquest were the attainment by the plebeians of political and social equality with the patricians; the gradual extension of Roman citizenship; and the growth and decay of the popular assemblies, the *comitia centuriata* and, later, the *concilium plebis*, as organs of legislation. The *interpretatio* of the Twelve Tables went on steadily throughout the period; the publication of styles and forms of actions in such collections as the *Jus Flavianum* and the *Jus Ælianum*, finally completed the work of making the law and its processes known to

all; the *leges*, passed in the *comitia centuriata*, and, in the later part of this period, the *plebiscita*, passed in the *concilium plebis*, contributed much to the development and amendment of the *jus civile*; and, most important of all, during the later centuries of the republic, the edicts of the praetors and the rise of the *jus gentium* combined to exercise a most potent ameliorating influence on every department of the law, by introducing simple forms and equitable rules in place of the old harsh and rigorous technicalities. Further, towards the close of the republican era, much began to be done for the law by *juris prudentes*, who, though they had no official position, busied themselves in discussing legal principles, framing styles, giving opinions on points of difficulty, and writing legal treatises.

The *third* period extends from the foundation of the principate under Augustus to about the time of Diocletian. Down to the end of the third century of the Christian era the rule of the emperors continued, at least in theory, to be invested with a constitutional character, and the forms, institutions, and traditions of the republican era were to some extent preserved. During this period, and in particular in the time of the Antonines, Roman jurisprudence attained its most vigorous and splendid development. The empire was now a great unity, embracing the civilised world, and, after the date of the famous decree of Caracalla, all the free inhabitants of the empire were citizens. Under the early emperors, the legislative function was exercised by the senate, and *senatus-consulta* became a recognised source of law. The acts by which the emperors interpreted or declared the law are known generically by the term *constitutiones*, and were of three kinds: (1) *rescripta*, authoritative interpretations of the law given by the emperors in answer to inquiries; (2) *decreta*, the judicial decisions of the emperor and council as the highest appellate tribunal; (3) *edicta*, legislative enactments by the emperor. During this period, the constitutions chiefly consisted of *rescripta* and *decreta*; it was not till Diocletian's time that *edicta* became a recognised source of law.

Throughout this period, however, the work of the jurists was by far the most important factor in amending and moulding the law. Shortly after the establishment of the principate, Augustus conferred on certain jurists the privilege *ut ex auctoritate principis respondcrent*. The jurists, who possessed the *jus respondendi*, henceforth occupied an official position as interpreters of the law, and their *responsa* were authoritative. The influence of these jurists rapidly increased. Not long after the time of Augustus we find them spoken of not merely as *juris consulti*, but as *juris auctores*; and Gaius refers to them as persons *quibus permissum est jura condere* (Gaius, i. 7). From the time of Hadrian the jurists occupied a position of commanding influence, and their writings became one of the most valuable sources of Roman law. The juridical writings achieved their highest perfection in the time of the Antonines, this being the era of the five classical jurists, Papinian, Paul, Ulpian, Gaius, and Modestinus. By these men, and by many others scarcely less eminent, Roman law was reduced to a homogeneous system, covering the whole field of human activity, and was expounded with masterly precision and lucidity.

The *fourth* period, extending from Diocletian to Justinian, may be termed the period of codification. By Diocletian, great alike as a soldier, a statesman, and a lawyer, the imperial authority was finally stripped of the lingering traces of its republican and constitutional origin, and thenceforward the empire was, in theory as well as in practice, an undisguised despotism. The constructive jurisprudence of the earlier centuries ceased, and imperial constitutions in the form of *edicta*, a thoroughly monarchical type of legisla-

tion, formed the only source of new law. A notable proof of the decadence of jurisprudence and of the mechanical nature of legal learning in the fifth century is furnished by the famous Law of Citations, issued by Valentinian III. in 426 A.D., which declared the works of the five classical jurists above mentioned to be the only authoritative juridical writings. The establishment of the new seat of empire at Constantinople paved the way for the final division of the empire into East and West—a separation which had been gradually becoming inevitable. The numerous imperial constitutions issued during the fourth and fifth centuries dealt mainly with small points of detail, and were in great part occupied in giving effect to the changes in the law made necessary by the adoption of Christianity. From Constantine to Justinian the imperial legislation has been aptly described as a continuous process of polishing and filing, as well as of testing and applying, the principles of the *jus cetus*, with a view to adapting the structure to meet the requirements of the new Christian environment. Far more important than the substantive changes in the law made during this period was the work done in gathering up and putting into shape the results of the labours of earlier generations. A beginning in this work of codification had been made in the time of Hadrian, under whom the praetorian edict was revised and consolidated by Salvius Julianus. The more notable collections of imperial constitutions—or *leges*, as the statutory enactments of the later emperors were called, in contradistinction to *jus*, the older law embodied in, and interpreted by, the writings of the jurists—which were made before Justinian, were the collections made by Gregorianus and Hermogenianus respectively, and the official collection made under the authority of Theodosius II. The Theodosian Code, which was adopted both in the Eastern and Western Empires, and the greater part of which is preserved, is now chiefly valuable for the light which it sheds on the administrative system of the later imperial times. After the fall of the empire of the West, several compilations of Roman law were made by the barbarian conquerors. The most important of these Romano-Barbarian collections were the Edict of Theodoric, the Lex Romana Visigothorum or Breviary of Alaric, and the Lex Burgundionum, which is often called the Papian. The final, and far the greatest, codification of Roman law, by the Emperor Justinian, carried out in the earlier half of the sixth century, is that which constitutes the *Corpus Juris Civilis*. The contents of the *Corpus Juris* are dealt with in this article *infra, s.v. Texts of Roman Law*. By the *Corpus Juris* all that was most valuable in Roman law in its final form was preserved for the use of future generations. "The *Corpus Juris* stands at the goal of the history of Roman law, summing up the results of the whole development of the law during the preceding thousand years,—and it is at the same time the starting-point and basis of all modern law. It thus occupies the central position in the whole history of law."

Divisions and Sources of Roman Law.—The law is divided into two great branches, Public and Private. *Jus publicum est quod ad statum rei Romanæ spectat* (*Inst.* i. 1. 4). Public law, in other words, regulates the ecclesiastical and civil administration. *Publicum jus in sacris, in sacerdotibus, in magistratibus consistit* (*Dig.* 1. 1. 1. 2). Private law, on the other hand, determines the rights and duties of individuals. *Jus privatum est quod ad singulorum utilitatem pertinet* (*Inst.* i. 1. 4). In the *Institutes* both of Gaius and Justinian, the exposition of the law is arranged under the heads: Persons, Things, and Actions. "Omne jus, quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones" (*Inst.* i. 2. 12).

Another division of Roman law was that into *jus scriptum* and *jus non*

scriptum. The *jus scriptum* consisted of *leges, plebiscita, senatus-consulta, principum placita, magistratuum edicta,* and *responsa prudentium*. These different sources of law, and the periods during which they were respectively the active agencies in forming the law, have been already explained (see *supra, History of Roman Law*). With the progress of the law, the limits of *jus non scriptum*, or customary law, became more and more circumscribed. Still to the end custom, or immemorial usage, continued to be a recognised source of law (*jus moribus constitutum*). As custom could make new law, so it could abrogate existing law, *tacito consensu omnium per desuetudinem*.

The private law of Rome had a threefold origin (*jus privatum est tripertitum, Inst.* i. 1. 4), or, in other words, consisted of a combination of three factors or elements. The *first* element was the *jus civile*, the ancient technical and formal law of Rome, *jus proprium civium Romanorum*. Its institutions are exemplified by *mancipatio* and *in jure cessio* in the transference of property, by *nexum* and *sponsio* in contracts, and by *agnatio*, kinship based on the *patria potestas*. The *jus civile* continued to be the predominant element in Roman law down to the end of the republican period. The *second* element was the *jus gentium*, a system free from the peculiarities and technicalities of the *jus civile*, built up chiefly through the edict of the Peregrine Prætors. These men having to adjudicate on questions arising between citizens and non-citizens or between non-citizens, in which cases the *jus civile* was inapplicable, found it necessary to devise and promulgate rules by which the legal relations of non-citizens should be determined. Among the foreign communities they came in contact everywhere with new ideas, customs, and institutions, and, in dealing with concrete cases, they had necessarily to balance the advantages and disadvantages of different systems, and to distinguish what was essential in each from what was local and temporary. In course of time this new jurisprudence, disencumbered as it necessarily was of all the peculiarities inherent in the different national systems, received shape and consistency. The inherent reasonableness of the new system, and its freedom from technicalities, soon began to react on the *jus civile*. Step by step, by means of the edict of the urban prætors and, later, by the labours of the jurists, the rules and institutions of the *jus gentium*, equitable, non-technical, and easy of application, were adopted and imported into the *jus civile*, simplifying and transforming it in every direction. The *third* element in Roman law was the *jus naturale*, under the influence of which the diverse materials forming the law were finally fused into one harmonious whole. The *jus naturale* was a result and application of Greek philosophical speculation. The central Stoic doctrine was that the world is the product of reason and that "law is the highest reason, implanted in nature." They taught that the duty of man is to observe and conform to the law of reason (*naturalis ratio*) inherent in his own nature and in the nature of things. For generations the Stoic doctrine exercised a most potent influence in Rome, furnishing the moral training and forming the character of the men who guided the development of the law. Inspired by the vision of a type of perfect law, in which liberty and order were realised together, and which was universally applicable to all men, the jurists assiduously strove to approximate the actually existing law to this ideal type. This conception of a *jus naturale* gave them fearlessness and confidence in discarding rules which, depending merely on authority, were found wanting on being tried by the test of reason. Obviously the rules of the *jus gentium*, free from formalism and more universal in their application, approached more nearly the ideal standard, and for practical purposes the jurists, in applying the *jus naturale*, generally

adopted the existing rules of the *jus gentium*. The terms *jus gentium* and *jus naturale* were indeed frequently used as synonymous. Still the two elements remained theoretically distinct and, in some instances, contrary. Thus slavery, though sanctioned by the *jus gentium*, was contrary to the *jus naturale* (*contra naturam*, *Inst.* i. 3. 2).

Texts of Roman Law.—The texts of Roman law are of two kinds:—(1) The collections of Justinian along with the Novels, which together form the *Corpus Juris Civilis*; and (2) the original texts and fragments which remain from the times preceding Justinian, constituting a considerable body of pre-Justinianian texts. The *Corpus Juris Civilis* consists of four parts:—The Code, the Digest or Pandects, the Institutes, and the Novels.

The Code.—In proceeding to accomplish an authoritative codification of the whole of Roman law, Justinian dealt first with the imperial constitutions. In 528 he appointed a commission of ten to codify the existing constitutions, with power to reject those which were obsolete or valueless, to abridge or amalgamate or alter the language of those they accepted, and to reconcile such enactments as appeared to be inconsistent. In 529 the code so prepared (*codex vetus*) was officially ratified and declared to be the only statute law of the empire. The amendments in the law introduced by Justinian during the next few years, including the *Quinquaginta Decisiones*, *i.e.* enactments issued to determine unsettled points discovered by the compilers of the Digest, very soon rendered this code in a measure obsolete and incomplete. Accordingly, a new edition (*Codex Repetitæ*) of the earlier code was prepared and issued in 534, the earlier code being repealed. The new code, which alone we possess, is divided into twelve books, each divided into titles, each title containing a greater or smaller number of constitutions arranged chronologically. At the head of each constitution is an *inscriptio* giving the name of the emperor who issued it and the person or body of persons to whom it was addressed, while at the end there is a *subscriptio* stating the place and date of its issue, if these were known. There are about 4600 enactments in the code, though many of them are abridged, altered, or modified. The earliest in date is a rescript of Hadrian; the latest is a constitution of Justinian dated about a fortnight before the publication of the code.

The Digest or Pandects.—After the publication of the first edition of the code, Justinian, in December 530, authorised Trebonian, with the aid of sixteen commissioners, to prepare a collection in a single code of what was most valuable in the writings of the most eminent jurists. The whole body of law inherited from the preceding centuries, including the legislation of the republican era, the prætorian edict, the *senatus-consulta*, and even the rescripts of the early emperors, was in these days referred to only as embodied in, and interpreted by, the writings of the jurists. This juridical literature, which in the later centuries of the empire was spoken of as *jus*, as distinguished from *leges*, the imperial constitutions, was very voluminous, and the propriety of sifting it, arranging it, and reducing it to manageable proportions was manifest. A large discretion was given to the commissioners to select the passages that seemed most valuable, to delete what was superfluous or obsolete, to alter and modernise the language, and even to make corrections in the original works with a view to avoid antinomies. Before the commissioners had gone far, they discovered several long-standing questions of controversy among the jurists which remained unsettled. These moot points were finally determined by Justinian by a series of enactments, issued as the work of compiling the Digest progressed. These enactments formed for a time a separate collection, known as the

Quinquaginta Decisiones. The immense task of completing the Digest was accomplished in three years. It was published on the 16th December 533, and declared to have the force of law. The Digest contains excerpts from the writings of thirty-nine jurists. The earliest jurist quoted is Quintus Mucius Scaevola, a contemporary of Cicero; the latest is Hermogenianus, who flourished about the middle of the fourth century. The extracts from the various works of Ulpian constitute 39 per cent. of the whole Digest; those from Paul nearly 18 per cent.; those from Papinian, Scaevola, Pomponius, Julianus, and Gaius make up together more than 24 per cent. In accordance with Justinian's instructions, the Digest was divided into fifty books. Each book, with the exception of the three on legacies (XXX.–XXXII.), is subdivided into titles, consisting of a greater or smaller number of excerpts or fragments. At the beginning of each fragment the names of its author and of the particular work from which it is taken are cited. Some of the extracts are very short, others are of considerable length. In the Middle Ages the longer fragments were divided into a *principium* and numbered paragraphs to facilitate reference. (For an admirable account of the composition and contents of the Digest, as well as of the principal jurists from whose writings it is compiled, see Roby's *Introduction to the Study of Justinian's Digest.*)

Institutes.—In the constitution decreeing the compilation of the Digest, Justinian announced that an elementary treatise for the use of students was in contemplation. The task of preparing this elementary work was intrusted to Trebonian, Theophilus, and Dorotheus. It was published at the close of the year 533, and received the force of law at the same time as the Digest. The Institutes are divided into four books, each subdivided into titles. In the preface to the Institutes, Justinian says that they were compiled from all the Institutes of the old writers, but their main sources are the *Institutiones* and *Res Cottidianæ* of Gaius.

These three works, though published at separate times, constituted in the aggregate one single code of law, and formed the *Corpus Juris* in the form in which it was designed by Justinian. The modes of citing the Code, Digest, and Institutes are various; but in this country, in modern times, the mode of citation generally adopted is what Gibbon calls "the simple and rational method of numbering the book, the title, and the law."

Novels.—The *Corpus Juris Civilis*, as received in Europe, consists, in addition to the works already mentioned, of *Novellæ Constitutiones*, issued from time to time by Justinian and some of his immediate successors after the publication of the second edition of the code. Of these about 170 are extant. The most important Novels are those (Nov. 118 *et* 127) remodelling the order of intestate succession. The system of intestate succession devised and ordained by Justinian in these two Novels not only continues to rule intestate succession in continental countries, but forms the basis of the existing law of intestate succession to personalty in England. The Novels are quoted by the number, chapter, and paragraph.

The best edition of the *Corpus Juris* is that published at Berlin, in which Krüger is responsible for the Institutes and Code, Mommsen for the Digest, and Schöll for the Novels.

Pre-Justinianian Texts.—The authoritative Roman law, as received in Europe, consists only of the *Corpus Juris.* For several centuries before the original writings of the Roman jurists, the constitutions of the early empire, and the fragments of other original sources of the law belonging to the ages preceding the Justinianian codification were discovered, the *Corpus Juris* had been so universally received as the sole authority, and so long established

as the basis of practice, that the new discoveries, though invaluable in elucidating the historical development of the law, and even in making clear many points and doctrines otherwise obscure, have remained excluded from practice, and are not accepted as authoritative in the Courts. During the present century enormous labour has been expended in searching for remains of the original ante-Justinianian law, and in reconstructing the original texts of the *edictum perpetuum*, *senatus-consulta*, early constitutions, and even of the Twelve Tables. This labour has been repaid by a very considerable measure of success in the recovery of original texts and the reconstruction of the surviving fragments of the monumental achievements of ancient Roman jurisprudence. The most important discovery has been that of the Institutes of Gaius by Niebuhr in Verona in 1816. In addition, there are now extant considerable fragments of the original works of Ulpian, Paul, and several other jurists of eminence. The most complete and trustworthy collections of ante-Justinianian sources of law are: Huschke, *Jurisprudentiæ Ante-Justinianæ quæ Supersunt* (5th ed., 1886); Bruns, *Fontes Juris Romani Antiqui* (5th ed., by Mommsen, 1886); and the *Collectio Librorum Juris Ante-Justiniani*, edited by Krüger, Mommsen, and Studemund.

History of Roman Law after the Time of Justinian.—In the Eastern empire many Greek paraphrases and translations of the different portions of Justinian's codification very soon appeared. One of the earliest of these, and certainly one of the most notable, was the Greek paraphrase of the Institutes of Theophilus. About the beginning of the tenth century there was published in Greek a revised and systematised version of Justinian's collection, supplemented by subsequent constitutions, the text being accompanied by many notes or *scholia*. This compilation, known as the *Basilica*, has been in great part reconstructed and edited by Heimbach (5 vols., Leipzig, 1833–51), and has proved of great service in explaining many passages of the *Corpus Juris*. In course of time the *Basilica*, being in the more familiar Greek language, and having the imperial sanction, superseded Justinian's codification throughout the East. In 1453 the empire of the East was overthrown by the Turks, but the Græco-Roman or Byzantine codes and manuals remained the law of the vanquished races, and continue to this day to be the basis of the law of the Greek communities in the East.

In the West, while successive waves of conquerors—Gothic, Lombard, and Frank—swept over the old Roman provinces, and the political system underwent rapid transformation, the Roman law to a large extent maintained its sway among the old populations. Each tribe of Teutonic settlers, indeed, brought with them their own unwritten customs, and, soon after the settlement, these customs, expressed in Latin, were reduced to writing, and formed, in contrast to the general Roman law prevailing among the native population, the peculiar law of each tribe or kingdom. Everywhere, however, the Roman law was recognised as continuing to regulate the private relations of the former inhabitants, who constituted the larger part of the population. For some time after the barbarian invasions, we find more or less in all parts of the Roman world the two systems, the old and the new, subsisting side by side, the applicability of each system depending on the person or persons concerned, the native members of the conquered communities being judged by Roman law, the conquerors being subject to the special "law" of the tribe to which they belonged. Some of the Teutonic kings, as Alaric, the West Goth, and Sigismund, the Burgundian, published and sanctioned special collections of Roman law for the guidance of their conquered subjects. Theodoric, the East Goth, went further, and drew

up, with the help of his Latin counsellors, his *Edictum*, a collection of Roman law rules which was declared to be binding alike on the conquered and on the conquerors. It was from these Romano-Barbarian codes that Western Europe mainly derived its knowledge of Roman law during the period of European history known as the Dark Ages. Even in those regions where the peculiar law and customs of the conquering tribes were maintained, the Roman law, with its settled rules and well-established principles, sooner or later asserted itself, as the conquerors settled down to the conditions of civil life. In buying and selling, in making wills, and in all the transactions of civil life, the conquerors found themselves, as Guizot expresses it, "caught in the meshes" of the vast system surrounding them, which, compared with the local laws of Franks or Goths, seemed like the universal law of the world, as contrasted with the bye-laws of some local association. Everywhere the Church consistently upheld the authority of the old law, and the idea—so powerful in many respects—of the Holy Roman Empire, *i.e.* the essential continuity of the older Roman Empire with the existing Germanic Empire, tended powerfully in the same direction. Thus by a slow process, and in proportions varying in different districts, the Roman law either gradually absorbed the laws and usages of the conquerors, or at least powerfully affected and entered into the composition of the laws of the conquering tribes. While the above-mentioned Romano-Barbarian collections formed the only source of knowledge of Roman law available in the greater part of Europe during the Dark Ages, there is abundant proof that in Italy the more learned lawyers were during these centuries acquainted with Justinian's great codification. Savigny has effectually shown the baselessness of the old theory that the Justinianian collection was unknown until the discovery of a MS. of the Pandects, upon the capture of Amalfi by the Pisans in 1135, revived its study. It is probable that, before the rise of the Bologna School, parts of the Justinianian texts were studied in the law schools at Rome, Pavia, and Ravenna; and it is certain that, some years before the capture of Amalfi, Irnerius at Bologna lectured on and annotated the Digest, the most valuable portion of the *Corpus Juris*. The lectures of Irnerius and the rise of the Bologna School in the early years of the twelfth century mark the beginning of a new epoch. The fame of the Bologna School attracted crowds of students from all quarters. Henceforward in the law schools throughout Europe—and the number of them grew rapidly—the former text-books, consisting of the Romano-Barbarian codes and other compilations of the older mediæval teachers, in all of which the original Roman texts were much mutilated and more or less mixed with base German alloy, were laid aside. Lawyers now applied themselves closely to the study, critical and textual, of the original Roman texts, and the systematic study of the whole *Corpus Juris Civilis* formed the regular curriculum of an ordinary legal education. So early as 1149, according to the received opinion, we find Vacarius teaching the civil law at Oxford, and his *Liber Pauperum*, consisting of extracts from Justinian's Digest and Code, occupied a prominent place in the studies of Oxford during the later years of the twelfth century. During the century and a half after the revival of the civil law by Irnerius, the Glossators did valuable service in constructing a sound text, and spreading a knowledge of the contents of the *Corpus Juris*. In addition to collating different MSS., they endeavoured to solve difficulties by furnishing references to parallel passages in the *Corpus Juris*, and by ample annotations. In the middle of the thirteenth century, Accursius, the last of the Glossators, collected and recast the annotations of

his predecessors, adding annotations of his own. This treatise of Accursius, which is frequently referred to as the Glossa simply, was for a time regarded as possessing authority almost superior to that of the original texts. The later history of Roman law in the various countries of the Continent concerns Scots lawyers only in so far as the works of the leading Civilians have influenced the development of Scots law by guiding the decision of the Scots Courts, and by furnishing authorities to, and moulding the opinions of, our Institutional writers. Of these Civilians, the most famous were: in Italy—Bartolus, who flourished in the fourteenth century, the most famous member of the school known as *Scribentes*, who succeeded the Glossators: in France—Cujas (Cujacius), Doneau (Donellus), Dumoulin, Domat, and Godefroi, father and son, the father being famous for his edition of the *Corpus Juris*, in the sixteenth century, and Pothier in the eighteenth century: in Holland — Grotius, Vinnius, Huber, Voet, Bynkershoek, and others, whose lectures in Leyden, Utrecht, and other Universities were attended by many Scottish lawyers during the seventeenth and eighteenth centuries: in Germany—Heineccius, Puchta, Haubold, Dirksen, Warnkonig, Savigny, Vangerow, and many others. Roman law is now the basis of the law of France, Germany, Spain, Italy, and Holland, and, indeed, its dominion may be said to extend throughout the whole of Europe with the exception of England. (For a comprehensive survey of the history of Roman law in the various European countries, since the Renaissance, see Rivier, *Introduction historique au droit Romain*, pp. 555–637.) In the French code, the Roman law, although fundamental, is considerably modified by the old customary laws and by rules having their origin in the Feudal law and other sources. In Germany, the Roman law, received in the form given it by Justinian, constitutes the common law. The reception of Roman law in Germany was completed about the middle of the sixteenth century. As now current in Germany, it is modified by the customary law, by German imperial statutes, and, in certain parts, by canon law. The general rule is that, while Roman law does not override the injunctions of particular laws, it applies in the absence of such express injunctions (Winscheid, *Lehrbuch des Pandektenrechts*, i. 1–7). In America, Roman law is fundamental in Louisiana, Lower Canada, Mexico, and the republics of South America. It is also the common law of many British colonies, *e.g.* Cape Colony, Lower Canada, Mauritius, Ceylon, Malta, British Guiana, and other territories acquired by Britain from Holland, France, or Spain.

Roman Law in Great Britain. — *England.* — The historical relation of the Roman law to the law of England is a subject on which there has been a good deal of conflict of opinion. For more than five centuries Britain was occupied by Roman legions, and for more than three centuries it was a Roman province. It is, at least, probable that Roman law must have left its mark on many institutions long after the legions were withdrawn, though the extent of this influence is difficult to trace and is a subject of controversy. After the conversion of the Anglo-Saxon invaders to Christianity, that is, "from the days of Ethelbert onwards," as is observed by Professor Maitland, "English law was under the influence of so much of Roman law as had worked itself into the tradition of the Catholic Church." During the Anglo-Saxon period the secular and ecclesiastical Courts were not separated, and the two jurisdictions were hardly distinguished. The bishop sat in the Shire Court, taking a large share in the direction of secular justice, and being often the only member of the Court who possessed any systematic training in public affairs. The

influence of Roman law, though exerted indirectly through the clergy, and thus "at a second remove," was unquestionably on an appreciable scale. With the Norman invasion a further importation of Roman law took place, the Normans having adopted the official machinery of the Frankish Government including whatever Roman elements had been taken up by the Franks, so that many institutions, which have now the most English appearance, may be connected through the customs of Normandy with the system of government elaborated in the later centuries of the Roman Empire. Further, after the Conquest, the influence of the ecclesiastics, whose chief training was Romano-Canonical, continued to increase rather than to diminish. The affairs of the realm were controlled for centuries by a series of great ecclesiastics, extending from Lanfranc to Wolsey. A majority of the members of the *curia regis*, and of the King's Courts, were Churchmen, during the most formative period of English law, when the common law was converted from a mass of customs into an articulate system. In the twelfth century, we know that the canon law, which was deeply impregnated with Roman law, was administered by the bishops side by side with the secular law of the King's Courts, and, according to the authorities, the canon law is still an important factor in certain departments of English law, such as, for example, the common law relating to wills of personalty and to married women. After the renaissance of Roman law at Bologna and the lectures of Vacarius at Oxford (*supra*, p. 383), the keenest minds of the age in England, as in the rest of Western Europe, were occupied with the study of the Justinianian texts. The Roman law became, in a new sense, a living system, demanding reverence, if not obedience, as the due of its intrinsic merits (Pollock and Maitland, *History of English Law*, vol. i. p. 89). The result of the new study of Roman law is seen in the publication in the reign of Henry II. of the treatise of Glanville, *Tractatus de legibus*, the first text-book on English law, which, alike in its form and in its contents, bears traces of the revived study of the Justinianian texts. Seventy years later, in the middle of the thirteenth century, there appeared the treatise, *De legibus et consuetudinibus Angliæ*, written by Henry de Bracton, Justice of the King's Bench. The method of this treatise is the same as that of Justinian's *Institutes*, and numerous passages from the Digest and the Code are scattered throughout the work. It is, as Sir Henry Maine has pointed out, a very notable fact in the history of English law, that an English writer of the time of Henry III. should put out, as a compendium of pure English law, a treatise of which a third of the contents was borrowed from the Digest. (On this point, see the treatise of Güterbock, translated by Brinton Coxe under the title *Bracton and his Relation to Roman Law*). It is not within the scope of this article to trace the relation of Roman law to the law of England during the later centuries, or to discuss the extent to which English law, in the process of becoming distinctly national, assimilated or rejected the principles of the ancient system. The position and authority of the Roman law at this day in England are explained by Tindal, C. J., as follows:—"The Roman law forms no rule binding in itself on the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe" (per Tindal, C. J., in *Acton*, 1843, 12 M. & W. 324 at 353).

Scotland.—The early law of Scotland, down to the fourteenth century,

was, speaking generally, composed of the same elements, and subject to the same influences, as the law south of the Tweed, and hence the relevancy of treating in this article, as has been done (*supra*), the relation of Roman law to the law of England in the earlier stages of its development. The population of Scotland was composed mainly, except in the central and western highlands, of Germanic race, though with a considerable admixture of Celtic blood, and the law and institutions of the people, like their language, were fundamentally Anglo-Saxon. Celtic law seems to have disappeared at an early date, leaving behind as few traces in Scotland as it did in England. On the other hand, though Scotland, unlike England, was not conquered by the Normans, and the Norman element in the population must have been small, the Norman law exercised a powerful influence on Scots law through the adoption in Scotland of the feudal system as developed by the Normans. In the fourteenth century, then, the law of Scotland, though probably more heterogeneous and less systematised, was in substance similar to the law prevailing in England, and the account given (*supra*) of the ways and manner in which the Roman law influenced, and entered into, the law of England during the preceding centuries applies *mutatis mutandis* to the law of Scotland during the same period. The practical similarity of the law north and south of the Tweed at this date is shown by the fact that the compiler of the *Regiam Majestatem*, the earliest treatise on Scots law, simply adopted, with a few alterations and certain additions, the above-mentioned treatise of Glanvill on the law of England. (The *Regiam Majestatem* is carefully collated with Glanvill's work in vol. i of the *Acts of the Parliament of Scotland*.) The additions made by the compiler of the *Regiam Majestatem* to the treatise of Glanvill show considerable acquaintance with Roman law, and are taken chiefly from the Gloss of Accursius (*supra*, p. 384) and the canon law. The *Regiam Majestatem*, composed of these elements, was accepted as an authoritative statement of the law of Scotland, and maintained its authority until the reception in Scotland of the Roman law in the form of the *Corpus Juris*. The practical identity of the Scots and English law in the fourteenth century is further proved by the fact that, as appears from the collection of writs know as *Quoniam Attachiamenta*, all the contemporary English writs were in use in Scotland. From the beginning of the fourteenth century down to the sixteenth century the law of Scotland underwent little change. The influences at work, however, were continental rather than English. The prominent lawyers and statesmen were ecclesiastics, and through the canon law, as well as from certain of the continental legal systems, ideas and phraseology having their source in Roman law continued to filter into our law. The Consistorial Courts of the bishops had at this time, it must be remembered, an extensive jurisdiction, administering not only the law regulating the domestic relations, but also the departments of contract and succession. It was not, however, till the sixteenth century that, with the general revival of letters, Roman law began to come in like a flood, and fundamentally influenced the whole structure and substance of Scottish jurisprudence.

The reception of Roman law in Scotland, which constitutes the outstanding feature in the history of Scots law, was brought about by the same means as the like reception in Germany and other continental countries. It was not introduced by any act of the Legislature, nor was its adoption the result of a movement on the part of the people in general. The rapid introduction of Roman law was intimately associated with the change in the constitution of the Courts, by which the judicial power passed from the territorial magnates into the hands of trained lawyers, lay and clerical. Before this date there

was not really in Scotland anything that could properly be termed a system of jurisprudence. There were, indeed, some general and many local customs, and a certain uniformity in procedure, but the chief secular legal tribunals —the Parliamentary Committee of the Lords Auditors and the Judicial Committee of the King's Council—were too weak, and the local Courts, in which the barons and their deputies or assessors presided, were too independent and arbitrary, to permit the foundation of any strong system of common law, outside the departments administered by the Consistorial Courts of the bishops. The central point in the process of centralising the judicial powers was the institution, in 1532, of the Court of Session, in which one half of the regular judges were laymen, trained in law, and the other half were clerics. Traces of the former power of the territorial magnates remained in their recognition as "extraordinary lords"—a recognition which continued, as a matter of form, down to the latter part of last century. Contemporaneously with this change came the rise in Scotland of a regular profession of lay lawyers or advocates, who acted as general procurators before the Court. There being now in Scotland a regular profession of law, whose training consisted chiefly in acquiring a knowledge of Roman law, and the power of the central Courts being in the hands of these trained lawyers, the introduction of Roman law into Scotland proceeded apace, simply by the practice of the Courts and of individual lawyers, who based their decisions and legal opinions on the Roman law. When it is remembered that the foundation of the Court of Session and the rise of a regular legal profession in Scotland were contemporaneous with the general revival of learning, when a fresh enthusiasm for, and a direct knowledge of, the texts of Roman law were rapidly spreading through Europe, it is not difficult to understand why the newly-instituted Court and the newly-born legal profession, in the absence of native authorities, turned to the rules and principles of Roman law, where the solution of nearly all questions waited for them ready made. In the fifteenth century it began to be common for young Scotchmen to go abroad to study Roman law, as well as other branches of learning, in the continental universities. So widespread did this practice become, that Scots colleges were founded in many foreign universities, and notably in Paris. In the sixteenth, seventeenth, and even in the eighteenth century it was the almost universal practice among men preparing to enter the Faculty of Advocates to train themselves for their profession by a course of study abroad; and this practice continued long after Chairs of Civil Law had been established in the Scottish universities. To men so trained, the *Corpus Juris*, with the works of the glossators, scholastic jurists, and, in later times, the civilians, became in practice the chief authorities, and the scanty fragments of native law were neglected. "Those who are in daily practice in the Courts," writes Sir John Skene, towards the end of the sixteenth century, "consume their days and nights in learning the civil law of the Romans, and give their whole labours to the practising of it; and—neglecting the laws of their fathers—hold in no esteem the law of Scotland, which ought to be their first care." After the Reformation the authority of the canon law was discredited, but the triumph of the Roman civil law was complete. Even in the statutes it is referred to as "the common law," and the law literature of the sixteenth, seventeenth, and eighteenth centuries is permeated with it. In Sir Thomas Craig's *Jus Feudale*, quotations from, and references to, the writings of the Civilians are found on every page; and he explains: "*Apud nos scriptarum legum maxima inopia, et naturaliter in plerisque negotiis jus civile sequimur.*" The dominating influence of Roman law continues to be apparent in the works of Sir George Mackenzie, Lord Bankton, Lord Stair, and Mr. Erskine,

Lord Stair is the earliest writer who refers freely to recorded decisions, but his great work is in all its parts based mainly on the Roman law, and, in particular, the titles dealing with the law of obligations may be said to consist purely of Roman law. When Erskine wrote, about the middle of the eighteenth century, there had accumulated a considerable mass of statutes and decisions, as well as of institutional writings. While using these authorities, however, he constantly appeals to the civil law, quoting and referring to the original texts of the *Corpus Juris*. The most conclusive evidence, however, of the extent to which Roman law has moulded and formed Scots law, is found in Morrison's *Dictionary of Decisions*. The constant citations from the *Corpus Juris* and from the writings of the Civilians show, even more strikingly than the works of the Institutional writers, the dominant authority of the civil law in the Scots Courts. By the end of the eighteenth century, references to the texts of Roman law and to the works of the Civilians, both in argument and in legal literature, became less common; for by that time the main principles of Roman law had been incorporated in the reported decisions of the Courts, and in text books of recognised authority. It is noteworthy that from the commencement of the Court of Session, the judgments of the Supreme Court—Scotland in this respect following the practice of England rather than of the Continent—were recognised as authoritative precedents. Thus the law of Scotland, constructed as it was mainly of Roman materials, gradually grew strong enough to determine most questions, and the necessity of having recourse directly to the *Corpus Juris* became more infrequent. Scots law, in spite of its composite origin, was now an independent system, with a character of its own, consistent in its parts and in their relation to the whole. During the present century the tendency has been, especially in cases on commercial law and on questions of interpretation, to resort to the analogies supplied by the law of England, and to the precedents of the English Courts of Equity, with the result that English law has taken the place of Roman law as the prevailing factor in shaping the present-day development of Scots law. In England itself, however, it is noteworthy that of late years, contemporaneously with the marked revival of the study of civil law in England, there is an increasing tendency among some of the most eminent judges to have recourse to the texts of Roman law to support and illustrate their enunciation and application of legal principles. In Scotland, though Roman law is no longer a living source of authority, its doctrines are so thoroughly worked into the existing system of Scots law, and its impress on all Scots legal institutions is so deep, that a knowledge of the civil law is the best introduction to, and is essential for a thorough understanding of, the law of Scotland.

Rotation of Crops.—See CROPPING.

Rotuli Scotiæ—These ancient records contain State papers chiefly relating to political transactions between Scotland and England in the fourteenth, fifteenth, and sixteenth centuries. They furnish evidence in questions of peerage, propinquity, etc. The contents are proved by sworn copies or extracts. (Dickson, *Evid.* s. 1111; *Crawford and Lindsay Peerage* case, 1848, 2 Cl. & Fin. 534, 547.)

Roup.—See AUCTION.

Royal Burghs.—See Burgh (Royal).

Royalty.—See Mines; Patent; Copyright.

Rubric.—See Statute.

Running Days.—See Demurrage; Charter-Party.

Running Letters.—See Criminal Prosecution (vol. iii. p. 381).

Runrig and Rundale.—(Gael. *Roinn* = share).—That sort of ownership of land which gives alternate or intermixed patches or ridges to each heritor in several. The generic word was *runrig*—but the term was more narrowly used for division by ridges of an acre or two; *rundale* or *cutchery* being applied to larger intermixed fields. Few traces of the system survive at the present day, aggregation or excambion (either by agreement or under the Act 1695, c. 23) having almost entirely effaced it. (Rankine, *Landownership*, 531.)

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